ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

CALRISSIAN & CO., INC.

v.

THE FEDERAL REPUBLIC OF DAGOBAH

MEMORIAL FOR CLAIMANT
20 SEPTEMBER 2014
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<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<td>CAC</td>
<td>Collective Action Clause</td>
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<tr>
<td>Corellia</td>
<td>The Corellian Republic</td>
</tr>
<tr>
<td>Dagobah</td>
<td>The Federal Republic of Dagobah</td>
</tr>
<tr>
<td>FET</td>
<td>Fair and equitable treatment</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td><em>effet utile</em></td>
<td>practical effectiveness</td>
</tr>
<tr>
<td><em>force majeure</em></td>
<td>unavoidable accident</td>
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<tr>
<td>ICJ</td>
<td>International court of Justice</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>ILA</td>
<td>International Law Association</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>ILC Articles</td>
<td>International Law Commission`s Articles on Responsibility of States for Internationally Wrongful Acts</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
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<td>LCIA</td>
<td>London Court of International</td>
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Arbitration

MFN
Most Favoured Nation

p.
Page

para.
Paragraph

PCA
The Permanent Court of Arbitration

PO
Procedural Order

res judicata
a matter judged

SCC
Stockholm Chamber of Commerce

SRA
The Sovereign Restructuring Act

The bonds
Old sovereign bonds

UNCITRAL
United nations Commission on International Trade Law

v
versus

[]
Paragraph
## STATEMENT OF FACTS

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<tr>
<td>1992</td>
<td>Dagobah and Corellia entered into the DC-BIT</td>
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<td>2001-2003</td>
<td>Economic crisis in Dagobah</td>
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<td>7 May 2001</td>
<td>Dagobah launched the exchange offer with respect to Dagobah’s sovereign bonds</td>
</tr>
<tr>
<td>Second half of 2001</td>
<td>Diplomatic negotiations between Dagobah and Corellia on interpretation of the DC-BIT (whether the sovereign bonds are covered)</td>
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<td>29 April 2003</td>
<td>Award of the PCA Arbitral Tribunal finding that sovereign bonds qualify as investments under the DC-BIT</td>
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<td>August 2003</td>
<td>Issue of the Bonds</td>
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<td>2005</td>
<td>Calrissian purchased the Bonds</td>
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<tr>
<td>Beginning of 2010</td>
<td>Start of the new recession in Dagobah</td>
</tr>
<tr>
<td>28 May 2012</td>
<td>Enactment of the SRA, retrospectively amending the terms of Dagobah’s sovereign bonds by introducing provision on amending the terms of the bonds by a vote of 75 % majority bondholders. No consultations were held with any of the bondholders</td>
</tr>
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**Prior to 29 November 2012**  
Consultations with the committee of representatives of 50% of the nominal value of the Bonds with respect to the future exchange offer. Calrissian did not participate in consultations due to a short period for notification.

**29 November 2012**  
Dagobah launched the exchange offer with respect to the Bonds

**12 February 2013**  
All Dagobahian law governed bonds are exchanged under the SRA to the bonds governed by the law of the Kingdom of Yavin and containing collective action clauses for amendment of their terms and initiating any enforcement action

**30 August 2013**  
Filing of Request for Arbitration with SCC by Calrissian pursuant to article 8 of the DC-BIT

**4 October 2013**  
Answer to the Request for Arbitration

**8 January 2014**  
This case is referred to the Tribunal
SUMMARY OF ARGUMENTS

1. In order for this Tribunal to have jurisdiction over the dispute concerning the Claimant’s Bonds, Claimant has to prove that the Bonds qualify as investment protected under the CD-BIT. Claimant submits that the Bonds do satisfy the definition of investment provided in Article 1 of the CD-BIT and do satisfy the requirement of nexus with the territory of Dagobah.

2. The final Award of the PCA rendered in the dispute between the BIT parties held that sovereign bonds qualify as investments under the BIT. This award has a binding force for this Tribunal on the basis of treaty interpretation rules recognized in international law. Furthermore, according to the principle of res judicata the PCA Award binds the parties and this Tribunal should follow it.

3. Respondent may not argue that this Tribunal lacks jurisdiction under the CD-BIT in view of the forum selection clause contained in the Bonds since Claimant’s claim derives from a violation of the CD-BIT.

4. Dagobah’s restructuring measures violated fair and equitable treatment standard. Respondent violated Claimant’s legitimate expectations, firstly, based on guarantee contained in the Bonds and secondly, based on the legal framework governing the investments. Further, Respondent’s restructuring measures lacked transparency and due process. Finally, the measures were coercive.

5. Claimant submits that Respondent may not be exempt from liability based on necessity defense. First, Art. 6 of the CD-BIT in the context of customary international law does not allow to justify Respondent’s measures. Second, Respondent cannot be exempt from liability based on the plain meaning of Art. 6 of the BIT.
ARGUMENTS

PART ONE: JURISDICTION

I. THIS TRIBUNAL HAS JURISDICTION OVER THE DISPUTE CONCERNING THE BONDS OWNED BY CLAIMANT UNDER THE CD-BIT

1. In order for this Tribunal to have jurisdiction over the dispute concerning the Claimant’s Bonds, Claimant has to prove that the Bonds qualify as investment protected under the CD-BIT. Claimant submits that the Bonds do satisfy the definition of investment provided in Article 1 of the CD-BIT (1) and do satisfy the requirement of nexus with the territory of Dagobah (2).

   A. Holding of the Bonds falls within the definition of “investment” under Article 1 of the CD-BIT

2. Article 1 of the CD-BIT contains a broad definition of an investment, which is “every asset that the investor owns or controls, whether directly or indirectly, that has the characteristics of investment”\(^1\). The Bonds, which bear an entitlement of Claimant to receive certain funds from the government of Dagobah, certainly constitute an “asset” of Claimant and thus are covered by the above broad definition.

3. Article 1 further specifies a list of indicative criteria of investment which supplement the broad definition of investment cited above. These criteria include: (i) commitment of capital and other resources; (ii) expectation of gain and profit; or (iii) assumption of risk, and it follows from the wording of Article 1 that satisfaction of at least one of them is sufficient. Claimant submits that its bond holding satisfies not one, but all of these indicative criteria.

4. Commitment of capital and other resources: Claimant notes that it alone holds 10% in nominal value of all outstanding bonds issued by Dagobah,\(^2\) which is a significant amount of capital that it committed to Dagobah. Since Claimant has created significant

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\(^1\) Article 1 of the DC-BIT

\(^2\) PO2 [24]
monetary value for Dagobah, it thus made an economic contribution, meaning that the “commitment of capital” criterion is satisfied.

5. **Expectation of gain and profit**: The nature of the debt instruments, such as the Bonds, contemplates regular payments of interest throughout the life of the Bond and repayment of principal on the Bond’s maturity.

6. **Assumption of risk**: According to *Bayindir v Pakistan* decision, a risk capable of satisfying the investment criteria is “inherent in long-term commercial contracts”. The twelve-year Bonds in the instant case certainly bear features of a long-term contract and hence their holding assumes the required level of risk.

