SEVENTH ANNUAL
FOREIGN DIRECT INVESTMENT
ARBITRATION MOOT COURT

MALIBU
24 TO 26 OCTOBER 2014

MEMORIAL FOR RESPONDENT

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

On behalf of

Federal Republic of Dagobah

Against

Calrissian&Co., Inc.

(RESPONDENT) (CLAIMANT)
A. THE TRIBUNAL DOES NOT HAVE JURISDICTION BECAUSE SOVEREIGN BONDS ARE NOT INVESTMENTS

1. Claimant’s purchase of sovereign bonds was no investment pursuant to Article 1 BIT
   1.1. The purchase of sovereign bonds is a purely commercial transaction and not an investment
   1.2. Sovereign bonds do not fulfill the characteristics of an investment
       1.2.1. Necessary characteristics of an investment
       1.2.2. Lack of the necessary characteristics
       1.2.3. Conclusion
   1.3. Sovereign bonds are not included in the list of examples for an investment in Article 1 BIT
   1.4. Conclusion

2. In any event, the purchase of sovereign bonds lacks the necessary territorial link
   2.1. A link of the investment to the territory of Dagobah is required
   2.2. The purchase of sovereign bonds lacks a territorial link to Respondent
   2.3. Conclusion

3. Conclusion

B. THE PCA AWARD DOES NOT PRECLUDE A FINDING OF NO JURISDICTION
1. The PCA Award is not binding because the PCA Tribunal overstepped its competence by rendering an abstract ruling on the meaning of the BIT .......................... 11

1.1. Case law supports the argument that only disputes regarding concrete breaches of the BIT are covered by Article 7 BIT .................................................. 12

1.2. A comparison with interpretation mechanisms in international treaties shows that Article 7 was not meant to be an interpretation mechanism ....................... 12

1.3. The confidentiality obligation under Article 7 BIT and Article 32(5) UNCITRAL Rules excludes any binding effect for future tribunals ........................................................................................................ 14

1.4. There is no principal difference between the tribunals established under Articles 7 and 8 BIT ........................................................................................................ 14

1.5. In any case the tribunal is free to decide over its own jurisdiction within the scope of Kompetenz-Kompetenz ........................................................................ 15

1.6. Conclusion ........................................................................................................ 16

2. Alternatively, The PCA Award is not binding because the PCA Tribunal overstepped its competence by issuing an amendment rather than an interpretation .... 16

3. Conclusion ........................................................................................................ 17

C. THE EXCLUSIVE JURISDICTION CLAUSE IN THE BOND TERMS EXCLUDES A DECISION BY THE TRIBUNAL IN THE PRESENT CASE .................................................. 18

1. The Tribunal lacks jurisdiction because Claimant is bringing a contract claim ........ 18

1.1. Claimant is essentially bringing a contract claim .................................................. 18

1.2. The Tribunal has no jurisdiction for Claimant’s contract claim ............................ 18

1.3. Claimant cannot “disguise” its contract claim as a treaty claim ......................... 19

1.4. Conclusion ........................................................................................................ 21

2. Even if Claimant’s claim were to be considered a treaty claim, the Tribunal would still not have jurisdiction ........................................................................ 21

3. Even if the Tribunal had jurisdiction, the claims would still be inadmissible .......... 22
4. Conclusion .................................................................................................................................................. 23

D. RESPONDENT ACTED FAIRLY AND EQUITABLY .................................................................................. 24

1. Respondent did not violate Claimant’s legitimate expectations ......................................................... 24
   1.1. Claimant received no representations that could have given rise to legitimate
       expectations ........................................................................................................................................... 25
   1.2. In any event, Claimant’s alleged expectations were not legitimate ........................................... 25
       1.2.1. Expectation of full repayment were not legitimate .............................................................. 25
       1.2.2. Expectation of the law and the bond terms not being changed were not
           legitimate ........................................................................................................................................... 27
       1.2.3. Conclusion .................................................................................................................................... 29
   1.3. Conclusion ......................................................................................................................................... 29

2. The legal framework Claimant encountered was stable and due process was
   guaranteed .................................................................................................................................................. 30
   2.1. The legal framework was stable ....................................................................................................... 30
   2.2. Respondent did not violate due process ......................................................................................... 30
   2.3. Conclusion ......................................................................................................................................... 31

3. Conclusion ............................................................................................................................................. 31

E. IN ANY EVENT, RESPONDENT IS EXCUSED BECAUSE OF NECESSITY ........................................ 32

1. Article 6(2) BIT excludes any violation of the BIT .............................................................................. 32
   1.1. Respondent’s essential security interests were at issue ............................................................... 33
   1.2. Respondent measures were necessary to protect its own essential security
       interest .................................................................................................................................................... 34
       1.3. Conclusion .................................................................................................................................... 36

2. Alternatively, Respondent is exempted under customary international law .................................. 36
   2.1. Respondent’s essential interests were at issue .............................................................................. 37
   2.2. Respondent faced a grave and imminent peril for its essential interests .......................... 37
2.3. Respondent’s measures were the only way to protect its essential interests .......... 37
2.4. The impaired interest of Corellia is outweighed............................................ 38
2.5. There was no contribution by Respondent ....................................................... 38
2.6. Article 27 ILC Draft Articles is irrelevant......................................................... 38
2.7. Conclusion ........................................................................................................... 39
3. Conclusion ............................................................................................................. 39
F. PRAYER FOR RELIEF .............................................................................................. 40
# List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>ARfA</td>
<td>Answer to the Request for Arbitration (Appendix 6, pp.34-37 in the file)</td>
</tr>
<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty (if no further indication is given, “BIT” refers to the Corellia – Dagobah Bilateral Investment Treaty, Appendix 1, pp.7-12 in the file)</td>
</tr>
<tr>
<td>CAC</td>
<td>Collective Action Clause</td>
</tr>
<tr>
<td>cf.</td>
<td>confer</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>e.g.</td>
<td>exempli gratia</td>
</tr>
<tr>
<td>et al.</td>
<td>et aliis</td>
</tr>
<tr>
<td>et seq.</td>
<td>et sequentia</td>
</tr>
<tr>
<td>FET</td>
<td>Fair and Equitable Treatment</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
</tr>
<tr>
<td>Ibid.</td>
<td>Ibidem</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
</tr>
<tr>
<td>i.e.</td>
<td>id est</td>
</tr>
<tr>
<td>IIA</td>
<td>International Investment Agreement</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>lit.</td>
<td>littera</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
</tr>
<tr>
<td>No.</td>
<td>Number</td>
</tr>
<tr>
<td>NPM</td>
<td>Non-precluded Measures</td>
</tr>
<tr>
<td>p.</td>
<td>Page</td>
</tr>
<tr>
<td>para.</td>
<td>Paragraph</td>
</tr>
<tr>
<td>PCA</td>
<td>Permanent Court of Arbitration</td>
</tr>
<tr>
<td>P.O.1</td>
<td>Procedural Order No.1 (Appendix 6, pp.45-47 in the file)</td>
</tr>
<tr>
<td>P.O.2</td>
<td>Procedural Order No.2 (Appendix 6, pp.48-52 in the file)</td>
</tr>
</tbody>
</table>
P.O.3  Procedural Order No.3 (Appendix 7, pp.53-57 in the file)
RfA  Request for Arbitration (Appendix 6, pp.27-30 in the file)
SRA  Sovereign Restructuring Act
      (Appendix 5, pp.23-26 in the file)
UNCTAD  United Nations Conference on Trade and Development
UNCITRAL  United Nations Commission on International Trade Law
US  United States
USD  US-Dollar
v.  versus
VCLT  Vienna Convention on the Law of Treaties
WTO  World Trade Organization
LIST OF AUTHORITIES

Ago


Anderson


Bainbridge


Bishop/Lee


Bond


Booysen


Born-1999

<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Title and Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Author(s)</td>
<td>Title</td>
</tr>
<tr>
<td>-------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Euler/Bianco</td>
<td>Dimitrij Euler, Giuseppe Bianco, “Breaking the Bond: Vulture Funds and Investment Arbitration”</td>
</tr>
<tr>
<td>Fitch</td>
<td>FitchRatings Definitions of Ratings and Other Forms of Opinion, published at:</td>
</tr>
<tr>
<td>FMLC</td>
<td>Financial Markets Law Committee, “Analysis of the role, use and meaning of pari passu clauses in sovereign debt obligations as a matter of English law”</td>
</tr>
<tr>
<td>Author</td>
<td>Title</td>
</tr>
<tr>
<td>--------</td>
<td>-----------------</td>
</tr>
</tbody>
</table>
ILC


ILC-YB


IMF-2005


IMF-2013


Indlekofer


Kranzusch/Icks

Peter Kranzusch, Annette Icks, “Die Quoten der Insolvenzgläubiger in Regel- und Insolvenzplanverfahren-Ergebnisse von Insolvenzverfahren nach der Insolvenzrechtsreform“, IfM-Materialien Nr. 186, Bonn, 2009

MIT

Moody’s
Moody’s Investors Service Rating Symbols and Definitions, published at:

Moffett

Moses

Nachbar/Brown

Oxford Dictionary
Oxford Dictionary Online Version, available at:
http://www.oxforddictionaries.com/

Paulsson

Peterson/Hepburn
Luke Eric Peterson, Jarrod Hepburn, IA Reporter (30 October 2012), published at:
www.iareporter.com/articles/20121030_1

Port
Redfern/Hunter

Reinhardt/Rogoff

Reinisch

Roberts

Sacerdoti

Sauvant

Schill
<table>
<thead>
<tr>
<th>Reference</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Schreuer-2005</strong></td>
<td>Christoph Schreuer, “<em>Fair and Equitable Treatment in Arbitral Practice</em>”, 6(3) The Journal of World Investment &amp; Trade 2005, pp.357-386</td>
</tr>
<tr>
<td><strong>Shany</strong></td>
<td>Yuval Shany, “<em>Toward a General Margin of Appreciation Doctrine in International Law?</em>”, 16(5) European Journal of International Law 2006, pp.907-940</td>
</tr>
</tbody>
</table>


LIST OF CASES

ABAACLAT, Abaclat et al. v. Argentine Republic
DISSENTING ICSID Case ARB/07/5
OPINION Dissenting Opinion by Georges Abi-Saab
28 October 2011

AES AES Corporation v. The Argentine Republic
ICSID Case ARB/02/17
Decision on Jurisdiction
26 April 2005

AMBIENTE, Ambiente Ufficio S.p.A. et al.
DISSENTING v. Argentine Republic
OPINION ICSID Case ARB/08/9
Dissenting Opinion of Santiago Torres Bernárdez
2 May 2013

BAYINDIR Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.
v. Islamic Republic of Pakistan
ICSID Case ARB/03/29
Decision on Jurisdiction
14 November 2005

BIVAC Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay
ICSID Case ARB/07/9
Decision on Objections on Jurisdiction
29 May 2009

BVerfGE 30, 292 German Constitutional Court Case
1 BvR 52, 665, 667, 754/66, BVerfGE 30, 292
BVerfGE 118, 124  
*Dissenting Opinion in a German Constitutional Court Case*
Judge Lübbe-Wolff, NJW 2007, 2610

CMS  
*CMS Gas Transmission Company*

*v. The Republic of Argentina*
ICSID Case ARB/01/8
Award
12 May 2005

CONTINENTAL  
*Continental Casualty Company*

*v. The Argentine Republic*
ICSID Case ARB/03/9
Award
5 September 2008

CORELLIA  
*Corellian Republic v. Federal Republic of Dagobah*

v. DAGOBAH  
PCA CASE 000-00

Dissenting Opinion by Professor Andreas Jeger

OPINION  
19 May 2003

CSOB  
*Ceskoslovenska Obchodni Banka, A.S.*

*v. The Slovak Republic*
ICSID Case ARB/97/4
Decision on Objections to Jurisdiction
24 May 1999

