ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE
UNDER THE RULES OF ARBITRATION INSTITUTE OF THE STOCKHOLM
CHAMBER OF COMMERCE

CALRISSIAN & CO., INC.  
Claimant

v.

THE FEDERAL REPUBLIC OF DAGOBAH  
Respondent

STATEMENT OF DEFENCE  
20 September 2014
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>LIST OF AUTHORITIES</th>
<th>ii</th>
</tr>
</thead>
<tbody>
<tr>
<td>LIST OF LEGAL SOURCES</td>
<td>viii</td>
</tr>
<tr>
<td>LIST OF ABBREVIATIONS</td>
<td>xiii</td>
</tr>
<tr>
<td>STATEMENT OF FACTS</td>
<td>1</td>
</tr>
<tr>
<td>PART ONE: PRELIMINARY ISSUES</td>
<td>4</td>
</tr>
<tr>
<td>I. The Tribunal lacks jurisdiction over the dispute</td>
<td>4</td>
</tr>
<tr>
<td>A. The 2003 Bonds are not an investment within the meaning of Art. 1 BIT</td>
<td>4</td>
</tr>
<tr>
<td>B. Even if the 2003 Bonds constituted an investment, their purchase was not made in the Respondent’s territory</td>
<td>9</td>
</tr>
<tr>
<td>II. The PCA Award has no significant effect on the decision of the Tribunal</td>
<td>10</td>
</tr>
<tr>
<td>A. The PCA Award amounts to impermissible amendment of the BIT</td>
<td>10</td>
</tr>
<tr>
<td>B. The res judicata principle is not applicable</td>
<td>14</td>
</tr>
<tr>
<td>C. The PCA Award should not be followed due to the PCA Tribunal’s errors in consideration</td>
<td>16</td>
</tr>
<tr>
<td>III. The claims are inadmissible by virtue of the forum selection clause contained in the 2003 Bonds</td>
<td>17</td>
</tr>
<tr>
<td>A. The Claimant waived its right to initiate international arbitration</td>
<td>17</td>
</tr>
<tr>
<td>B. Calrissian raises contractual claims, hence it must abide by the forum selection clause</td>
<td>19</td>
</tr>
<tr>
<td>C. The umbrella clause in Art. 8 (2) BIT does not override the contractual choice of forum</td>
<td>21</td>
</tr>
<tr>
<td>PART TWO: MERITS</td>
<td>23</td>
</tr>
<tr>
<td>IV. Dagobah’s action complied with Art. 6 (2) BIT and CIL necessity principle</td>
<td>23</td>
</tr>
<tr>
<td>A. The Respondent complied with its Art. 6 (2) BIT obligations</td>
<td>23</td>
</tr>
<tr>
<td>B. The Respondent can invoke CIL necessity</td>
<td>26</td>
</tr>
<tr>
<td>V. Respondent’s measures did not amount to a violation of the fair and equitable treatment standard pursuant to Art. 2 (2) BIT</td>
<td>32</td>
</tr>
<tr>
<td>A. The fair and equitable treatment standard must be construed under the customary international law</td>
<td>32</td>
</tr>
<tr>
<td>B. The Respondent’s measures preserved a stable legal environment</td>
<td>34</td>
</tr>
<tr>
<td>C. Dagobah undertook reasonable measures in order to protect its public interest</td>
<td>36</td>
</tr>
<tr>
<td>PRAYER FOR RELIEF</td>
<td>39</td>
</tr>
</tbody>
</table>
# LIST OF AUTHORITIES

## I. BOOKS

<table>
<thead>
<tr>
<th>Author</th>
<th>Reference</th>
<th>Cited as</th>
</tr>
</thead>
<tbody>
<tr>
<td>CRAWFORD, James</td>
<td><em>The International Law Commission’s Articles on State Responsibility</em> (Cambridge University Press, 2002)</td>
<td>Crawford</td>
</tr>
<tr>
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<td>Joyner</td>
</tr>
<tr>
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<td>Book Title</td>
<td>Publisher</td>
</tr>
<tr>
<td>----------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------</td>
<td>--------------------------------</td>
</tr>
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<td>Mankiw</td>
</tr>
<tr>
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</tr>
<tr>
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</tr>
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</tr>
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<td>Sornarajah</td>
</tr>
<tr>
<td>Name</td>
<td>Title</td>
<td>Author</td>
</tr>
<tr>
<td>---------------------------</td>
<td>----------------------------------------------------------------------</td>
<td>--------------</td>
</tr>
</tbody>
</table>
## II. ARTICLES