7. According to *Ambiente* decision if a risk of host state’s sovereign intervention is inherent to a business undertaking, then this risk is sufficient for the undertaking to qualify as investment. There may be no doubt that Claimant’s holding of the Bonds was inherently subjected to intervention of Dagobah. This risk has actually materialised in unilateral actions of Dagobah adopting the SRA leading ultimately to this arbitration.

8. Moreover, according to *Fedax* decision, the sole fact of existence of a dispute qualifiable as investment dispute under a BIT evidences the required level of risk assumed by an investor. This very dispute is thus a further evidence that Claimant assumed a sufficient risk by acquiring and holding the Bonds.

9. Further to criteria stipulated in Article 1 of the CD-BIT, jurisprudence of investment tribunals advocates that duration of a business undertaking serves as another indicative criteria of investment. Claimant submits that this criterion is satisfied as well.

10. When it comes to financial instruments, duration of investment contemplates the period during which the credit is made available to the borrower, or the period during which

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3 *Abaclat* [364-366]
4 *Ambiente* [486]
5 *Bayindir v Pakistan* [134-136]
6 *Po2* [14]
7 *Ambiente* [485]
8 *Fedax* [40]
9 *Romak v Uzbekistan* [207]
the borrower enjoys a “continuous credit benefit”. Since the credit under the Bonds was extended to Dagobah for the period of twelve years, this period well satisfies the duration criterion.

11. Even without appeal to the “continuous credit benefit” doctrine, if we instead consider the duration of Claimant’s holding of the Bonds, it is still long enough to satisfy the “duration” criteria, since Claimant was the owner of the Bonds since 2005, i.e. for nine years as at the date of this memorial. Other tribunals considered a period of “two to five years” to be sufficient.

12. Since the holding of the Bonds by Claimant satisfies the broad definition of investment and indicative criteria listed in Article 1 of the CD-BIT, as well as the duration criteria developed through jurisprudence of investment tribunals, this holding is sufficient for the Tribunal to establish jurisdiction ratione materiae to hear this case.

13. In addition to the broad definition and indicative criteria of investment considered above, Article 1 of the CD-BIT provides an indicative, non-exhaustive list of assets which may qualify as investment. Bonds or similar instruments are not mentioned in this list. Claimant submits that this fact is not a bar for the Claimant’s Bonds to qualify as investment under the CD-BIT. First, this conclusion is warranted by broad, “catch-all” definition of investment in Article 1, covering “every asset” satisfying the criteria of investment. The list of assets, on the other hand, is indicative and non-exhaustive and may not serve as a sufficient basis for any conclusion.

14. Second, jurisprudence of investment tribunals suggests that absence of an asset in an indicative list of a BIT is not a bar to qualification as investment. In CSOB, for instance, the debt instruments were not specified in the definition of investment, however the tribunal still found itself competent to hear a dispute related to a loan. Finally, BIT practice of other states suggests that should Dagobah and Corellia really wished to
exclude debt instruments from the scope of BIT coverage, they would have used a specific wording for this, as other states do. For example, Japan – Peru BIT provides in article 1(c) that an investment “does not include a debt of, regardless of original maturity, a Contracting Party or a state enterprise”. Croatia – Azerbaijan BIT provides that “bonds, debentures or other debt instruments to, or a debt security issued by, a Contracting Party” are excluded from the definition of investment. No such wording is used in the CD-BIT.

15. No additional requirements to such asset such as association with a project or enterprise is introduced. In this regard provisions of the CD-BIT may be differentiated, for example, from Argentina - China BIT, under which the definition of loans are only included in the definition of “investment” “where they are directly related to a specific investment”. Again, no such requirement is introduced in the CD-BIT.

B. The purchase of the Bonds by Claimant was made for the benefit of Dagobah and hereby satisfies the requirement of territorial connection

16. Respondent might argue that since the Bonds are not physically located in Dagobah, they are not investment made “in the territory” of Dagobah and thus are not investment at all. Claimant submits that no such physical presence is necessary for financial instruments such as the Bonds in order to satisfy nexus with the territory of Dagobah.

17. It is established in jurisprudence of the investment tribunals, that – borrowing the words of CSOB tribunal – “a transaction can qualify as an investment even in the absence of a physical transfer of funds” to the territory of the host state. For those investments, which do not concern a “physical business” in the host state, the decisive criterion of

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15 Japan – Peru BIT, Article 1
16 Croatia – Azerbaijan BIT, Article 1
17 Argentina - China BIT, Article 1
18 See e.g. Preamble of the CD-BIT
19 See e.g. Bayview, Canadian Cattlemen
20 CSOB [78]
21 Schreuer 2012 [77]
territorial link is for whose benefit the investor’s funds are ultimately utilised.22 This is especially true for financial instruments which never physically cross the border of the host state. These conclusions are illustrated below by examples from jurisprudence of investment tribunals.

18. In Petrobart v Kyrgyz Republic a short-term supply contract was qualified by the tribunal as an investment, although it “did not involve any transfer of money or property as capital in a business in the Kyrgyz Republic”.23 The irrelevance of physical presence in the host state was confirmed in SGS cases with regard to pre-shipment inspection services provided outside the borders of the host state.24 In Inmaris Perestroika, the tribunal observed in relation to certain maritime operations:

19. “In the Tribunal’s view, an investment may be made in the territory of a host State without a direct transfer of funds there, particularly if the transaction accrues to the benefit of the State itself.”25

20. Similar conclusions were reached by investment tribunals with respect to various financial instrument. That was the decision in Fedax in relation to the promissory notes, in CSOB in relation to the loans and, more recently, in Abaclat and Ambiente in relation to sovereign bonds. In all these cases the tribunals concluded that sufficient territorial nexus was present just because the respective states received and utilised the funds in exchange to the debt instruments.

21. The non-physical nature of such financial instruments as sovereign bonds makes physical location in the host state’s territory irrelevant as a matter of ratione materiae.26 Taking into account the mechanics of modern bonds’ issuance process, there may be lots of factors connecting sovereign bonds with the issuer under private international law. However, in the context of protection under investment treaties, the decisive factor is that the funds are ultimately given for the benefit of the debtor (host) state.

22 Abaclat [374], Ambiente [499], Fedax [41]
23 Petrobart v Kyrgyz Republic p.69-72
24 SGS v Pakistan [136]; SGS v Philippines [99-112]
25 Inmaris Perestroika [123-125]
22. By contrast, the physical transfer of funds into the territory of the host state was found relevant by those tribunals which dealt with businesses which were physically located in the host states. For example, this criterion was highlighted in *Canadian Cattlemen* where an alleged investment was a beef and cattle business located in the investor’s home state.27 Similarly, this criterion was advanced in *Bayview* where alleged investments concerned farms and irrigation facilities located in the investor’s state of origin. The tribunal there concluded that the territorial nexus was absent.28

23. As further analysis shows, the Claimant’s holding of sovereign Bonds at stake qualifies as an investment made in the territory of Dagobah as it serves for the benefit of Dagobah and has hence strong territorial connection with Dagobah.