DUKE ENERGY  
*Duke Energy Electroquil Partners & Electroquil S.A.*

*v. Republic of Ecuador*
ICSID Case ARB/04/19
Award
18 August 2008
<table>
<thead>
<tr>
<th>Company</th>
<th>Case Description</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>DU PONT</strong></td>
<td><em>Du Pont de Nemours &amp; Co v. Mexico</em></td>
<td>quoted in: John Bassett Moore, “History and Digest of the international arbitrations to which the United States has been a Party”, Washington, 1898</td>
</tr>
<tr>
<td><strong>EDF</strong></td>
<td><em>EDF (Services) Limited v. Romania</em></td>
<td>ICSID Case ARB/05/13 Award 8 October 2009</td>
</tr>
<tr>
<td><strong>ENRON</strong></td>
<td><em>Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic</em></td>
<td>ICSID Case ARB/01/3 Award 22 May 2007</td>
</tr>
<tr>
<td><strong>FEDAX</strong></td>
<td><em>Fedax N.V. v. The Republic of Venezuela</em></td>
<td>ICSID Case ARB/96/3 Decision of the Tribunal on Objections to Jurisdiction 11 July 1997</td>
</tr>
<tr>
<td><strong>MEMORIAL FOR RESPONDENT</strong></td>
<td><strong>BARROS</strong></td>
<td></td>
</tr>
<tr>
<td>-----------------------------</td>
<td>-----------</td>
<td></td>
</tr>
<tr>
<td><strong>GABČIKOVO</strong></td>
<td><em>Gabčikovo-Nagymaros Project (Hungary/Slovakia)</em></td>
<td></td>
</tr>
<tr>
<td>Judgment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>25 September 1997</td>
<td></td>
<td></td>
</tr>
<tr>
<td>I.C.J. Reports 1997, p.7</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>GENERATION</strong></td>
<td><em>Generation Ukraine, Inc. v. Ukraine</em></td>
<td></td>
</tr>
<tr>
<td>UKRAINE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ICSID Case ARB/00/9</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Award</td>
<td></td>
<td></td>
</tr>
<tr>
<td>16 September 2003</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>HANDYSIDE</strong></td>
<td><em>Handyside v. United Kingdom,</em></td>
<td></td>
</tr>
<tr>
<td>Application No. 5493/72</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judgment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7 December 1976</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>HELNAN</strong></td>
<td><em>Helnan International Hotels A/S v. Arab Republic of Egypt</em></td>
<td></td>
</tr>
<tr>
<td>ICSID Case ARB/05/19</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Decision on Objections to Jurisdiction</td>
<td></td>
<td></td>
</tr>
<tr>
<td>17 October 2006</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>IBM</strong></td>
<td><em>IBM World Trade Corporation</em></td>
<td></td>
</tr>
<tr>
<td><strong>DISSENTING</strong></td>
<td><em>v. República del Ecuador</em></td>
<td></td>
</tr>
<tr>
<td>OPINION</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ICSID Case ARB/02/10</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dissenting Vote of Mr. León Roldós Aguilera</td>
<td></td>
<td></td>
</tr>
<tr>
<td>22 December 2003</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>IMPREGILO</strong></td>
<td><em>Impregilo S.p.A. v. Islamic Republic of Pakistan</em></td>
<td></td>
</tr>
<tr>
<td>ICSID Case ARB/03/3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Decision on Jurisdiction</td>
<td></td>
<td></td>
</tr>
<tr>
<td>22 April 2005</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Case Name</td>
<td>Description</td>
<td>Details</td>
</tr>
<tr>
<td>---------------------------</td>
<td>-----------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>ITALY v. CUBA</td>
<td><em>Italian Republic v. Republic of Cuba</em></td>
<td>Award 1 January 2008</td>
</tr>
<tr>
<td>JOY MINING</td>
<td><em>Joy Mining Machinery Ltd. v. Arab Republic of Egypt</em></td>
<td>ICSID Case ARB/03/11 Award on Jurisdiction 6 August 2004</td>
</tr>
<tr>
<td>LG&amp;E</td>
<td><em>LG&amp;E Energy Corp. et al. v. Argentine Republic</em></td>
<td>ICSID Case ARB/02/1 Decision on Liability 3 October 2006</td>
</tr>
<tr>
<td>LINGENS</td>
<td><em>Lingens v. Austria</em></td>
<td>Application No. 9815/82 Judgment 8 July 1986</td>
</tr>
<tr>
<td>MITCHELL</td>
<td><em>Mr. Patrick Mitchell v. Democratic Republic of the Congo</em></td>
<td>ICSID Case ARB/99/7 Annulment Decision 1 November 2006</td>
</tr>
<tr>
<td><strong>MONDEV</strong></td>
<td><em>Mondev International Ltd. v. United States of America</em></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td></td>
<td>ICSID Case ARB (AF)/99/2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Award</td>
<td></td>
</tr>
<tr>
<td></td>
<td>11 October 2002</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>MYTILINEOS, DISSENTING OPINION</strong></th>
<th><em>Mytilineos Holdings SA v. Serbia &amp; Montenegro</em></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>UNCITRAL</td>
</tr>
<tr>
<td></td>
<td>Dissenting Opinion by Dobrosav Mitrovic</td>
</tr>
<tr>
<td></td>
<td>6 September 2006</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>NIAZI</strong></th>
<th><em>Niazi v. Secretary of State for the Home Department</em></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>[2007] EWCA Civ 1495</td>
</tr>
<tr>
<td></td>
<td>Judgment</td>
</tr>
<tr>
<td></td>
<td>9 July 2008</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>NOVA SCOTIA</strong></th>
<th><em>Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela</em></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ICSID Case ARB(AF)/11/1</td>
</tr>
<tr>
<td></td>
<td>Award</td>
</tr>
<tr>
<td></td>
<td>30 April 2014</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>NYKOMB</strong></th>
<th><em>Nykomb Synergetics Technology Holding AB v. The Republic of Latvia</em></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Arbitral Award</td>
</tr>
<tr>
<td></td>
<td>16 December 2003</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>PALESTINIAN WALL</strong></th>
<th><em>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory</em></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Advisory Opinion</td>
</tr>
<tr>
<td></td>
<td>9 July 2004</td>
</tr>
<tr>
<td></td>
<td>I.C.J. Reports 2004, p.136</td>
</tr>
</tbody>
</table>
PHOENIX  
Phoenix Action, Ltd. v. The Czech Republic  
ICSID Case ARB/06/5  
Award  
15 April 2009

POPE&TALBOT  
Pope & Talbot Inc. v. The Government of Canada  
Award in Respect of Damages  
31 May 2002

PSEG  
PSEG Global, Inc. et al. v. Republic of Turkey  
ICSID Case ARB/02/5  
Award  
19 January 2007

ROMAK  
Romak S.A.(Switzerland) v. The Republic of Uzbekistan  
PCA Case AA280  
Award  
26 November 2009

LAUDER  
Ronald S. Lauder v. The Czech Republic  
UNCITRAL  
Final Award  
3 September 2001

SALINI  
Salini Costruttori S.p.A. et al. v. Kingdom of Morocco  
ICSID Case ARB/00/4  
Decision on Jurisdiction  
31 July 2001
SALINI v. JORDAN  \textit{Salini Costruttori S.p.A. and Italstrade S.p.A.}  
v. \textit{The Hashemite Kingdom of Jordan}  
ICSID Case ARB/02/13  
Decision on Jurisdiction  
9 November 2004

SAN ANTONIO  \textit{San Antonio Indep. Sch. Dist. v. Rodriguez}  
U.S. Supreme Court  
411 U.S. 1 (1973)

SGS v. PAKISTAN  \textit{SGS Société Générale de Surveillance S.A.}  
v. \textit{Islamic Republic of Pakistan}  
ICSID Case ARB/01/13  
Decision on Objections to Jurisdiction  
6 August 2003

SGS v. PHILIPPINES  \textit{SGS Société Générale de Surveillance S.A.}  
v. \textit{Republic of the Philippines}  
ICSID Case ARB/02/6  
Decision on Objections to Jurisdiction  
29 January 2004

TECMED  \textit{Técnicas Medioambientales Tecmed, S.A.}  
v. \textit{The United Mexican States}  
ICSID Case ARB (AF)/00/2  
Award  
29 May 2003

THAILAND  \textit{Panel Report, Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes}  
WT/DS10/R  
5 October 1990
TOTO

Toto Costruzioni Generali S.p.A.
v. The Republic of Lebanon
ICSID Case ARB/07/12
Award
7 June 2012

TSA, TSA Spectrum de Argentina S.A.
CONCURRING v. Argentine Republic
OPINION ICSID Case ARB/05/5
Concurring Opinion of Georges Abi-Saab
19 December 2008

ULYSSEAS Ulysseas, Inc. v. The Republic of Ecuador
Final Award
12 June 2012

VIVENDI Compañía de Aguas del Aconquija S.A.
and Vivendi Universal S.A. v. Argentine Republic
ICSID Case ARB/97/3
Decision on Annulment
3 July 2002
STATEMENT OF FACTS

1. The Federal Republic of Dagobah (the “Respondent”) is a democratic sovereign state commonly described as an emerging market.\(^1\) Calrissian\&Co. Inc. (the “Claimant”) is a hedge fund registered in the Corellian Republic ("Corellia").\(^2\)

2. In 1992, Respondent entered into an Agreement for the Promotion and Protection of Investments (the “BIT”) with Corellia. With the BIT, Respondent and Corellia both intended to stimulate foreign direct investment and economic growth.\(^3\)

3. In 2001, Respondent fell into a two-and-a-half year long economic crisis and found itself in a situation of an unsustainable debt burden.\(^4\) Respondent’s government thereupon restructured its sovereign debt, offering its bondholders an exchange of old bonds for new bonds with a lower face value.\(^5\) In that connection, the International Monetary Fund ("IMF") provided Respondent with certain recommendations to prevent the further increase of debt in the future. Respondent implemented most of these recommendations.\(^6\)

4. Subsequently, Corellia initiated arbitral proceedings under the state-to-state arbitration mechanism pursuant to Article 7 BIT, requesting a decision as to whether, abstractly, sovereign bonds were covered by the investment definition of the BIT.\(^7\) In 2003, a tribunal under the auspices of the Permanent Court of Arbitration (the “PCA Tribunal”) answered the question in the affirmative.\(^8\) The decision was taken by majority, with the dissenting arbitrator presenting a well-reasoned opinion explaining clearly that sovereign bonds did not constitute an investment under the BIT.\(^9\) As Respondent and the Corellian bondholders had already agreed on debt restructuring terms by that time, the decision was without consequences and Respondent did not seek to set aside the award.\(^10\)

---

\(^1\) Uncontested Facts, para.1.
\(^2\) Ibid., para.22.
\(^3\) Ibid., para.2.
\(^4\) Ibid., para.3.
\(^5\) Ibid., para.4.
\(^6\) Ibid., para.6.
\(^7\) Ibid., para.8.
\(^8\) Ibid., para.11.
\(^9\) Ibid., paras.11-12.
\(^10\) Ibid., para.13.
In 2005, Claimant purchased sovereign bonds on the secondary market in Corellia. Respondent had issued these bonds, which have a maturity of 12 years, in August 2003. The terms of these sovereign bonds foresaw that Respondent’s own courts would be exclusively competent for any dispute relating to the bonds.