<table>
<thead>
<tr>
<th>Author</th>
<th>Reference</th>
<th>Cited as</th>
</tr>
</thead>
<tbody>
<tr>
<td>BALTAG, Crina</td>
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<td>Baltag</td>
</tr>
<tr>
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</tr>
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</tr>
<tr>
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<td>'The Role of Precedent in</td>
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</tr>
<tr>
<td>Author/Editors</td>
<td>Title and Source</td>
<td></td>
</tr>
<tr>
<td>---------------</td>
<td>-----------------</td>
<td></td>
</tr>
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</tr>
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<td>UNCTAD – FET Series</td>
</tr>
<tr>
<td>--------</td>
<td>-----------------------------------------------------------------------------------------------------------------</td>
<td>---------------------</td>
</tr>
<tr>
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<td>UNCTAD – IIA Interpretation</td>
</tr>
</tbody>
</table>

### III. MISCELLANEOUS

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
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<td>'CME Czech Republic BV v The Czech Republic, Legal Opinion' [20 June 2002]</td>
<td>CME – Legal Opinion</td>
</tr>
</tbody>
</table>
**LIST OF LEGAL SOURCES**

**IV. ARBITRAL AWARDS**

<table>
<thead>
<tr>
<th>Origin</th>
<th>Reference</th>
<th>Cited as</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICSID</td>
<td>AES Summit Generation Limited and AES-Tisz Erömü Kft v The Republic of Hungary, ICSID Case No ARB/07/22, Award (23 September 2010)</td>
<td>AES - Hungary</td>
</tr>
<tr>
<td>ICSID</td>
<td>AES Corporation v The Argentine Republic, ICSID Case No ARB/02/17, Decision on Jurisdiction (26 April 2005)</td>
<td>AES - Argentina</td>
</tr>
<tr>
<td>ICSID</td>
<td>Aguas del Tunari SA v Republic of Bolivia, ICSID Case No ARB/02/3, Jurisdiction (21 October 2005)</td>
<td>Aguas del Tunari</td>
</tr>
<tr>
<td>ICSID</td>
<td>Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia, ICSID Case No ARB/99/2, Award (25 June 2001)</td>
<td>Alex Genin</td>
</tr>
<tr>
<td>ICSID</td>
<td>American Manufacturing &amp; Trading, Inc v Republic of Zaire, ICSID Case No ARB/93/1, Award (21 February 1997)</td>
<td>AMT</td>
</tr>
<tr>
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</tr>
</tbody>
</table>
ICSID