24. First and foremost, just as in *Abaclat* and *Ambiente*, the funds accumulated through the issuance of bonds were utilised by Dagobah for the financing of its budgetary needs29 and contributed to its economic development.

25. Moreover, the very fact that the issuance of the Bonds was sanctioned precisely for these purposes by Dagobah and that the Bonds were governed by the Dagobahian laws and provided for jurisdiction of Dagobahian state courts speaks for obvious territorial connection.30

26. The purchase of the Bonds at the secondary market does not affect the evaluation of territoriality. In this respect, Claimant submits that there is an economic unity of operations at primary and secondary market i.e. the bond issuance process is a single act of investment, which includes circulation of bonds at the secondary markets.31

27. In particular, according to the standard procedure, the sovereign debt is issued to underwriters at the primary market, while secondary markets are “simply assets held by

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27 *Ambiente* [498]; *Fedax* [41]
27 *Canadian Cattlemen*
28 *Bayview*
29 *Ambiente* [425]
30 UF [20]
31 *Ambiente* [431]
one investor selling them to another investor” 32. The bonds, therefore, can *never* be purchased by the bondholders directly from the issuer. The secondary market thus enables the very existence of the primary market as it creates the liquidity for the bonds. 33

28. For that reason, the mere fact that the Bonds were purchased by Calrissian in the secondary market does not make a tenable argument as this is the only possible way of purchasing this particular financial instrument.

29. Respondent might (wrongfully) attempt to question qualification of the Bonds as investments by questioning the bondholders’ status as investors. To this end, it might argue that the actual investors are underwriters (instead of the bondholders), which is of no avail for its position. The underwriters cannot be viewed as investors as they have no purpose of acquiring bonds for their own benefit, which is a condition for qualifying them as such 34. The lump-sum paid by the underwriters to the issuer upon the bonds’ issuance is just an advance payment, which is subsequently ‘reimbursed’ by the investors at the secondary market. 35 In other words, the underwriters’ costs are just an intermediary step in a single payment transaction, whereby the payment is ultimately made by the investors.

30. For the above reasons, it is irrelevant that Respondent does not directly receive funds every time that the Bonds change hands (which has not happened for the last nine years), so long as such funds are provided for its benefit, which benefit extends until the Bonds’ maturity.

31. Since “*for the benefit of whom*” criteria is satisfied in the present case, the Bonds satisfy territorial nexus test applicable to them as financial instruments. Hence they are an investment made in the territory of Dagobah.

32 *Abaclat* [26]
33 *Abaclat* [376]
34 *Abaclat* [358, 360]
35 *Abaclat* [376]
II. AWARD OF THE PCA TRIBUNAL BINDS THIS TRIBUNAL

32. The final Award of the PCA rendered in the dispute between the BIT parties held that sovereign bonds qualify as investments under the BIT. Consequently, Respondent may no longer contest the bond’s status as investments. It follows, that bondholders, such as Claimant may resort to international arbitration pursuant to Article 8 of the CD-BIT. This Tribunal should dismiss Respondent’s ‘lack of an investment’ objection on the basis of the PCA Award alone in light of the international law rules on treaty interpretation (A). Furthermore, according to the principle of res judicata the PCA Award binds the parties and this Tribunal should follow it (B).

A. Award of the PCA should be followed due to the rules of treaty interpretation

33. This tribunal will find a binding effect of the PCA Award applying the rules of treaty interpretation recognized in international law. Firstly, according to the rules provided by the VCLT subsequent agreement between the parties has a binding force. Secondly, the interpretive principle of effectiveness requires application of the PCA Award.

1. Decision of the PCA Tribunal is a subsequent agreement of the states on interpretation and application of the CD-BIT which shall be relied on by the tribunal

34. Under Article 31 (3)(a) of the VCLT “any subsequent agreement between the parties regarding the interpretation of the treaty or application of its provisions” shall be taking into account while interpretation of the treaty provisions. It represents form of authentic interpretation whereby parties to the treaty agree on interpretation of treaty terms by means which are extrinsic to the treaty. Therefore, parties’ authentic interpretation of the treaty terms is not only reliable, it is also endowed with binding force as it based on the parties’ explicit consent. Such interpretation of the treaty demonstrates which of the various ordinary meanings shall apply according to the parties’ agreement.

35. The parties’ subsequent agreement may be reflected in a decision adopted under a mechanism the parties’ agreed to in the treaty. For instance, parties to the NAFTA

36 Villiger, p.429; Yen, p. 44.
established the FTC which has the power to “resolve disputes that may arise regarding its interpretation or application.”\textsuperscript{37} Interpretations issued by the FTC shall be binding pursuant to Article 1131(2) of the NAFTA. \textit{Methanex} tribunal confirmed that “FTC’s interpretation is properly characterized as subsequent agreement on interpretation falling within the scope of Article 31 of the Vienna Convention.”\textsuperscript{38}

36. Similarly, Dagobah and Corellia provided a special mechanism for deciding interpretive disputes. They voluntarily agreed that “any dispute concerning the interpretation or application of Agreement shall be settled by consultation through diplomatic channels.”\textsuperscript{39} If it cannot be thus settled it shall be submitted to the PCA “for binding decision in accordance with the applicable rules of international law.”\textsuperscript{40}

37. The PCA Award accordingly reflects parties binding subsequent agreement and should be applied by this Tribunal. Corellia had commenced arbitral proceedings against Dagobah to resolve a dispute over treaty interpretation.\textsuperscript{41} The PCA Tribunal decided that bonds constitute an investment. The Award reflects a subsequent agreement of the States on interpretation and application of CD-BIT which the Tribunal should follow under Article 31 of the VCLT.

\textbf{2. Principle of effective interpretation refers to the PCA Award}

38. It is universally accepted and deployed by international courts and tribunals and operated on the presumption that parties intended that all terms in their agreement had a purpose and that they did not intend any part of it to be ineffective.\textsuperscript{42} The \textit{ad hoc} Committee in \textit{Kloeckner} determined the principle as a customary principle of interpretation.\textsuperscript{43} \textit{Eureko} tribunal stated that the principle of effectiveness is a cardinal

\textsuperscript{37} Art.2001(2), NAFTA

\textsuperscript{38} \textit{Methanex} [19-21]

\textsuperscript{39} Art. 7(1), CD-BIT

\textsuperscript{40} Art. 7(2), CD-BIT

\textsuperscript{41} UF, p.2.

\textsuperscript{42} Weeramantry, p.144.

\textsuperscript{43} \textit{Kloeckner} [62]
rule of the treaty interpretation under which “each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless, and treaties and, hence, their clauses are to be interpreted so as to render them effective rather than ineffective”.  