In September 2008, a worldwide financial crisis started with the collapse of Lehman Brothers. Respondent was hit hard by this crisis in 2010. The IMF found that, although Respondent had followed the IMF’s 2001 recommendations, Respondent’s debt had reached an unsustainable level. Therefore, the IMF offered a much needed “bailout” in the amount of USD150 billion. However, the IMF also stated that it would only provide the bailout if Respondent enacted a sovereign debt restructuring.

It was for this reason that in May 2012, Respondent enacted the Sovereign Restructuring Act (“SRA”) applicable to all bonds governed by Dagobah law. The major change brought about by the SRA was that it allowed a modification of sovereign bond terms binding on all bondholders if bondholders holding at least 75% of the aggregate nominal value of all outstanding bonds agreed to such modification.

In November 2012, Respondent offered all bondholders to exchange their old bonds for new ones worth approximately 70% of the original net value. This well-balanced and appropriate offer was accepted by a vast majority of bondholders holding over 85% of the aggregate nominal value of all outstanding bonds. As a result, all bonds were exchanged in February 2013.

The new bonds also included a Collective Action Clause (“CAC”), similar to clauses contained in many sovereign bond terms used throughout the world, providing *inter alia* that if bondholders wanted to initiate legal action, they would at least need to gather 20% of the nominal value of all outstanding bonds in order to sue (“Collective Enforcement Clause”).
Claimant’s claim in this arbitration should not be accepted by the Tribunal. First of all, the Tribunal lacks jurisdiction because the purchase of sovereign bonds is no investment within the meaning of the BIT (see A.). In that regard, the Tribunal is in no way bound by the decision of the PCA Tribunal (see B.). In any event, the Tribunal also lacks jurisdiction and the claims are inadmissible because of the exclusive jurisdiction clause in the bond terms (see C.). On the merits, the measures taken by Respondent were at all times in accordance with the FET standard (see D.). Alternatively, even if there had been a breach of the FET standard, such breach would be justified because of the necessity exceptions under the BIT as well as under customary international law (see E.).
A. THE TRIBUNAL DOES NOT HAVE JURISDICTION BECAUSE SOVEREIGN BONDS ARE NOT INVESTMENTS

The Tribunal should dismiss Claimant’s claim at the very outset because it lacks jurisdiction.

Before going into the details of this argument, Respondent notes that it could seriously threaten the stability of the international financial system if sovereign bonds were to be put under the ambit of investment treaty protection. Due to the lack of a formal state insolvency mechanism, matters of debt restructuring have been resolved by means of negotiation between states and creditors for centuries. Investment treaties were never meant to meddle with this state practice on debt restructurings. They were never meant to put investment tribunals in charge of administering a state insolvency either. In fact, arbitrators and scholars have repeatedly pointed out the danger posed by judicial intervention to the well balanced system of negotiated sovereign debt restructurings. Already the US-Mexican Mixed Claims Commission stated that “the disturbance which would ensue in the administration, credit, and relation of modern nations, if the claims on account of the public debt […] were made the matter of international claims, has long been understood”. Against this background, it would be in clear contravention of state practice and state intention to extend the ambit of investment treaty protection to sovereign debt.

With these observations in mind, Respondent submits that the Tribunal lacks jurisdiction to hear Claimant’s claim. This is because Claimant’s purchase of sovereign bonds was no investment within the meaning of Article 1 BIT (see 1.) and because the purchase lacks the necessary link with Respondent’s territory (see 2.).

1. CLAIMANT’S PURCHASE OF SOVEREIGN BONDS WAS NO INVESTMENT PURSUANT TO ARTICLE 1 BIT

The Tribunal has no jurisdiction to adjudicate the present case because the acquisition of sovereign bonds is no investment as required by Article 1 BIT.

The most relevant parts of Article 1 BIT read as follows:

---

19 UNCTAD-2011(1), p.1; Brahms, p.1; Euler/Bianco, p.558.
20 Indlekofer, pp.299, 319-320.
21 Cf. e.g. Abaclat, Dissenting Opinion, para.271; Gallagher, pp.2, 26.
22 Du Pont, p.3616.
“[...] ‘investment’ means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”

The BIT explicitly requires an “investment” to have the characteristics of an investment. This requirement is not fulfilled because firstly, the purchase of sovereign bonds has the characteristics of a simple commercial transaction (see 1.1) and secondly, the purchase does not fulfill the essential criteria of an investment (see 1.2). Thirdly and alternatively, sovereign bonds are no investments because they are not included in the list of examples contained in Article 1 BIT (see 1.3).

1.1. THE PURCHASE OF SOVEREIGN BONDS IS A PURELY COMMERCIAL TRANSACTION AND NOT AN INVESTMENT

Purely commercial transactions are excluded from the ambit of the BIT. However, the purchase of state bonds is precisely such a plain commercial transaction.

Tribunals have regularly distinguished investments from purely commercial transactions, both because states want BITs to only protect investments and because otherwise, a limitless application of the BIT would threaten the stability of the legal order.23

However, the purchase of sovereign bonds is a purely commercial transaction.24 For a commercial transaction, a reciprocal relationship between the involved parties is typical. This means that goods or services are exchanged without further shared interests. An investment, on the other hand, requires a symbiotic relationship in which the investor creates or increases a value, the loss of which would harm both the investor and the state.25 Bonds are a “certificate issued by a government or a public company promising to repay borrowed money at a fixed rate of interest at a specified time.”26 As this definition shows, the effects of sovereign bonds are limited to the provision of money for a certain time in return for an interest payment. The relationship is thus reciprocal. No creation or increase of a value for the

---

23 Romak, paras.185, 189; Joy Mining, para.58.
25 Waibel, p.726.
26 Oxford Dictionary.
benefit of both parties is intended. Consequentially, the purchase of sovereign bonds was no investment.\textsuperscript{27}

\textbf{1.2. SOVEREIGN BONDS DO NOT FULFILL THE CHARACTERISTICS OF AN INVESTMENT}

Moreover, the purchase of sovereign bonds also does not have the characteristics of an investment as required by Article 1 BIT.

\textbf{1.2.1. NECESSARY CHARACTERISTICS OF AN INVESTMENT}

The characteristics of an investment can primarily be found in Article 1 BIT which mentions “commitment of capital”, “expectation of gain or profit” and the “assumption of risk”. However, the characteristics mentioned in Article 1 BIT are not exhaustive, given that the formulation “including such characteristics as” is used. Additionally, relevant characteristics are “a certain duration” and “contribution to the economic development of the host state”. These two characteristics have been regularly mentioned in investment case law and commentary.\textsuperscript{28} With regard to the contribution to the economic development, reference can also be made to the BIT’s preamble, which explicitly mentions the goal of economic development.\textsuperscript{29}

\textbf{1.2.2. LACK OF THE NECESSARY CHARACTERISTICS}

Claimant’s purchase of sovereign bonds does not fulfill at least two of these requirements.

Firstly, the purchase of sovereign bonds lacks the risk necessary for an investment. It is obvious that any transaction involves a risk. An investment risk, however, has to be distinguishable from a risk that arises out of an ordinary commercial transaction.\textsuperscript{30} Thus, the mere risk of non-payment is insufficient. Instead, there has to be an investment risk, i.e. the risk that an operation fails as such.\textsuperscript{31}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{27} Corellia v. Dagobah, Dissenting Opinion, paras.91-92; Waibel, pp.711, 722. Cf. also Mytilineos, Dissenting Opinion, para.2.
  \item \textsuperscript{28} Cf. e.g. Fedax, para.43; Salini, para.52; Joy Mining, para.53; AES, para.88; Bayindir, para.130; Jan de Nul, para.91; Helnan, para.77; CSOB, paras.64-78; Phoenix, para.114; Mitchell, paras.27-33; García-Bolívar-2012.
  \item \textsuperscript{29} Cf. Preamble BIT.
  \item \textsuperscript{30} Nova Scotia, paras.105-106; Joy Mining, para.57; Nykomb, 2.5 c.
  \item \textsuperscript{31} Italy v. Cuba, paras.198, 219.
\end{itemize}
\end{footnotesize}
The risk Claimant faced in the present case is essentially the loss of money. This is a risk for anyone investing in the sovereign bonds of emerging countries. Claimant thus only faced a sovereign bond related risk, i.e., a commercial risk, and no inherent investment risk.\(^{32}\)

Secondly, state debt does not contribute to the economic development of the country. By issuing sovereign bonds, the state might receive some money when the bonds are purchased, but in the end, the money has to be repaid with substantial interest. Consequently, the state always pays more than it receives. Moreover, many international statistics have shown that a high debt level slows down economic development.\(^{33}\) The facts indicate that this is precisely what happened in the present case, in that a decade of heavy borrowing by Respondent\(^{34}\) was followed by two consecutive crises within a relatively short time frame.\(^{35}\) In addition, many commentators see the exchange of technological knowledge or other know-how as a critical element of any contribution to the economic development of a state.\(^{36}\) Such elements are absent in the purchase of sovereign bonds. In conclusion, sovereign bonds do not contribute to the economic development.

**1.2.3. CONCLUSION**

The necessary characteristics of an investment are not fulfilled. Sovereign bonds are therefore not investment within the meaning of Article 1 BIT.

**1.3. SOVEREIGN BONDS ARE NOT INCLUDED IN THE LIST OF EXAMPLES FOR AN INVESTMENT IN ARTICLE 1 BIT**

Further, sovereign bonds are not investments because they are not listed among the examples of investments under Article 1 BIT.

In Article 1 BIT, the state parties to the BIT laid down a list of transactions and commitments that can serve as an investment under the BIT. This list does not include any form of debt and it thus also does not include sovereign bonds. Naturally, Respondent accepts that the list is non-exhaustive. Nonetheless, the omission of such a fundamental form of economic

---

\(^{32}\) Cf. Corellia v. Dagobah, Dissenting Opinion, para.92; Nykomb, 2.5 c.

\(^{33}\) Reinhardt/Rogoff, pp.573-575; Herman, pp.12-16.

\(^{34}\) Uncontested Facts, para.3; Brock, p.21.

\(^{35}\) Uncontested Facts, paras.3, 14.

participation as debt demonstrates that the state parties to the BIT made a deliberate decision not to protect pure debt arrangements such as state bonds by way of the BIT.

29 This conclusion is supported by the fact that almost all international investment treaties contain lists with examples of investments that refer to debt. Respondent and Corellia were obviously aware of this repeated state practice when they concluded their BIT. The non-mentioning of debt thus implies that Respondent and Corellia made a conscious decision not to accept debt instruments and in particular not to accept sovereign bonds as investments. This decision should be respected.

1.4. CONCLUSION

30 The purchase of sovereign bonds by Claimant was no investment within the meaning of Article 1 BIT.

2. IN ANY EVENT, THE PURCHASE OF SOVEREIGN BONDS LACKS THE NECESSARY TERRITORIAL LINK

31 Even if the Tribunal were to consider the purchase of sovereign bonds as an investment, it should still not assume jurisdiction. This is because the necessary territorial link is missing.

2.1. A LINK OF THE INVESTMENT TO THE TERRITORY OF DAGOBAH IS REQUIRED

32 For the Tribunal to have jurisdiction, a territorial link of the investment to Dagobah’s territory is necessary. That is because Article 8(1) BIT requires a claim by an “investor” and Article 1 BIT defines “investor” as someone who attempts to make an investment “in the territory of the other party”.