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<table>
<thead>
<tr>
<th>Tribunal on Objections the Jurisdiction (11 July 1997)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ICSID</strong></td>
</tr>
<tr>
<td><em>LG&amp;E Energy Corporation and ors v Argentina, ICSID Case No ARB/02/1, Award (30 April 2004)</em></td>
</tr>
<tr>
<td><strong>LG&amp;E</strong></td>
</tr>
<tr>
<td><strong>ICSID</strong></td>
</tr>
<tr>
<td><em>Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001)</em></td>
</tr>
<tr>
<td><strong>Salini</strong></td>
</tr>
<tr>
<td><strong>ICSID</strong></td>
</tr>
<tr>
<td><em>SGS Société Générale de Surveillance v Republic of Pakistan, ICSID Case No ARB/01/13, Jurisdiction (6 August 2003)</em></td>
</tr>
<tr>
<td><strong>SGS - Pakistan</strong></td>
</tr>
<tr>
<td><strong>ICSID</strong></td>
</tr>
<tr>
<td><em>SGS Société Générale de Surveillance v Republic of Philippines ICSID Case No ARB/02/6, Jurisdiction (29 January 2004)</em></td>
</tr>
<tr>
<td><strong>SGS - Philippines</strong></td>
</tr>
<tr>
<td><strong>ICSID</strong></td>
</tr>
<tr>
<td><em>Técnicas Medioambientales Tecmed, SA v The United Mexican States, ICSID Case No ARB(AF)/00/2, Award (29 May 2003)</em></td>
</tr>
<tr>
<td><strong>Tecmed</strong></td>
</tr>
<tr>
<td><strong>ICSID</strong></td>
</tr>
<tr>
<td><em>Malaysian Historical Salvors SDN, BHD v Malaysia, ICSID Case No ARB/05/10, Award on Jurisdiction (17 May 2007)</em></td>
</tr>
<tr>
<td><strong>MHS</strong></td>
</tr>
<tr>
<td><strong>ICSID</strong></td>
</tr>
<tr>
<td><em>Saipem SpA v Bangladesh, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007)</em></td>
</tr>
<tr>
<td><strong>Saipem</strong></td>
</tr>
<tr>
<td>Arbitration Forum</td>
</tr>
<tr>
<td>-------------------</td>
</tr>
<tr>
<td>ICSID</td>
</tr>
<tr>
<td>ICSID</td>
</tr>
<tr>
<td>LCIA</td>
</tr>
<tr>
<td>PCA</td>
</tr>
<tr>
<td>PCA</td>
</tr>
<tr>
<td>Ad hoc arbitration</td>
</tr>
<tr>
<td>Ad hoc arbitration</td>
</tr>
</tbody>
</table>
## V. INTERNATIONAL COURT CASES

<table>
<thead>
<tr>
<th>Court</th>
<th>Case Title</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICJ</td>
<td>Gabčikovo-Nagymaros Project, Hungary v Slovakia, Merits, ICJ GL No 92 (25 September 1997)</td>
<td>Gabčikovo</td>
</tr>
<tr>
<td>ICJ</td>
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<td>Oil Platforms</td>
</tr>
<tr>
<td>PCIJ</td>
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</tr>
<tr>
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<td>Jaworzyna</td>
</tr>
</tbody>
</table>

## VI. TREATIES

<table>
<thead>
<tr>
<th>Party</th>
<th>Treaty Title</th>
<th>Citation</th>
</tr>
</thead>
</table>

## VII. MISCELLANEOUS

<table>
<thead>
<tr>
<th>Party</th>
<th>Agreement Title</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>French Republic - People’s Republic of China</td>
<td>Accord entre le gouvernement de la République française et le gouvernement de la République populaire de Chine sur l’encouragement et la protection réciproques des investissements (Beijing, 26 November 2007, UNTS No 49185)</td>
<td>France-China BIT</td>
</tr>
</tbody>
</table>
## LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>App 1</td>
<td>Appendix 1, Agreement between the Corellian Republic and The Federal Republic of Dagobah for the Promotion and Protection of Investment from 30 June 1992</td>
</tr>
<tr>
<td>App 2</td>
<td>Appendix 2, Award of the Arbitral Tribunal of PCA between The Corellian Republic and the Federal Republic of Dagobah from 29 April 2003</td>
</tr>
<tr>
<td>App 3</td>
<td>Appendix 3, dissenting opinion by professor Andreas Jeger from 18 June 2003 to the Award of the Arbitral Tribunal of PCA between The Corellian Republic and the Federal Republic of Dagobah from 29 April 2003</td>
</tr>
<tr>
<td>App 4</td>
<td>Appendix 4, The Global Financial Herald from 12 December 2011</td>
</tr>
<tr>
<td>App 5</td>
<td>Appendix 5, Sovereign Restructuring Act No. 45/12 approved by The Congress of the Federal Republic of Dagobah</td>
</tr>
<tr>
<td>App 6 (RfA)</td>
<td>Appendix 6, Request for Arbitration on 30 August 2013</td>
</tr>
<tr>
<td>App 6 (Answer)</td>
<td>Appendix 6, Answer to the Request for Arbitration on 4 October 2013</td>
</tr>
<tr>
<td>App 6 (PO1)</td>
<td>Appendix 6, Procedural Order No 1 issued on 3 February 2014</td>
</tr>
<tr>
<td>App 6 (PO2)</td>
<td>Appendix 6, Procedural Order No 2 issued on 23 June 2014</td>
</tr>
</tbody>
</table>
| App 7        | Appendix 7, Procedural Order No 3 issued on 1
Agreement between the Corellian Republic and The Federal Republic of Dagobah for the Promotion and Protection of Investment from 30 June 1992