39. Unless this Tribunal follows the PCA Award, almost the entire inter-state dispute resolution mechanism in the BIT would be rendered without effect. In Article 7 in CD-BIT the parties agreed on a specific mechanism for solving interpretive disputes. It will be prudent to assume that the parties created such a mechanism in order to clarify provisions of the treaty and provide guidance on application of the BIT. Hence, the entire procedure would be rendered meaningless unless subsequent tribunals follow the interpretation adopted by such a specific mechanism. This Tribunal should give effect to the parties’ “intentions that are envisaged in the BIT through its terms.” and follow the PCA Award.

40. Furthermore, the Claimant relied on this Respondent’s apparent agreement to the PCA Award interpretation reflected in the CD-BIT, and this formed a part of the Claimant’s legitimate expectations. Respondent is estopped from revocation of part of its consent in order to avoid liability under the BIT.

41. To conclude on treaty interpretation, the Tribunal should follow the PCA Award, because the Award reflects the parties’ subsequent agreement and the Tribunal’s failure to follow the PCA award would render the inter-state dispute settlement procedure meaningless.

B. The PCA Award is res judicata and binds the parties to the dispute

42. The rule of res judicata brings to the effect that once a matter is judicially determined it may not be litigated again by the same parties or parties in the same interest. According to the ILA Committee the term “res judicata” refers to the general doctrine

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44 Eureko [248]
45 Yen, p. 44.
46 Parry, p.339.
that an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings.\textsuperscript{47}

43. Principle of \textit{res judicata} is recognized as a rule of international law. The large majority of international decisions and commentators accept \textit{res judicata} as a general principle of law.\textsuperscript{48} In addition the principle is sometimes also referred to as a part of customary international law.\textsuperscript{49} In fact, there is no discussion on existence of the principle, and if it was not applied in some cases it might simply have been because the requirements for its application were not met under the circumstances.

44. There is a widespread acknowledgment that three main preconditions for \textit{res judicata} to apply in international law as following: the proceedings must have been conducted before courts or tribunals in the international legal order; they must be between the same parties; the proceedings must concern the same issues.\textsuperscript{50} Claimant submits that these requirements for application of \textit{res judicata} are satisfied in the present case. Firstly, decision rendered by the PCA Tribunal was based on the present BIT. Secondly, Claimant is a related party to the procedure held in the PCA. Thirdly, subject matter of the both procedures is the same.

\textbf{1. The PCA Tribunal and this Tribunal are operating within the same legal order}

45. Mixed arbitration between States and private parties can be regarded as international arbitration for purposes of \textit{res judicata} which is clearly evidenced by the approach followed by tribunal in the case \textit{SPP v. Egypt.}\textsuperscript{51} \textit{Res judicata} relates to the binding effect of a decision of one international tribunal on a subsequent international tribunal dealing with the same matter.\textsuperscript{52}

\begin{flushleft}
\textsuperscript{47} ILA Interim Report, p.2.
\textsuperscript{48} Lauterpacht, p.246; Cheng, p.336; \textit{Waste Management} [39]; Bosh [277].
\textsuperscript{49} Dodge, p.357.
\textsuperscript{50} Legal opinion, p.8.
\textsuperscript{51} \textit{SPP} [131].
\textsuperscript{52} Oxford Handbook, p.1018.
\end{flushleft}
46. In this case previous decision on the interpretation issue was rendered by international tribunal under UNCITRAL Arbitration Rules. Corellia commenced arbitral proceeding against Dagobah pursuant to Article 7 of the BIT which provides a mechanism for settlement of interpretive disputes between the parties. This tribunal was organized under Article 8 of the BIT. So, the legal order in the both proceedings is the same.

2. \textit{Res judicata} should be applied since Claimant is a related party to arbitration in the PCA proceedings

47. Respondent may argue that \textit{res judicata} cannot be applied by this Tribunal because Claimant was not a party to the procedure commenced in the PCA since identity of the parties is stated as a requirement for its application.

48. However, \textit{res judicata} does not require strict legal identity of the parties of both procedures. Commentators point out on a flexible approach to the requirement of parties’ identity since formal test might undermine the effect of the doctrine which will never be applied in such case.\textsuperscript{53}

49. The ILA Interim Report on \textit{Res Judicata} and Arbitration suggested that principle might also apply where the parties are so closely related that they are “privies”. Professors Ch.Schreuer and A. Reinisch also suggested the concept of “privity” for determination of the parties’ identity. Concept of ‘privity’ pertains to the relationship between a party to a suit and a person who was not a party, but whose interest in the action was such that he will be bound by the final judgment as if he was a party\textsuperscript{54}.

50. Besides, international tribunals are also open to the idea of applying \textit{res judicata} even to situations where the parties to two subsequent sets of proceedings were not strictly identical. For instance, \textit{Amco v. Indonesia}\textsuperscript{55}, \textit{Kloeckner v. Cameroon}\textsuperscript{56} tribunals followed an economic approach with regard to separate legal personality versus economic unity. They generally take a realistic attitude when identifying the party.

\textsuperscript{53} Shany, p.137.

\textsuperscript{54} Legal opinion, p.14-15.

\textsuperscript{55} Amco v. Indonesia.

\textsuperscript{56} Kloeckner v. Cameroon.
These tribunals found that subsidiary and main company could be described as the same parties.

51. In the present case, first of all, Dagobah was a party to the procedure in the PCA. Consequently, the PCA Award is obligatory for Respondent. The other party of the PCA arbitration was Corellia, Claimant’s home state. Then, despite of the fact that Claimant was not a party to the PCA arbitration it had a direct interest in it. Corellia commenced interpretive dispute in order to ensure the protection of Correlian bondholders by trying to clarify the language of CD-BIT.57 This is the evidence that Claimant is a related party to this procedure and can be considered as the same party for application of res judicata. Therefore, we conclude that the requirement of the parties’ identity for application of res judicata is satisfied in this case.

3. The object of both procedures is sufficiently the same

52. Another requirement for application of res judicata relates to the subject matter of the dispute. Requested relief should be identical. International tribunals are not in favor of using too restrictive criteria of identity of ‘objects’ and ‘grounds’ as the doctrine would then rarely apply. Therefore, for the avoidance of re-litigating already decided disputes underlying nature of a dispute should be analyzed instead of its formal classification.58

53. In this case the question that bonds are covered by definition of investment under Article 1 of the CD-BIT has already been decided by the PCA Tribunal. Respondent’s argument that the PCA Award defines only the Bonds before restructuring fails due to the two reasons.

54. Firstly, the PCA Tribunal interpreted Article 1 in abstract without express reference to the specific bonds. In accordance with the requested relief based on the BIT’s provision on interpretation Corellia argued “that the purchase of sovereign bonds issued by Dagobah constituted an investment within the meaning of Article 1(1) of the BIT”.59 It

57 UF [6].

58 Pauger

59 UF [8-9].
was the parties’ subjective understanding and intention that PCA’s interpretation related to bonds in general as investment under the BIT. The PCA Tribunal found that “sovereign debt bonds issued by state parties to the treaty qualify as investments within the meaning of the BIT”. It follows that bonds in general were the objects of the PCA proceedings, neither the Parties, nor PCA Tribunal limited the scope of the term “bonds” for the purpose of interpretation.