33 Importantly, the territorial link requires a physical presence in the country. This follows from the definition of the term “territory” in Article 1 BIT:

37 Cf. e.g. Article 1(1)(c) France/Poland BIT; Article 1(a)(iii) UK/Indonesia BIT; Article 1(1)(c) Germany/Argentina BIT; Article 1(a)(iii) US/Kazakhstan BIT; Article 1(1)(c)(iii) China/Turkey BIT; Article 1(a)(iii) Netherlands/Pakistan BIT; Article 1(1)(c) Sweden/South Africa BIT.


“The Territory’ means the territory of the Parties, as well as the territorial sea and any maritime area situated beyond the territorial sea of the Party concerned [...]” (emphasis added)

34 The definition refers to the physical land and sea of the country. In his legal assessment in Ambiente v. Argentina, Dr. Torres Bernárdez concluded with regard to an almost identical definition of the term “territory” that the reference to “physical/legal land and maritime terms [...] excludes virtual construction of the concept of ‘territory’.” Notably, Dr. Torres Bernárdez also underscored the importance of the territorial link requirement, stating that “[b]eing expressly and clearly manifested in the text of the [treaty], the territoriality requirement as defined therein cannot be put aside in an interpretation of the common intention of the parties on the issue of the ‘protected investments’ when they concluded the BIT.”

35 Hence, the Tribunal’s jurisdiction requires a physical link of the investment to the territory of Respondent.

2.2. THE PURCHASE OF SOVEREIGN BONDS LACKS A TERRITORIAL LINK TO RESPONDENT

36 Claimant’s purchase of sovereign bonds does not have a link to Respondent’s territory because the necessary physical manifestation of the investment in the host state is non-existent. Sovereign bonds are mere money instruments. They do not have any physical embodiment but are simply representations of one entity’s claim against another. Furthermore, the bonds did not form part of a specific physically tangible project, operation or activity in Respondent’s territory. Rather, the funds raised were used as part of the general budget so that a territorial link is clearly missing.

37 In order to find a way around this clear result, Claimant might argue that a mere inflow of capital into the host state by way of the alleged investment is sufficient to create a territorial link. However, such view is both incorrect and irrelevant in the present case.

39 Cf. e.g. Sacerdoti, p.303.
40 Ambiente, Dissenting Opinion, para.299.
41 Ambiente, Dissenting Opinion, paras.299-303.
42 P.O.3, para.30.
38 The BIT clearly sets out that a physical link to the host state’s territory is necessary.\textsuperscript{44} As was held under a comparable treaty in \textit{SGS v. Philippines}:

\begin{quote}
\textit{In accordance with normal principles of treaty interpretation, investments made outside the territory of the Respondent State, however beneficial to it, would not be covered by the [applicable treaty].}\textsuperscript{45}
\end{quote}

39 In other words, the simple phrase “in the territory” shows that it is decisive under the BIT “where” the investment is made. It is not important, “for the benefit of whom” it was made – a phrase that was avoided by the state parties to the BIT.\textsuperscript{46} Any attempt to rely on the use of the funds rather than the place of the investment essentially equals rewriting the applicable treaty.\textsuperscript{47}

40 In any event, the sovereign bonds were purchased by Claimant on the secondary market in Corellia\textsuperscript{48} and thus outside of the territory of Respondent, with a flow of capital occurring only outside of Respondent’s territory. However, it is the transaction on the secondary market that is relevant for assessing whether an investment occurred.\textsuperscript{49} As a result, there cannot be a territorial link even if one applies a view that is based on the flow of capital.\textsuperscript{50}

\textbf{2.3. CONCLUSION}

41 In consequence, the purchase of the sovereign bonds at issue lacks the necessary territorial link.

\textbf{3. CONCLUSION}

42 The Tribunal has no jurisdiction over the present case because Claimant neither made an investment nor does a territorial link exist.

\textsuperscript{44} See paras.32 et seqq.
\textsuperscript{45} \textit{SGS v. Philippines}, para.99.
\textsuperscript{46} Cf. \textit{Abaclat}, Dissenting Opinion, para.99.
\textsuperscript{47} \textit{Ambiente}, Dissenting Opinion, para.301. Cf. also Waibel, pp.711, 727.
\textsuperscript{48} P.O.2, para.11.
\textsuperscript{49} \textit{Abaclat}, Dissenting Opinion, paras.71 et seq. Cf. also Waibel, pp.711, 725-727.
\textsuperscript{50} \textit{Abaclat}, Dissenting Opinion, para.78. Cf. Waibel, pp.711, 727.
B. THE PCA AWARD DOES NOT PRECLUDE A FINDING OF NO JURISDICTION

43 Claimant argues that the Tribunal is not entitled to scrutinize the character of sovereign bonds as investments and that instead, the Tribunal has to follow a previous ruling by a tribunal under the auspices of the PCA (the “PCA Award”). This view is incorrect. The present Tribunal is not bound by the PCA Award. Therefore, the Tribunal is free to adopt Respondent’s arguments presented above. This follows from the fact that the PCA Tribunal overstepped its competences, firstly, by addressing an abstract legal question (see 1.), and secondly, by issuing what is in fact an amendment rather than merely an interpretation of the BIT (see 2.).

1. THE PCA AWARD IS NOT BINDING BECAUSE THE PCA TRIBUNAL OVERSTEPS ITS COMPETENCE BY RENDERING AN ABSTRACT RULING ON THE MEANING OF THE BIT

44 The Tribunal is not bound by the PCA Award because this award was rendered outside of the competence given to the PCA Tribunal in Article 7 BIT. The PCA Award established a decision as to the abstract meaning of Article 1 BIT, yet, Article 7 BIT does not give tribunals the power to address abstract legal questions. State-to-state tribunals can only resolve concrete disputes relating to specific alleged treaty violations by one contracting party to the BIT. In this sense, Article 7 BIT is reminiscent of the traditional diplomatic protection mechanism under which a state alleged specific violations of international law by another state and asked for damages.

45 Case law supports the understanding that Article 7 BIT is a provision limited to concrete disputes (see 1.1.). This also follows from a comparison of Article 7 BIT to actual abstract interpretation mechanisms in other treaties (see 1.2). Moreover, the confidentiality of awards rendered under Article 7 BIT (see 1.3) and the fact that state-to-state tribunals and investor-state tribunals under the BIT are not principally different (see 1.4) support this conclusion. In addition, the binding nature of the PCA Award also has to be denied because of the principle of Kompetenz-Kompetenz (see 1.5).

51 RfA, paras.7-10.
1.1. Case law supports the argument that only disputes regarding concrete breaches of the BIT are covered by Article 7 BIT

To begin with, case law demonstrates that Article 7 BIT is not meant to cover abstract legal disputes.

As far as Respondent is aware, the case of Ecuador v. USA\textsuperscript{52} is the only case ever decided in which a state-to-state arbitral tribunal was asked to abstractly determine the meaning of provisions in an investment treaty. In that case, the tribunal dismissed the claims of Ecuador \textit{inter alia} because of a lack of “concreteness” of the dispute.\textsuperscript{53} Incidentally, the case was based on a state-to-state dispute settlement clause very similar to Article 7 BIT. Like Article 7 BIT, the clause vested jurisdiction in the state-to-state arbitral tribunal for “[a]ny dispute between the Parties concerning the interpretation or application” of the treaty.\textsuperscript{54} The identical wording of the clauses leads to the conclusion that their scope is also identical. Hence, the finding of the tribunal in the case of Ecuador v. USA can be directly applied to the present case.

As a consequence, the PCA Tribunal had no competence under Article 7 BIT to address abstract legal questions. Thus, the PCA Tribunal ruled \textit{ultra vires} and its award is not binding.

1.2. A comparison with interpretation mechanisms in international treaties shows that Article 7 was not meant to be an interpretation mechanism

Furthermore, comparing Article 7 BIT with actual interpretation mechanisms contained in international treaties also shows that Article 7 BIT is not a clause providing for abstract interpretation of the BIT, but rather only for the resolution of disputes regarding concrete treaty violations.

Treaty practice shows that states are indeed free to agree on interpretation mechanisms for their treaties and have frequently made precisely such agreements. However, where states did so, such interpretation mechanisms are explicitly foreseen and not merely implied. Moreover, where interpretation mechanisms are established, it is explicitly stated that the interpretations

\textsuperscript{52} Ecuador v. US.
\textsuperscript{53} Peterson/Hepburn.
\textsuperscript{54} Article 7(1) US/Ecuador BIT.
rendered are binding on future investor-state tribunals.\textsuperscript{55} This is sensible, given that an abstract legal determination would be useless if it were not binding for future disputes. Further, this is also sensible because international investment arbitration generally does not observe binding precedent.\textsuperscript{56} However, Article 7 BIT lacks any express mentioning of a binding effect for future tribunals.

51 In contrast to Article 7 BIT, the provisions on the interpretative powers of NAFTA’s Free Trade Commission are very precise on the effects of the Commission’s interpretative decisions. Article 1131(2) NAFTA expressly states that “[a]n interpretation by the Commission of a provision of this Agreement shall be binding on [an investor-state tribunal]”. This makes clear that the Commission may abstractly interpret NAFTA and that any interpretation rendered by the Commission binds all future investor-state tribunals. Such a wording is absent in Article 7 BIT. Consequently, since no express competence to interpret the BIT is created in Article 7 BIT and since moreover, no binding effect for future investor-state tribunals is established, Article 7 BIT does not allow for the abstract interpretation of the BIT.

52 Notably, the US and the Canada Model BIT as well as other treaties contain similar clauses as Article 1131(2) NAFTA.\textsuperscript{57}

53 Against this background, it is clear that if the parties had intended a binding effect on future tribunals, they would have expressly mentioned it in the provision, as was done in other investment treaties. The disputes the parties had in mind with Article 7 BIT thus have to be specific and not abstract. Consequently, the PCA Tribunal overstepped its jurisdiction when it decided abstractly on the ambit of the BIT. Its decision cannot be binding for the present Tribunal.

\textsuperscript{55} Cf. e.g. Article 1131(2) NAFTA; Article 30(3) 2012 U.S. Model BIT; Article 40(2) 2004 Canada Model BIT; Articles 40(3), 27 Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement.

\textsuperscript{56} Duke Energy, paras.116-117.

\textsuperscript{57} See Article 30(3) 2012 U.S. Model BIT; Article 40(2) 2004 Canada Model BIT; Articles 40(3), 27 Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement.
1.3. The confidentiality obligation under Article 7 BIT and Article 32(5) UNCITRAL Rules excludes any binding effect for future tribunals

Additionally, since the BIT provides for the confidentiality of state-to-state arbitral awards, no binding effect for future investor-state tribunals can exist.

If Article 7 BIT were meant to be an abstract interpretation mechanism, there would have to be an obligation to publish the state-to-state awards rendered pursuant to the provision. Otherwise, investors would not know the precise scope of protection of the BIT. Investors might legitimately believe they had a strong legal position only to discover in arbitration that a crucial matter has already been resolved against them. Obviously, this would violate many of the principal purposes of the BIT, in particular the promotion of legal security and the providing of “effective means of asserting claims and enforcing rights with respect to investment […] through international arbitration”.

However, Article 7 BIT does not provide for the publication of state-to-state awards, but instead for their confidentiality. Article 7(2) BIT determines the 1976 UNCITRAL Rules to be applicable in state-to-state arbitration. Article 32(5) of the Rules states that an award “may be made public only with the consent of both parties”. Thus, absent contrary agreement, state-to-state awards remain confidential. This directly undermines Claimant’s argument that Article 7 BIT provides for a mechanism for the abstract interpretation of the BIT.