<table>
<thead>
<tr>
<th>BIT</th>
<th>sovereign bonds issued by Dagobah in 2001</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001 Bonds</td>
<td>sovereign bonds issued by Dagobah in 2003</td>
</tr>
<tr>
<td>2003 Bonds</td>
<td>sovereign bonds issued by Dagobah in 2012</td>
</tr>
<tr>
<td>2012 Bonds</td>
<td>collective action clause contained in the 2012 Bonds</td>
</tr>
<tr>
<td>CAC</td>
<td>customary international law</td>
</tr>
<tr>
<td>CIL</td>
<td>Calrissian &amp; Co., Inc.</td>
</tr>
<tr>
<td>Claimant / Calrissian</td>
<td>Corellian Republic</td>
</tr>
<tr>
<td>e.g.</td>
<td>exempli gratia (for example)</td>
</tr>
<tr>
<td>Facts</td>
<td>uncontested facts</td>
</tr>
<tr>
<td>FET</td>
<td>fair and equitable treatment</td>
</tr>
<tr>
<td>Financial Crisis</td>
<td>global financial crisis of 2008</td>
</tr>
<tr>
<td>First Crisis</td>
<td>the first economic crisis of Dagobah that started in early 2001 and lasted for 2,5 years</td>
</tr>
<tr>
<td>First IMF Recommendation</td>
<td>recommendation issued by IMF during the First Crisis</td>
</tr>
<tr>
<td>FSC</td>
<td>forum selection clause contained in the 2003 Bonds</td>
</tr>
</tbody>
</table>
Statement of Defence – Team Xue

i.e.  \textit{id est} (that is)

IMF  International Monetary Fund

No.  Number

p / pp  page / pages

para / paras  paragraph / paragraphs

Parties  the Claimant and the Respondent

Award of the Arbitral Tribunal of PCA between The Corellian Republic and the Federal Republic of Dagobah from 29 April 2003

PCA Award  the tribunal that rendered the PCA Award

Preamble to the Agreement between the Corellian Republic and The Federal Republic of Dagobah for the Promotion and Protection of Investment from 30 June 1992

Preamble

Respondent / Dagobah  Federal Republic of Dagobah

the second economic crisis of Dagobah that started at the beginning of 2010

Second Crisis

Second IMF Recommendation recommendation issued by IMF during the Second Crisis on 14 September 2011

Second IMF Recommendation

SRA  Sovereign Restructuring Act No. 45/12

Tribunal  Arbitral Tribunal in the present case
STATEMENT OF FACTS

1. The Federal Republic of Dagobah (“the Respondent”) is an emerging market.¹ In 1992, it concluded the BIT with the neighbouring Corellian Republic.²

2. The Calrissian & Co., Inc. (“the Claimant”) is a hedge fund incorporated under the law of Corellia. In 2005³, it purchased the 2003 Bonds in the secondary market in Corellia⁴.

3. In the first half of 2001, the Respondent descended in two-and-a-half year lasting First Crisis.⁵

4. To mitigate the impact of the crisis, the Respondent decided to restructure its sovereign debt and launched a bonds exchange offer. The bondholders could exchange their bonds for new ones with a new bonds’ face value.⁶

5. Corellian government, pressured by its domestic investors affected by the Respondent’s crisis, initiated diplomatic negotiations with the Respondent. Corellia sought to clarify whether the definition of an investment under the BIT also covered sovereign bonds, even though they were not included in the list of forms of investments in Art. 1 BIT.⁷

6. Dissatisfied with the outcome of the negotiations, Corellia initiated Art. 8 BIT arbitral proceedings before the PCA and requested the PCA to resolve the interpretation issue.⁸