55. Secondly, after changes enacted by the SRA the nature of “bonds” as a financial instrument remained unchanged. As it is defined by Black’s Law dictionary “bond is a deed or instrument under seal, by which the maker or obligor promises to pay a designated sum of money to another.” Changes of the net value, governing law and incorporation of a forum selection clause did not change the bonds as it is.

56. Claimant submits that the same objects are sought in the both proceedings. Abstract interpretation by the PCA Tribunal stated that any bonds could be considered as investment under the BIT. Independently of enacting of the SRA bonds remained a financial instrument.

57. As explained above, all conditions for application of res judicata are fulfilled in this case. Therefore, the PCA Award should be binding. Consequently, bonds must be considered as investment under Article 1 of the CD-BIT.

58. To conclude, the Respondent’s ‘lack of investment’ objections should be dismissed on the strength of the PCA award alone. According to the rules of treaty interpretation and the principle of res judicata the PCA Award has a binding force for the parties of this dispute. For these reasons, in the words of the PCA Tribunal, this Tribunal has “jurisdiction over treaty claims by holders of bonds issued by State parties to the treaty.”

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60 App.2, p.16.

61 Black’s law dictionary.

62 App.2, p.16
III. THIS TRIBUNAL IS ENTITLED TO RULE ON THE CLAIM ASSERTED REGARDLESS OF THE FORUM SELECTION CLAUSE IN THE BONDS

59. Respondent may not argue that this Tribunal lacks jurisdiction under the CD-BIT in view of the forum selection clause contained in the Bonds since Claimant’s claim derives from a violation of the CD-BIT.

A. This Tribunal has jurisdiction to hear the claims based on the CD-BIT

60. Claimant does not deny the fact that a contractual claim of a bondholder is possible in case of non-payment under the Bonds. A violation of such private contractual obligations should be considered by the forum selected in the Bonds. “Pure contract claims must be brought before the competent organ, which derives its jurisdiction from the contract.” However, when the claim is based on the State’s failure to meet its international law obligations under the BIT, deriving from its exercise of sovereign authority, investment tribunal is entitled to rule on a claim.

61. In fact, sovereign bonds are usually governed by municipal law of a foreign financial centre, not by international law. Governing law determines such things as, for example, existence, validity and enforceability of obligations under the bonds, while the BIT provides standards of treatment which are ground rules for the host’s state conduct. A treaty and a contract operate in different spheres. In particular, a forum selection clause contained in a contract does not cover treaty claims which an investor may have.

62. In the case at hand, the claim is based on Act of the sovereign which violated standard of treatment envisaged by the CD-BIT.

1. State acted in its sovereign capacity

63. The test used to determine whether a submitted claim derives from a BIT or a contract concerns whether the state “acts in the exercise of its governmental or sovereign authority, rather than merely as a commercial party.” For instance, the tribunal in _Abaclat_ found that a claim is to be considered a pure contract claim where the Host

63 _Abaclat_ [316]
64 Waibel, 257.
65 _RFCC v. Morocco_ [51]
State, being a party to a contract, breaches its obligations arising by the sole virtue of such contract. This is not the case where the “equilibrium” of the contract and provisions contained therein are unilaterally altered by a sovereign act of the Host State. Therefore, the tribunal in *Abaclat* decided that Argentina promulgating the law entitling it not to perform a part of its obligations under the sovereign bonds violated provisions of Argentina-Italy BIT. The same position was supported by the tribunal in *Ambiente* which found that “restructuring the debt the State used its sovereign prerogatives”.

64. In this case Respondent unilaterally changed terms of the contract. Such power is not available for a mere private party to contract. Dagobah enacted the SRA which provided a mechanism for the bonds’ exchange. Respondent justifies its failure under the Bonds by stating that measures were taken “in efforts to reduce its debt down on sustainable level without compromising basic function of the state”. This policy of Dagobah has affected its creditors in general, including but not limited to Claimant. Dagobah does not refer to any contractual provisions to justify its unilateral changes of obligations. It does not demonstrate that it had any contractual right of doing so, such as a *force majeure*. When restructuring debt Respondent used only its sovereign prerogatives which are clearly outside of a party’s right within a contractual framework.

2. **Respondent violated its international obligations under the treaty**

65. Regardless of whether acts of the State are sovereign or nor, it was a violation of an international obligation under the treaty which provides for a special forum selection clause.

66. This Tribunal still will have jurisdiction since the claim is based on a violation of the CD-BIT. According to Article 12 of the ILC Articles character of State’s act does not matter for finding a breach of an international obligation if it is not in conformity with what is required by its obligation. In such a case the governmental or commercial

66 *Abaclat* [318]
67 *Abaclat* [326]
68 *Ambiente* [543]
69 UF [26]
character of the breach does not play any role. The only relevant question in this context is whether the State complied with its international obligations.\footnote{Crawford, p.356; Noble Ventures [82]}

67. Respondent did not comply with its obligation under the CD-BIT to provide fair and equitable treatment. In other words, the claim at stake arises out of international obligations of Dagobah contained in the CD-BIT. Therefore, irrespective of the nature of state’s actions the present dispute falls within jurisdiction of this Tribunal.

68. For these reasons, Claimant’s submission is that forum selection clause contained in the Bonds does not affect jurisdiction of this Tribunal. Claimant’s claim derives from violation of the CD-BIT by exercise of the sovereign authority on the part of Respondent.
PART TWO: MERITS OF THE CLAIMS

IV. DAGOBAH’S RESTRUCTURING MEASURES VIOLATED FAIR AND EQUITABLE TREATMENT STANDARD UNDER ARTICLE 2 OF THE CD-BIT

69. According to article 2(a) of the CD-BIT, investments of each Party shall at all times be accorded fair and equitable treatment.

70. Although the precise content of fair and equitable treatment standard is not enshrined in the treaty, there are specific elements that have been established in case law. For instance, in the recent case Deutsche Bank AG v Sri Lanka the tribunal, referring to Waste Management II \(^{71}\) stated that FET standard includes the following elements: protection of legitimate and reasonable expectations which have been relied upon by the investor to make the investment; good faith conduct; conduct that is transparent, consistent and not discriminatory, that is, not based on unjustifiable distinctions or arbitrary; conduct that does not offend judicial propriety, that complies with due process and the right to be heard. \(^{72}\)

71. Claimant firstly submits that Dagobah’s restructuring measures violated Claimant’s legitimate expectations (A). Secondly, Dagobah’s restructuring measures lacked transparency and due process (B). Finally, Dagobah’s restructuring measures were coercive (C).

A. Dagobah’s restructuring measures violated Claimant’s legitimate expectations

72. Protection of investor’s legitimate expectations is a dominant element of fair and equitable treatment standard, as confirmed by case law \(^{73}\) and doctrine. \(^{74}\) This concept relates to a situation where State’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct.

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\(^{71}\) Waste Management [98].

\(^{72}\) Deutsche Bank AG v Sri Lanka [420].