1.4. There is no principal difference between the tribunals established under Articles 7 and 8 BIT

Claimant’s argument regarding Article 7 BIT as an abstract interpretation mechanism also has to be rejected because there is no principal difference between tribunals established under Articles 7 and 8 BIT.

If the state parties to the BIT had intended Article 7 tribunals to be able to provide abstract interpretations binding for Article 8 tribunals, one would expect Article 7 tribunals to be more qualified, specialized, or in some way distinguishable from Article 8 tribunals. Notably, in

54
55
56
57
58

Preamble BIT.
Caron/Caplan, p.755; Bond, para.6.
other fields of international law, abstract interpretative bodies are more authoritative and can be clearly distinguished from tribunals that are only meant to resolve concrete disputes. For example, in the framework of the Iran-US Claims Tribunal, interpretative decisions binding in future concrete cases are indeed possible. However, the interpretative decisions are rendered by all nine judges of the Iran-US Claims Tribunal whereas concrete disputes are decided by only one chamber consisting of three judges.\(^{61}\) Moreover, it is typical throughout the world that higher judicial authorities are clearly distinct from lower authorities. This is for example shown by the larger number of judges deciding cases at the highest courts.\(^{62}\)

59 However, tribunals under Articles 7 and 8 BIT are both established in essentially the same way. Both types of tribunals consist of three arbitrators, two of which are appointed by the parties.\(^{63}\) There is no requirement in Article 7 BIT that the parties may only appoint experts in international law or otherwise are limited in the choice of arbitrator. Since there is no difference in the line-up, there can also be no difference in the quality of the two decisions and importantly, there cannot be precedence of one type of tribunal over the other.

1.5. IN ANY CASE THE TRIBUNAL IS FREE TO DECIDE OVER ITS OWN JURISDICTION WITHIN THE SCOPE OF KOMPETENZ-KOMPETENZ

60 Finally, abstract interpretative powers of tribunals under Article 7 BIT must be rejected specifically with regard to jurisdictional issues such as the present one. This follows from the generally accepted Kompetenz-Kompetenz principle. According to this principle, the tribunal seized with a case is empowered to make an initial determination as to its own competence to hear the case.\(^{64}\) Given the near universal acceptance of this principle and that the BIT refers investor-state disputes to the ICSID Convention,\(^{65}\) which expressly provides for a tribunal’s competence to judge its own competence,\(^{66}\) one would have expected the state parties to the BIT to have mentioned explicitly any exception to this principle. Giving a tribunal under

\(^{61}\) Roberts, p.62.

\(^{62}\) Cf. e.g. Circuit Judges Act of 1869, 16 Stat. 44 (US Supreme Court); § 2(2) BVerfGG (German Federal Constitutional Court); Articles 35, 39(2) Loi du 7 mars 1980 sur l'organisation judiciaire (Luxembourgish Cassation Court).

\(^{63}\) Cf. Article 7(3) BIT; Article 12 SCC Rules; Article 37(2) ICSID Convention.

\(^{64}\) Cf. e.g. Article 16(1) UNCITRAL Model Law (2006); Article 23(1) UNCITRAL Rules (2010); Article 21(1) UNCITRAL Rules (1976); Article 41(1) ICSID Convention; Article 23.1 LCIA Rules. Cf. also Huber, pp.249-250; Redfern/Hunter, paras.5.99, 10.37; Port, p.274; Gaillard, paras.650 et seq.; Bühring-Uhle, p.48.

\(^{65}\) Cf. Article 8(2)(a) BIT.

\(^{66}\) Article 41(1) ICSID Convention.
Article 7 BIT the power to make a jurisdictional determination binding on a tribunal under Article 8 BIT would be precisely such exception to the Kompetenz-Kompetenz principle. Yet, there is no express for this in Article 7 BIT. Consequently, the Tribunal should conclude that the state parties to the BIT did not mean to abrogate the Kompetenz-Kompetenz principle and did not vest with a tribunal under Article 7 BIT the power to make a binding determination as to the jurisdiction of a tribunal under Article 8 BIT.

1.6. CONCLUSION

Concluding, in issuing an abstract decision as to the meaning of the BIT, the PCA Tribunal overstepped the limits of its jurisdiction and ruled ultra vires. As a result, the present Tribunal is not bound by the PCA Award.

2. ALTERNATIVELY, THE PCA AWARD IS NOT BINDING BECAUSE THE PCA TRIBUNAL OVERSTEPPED ITS COMPETENCE BY ISSUING AN AMENDMENT RATHER THAN AN INTERPRETATION

Assuming Article 7 BIT was meant to be an interpretation mechanism, the PCA tribunal still overstepped its competence, namely by issuing an amendment rather than rendering an interpretation of the BIT.

Even assuming that under Article 7 BIT, the PCA Tribunal had been entitled to address abstract legal questions, it is clear that the PCA Tribunal was only entitled to interpret the BIT, not to amend it. Article 7 BIT simply makes no reference to amendments of the BIT but instead only to its “interpretation or application”. Naturally, no future tribunal could be bound to such an amendment rendered ultra vires.

Presently, the PCA Tribunal’s decision constitutes an amendment, not an interpretation. An interpretation is in principle confined to clarifying the terms of a treaty and not aimed at filling them with a new meaning. In contrast, an amendment adds or modifies existing obligations. Respondent has already explained that an interpretation of Article 1 BIT can only lead to the conclusion that sovereign bonds are not investments. Any contradictory statement, such as the PCA Award, can thus only be seen as an amendment of the BIT.

---

67 UNCTAD-2011(2), p.5. Cf. also Article 2202 NAFTA.
68 See paras.14 et seqq.
In order to determine whether the award constitutes an interpretation or an amendment, the Tribunal has to conduct its own interpretation. Importantly, the Tribunal is fully competent to analyze whether the PCA Tribunal rendered an amendment or an interpretation. This view is supported for example by the *Pope&Talbot* tribunal. In relation to the above mentioned interpretation mechanism under Article 1131 NAFTA, this tribunal ruled that later investor-state tribunals are entitled to check whether a decision by the Commission under Article 1131 NAFTA is indeed an interpretation or an amendment.\(^{69}\) The same has to apply to an award under Article 7 BIT.

In conclusion, the PCA Tribunal overstepped its competence by amending, rather than just interpreting, Article 1 BIT. Thus, even assuming that Article 7 BIT allows for the abstract interpretation of the BIT, the PCA Award is not binding for the Tribunal.

### 3. Conclusion

The ruling of the PCA Tribunal is not binding on the present Tribunal. As a consequence, given that the sovereign bonds are in fact no investments, the Tribunal should decline its jurisdiction.

\(^{69}\) *Pope&Talbot*, paras.

72 et seqq.
C. **THE EXCLUSIVE JURISDICTION CLAUSE IN THE BOND TERMS EXCLUDES A DECISION BY THE TRIBUNAL IN THE PRESENT CASE**

68 Even if the Tribunal were to find that the purchase of sovereign bonds constitutes an investment, the Tribunal still could not adjudicate the claim brought by Claimant. That is because the claim is essentially a contract claim for which the exclusive jurisdiction clause in the sovereign bond terms vests jurisdiction in Dagobah’s courts (see 1.). Alternatively, even if the claim were to be considered a treaty claim, the Tribunal would not have jurisdiction because the exclusive jurisdiction clause also refers treaty claims to Dagobah’s courts (see 2.). In any event, the claim is inadmissible (see 3.).

1. **THE TRIBUNAL LACKS JURISDICTION BECAUSE CLAIMANT IS BRINGING A CONTRACT CLAIM**

69 Because of the exclusive jurisdiction clause in the old bond terms, the present Tribunal has no jurisdiction to hear the present case. Claimant is essentially raising a contract claim (see 1.1) for which – under the exclusive jurisdiction clause of the bond terms – the Tribunal has no jurisdiction (see 1.2). Importantly, Claimant cannot pretend that its contract claim is a treaty claim in order to circumvent the exclusive jurisdiction clause (see 1.3).

1.1. **CLAIMANT IS ESSENTIALLY BRINGING A CONTRACT CLAIM**

70 Claimant is essentially bringing a contract claim. Claimant and Respondent’s legal relationship is governed by the terms of Respondent’s sovereign bonds. This is a contractual arrangement. In the present proceedings, Claimant complains that it will not be repaid in full under this arrangement, but that instead only a limited amount of the original principal will be paid out. In other words, Claimant alleges a breach of the sovereign bond terms, making Claimant’s claim a contractual one.

1.2. **THE TRIBUNAL HAS NO JURISDICTION FOR CLAIMANT’S CONTRACT CLAIM**

71 The Tribunal has no jurisdiction for Claimant’s contract claim because the bond terms provide for the exclusive jurisdiction of Dagobah’s courts.
The basis for any potential jurisdiction the Tribunal may exercise in the present case is, in principle, Article 8 BIT. However, this basis has vanished because of the exclusive jurisdiction clause in the bond terms.

The old bond terms provide that “[a]ny dispute arising from or relating to this contract will be exclusively resolved before the Courts of Dagobah“.

Thus, there is an agreement between the parties that the parties will resolve contractual disputes arising out of the bond terms exclusively in Dagobah’s courts. Any jurisdiction one might try to derive from Article 8 BIT is thus replaced by the more specific rule contained in the sovereign bond terms. The exclusive jurisdiction clause in the bond terms has especially been developed for disputes concerning the sovereign bond agreement and therefore prevails over Article 8 BIT.

This conclusion is supported by the case of SGS v. Philippines. Therein, the tribunal held with reference to the principle of *generalia specialibus non derogant* that it is not to be presumed that a general jurisdiction clause in the BIT has the effect of overriding a specific jurisdiction clause in a contract. Similarly, the tribunal in SGS v. Pakistan held that an investor-state dispute settlement clause in a BIT does not implicitly set aside a specific agreement between the parties as to the settlement of contract claims. Professor Schreuer has also stated that “[a] document containing a dispute settlement clause which is more specific in relation to the parties and to the dispute should be given precedence over a document of more general application.”

As a result, the Tribunal does not have jurisdiction over Claimant’s contract claims.

1.3. **CLAIMANT CANNOT “DISGUISE” ITS CONTRACT CLAIM AS A TREATY CLAIM**

Claimant cannot “disguise” its contract claim as a treaty claim, thereby attempting to circumvent the exclusive jurisdiction clause provided for in the bond terms.

In order to circumvent the exclusive jurisdiction clause, Claimant presents its claim as a claim based on the BIT (i.e. a “treaty claim”) rather than a contract claim. The Tribunal should not...
be swayed by such attempts. The claim is purely contractual and merely disguised as a treaty claim.

78 In many international investment cases, there are two kinds of obligations between investors and states. Firstly, there are obligations arising out of specific contracts between investors and states, which are the basis for investments. Secondly, there are the more general obligations under the BIT. In determining whether a claim is of contractual or treaty nature, the decisive factor is which kind of obligation has been breached.

79 Claimant might argue that its own decision to formulate the claim as a treaty claim is decisive. The argument would be that a tribunal should not look at the essence of the claim. Instead, it should simply content itself with how the claim was presented by the claimant. Such an argument would, however, not be in line with international law. The annulment committee in Vivendi explained that in “a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.” This and other decisions show that tribunals need to differentiate contract and treaty claims by looking at the “essence” of the claim.