\(^{73}\) Saluka [302]; EDF [216].

\(^{74}\) Newcombe/Paradell, p.278.
such that a failure to honor those expectations could cause the investor (or investment) to suffer damages.\textsuperscript{75}

73. Investor’s expectations may arise either from specific assurances of the State, made explicitly or implicitly, or from the legal framework existing at the time investment was made.\textsuperscript{76} Claimant submits that Dagobah violated its legitimate expectations based on guarantee contained in the Bonds (1), and that it acted in contravention with the legal framework governing the investment (2).

1. Dagobah acted in contravention with its assurances contained in the Bonds

74. It is established that contractual arrangements may create legitimate expectations for an investor.\textsuperscript{77} In Continental Casualty case the tribunal stated that “contractual undertakings by governments […] generate as a rule legal rights and therefore expectations of compliance,” and their unilateral modifications by those governments is a factor need to be taken into account in determining whether a breach of FET standard has occurred.\textsuperscript{78}

75. Under the terms of the Bonds any changes in their terms were subject to consent of all bondholders.\textsuperscript{79} At the time of making the investment Claimant expected that the terms of the Bonds cannot be changed without its consent. By adopting the SRA and introducing collective action mechanism with retroactive effect Dagobah acted in contradiction with the assurance provided by the contract and therefore violated Claimant’s legitimate expectations.

76. CACs which allow certain majority of bondholders to agree to modification of the bonds’ terms binding to other bondholders are sometimes included into sovereign bonds and are regarded as a helpful mechanism in debt restructuring.\textsuperscript{80} However, it is certainly not a common practice to include such mechanism into existing sovereign bonds and

\textsuperscript{75} Thunderbird [147].
\textsuperscript{76} Newcombe/Paradell, p. 278-279.
\textsuperscript{77} Ibid. p. 279; Dolzer/Schreuer, p.140, Eureko [231-232].
\textsuperscript{78} Continental Casualty [261].
\textsuperscript{79} UF, para.17.
\textsuperscript{80} IMF Report on Collective Action Clauses.
giving them retroactive effect. To the best of Claimant’s knowledge, such an outrageous restructuring measure was used only once by Greece in February 2012,\textsuperscript{81} and even this one is contested as violating the BIT regime.\textsuperscript{82}

77. Since CACs were absent in the Bonds, Claimant had an expectation that even if Dagobah will undertake another debt restructuring it will not be able to do so without Claimant’s consent on the restructuring measures. However, by adoption of the SRA and consequently managing to exchange the Bonds to the new ones with less value without consideration of claimant’s position Dagobah violated this legitimate expectation.

2. Dagobah violated Claimants legitimate expectations of stability of legal framework

78. Legitimate expectations are closely connected with stability of the legal and business environment.\textsuperscript{83} Many tribunals have agreed that FET standard protects investor’s justified expectations of stable and predictable legal framework.\textsuperscript{84} This is moreover reaffirmed in the Preamble of the CD-BIT which states that “a stable framework for investment will maximize effective utilization of economic resources and improve living standards.”

79. Contracts form part of existing legal environment and therefore may give rise to legitimate expectations of its stability and predictability. By implementation of second debt restructuring Respondent violated Claimants legitimate expectations of stability of legal framework which caused major losses to Claimant. As a result of exchange made in November 2012 the bond’s net value cut by 30 % comparing with that of original bonds.\textsuperscript{85}

\textsuperscript{81} Rules for the amendment of securities, issued or guaranteed by the Greek Government by consent of the Bondholders.

\textsuperscript{82} Poštová banka v. Greece (no decision has rendered yet).

\textsuperscript{83} Duke Energy [340]; Bayindir [179].

\textsuperscript{84} LG&E 131; CMS, para.274-275; Occidental, para.145; Enron, para.260.

\textsuperscript{85} UF, para.18.
Moreover, introduction of collective action mechanism into the sovereign bonds was not reasonable. Dagobah restructured its sovereign debt in 2001 providing an exchange offer with even more severe reduction of the bonds face value. However, at that time Dagobah managed to conduct the restructuring without having to force the minority to accept the offer. In 2012 the economic situation in Dagobah was not significantly worse that at the time of the first restructuring, and therefore there was no need for Dagobah to adopt substantially more restrictive measures.

B. Dagobah’s restructuring measures lacked transparency and due process

1. Transparency and due process are closely connected concepts and are both recognized as important elements of FET, as confirmed by arbitral awards and doctrine.

2. In Rumeli Telecom v. Kazakhstan meeting of a working group was appointed to verify fulfillment of the State’s obligations under the investment contract, where the investor did not have an opportunity to present its position and were only verbally invited to that meeting only two days before it. The tribunal found that such decision-making “lacked transparency and due process and was unfair, in contradiction with the requirements of the fair and equitable treatment principle.”

3. Dagobah did not conduct the debt restructuring in due process since Claimant did not have any opportunity to participate in it.

4. Firstly, Dagobah did not consult with the Claimant as well as other bondholders while drafting the SRA.

5. Secondly, Claimant was not allowed to participate in the restructuring process as a part of the committee of bondholders. Although Dagobah made an invitation to participate in the restructuring process, it cannot be considered as a due notification, since it required to express intent to participate in three working days which is certainly too short period

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86 PO3, para.31.
87 Waste Management [98]; S.D.Myers [134]; Thunderbird [200]
88 Dolzer/Schreuer p.133, 142; Reinisch p.119-120; Newcombe/Paradell, p.290.
89 Rumeli Telecom [617-618].
90 PO2, para.21.
especially because the invitation was only published on a website and was not
communicated directly to the bondholders.\footnote{PO3, para.35.}

\section*{C. Dagobah’s restructuring measures were coercive}

86. Protection of investor from coercion and harassment from a host State’s side is usually
considered as one of the elements of the FET standard.\footnote{Dolzer/Schreuer, p.147; Dugan, Wallace, Rubins, Sabahi, p.523; Newcombe/Paradell, p.293; Bayindir, para.178, Saluka [308], EDF [104].} Coercion in sovereign debt
restructuring is of particular importance in determining whether fair and equitable
treatment standard was violated.\footnote{Waibel, p.291-292.}

87. Coercion relates to a situation of improper use of power where the relation of the parties
is such that one is under subjection to the other, and is thereby constrained to do what
his free will would refuse.\footnote{Black’s Law Dictionary.} In \textit{Tecmed} case denial of a State to renew a license was
considered by the tribunal as being directed to force the investor to relocate the landfill
to another place. The tribunal decided that such pressure involved form of coercion
inconsistent with the FET standard.\footnote{Tecmed [163]}

88. Bond exchanges may be considered as being coercive when the incentives adopted by
the debtor do not provide any choice to the creditors, for example when they are
compelled to participate in the exchange.\footnote{Waibel, p.290.}

89. Claimant submits that the debt restructuring measures adopted by Respondent were
coercive. The collective action mechanism introduced by the SRA provided that consent
of 75\% of the bondholders would be enough to approve the exchange offer and decision
of that qualified majority would bind the remaining bondholders.\footnote{Article 2(3) of the SRA.} Thus, the SRA
essentially provided participation of the holdout minority in the exchange offer against
their consent, which clearly shows that the nature of the restructuring measures were
coercive.
V. RESPONDENT CANNOT BE EXEMPT FROM LIABILITY BASED ON ART. 6 OF CD-BIT

90. As stated above, the restructuring measures adopted by Respondent amount to violation of the fair and equitable treatment standard under CD-BIT. Claimant further submits that this violation may not be justified by reliance on the necessity clause in Art. 6 of the BIT.

91. Art. 6 of the BIT reads:

“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”.

92. Art. 6 does not offer further guidance as to what measures may be treated as “necessary”. Claimant submits that this guidance should be obtained through interpretation of the BIT in accordance with customary rules as codified in Art. 31 of the VCLT. Art. 31 of the VCLT prescribes that terms of a treaty shall be interpreted “in context”, which shall comprise “any relevant rules of international law applicable in the relations between the parties”. With respect to interpretation of the term “necessity” relevant rules should be derived from Art. 25 of the ILC Articles, which constitute a codification of customary international law with respect to the necessity defense. In a similar way LG&E and CMS tribunals relied on Art. 25 of the ILC Articles to construe the necessity defense used in the USA-Argentina BIT.

93. According to Art. 25 of the ILC Articles, measures may be considered “necessary for the protection of essential security interest” only if: (1) there is a grave and imminent peril threatening to the essential security interest; (2) the measures adopted by a state are the only way to guard the essential security interest; (3) a state has not contributed to the state of necessity; (4) the international obligation in question does not preclude the use of the defense. These requirements are cumulative. Non-compliance with any of them shall bar the necessity defense.

98PO2, para.7
94. Claimant will demonstrate below that Respondent failed to meet any of the requirements for invocation of necessity defense as stipulated in Art. 25 of the ILC Articles. Alternatively, Claimant submits and will demonstrate below that should this Tribunal ignore the criteria of Art. 25 and apply the term “necessity” in its plain meaning, Respondent still may not rely on the necessity defense.

A. Respondent cannot be exempt from liability based on Art. 6 of the CD-BIT in the context of customary international law

1. Respondent was not facing grave and imminent peril

95. The “grave and imminent peril” refers to a situation where a state is threatened with a risk which is compromising “the very existence of a state and its independence” and this risk is “imminent”, and not simply possible or peripheral.

96. In the present case, though Respondent did face the economic crisis and unsustainable debt level, there is no evidence that these events had marked a threat to the very existence or independency of Respondent. Recent history was marked with collapses of many national economies, as well as by world economic recessions, but neither of them led to the extinction of or total loss of independence by a state. There are no specific circumstances in the Dagobah’s case that would indicate the opposite.

97. The Dagobah’s 124% net government debt to GDP ratio is by no means an indicator of economic catastrophe – it is even lower than in many developed countries. For example, nowadays the net debt to GDP ratio in Japan amounts to approximately 230%, in Italy - 132 %, in Portugal – 129%, etc. Despite this level of debt, the states can perfectly exist and preserve their independence.

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99 ILC Commentaries, p.202, Cheng, p.74; Boed, p.10; LG&E. [257]
100 Gabciko-Nagymaros Project, p.42-44
101 PO3, para.37
102 IMF Country Report, p.6
103 Trading Economics
98. The Dagobah’s inflation, increase in unemployment to 10.9% and massive dismissals, which followed the crisis and recession of 2008-2010, do not indicate signs of the grave peril as well. By way of comparative example, the Argentina’s economic, social and political crisis in 2000-s\textsuperscript{104} was similarly followed by the collapse of the currency, the major part of population living below the poverty line, the rise of unemployment rate to 25%, the riots and protests occurring all over the country, the change of presidents for 5 times during 10 days\textsuperscript{105} and etc. The crisis in Argentina escalated to a considerably greater level, than the Dagobah’s crisis. However, majority of the investment tribunals dealing with the Argentina’s crisis did not consider the above named circumstances as marking the grave peril for the state.\textsuperscript{106} There is no reason for this tribunal to deviate from the conclusions of the prior tribunals reached with respect to Argentina: events in Dagobah should not be considered as evidencing the grave peril.

99. Even if the tribunal finds that the economic crisis in Dagobah constitutes a grave peril, in any case, it was not “imminent”, but was of a long term nature and would not necessarily ever come to pass. The burden of proof for showing the state of necessity lies with Respondent. Under the ILC Articles, where a state “seeks to avoid its responsibility by relying on some circumstance under Chapter V ... the onus lies on that State to justify or excuse its conduct”.\textsuperscript{107} Since Respondent has not satisfied this burden and there is no other evidence proving imminent grave consequences which would occur as the result of the economic crisis, no imminent peril can be found in this case.

100. Consequently, the first precondition for the necessity defense may not be satisfied by Respondent.

2. The disputed measures were not the only way to preclude the peril

101. Even if the Tribunal finds that Respondent did face “grave and imminent peril”, Claimant submits that, in any case, the disputed measures had not been the only way to preclude it.

\textsuperscript{104} CMS, Enron, Sempra, LG&E
\textsuperscript{105} Economist, p.26
\textsuperscript{106} CMS, Enron, Sempra
\textsuperscript{107} Second Crawford Report, para.349
102. Art. 25 of the ILC Articles requires that the disputed measure must have been the only means available to the state in order to protect its essential security interest. Such requirement implies that “the State must have exhausted all possible legal means before being forced to act as it does”,\(^{108}\) even if the alternatives have been “much more onerous to the state”.\(^{109}\)

103. It is Claimant’s submission that Respondent has not exhausted all other possible ways to prevent the peril before adopting the SRA. IMF has suggested Respondent a number of alternative options to combat the crisis: restructuring measures were only one option, other options included, for example, some austerity measures inside the country.\(^{110}\) However, Respondent has chosen to adopt the restructuring measures on the first place: by the time of restructuring Respondent had not implemented any of the other IMF’s suggestions.\(^{111}\)

104. Respondent also ignored practice of other states as to potential other ways to deal with the economic crisis, except debt restructuring. For example, Turkey in 2000-s managed to turn around an unsustainable debt situation by letting the currency depreciate, sharply tightening fiscal policy and restructuring its banking policy.\(^{112}\) In the present case there is no evidence that Respondent has considered such kind of alternatives. Even contrary to the practice of Turkey, Dagobah had left the significant issue of tax evasion unaddressed.\(^{113}\)

105. Furthermore, the restructuring method chosen by Respondent, namely collective action mechanism, is not the only one available in global financial and economic practice. For example, most sovereign debt exchange offers include such measures as minimum participation thresholds, exit consents (Belize, Dominican Republic) and etc.\(^{114}\)

\(^{108}\) Ibid.
\(^{109}\) United Nations Report, pp. 155,175
\(^{110}\) UF para.15
\(^{111}\) PO3, para.36
\(^{112}\) IMF Sovereign debt restructuring, para.23
\(^{113}\) App.4, p.21
\(^{114}\) IMF Sovereign debt restructuring, para.36
106. Moreover, from various available options Respondent chose to adopt the measures the efficiency of which is highly questionable. The last crisis in 2001 had shown that the restructuring measures were not a good solution for the economic problems in Dagobah. As independent economic observers note, the restructuring measures conditioning the IMF’s debt relief “suffocated the economy and did not bring about the economic recovery”.