80 In fact, if the presentation by the Claimant were solely relevant, Claimant would be in a position to decide between the forums foreseen in the BIT and the one agreed on in the contract. This would almost completely undermine what was agreed upon in the contractual exclusive jurisdiction clause. As Professor Abi-Saab stated: “where what is contended in the treaty claim is mainly that the contract has been violated and that this violation constitutes in turn and by another name […] a treaty violation, such a nominal trick does not suffice to transform the contract claim into a treaty claim or to create a parallel treaty claim.” Hence, the essence of the claim is decisive.

---

75 Moses, p. 244.
76 Cf. e.g. Salini v. Jordan, paras. 137-139; Impregilo, paras. 237-243; Fisheries Jurisdiction, paras. 30, 37.
77 Vivendi, para. 98 (emphasis added).
78 SGS v. Philippines, para. 157; Bayindir, paras. 151 et seqq.; Joy Mining, paras. 78, 82.
80 TSA, Concurring Opinion, para. 5.
81 Looking at the actual essence of Claimant’s claim in the present case, it is clear that merely a contract claim is being brought. As explained above,\(^8^1\) the purchase of sovereign bonds is a mere commercial transaction and Claimant in essence complains that the bonds will not be repaid in full. The Tribunal should reject any attempt by Claimant to “disguise” its contract claim.

1.4. **CONCLUSION**

82 The claim brought forth by Claimant is in essence not a treaty claim, but a contract claim. Because of the exclusive jurisdiction clause in the bond terms, the Tribunal lacks jurisdiction.

2. **EVEN IF CLAIMANT’S CLAIM WERE TO BE CONSIDERED A TREATY CLAIM, THE TRIBUNAL WOULD STILL NOT HAVE JURISDICTION**

83 Even if the claim were a treaty claim, the present Tribunal should still dismiss it for lack of jurisdiction. That is because the exclusive jurisdiction clause in the bond terms also covers treaty claims and thus derogates from the more general jurisdiction established by Article 8 BIT. Thus, treaty claims also have to be heard before the contractually agreed upon forum, i.e. the courts of Dagobah.

84 It has generally been accepted that a specific contractual jurisdiction clause in a contract can also cover treaty claims and can thus trump a jurisdictional clause in a BIT. To that end, the annulment committee in *Vivendi* merely required that the exclusive jurisdiction clause be sufficiently clear in indicating the intention to also cover treaty claims.\(^8^2\) Other case law and commentary also confirms that exclusive jurisdiction clauses in bond contracts can steer treaty claims to other venues.\(^8^3\)

85 Presently, it is clear that the parties intended to grant Dagobah’s courts exclusive jurisdiction to hear treaty claims with the jurisdiction clause in the bond terms. The clause reads:

“All dispute arising from or relating to this contract will be exclusively resolved before the Courts of Dagobah.”\(^8^4\)

---

\(^8^1\) See paras.17 et seqq.

\(^8^2\) *Vivendi*, para.76.


\(^8^4\) P.O.2, para.16 (emphasis added).
By using the extremely broad phrases “any” and “relating to this contract”, the parties made clear that not only contractual claims *stricto sensu*, but also other claims relating to the bonds are subject to the exclusive jurisdiction of Dagobah’s courts. This naturally includes treaty claims that have a strong connection to the bonds.

Presently, it is unquestionable that a treaty claim, if such existed, would be strongly connected to the bonds and their terms. Hence, such a treaty claim “relating to” the bonds would be covered by the exclusive jurisdiction clause. As this clause is more specific than the general jurisdictional clause of Article 8 BIT, it excludes the latter. In order to give effect to the parties’ agreement, the Tribunal should decline jurisdiction in favor of Dagobah’s courts.

Claimant might suggest that Dagobah’s courts are not equipped to hear treaty claims. Such argument would however be baseless. Domestic courts in numerous countries around the world, such as Argentina, Venezuela, Mexico and Namibia, have directly applied BIT provisions. There is no reason why Dagobah’s courts should not be able to do so as well.

Thus, the exclusive jurisdiction clause in the bond terms covers treaty claims. Hence, the Tribunal lacks jurisdiction even if Claimant’s claims were considered treaty claims.

**3. Even if the Tribunal had Jurisdiction, the Claims Would Still be Inadmissible**

Even if the Tribunal were to find jurisdiction over the present claim, the Tribunal can still not decide the claim because it is inadmissible.

The concept of admissibility, as formulated by the *SGS v. Philippines* tribunal, relates to the question of “whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum.” Essentially, the *SGS* tribunal held that a party should only be allowed to rely on a contract if the party complies with the contract itself. Based on this argument, that tribunal considered the claims brought

---

86 *BIVAC*, para.145.
87 See paras.70 et seqq.
88 See paras.71 et seqq.
89 Cf. e.g. Hamida, pp.69, 72 et seqq.; Yimer, V.A.iii., V.J.iii.
90 *SGS v. Philippines*, para.154.
91 *SGS v. Philippines*, para.154.
by the claimant inadmissible. It held that the claimant could not raise the claims, which were essentially based on a contract, without breaching the contractually agreed upon exclusive jurisdiction clause in the contract.\footnote{SGS \textit{v. Philippines}, paras.169(4), 154.} Other tribunals and authors came to similar findings.\footnote{Cf. \textit{e.g. BIVAC}, paras.143-161; Paulsson, pp.86-90.}

92 In the present case, Claimant bases its claims on the sovereign bond agreement. However, Claimant frustrates the expressly agreed on exclusive jurisdiction clause by pursuing arbitration before the present Tribunal, thus denying the exclusive jurisdiction of Respondent’s courts. Applying the \textit{SGS} ruling, Claimant cannot base its claims on the contract while violating the contract by ignoring the exclusive jurisdiction clause. The claims are consequently inadmissible and the Tribunal should, as was done by the \textit{SGS} tribunal, at the very least stay the proceedings pending a determination in local courts.\footnote{\textit{SGS v. Philippines}, paras.170 et seqq.}

4. \textbf{Conclusion}

93 In conclusion, the Tribunal does not have jurisdiction. Claimant’s claims are contract claims for which the jurisdiction clause in the bond terms grants exclusive jurisdiction to the courts of Dagobah. However, even if the claims are deemed to be of a treaty nature, the exclusive jurisdiction of Dagobah’s courts prevails. Moreover, even if the Tribunal were to find that it has jurisdiction, the claims are still inadmissible because Claimant cannot base its claims on a contract which Claimant itself does not comply with.
D. RESPONDENT ACTED FAIRLY AND EQUITABLY

94 In 2012, Respondent implemented the SRA in order to reduce its sovereign debt. Under the SRA, bondholders totaling 75% of the nominal value of all of Respondent’s sovereign bonds subject to Respondent’s laws could agree to change the terms of Respondent’s bonds with binding effect for all bondholders. In the following, such agreement between Respondent and a supermajority of bondholders was reached and the terms of Respondent’s bonds were changed. Specifically, those changes included the addition of a Collective Enforcement Clause and the haircut.95

95 Claimant alleges that these measures amount to a violation of the FET standard contained in Article 2(2) BIT. Respondent categorically denies any such allegation. In particular, Respondent did neither breach any legitimate expectations of Claimant (see 1.) nor the guarantees of stability and due process (see 2.) encompassed by the FET standard.

1. RESPONDENT DID NOT VIOLATE CLAIMANT’S LEGITIMATE EXPECTATIONS

96 Respondent did not violate the legitimate expectations of Claimant and hence did not violate the FET standard. Potential expectations Claimant might raise in this arbitration could be:

- the expectation of payment of principal and interest;
- the expectation that a change in bond terms is only possible through a unanimous decision;
- the expectation that in case of a legal dispute, the Courts of Dagobah have exclusive jurisdiction; or
- the expectation that there will be no limitations to the initiation of legal procedures.

97 However, Claimant received no representations it could have based these expectations on (see 1.1). Furthermore, in the event that the Tribunal should find otherwise, such hypothetical expectations were not legitimate (see 1.2).

95 Uncontested Facts, paras.19 et seq.
1.1. **Claimant received no representations that could have given rise to legitimate expectations**

Respondent gave no representations that could have given rise to the above mentioned expectations. That is because Respondent never made any representations directed at Claimant and in fact never even communicated with Claimant. However, tribunals have regularly found that representations giving rise to legitimate expectations have to be made specifically to the investor.\(^96\)

Importantly, Claimant cannot refer to the bond terms as a source of expectations. The bond terms were directed at those institutions which bought the bonds when they were first issued. Claimant however bought the bonds on the secondary market.\(^97\) Consequentially, Claimant had no direct contact with Respondent which rules out the existence of assurances giving rise to legitimate expectations.

1.2. **In any event, Claimant’s alleged expectations were not legitimate**

Even assuming the existence of state declarations, Claimant’s potential expectations were in any event not legitimate. This applies both with regard to the potential expectation of full repayment (see 1.2.1) and the potential expectation of the law and the bond terms not being changed (see 1.2.2).

1.2.1. **Expectation of full repayment were not legitimate**

Any expectation of full repayment would not have been legitimate.

First of all, the expectation of a full repayment is never legitimate with regard to sovereign bonds. Sovereign debt restructurings are a lenient tool to prevent states from outright default and have existed for hundreds of years.\(^98\) Like bankruptcies, their private counterparts, sovereign debt restructurings are a common event that any bondholder has to expect. Recent haircuts occurred for example in Russia, Ecuador and Pakistan, all in 2000. Haircuts as a tool to restructure sovereign debt at times reached over 70% (Argentina 2005).\(^99\)

---

\(^{96}\) *Continental*, para.8; *Duke Energy*, para.340.

\(^{97}\) P.O.2, para.11.

\(^{98}\) Cf. MIT, p.1.

\(^{99}\) MIT, p.25.
103 This is further supported by Schreuer who points out, “a breach of contract resulting from serious difficulties on the part of the government to comply with its financial obligations cannot be equated with unfair and inequitable treatment”.100

104 Moreover, in business relations dealing with private persons, there is always a risk of bankruptcy as well. In such a case, creditors rarely get more than a fraction of their initial investment. For example, studies have shown that in some countries, only 4% of the initial investment can be recovered on average.101 This clearly shows that in case of sovereign debt, any expectation of full repayment cannot be legitimate.

105 In any event, Claimant’s potential expectation of a full repayment cannot be legitimate at least in the present case because of the specific situation of Respondent at the time of Claimant’s bond purchase. Respondent was only just recovering from a financial crisis. In such a situation, any diligent investor has to expect further financial difficulties as well as an eventual haircut. It was in fact held in many cases that an investor has to be aware of the development of the country it plans to invest in.102 Investors have to consider the typical business risk connected to the purchase of sovereign debt. The investor also has to expect that “greater profits lead to greater risks”103 and has to consider potential changes in the economic situation. A state recovering from such a major financial crisis as Respondent is expected to have a vulnerable and unpredictable economy.

106 Moreover, this is also reflected in the ratings of Poor’s Standard, one of the four major international rating agencies. Poor’s Standard rated Respondent’s sovereign bonds at B+ when Claimant purchased the bonds.104 A rating of B+, according to the official terminology of rating agencies, means that the bonds were “highly speculative” and “non-investment grade”.105

107 In conclusion, any expectation of Claimant that it would be repaid in full would not have been reasonable.

---

100 Schreuer-2005, p.380.
101 Cf. Kranzusch/Icks for an example from german bankruptcy law.
102 UNCTAD-2012, p.72.
103 Generation Ukraine, (20.37).
104 P.O.3, para.31.
105 S&P; Fitch, p.9; Moody’s, p.5 (refering to the equivalent rating of B1 respectively).
1.2.2. EXPECTATION OF THE LAW AND THE BOND TERMS NOT BEING CHANGED WERE NOT LEGITIMATE

108 Claimant’s potential expectation that Respondent would not change the law, implement the SRA and ultimately change the bond terms would also not have been legitimate. That is because of Respondent’s right to regulate.