107. Hence, the measures adopted by Respondent were not helpful to protect its essential security interest, much less were they the only way to assure such protection. Hence, the second precondition for the necessity defense may not be satisfied by Respondent.

3. Respondent has contributed to the state of necessity

108. Claimant submits that Respondent cannot be exempt from liability based on necessity clause, because it has contributed to the state of necessity. Justifying Respondent’s measures which became necessary because of Respondent’s own mistakes, would be contrary to “the general principle of law devised to prevent a party taking legal advantage of its own fault”, as Enron tribunal explained, and contrary to “logic”, as LG&E tribunal concurred.

109. The contribution may not necessarily result from a fault of a single administration, but the problems may have been mounting for a decade. This is exactly the case at hand. The complex economic situation in Dagobah resulted inter alia from the chain of unsolved and long standing problems, which Respondent failed to effectively address. As observed by the independent economic newspaper “The Global Financial Gerald”, the main reason for the 2008 crisis was the expansive borrowing policy of Respondent, which has not been complemented by adequate reforms on the revenue side. It is also stated that Respondent failed to address the significant issue of tax evasion and that these mistakes amplified the government’s revenue crisis. Therefore, Respondent has

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115 App.4, p.21-22
116 Enron [311]
117 LG&E [256]
118 Bjorklund, p.16; Sempra [354]
119 App. 4, p.21-22
by itself substantially contributed to the economic crisis 2008 and there is no reason why Claimant should bear the negative consequences of Respondent’s mistakes.

110. Similar issues were addressed by investment tribunals in the context of Argentinean crisis. As result of the governmental policy, Argentinean economy was marked with “structural rigidities”, “fiscal deficits” and “debt accumulation”. These internal problems enhanced the effect of the worldwide economic crisis that stroke Argentina. The majority of the tribunals decided that despite the exogenous character of the crisis, Argentina made substantial contribution to its development and severity inside the country. Since Respondent’s actions and internal economic problems are similar to those of Argentina, there is no reason why this Tribunal should adopt a different approach.

111. The approach of LG&E tribunal in respect to the Argentinean crisis, which came to the opposite conclusion, is widely criticized and shall not be taken into consideration. The tribunal did not find contribution, because it shifted the burden of proof to the investor for proving the facts contributing to the state of necessity. However, as shown above, this practice is contrary to the meaning of Art. 25 of the ILC Articles and therefore should be disregarded.

112. Therefore, the third precondition for invocation of the necessity defense may not be satisfied.

4. The obligations under the BIT preclude the use of the necessity defense

113. Claimant further argues that the object and purpose of the BIT impedes reliance on necessity in financial and economic crisis situations. This is because the very purpose of the BIT is the protection of investors in crisis situations. As states by Prof. Reinisch:

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120 Sempra, [342]
121 Sempra [354]; Enron, [312]; CMS, [329]
122 Subramanian, p.88; Bjorklund, p.16; National Grid plc [261]
123 Para.104 of this Memorandum
124 Binder, p.19; Reinish, p.205; CMS [353]
“BITs generally aim at protecting investors against host state measures that are typically taken in situations of economic difficulties. In such situations, host states may tend to act against the interests of foreign investors to pursue national policy goals. It is exactly in these situations where the protection offered by BITs is applicable”.

114. Therefore the application of necessity defense is precluded by the object and purpose of the BIT and Respondent may not rely on this defense. In view of the above mentioned, Respondent cannot be exempted from liability under Art. 6 of the BIT.

B. Respondent cannot be exempt from liability based on the plain meaning of Art. 6 of the BIT

115. In case the Tribunal finds that Art. 25 of the ILC Articles should not be taken into account for interpretation of Art. 6 of the BIT, Respondent still may not rely on the necessity defense. Claimant submits that the plain text of Art. 6 of the BIT warrants the same conclusion as is assured under Art. 25 of the ILC Articles (A) and application of the margin of appreciation doctrine does not change such conclusion (B).

1. Plain text of Art. 6 of the BIT does not exempt Respondent from liability

116. The ordinary meaning of the word “necessary” used in Art. 6 of the BIT refers to something what needs to be done, achieved, or present; something essential or inevitable.\(^\text{125}\) This means that a “necessary” measure is the one that cannot be avoided by other possible means. As shown above,\(^\text{126}\) this is not the case at hand.

2. Margin of appreciation is not applicable for qualification of Respondent’s actions under Art. 6 of the BIT

117. Respondent may claim to have certain margin of appreciation when choosing which measures were “necessary” to combat the economic crisis. However, jurisprudence of investment tribunals provides that this margin cannot not be without limits. For, example, LG&E and CMS tribunals denied self-judging character of necessity clauses of the USA-Argentina BIT, because other interpretation would contradict to the BIT’s

\(^{125}\) Oxford dictionary

\(^{126}\) Paras.106-112 of this Memorandum
ultimate purpose – to protect the investments.\textsuperscript{127} \textit{Plama} tribunal noted that self-judging character of clause would be “a license for injustice”.\textsuperscript{128}

118. In this light Claimant submits that Respondent’s margin of appreciation should be limited by the principle of proportionality – Respondent may choose to adopt only those measures which are proportionate to the aim pursued.\textsuperscript{129} To be proportionate the measure shall be no more severe than is needed to reach the pursued aim, and should be the least burdensome of all possible.\textsuperscript{130} It was demonstrated above that in the instant case the adopted measures were not the only possible, much less least burdensome to investors.\textsuperscript{131}

119. On the basis of the above, Respondent cannot be exempt from liability based on Art. 6 of the BIT.

\textsuperscript{127} \textit{LG\&E} [212]; \textit{CMS} [370]

\textsuperscript{128} \textit{Plama Consortium Limited} [721]

\textsuperscript{129} \textit{James and others} [50]; \textit{Tecmed} [122]

\textsuperscript{130} Wäde/Kolo, p.828

\textsuperscript{131} Para.106-112 of this Memorandum
PRAYER FOR RELIEF

For the foregoing reasons Claimant respectfully asks the Tribunal to find that:

1. Tribunal did not have jurisdiction over the dispute concerning the sovereign bonds owned by Claimant under the CD-BIT;

2. Award of the PCA did not have an effect on jurisdiction of this tribunal;

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

4. Respondent’s debt restructuring measures did not amount to a breach of the fair and equitable treatment standard under the CD-BIT;

5. Respondent’s actions are exempted from breaching the CD-BIT since the debt restructuring measure was a measure necessary to safeguard the respondent’s essential security interests.

RESPECTFULLY SUBMITTED
COUNSEL FOR CLAIMANT