109 As is generally accepted, the FET standard does not prevent states from acting in the public interest and especially not from acting in pursuit of a fundamental public interest such as securing the state’s solvency. This entails that an investor can never legitimately expect that a state will refrain from implementing legitimate measures in the public interest, unless there is a stabilization clause in a contract between the state and the investor. Any other interpretation of the FET standard would unreasonably infringe the states’ sovereignty and cannot in good faith be considered the intention of the state parties to the BIT.

110 According to the tribunal in EDF v. Romania, “[e]xcept where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework”. Similarly, the tribunal in Toto v. Lebanon noted that, in the absence of a stabilization clause or similar commitment, changes in the regulatory framework would be considered as violations of the FET standard “only in case of a drastic or discriminatory change in the essential features of the transaction.”

111 In addition, assuming a breach of the FET standard in the case of regulatory measures would give the FET standard the effects of a stabilization clause. However, it is beyond doubt that the FET standard was not meant to create a stabilization clause for all state contracts. Holding otherwise would entail that the specific negotiations in investor-state contracts become meaningless, as every contract would automatically be considered stabilized.

112 In the present case, there was no stabilization clause. The host state’s right to regulate therefore excludes the legitimacy of Claimant’s potential expectations in any case.

106 UNCTAD-2009, p.73
107 Moffett, para.19; Niazi, para.30.
109 EDF, para.217. Cf. also Ulysseas, para.249.
110 Toto, para.244.
113 Should Tribunal decide that the right to regulate in itself is not enough to invalidate the legitimacy of Claimant’s potential expectations, this has to be the case at least because Respondent’s rights and interests presently outweigh Claimant’s rights and interests.

114 Claimant’s interests are comparatively minor. While it is uncontested that the bond exchange entailed losses, Claimant never alleged that these losses in any way threatened its economic existence or were otherwise severe. The haircut negotiated with the bondholders was rather moderate, resulting only in losses of 30%.\textsuperscript{112} This is much lower than some recent haircuts by other states.\textsuperscript{113} Claimant’s interests were thus only affected very mildly.

115 In comparison, Respondent’s interests in implementing the haircut outweigh Claimant’s contrary interests by far. Respondent’s motivation was the public interest and the security of its economy. The situation was most severe, as is demonstrated not least by the fact that the IMF recommended a haircut and even made such haircut a condition for the provision of its massive USD150 billion bailout.\textsuperscript{114} Naturally, the interests of a whole economy outweigh Claimant’s personal profit interests.

116 Not taking any debt restructuring measures was not an option. As was determined by the IMF, Respondent’s debt levels were unsustainable.\textsuperscript{115} The interest due under the bonds would have continuously added to the debt. After a while, more and more creditors would have lost faith in the ability of Respondent to recover and therefore would have demanded payment. This, however, would have led to additional litigations. Respondent could have lost its ability to sustain its infrastructure, police and health care. This could have led to more social unrest,\textsuperscript{116} which would have threatened the fundamental stability of the state.

117 Moreover, the haircut could not have been successfully implemented without the SRA and the change of the bond terms by a 75% supermajority. All bondholders needed to be bound to the outcome of the restructuring because otherwise, the whole restructuring could have failed.

\textsuperscript{112} Uncontested Facts, para.18.
\textsuperscript{113} See para.102.
\textsuperscript{114} Uncontested Facts, para.16.
\textsuperscript{115} Uncontested Facts, para.15.
\textsuperscript{116} P.O.3, para.38.
That is because of the *pari passu* clause contained in the bond terms.\(^{117}\) This *pari passu* clause determines that one bondholder’s debt will rank equally with another bondholder’s debt.\(^{118}\)

118 Under such a *pari passu* clause, there is a strong incentive for bondholders to hold out and thus to effectively prevent a debt restructuring from being successful. As the Tribunal will be aware, a *pari passu* clause in bond terms was recently used to force Argentina into default.\(^ {119}\) A group of holdout bondholders secured an order that barred Argentina from making payments on its restructured debt unless Argentina paid holdout bondholders proportionally.\(^ {120}\) It is this reading of the *pari passu* clause that makes holding out attractive for bondholders and thus threatens debt restructurings.

119 The SRA and the 75% supermajority rule made it possible to impose common settlement terms on all holders of outstanding bonds. By binding all bondholders to the same new bond terms with reduced claims and a Collective Enforcement Clause, it became impossible for a holdout minority to obtain in its favor a ruling as the one from the Argentina case.\(^ {121}\) Thus, the 75% supermajority rule and the Collective Enforcement Clause ensured the success of the debt restructuring despite the *pari passu* clause. This is the commonly accepted purpose of these provisions.\(^ {122}\) Retroactively including CACs and thus allowing a universal bond exchange was the only realistic and efficient way to create a functional restructuring.

120 Considering the abovementioned, Respondent’s right to regulate clearly outweighs any interest Claimant may have had in keeping up the existing legal framework. Any expectation of the continued existence of this legal framework was thus not legitimate.

1.2.3. CONCLUSION

121 Claimant’s potential expectations were not legitimate.

1.3. CONCLUSION

122 Respondent did not frustrate any legitimate expectations of Claimant.

\(^{117}\) P.O.3, para.15.
\(^{118}\) FMLC, p.8.
\(^{119}\) See Bainbridge for an overview.
\(^{120}\) Buchheit, p.16.
\(^{121}\) See Bainbridge.
\(^{122}\) Cf. e.g. Wright, p.8.
2. **THE LEGAL FRAMEWORK CLAIMANT ENCOUNTERED WAS STABLE AND DUE PROCESS WAS GUARANTEED**

123 Claimant encountered a legal framework that was stable (see 2.1). Moreover, Claimant at all times enjoyed due process (see 2.2).

### 2.1. THE LEGAL FRAMEWORK WAS STABLE

124 Claimant cannot invoke a breach of a stability obligation.

125 The FET substandard of stability is no abstract guarantee that a state’s regulatory environment will not change. As demonstrated above, limitations on legitimate regulatory state action can only arise from explicit assurances in the form of stabilization clauses. Rather, stability as part of the FET standard means that a state may not change its regulatory environment continuously and endlessly. For example in the *PSEG* case, the government changed the laws on a daily basis and stripped investors of their ability to plan and adapt to the legislation.

126 Such a “roller-coaster effect” was not present in Dagobah. With the SRA, only one new law was introduced. Claimant’s ability to plan and adapt to the legislation was not diminished. Therefore, the provided legal framework was stable.

### 2.2. RESPONDENT DID NOT VIOLATE DUE PROCESS

127 Claimant might rely on the argument that it was not heard during the implementation of the SRA and the subsequent bond exchange and that therefore, Respondent did not guarantee due process. However, such an argument is not convincing.

128 Firstly, Respondent was under no obligation to give Claimant an opportunity to be heard either before the implementation of the SRA or before making the offer to exchange the bonds. This is due to simple considerations of efficiency. It would hinder the restructuring process immensely if every bondholder would have had to be heard prior to legislative changes. With hundreds of thousands of bondholders, a hearing procedure would have taken an unbearable amount of time and required an unreasonable amount of administration. Moreover, some of the bondholders may not have had an interest in being heard at all, which

---

123 Cf. *Continental*, para.258; *Enron*, para.261.
124 See paras.98 et seqq.
125 *PSEG*, para.254.
entails that in a general hearing procedure, a lot of effort would have been wasted.\textsuperscript{126} Against this background, the traditional right to petition the government was sufficient.

129 Secondly, Claimant in fact had the opportunity to be heard prior to the bond exchange offer. However, Claimant failed to declare in time its intention to join the bondholder committee that was created for this purpose.\textsuperscript{127} Against this background, any allegation of a lack of due process has to be rejected.

2.3. CONCLUSION

130 Respondent guaranteed a legal framework that was at all times stable. Moreover, due process was guaranteed.

3. CONCLUSION

131 In conclusion, Respondent did not violate the FET standard.

\textsuperscript{126} Waibel, p.753.
\textsuperscript{127} P.O.3, para.35.
E. IN ANY EVENT, RESPONDENT IS EXCUSED BECAUSE OF NECESSITY

132 Even if the Tribunal were to find that Respondent’s measures breached the FET standard, Respondent would still not be liable.

133 When in 2008, a worldwide financial crisis hit Respondent, Respondent had to consider the essential needs of its population. In order to keep up the basic functions of the state, Respondent implemented the SRA and exchanged its sovereign bonds. These measures were required to reduce Respondent’s debt.

134 Precisely for situations such as the one Respondent found itself in, international law provides the doctrine of necessity. In the following, Respondent will show that it fulfilled the requirements of all necessity mechanisms imaginable, namely the one provided for in Article 6(2) BIT (see 1.) and the one provided for by customary international law (see 2.).

1. ARTICLE 6(2) BIT EXCLUDES ANY VIOLATION OF THE BIT

135 Respondent’s measures did not breach the BIT because the debt restructuring was a measure necessary to protect Respondent’s essential security interests in the meaning of Article 6(2) BIT.

136 Article 6(2) BIT is a so-called Non-precluded Measures Clause (NPM clause). It stipulates:

> “Nothing in this treaty shall be construed: [...]”

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

137 According to Article 6(2) BIT, there has to be a danger to essential security interests (see 1.1) and the measures taken by Respondent have to be necessary to protect these essential security interests (see 1.2). These requirements are fulfilled.

---

128 Burke-White, pp.326-329.
1.1. **RESPONDENT’S ESSENTIAL SECURITY INTERESTS WERE AT ISSUE**

138 A worldwide economic crisis with an enormous damaging potential for a great number of states and their people is within the scope of the term “essential security interest” pursuant to Article 6(2) BIT.

139 Other than Claimant might argue, essential security interests can be affected by purely economic crisis situations; a threat of physical harm or armed conflict is not necessary. This follows first and foremost from the wording of the phrase “essential security interest” which does not specifically mention the existence of an armed conflict or other forms of violence. Quite simply, one cannot assume restrictions that are not evident from the treaty text itself.

140 Moreover, excluding economic emergencies and only covering immediate political and national security concerns would lead to an unbalanced understanding of the Article. Thus, the overwhelming case law, expressed e.g. in the *LG&E, CMS* and *Enron v. Argentine* cases, holds that an economic emergency can affect essential security interests. The tribunal in *LG&E* expressly stated:

> „To conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead. When a State’s economic foundation is under siege, the severity of the problem can equal that of any military invasion.‟

141 Respondent had to safeguard the well-being of its population and guarantee its population’s basic human rights by providing the basic and minimum amount of functions a state has to offer. This was the intention of the SRA, as reaching this goal is only possible in a healthy financial situation.

142 In conclusion, Respondent legitimately protected its own essential security interests.

---

129 Yannaca-Small, p.102.
130 CMS, para.360.
131 *LG&E*, paras.132 et seqq.; CMS, Award, paras.259 et seqq.; *Enron*, para.321. Cf. also Yannaca-Small, p.102 et seq.
132 *LG&E*, para.238.
133 Cf. *LG&E*, para.234; Reinisch, para.31; Ago, para.25.
1.2. **Respondent Measures were Necessary to Protect its Own Essential Security Interest**

143 The measures taken were necessary for the protection of Respondent’s essential security interests.

144 The term “necessary” requires that the measures taken by the state have to infringe as little as possible on the investor protection rights contained in the treaty. In other words, more investor friendly measures that address the essential security concerns equally effectively have priority. Importantly, in determining the least intrusive measures available, the state has a margin of appreciation.\(^{134}\)

145 The above mentioned understanding of the term “necessary” finds support both in domestic human rights jurisprudence\(^ {135}\) and in international law. For example, in the *Thailand Cigarettes* case, a WTO panel found that the justification of trade restrictions under Article XX(b) GATT on the ground that such restrictions are “necessary” to protect human health requires the measures taken to be the least restrictive ones achieving this legitimate policy goal.\(^ {136}\) Importantly, this understanding of the term “necessary” also makes sense from a policy perspective, as it best balances the interests of states and investors.\(^ {137}\)

146 With regard to the margin of appreciation, reference is due to the jurisprudence of the ECtHR, on which investment tribunals have regularly relied when interpreting investment treaties.\(^ {138}\) There are numerous clauses in the ECHR that allow states to impinge on human rights if this is “necessary” to achieve certain policy goals.\(^ {139}\) With regard to these clauses, the ECtHR has consistently held that in determining the least intrusive measure that effectively achieves the relevant policy goal, a certain margin of appreciation applies in favor of the state.\(^ {140}\)

147 Such margin of appreciation is sensible, given that the state is closest to the situation and thus in the best position to determine which measures are necessary to achieve the relevant policy

---

\(^{134}\) Shany, p.909; UNCTAD-2009, p.42.

\(^{135}\) Cf. e.g. *San Antonio; BVerfGE 30, 292*, para.60.

\(^{136}\) *Thailand Cigarettes*, para.75. Cf. also Burke-White, p.347.

\(^{137}\) Burke-White, pp.348 et seq.

\(^{138}\) *Mondev*, para.138; *Tecmed*, paras. 116, 122; *Lauder*, para.200.

\(^{139}\) Cf. e.g. Articles 8(2), 9(2), 10(2), 11(2) ECHR.

\(^{140}\) Cf. e.g. *Handyside*, para.48; *Kokkinakis*, para.47; *Lingens*, para.39.
Moreover, determining which measures are necessary to protect a state’s security is in itself a highly political exercise that should not be unduly overridden by judicial considerations.\textsuperscript{142}

In the present case, Respondent’s measures were “necessary” to protect essential security interests. First of all, Respondent could not simply do nothing but had to restructure its debt. Respondent’s economy was already severely affected by the worldwide financial crisis, with large-scale dismissals causing social unrest.\textsuperscript{143} Moreover, some of the state’s public services were already on the verge of shutting down.\textsuperscript{144} The state was no longer able to create sufficient revenues so that there was a very real threat that it would have to shut down important public services.\textsuperscript{145} It was against this background that the IMF found debt levels to be unsustainable\textsuperscript{146} and decided to grant a massive bailout of USD150 billion, provided that Respondent would refinance and reduce its debt in bonds through an exchange offer.\textsuperscript{147} While the sheer volume of the bailout demonstrates the severity of Respondent’s financial situation, it is the condition the IMF put on the bailout that clearly demonstrates that Respondent had no other realistic option but to restructure its debt. This applies all the more given that public creditors other than the IMF also stated that they would not provide more money unless there was a debt restructuring ensuring the participation of private creditors.\textsuperscript{148}

Secondly, the specific implementation of the debt restructuring was also the least intrusive effective measure conceivable in the present case. In fact, Respondent went to great pains to ensure that the bondholders’ interests would be protected as strongly as possible. To begin with, Respondent did not simply impose a haircut but instead sought the consent of the bondholders. Moreover, the haircut was comparatively modest, amounting to only 30% of the bonds’ nominal value.\textsuperscript{149} In the end, Respondent’s exchange offer found the broad approval of bondholders holding more than 85% of the aggregate nominal value of the outstanding bonds,

\textsuperscript{141} UNCTAD-2009, p.42; \textit{Handyside}, para.48.
\textsuperscript{142} Cf. Burke-White, p.372.
\textsuperscript{143} P.O.3, para.38.
\textsuperscript{144} P.O.2, para.20.
\textsuperscript{145} P.O.2, para.20.
\textsuperscript{146} Uncontested Facts, para.15.
\textsuperscript{147} Uncontested Facts, para.16.
\textsuperscript{148} Brock, p.22.
\textsuperscript{149} Uncontested Facts, para.18.
underscoring the reasonableness of the settlement terms.\textsuperscript{150} Importantly, Respondent had to implement the SRA and in particular had to introduce the 75% supermajority requirement to avoid a major holdout problem.\textsuperscript{151} At least applying the essential margin of appreciation of states, Respondent’s measures were thus “necessary” in the meaning of Article 6(2) BIT.

1.3. CONCLUSION

150 The requirements of Article 6(2) BIT are fulfilled. The measures adopted by Respondent thus did not breach the BIT.

2. ALTERNATIVELY, RESPONDENT IS EXEMPTED UNDER CUSTOMARY INTERNATIONAL LAW

151 Alternatively, Respondent is exempted under the customary international law rule of necessity. Notably, international jurisprudence has recognized from early on that sovereign debt crises are a typical case for the application of the necessity defense under customary international law.\textsuperscript{152}

152 The customary international law rule of necessity has been codified in Article 25(1) ILC Draft Articles.\textsuperscript{153} This Article reads:

\begin{quote}
\textit{“1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:}

\begin{itemize}
\item \textit{(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and}
\item \textit{(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”}
\end{itemize}
\end{quote}

153 The requirements set out in this Article are fulfilled.

\textsuperscript{150} Uncontested Facts, para.19.
\textsuperscript{151} See paras.118 et seq.
\textsuperscript{152} \textit{BVerfGE 118, 124}, para.81.
\textsuperscript{153} Thjoernelund, pp.429, 431. Cf. \textit{Gabčíkovo}, para.51; CMS, para.315; \textit{Palestinian Wall}, para.140; Reinisch, paras.12, 17; Yannaca-Small, pp.99 et seq.
2.1. **Respondent’s Essential Interests Were at Issue**

Respondent pursued essential interests within the meaning of this provision. An essential interest in the meaning of Article 25 ILC is any essential or particularly important interests of the state, like the political and economic survival, the maintenance of basic services and the preservation of inner peace.  

As explained above, there was a very real threat of state bankruptcy and social unrest. Hence, Respondent’s measures were necessary to safeguard an “essential interest” pursuant to Article 25 ILC Draft Articles. Importantly, it has long been accepted in state practice that “[a] State cannot, for example, be expected to close its schools and universities and its courts, to disband its police force and to neglect its public services to such an extent as to expose its community to chaos and anarchy merely to provide the money wherewith to meet its moneylenders”.

2.2. **Respondent Faced a Grave and Imminent Peril for Its Essential Interests**

Respondent’s essential interests were also endangered by a grave and imminent peril.

“Imminent peril” requires that a serious danger to an essential interest is more than just possible, without it being necessary that the danger has already realized or is certain to do so. Here, public services were already on the verge of shutting down and the IMF itself stated that the debt levels were unsustainable. There was thus a “grave and imminent peril” for the above mentioned interests.

2.3. **Respondent’s Measures Were the Only Way to Protect Its Essential Interests**

The debt restructuring was also the “only way” to safeguard Respondent’s interests. As explained above, there simply had to be a debt restructuring to get the IMF’s bailout money.

---

154 Agö, para.15; Reinisch, para.38 et seq.; ILC-YB, p.35
155 See para.148.
156 Preamble SRA; Thjoernelund, p.436; Schill, p.62.
157 ILC-YB, p.25.
158 Gabčíkovo, para.52; ILC, p.80, Article 25, paras.2 et seqq.
159 P.O.2, para.20.
160 Uncontested Facts, para.15.
161 See para.148.
and to keep up the basic functions of the state. Moreover, the specific implementation of the
debt restructuring was done in the least intrusive manner possible.

2.4. **THE IMPAIRED INTEREST OF CORELLIA IS OUTWEIGHED**

The impaired interest of Corellia according to Article 25(1)(b) ILC Draft Articles is
outweighed by the Respondent’s essential duties towards its population. Of course, investor
protection is not an entirely negligible interest. However, in this specific situation, the state’s
interest to financially survive and to guarantee the basic well-being of its population trumps
any interest of investor protection.

2.5. **THERE WAS NO CONTRIBUTION BY RESPONDENT**

Contrary to what Claimant might argue, Article 25(2)(b) ILC Draft Articles is of no relevance
because Respondent did not contribute to the situation of necessity. Rather, Respondent did
everything to prevent such a crisis.

The economic crisis in 2010 is a direct result of the global economic crisis of 2008.
Respondent had no means to prevent this global crisis that originated in the US subprime
mortgage market. In contrast, Respondent followed the recommendations of the IMF issued
in 2001 almost entirely and thus tried to avoid a future debt crisis.

2.6. **ARTICLE 27 ILC DRAFT ARTICLES IS IRRELEVANT**

Article 27 ILC Draft Articles does not exclude the application of
Article 25 ILC Draft Articles.

Essentially, Article 27 ILC Draft Articles states that Article 25 ILC Draft Articles does not
relieve a state from compliance with its international obligations once the state of necessity no
longer exists.

The application of the Article 27 ILC Draft Articles to the present case is absurd. Assuming
one had to apply Article 27 ILC Draft Articles and Respondent would have to pay its
outstanding obligations, Respondent’s debt would return into existence in full. The economic
crisis would immediately reemerge. In consequence of this return of the debt crisis, however,

---

162 See Taylor, pp.7 et seq.
163 Cf. ILC, p.85, Article 27(a).
Article 27 ILC Draft Articles could no longer be applied. This would allow Respondent again to implement the measures in question and again reduce its debt. Then, with the crisis again eradicated, Article 27 ILC Draft Articles could no longer be applied. This carousel of applicability and non-applicability could be continued ad infinitum, which shows the paradoxical nature of the application of Article 27 ILC Draft Articles to the present case. Its application has therefore to be denied. Or as one commentator put it: “A government cannot be required to take decisions that would reignite the very same threats to essential security and public order that existed at the time such measures were initially adopted.”

In fact, the present crisis could only be battled by way of a final measure. The basis for the whole crisis was the existence of an unsustainable amount of debt. Nothing but a final measure reducing the debt could consequently help Respondent rebuild its economy. The only available and most effective final measure was the haircut of the bonds.

2.7. CONCLUSION

Respondent is exempted under customary international law pursuant to Article 25 ILC Draft Articles on State Responsibility.

3. CONCLUSION

Respondent’s measures are covered by necessity under Article 6(2) BIT as well as Article 25 ILC Draft Articles on State Responsibility. Therefore, even if there had been a breach of the FET standard, Respondent is not liable towards Claimant.

---

164 Burke-White, p.390.
165 Gallagher, p.8; MIT, p.25; IMF-2013, pp.63 et seq.
F. PRAYER FOR RELIEF

In light of the above, Respondent respectfully requests the Arbitral Tribunal to find that:

a) it lacks jurisdiction under the BIT to decide the present dispute;

b) in the alternative, it is not entitled to rule on the claims asserted in view of the forum selection clause contained in the sovereign bonds;

c) furthermore, in the event the tribunal decides that it has jurisdiction, the relief sought by Claimant’s has no support in the applicable law and thus should be denied; and

d) in any event Claimant shall pay for all costs related to these proceedings.

Respectfully submitted on 19 September 2014 by

/s/

Team Alias Barros