7. On 29 April 2003, the PCA Arbitral Tribunal delivered a decision holding that sovereign bonds were investments within the definition of the BIT.⁹

8. On 19 May 2003, Prof. Andreas Jeger delivered his dissenting opinion on the matter. In this opinion, Prof. Jeger observed that sovereign bonds fall outside of scope of Art. 1 BIT as they resemble commercial transactions and portfolio investments, which are not protected under the BIT.¹⁰

¹ Facts, p 1, para 1.
² Id., para 2.
³ App 6 (PO2), p 50, para 11.
⁴ Id.
⁵ Facts, p 1, para 3.
⁶ Id., p 1, para 4.
⁷ Id., p 2, para 6.
⁸ Id., p 2, para 6.
⁹ App 2, p 16.
¹⁰ App 3, p 20, para 155.
9. By then, all Corellian bondholders had already accepted the exchange offer.\textsuperscript{11} The Respondent decided not to prolong the dispute by challenging the PCA Award, it nevertheless publicly voiced its disagreement with the award.\textsuperscript{12}

10. In order to evade any crisis in the future, the Respondent implemented the First IMF Recommendations and clearly articulated its “commitment to a more stable economy and financial sector”\textsuperscript{13}. By 2003, the Respondent overcame the most difficult period.\textsuperscript{14}

11. In 2010, following the Financial Crisis, the Respondent was hit by a new recession. Despite the implementation of austerity measures recommended by international institutions, including the IMF\textsuperscript{15}, the Respondent’s sovereign debt reached an unsustainable level.\textsuperscript{16}

12. The Financial Crisis caused severe social disturbance within the Respondent’s territory.\textsuperscript{17} There was a wave of massive lay-offs, which caused the unemployment rate to rise up to 10.9\%.\textsuperscript{18} The inflation rate elevated as well.\textsuperscript{19} Consequently, demonstrations and social unrest appeared in the capital and other large cities.\textsuperscript{20}

13. On 14 September 2011, the IMF issued the Second IMF Recommendation suggesting new sovereign debt restructuring\textsuperscript{21}. Furthermore, the IMF with the support of several other states offered a possible bailout in the amount of USD 150 billion conditioned upon reduction of Respondent’s outstanding debt in bonds through a bond exchange.\textsuperscript{22}

14. On 28 May 2012, in response to the Second IMF Recommendation the Respondent enacted the Sovereign Restructuring Act (the “SRA”) applicable to all bonds issued by the Respondent and governed by the Respondent’s law.\textsuperscript{23}

15. SRA was subjected to constitutional review.\textsuperscript{24} Moreover, prior to its enactment, updated drafts were being constantly published online to inform the bondholders about

\textsuperscript{11} Facts, p 2, para 13.
\textsuperscript{12} App 6, (PO2), p 49, para 10.
\textsuperscript{13} App 6 (PO2), p 50, para 18.
\textsuperscript{14} App 4, p 21.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} App 7, p 57, para 38.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Facts, para 15.
\textsuperscript{22} Id., para 16.
\textsuperscript{23} App 5, p 23, Art 1 (1) (a).
the drafting process. Before the exchange offer, the Respondent consulted a committee representing owners of approximately half of the bonds aggregate nominal value.

16. To prevent individual bondholders from obstructing the majority of bondholders pursuing modification of bond terms, SRA devised a new mechanism to facilitate their amendment. An amendment would bind all bondholders, if a qualified majority of owners of 75% of the aggregate nominal value of all outstanding bondholders voted for that amendment.

17. On 29 November 2012, a second bond exchange, where bondholders could exchange their bonds for the 2012 Bonds, was launched. The exchange offer observed IMF’s policies regarding sovereign debt restructuring.

18. More than 85% of all outstanding bondholders agreed to accept the exchange offer. On 12 February 2013 the 2012 Bonds were distributed to the bondholders, including the Claimant who was bound by the majority decision as provided by Art. 2 (3) SRA.

19. The 2012 Bonds were governed by laws of the Kingdom of Yavin and Yavin courts had exclusive jurisdiction to resolve any disputes relating to the bonds.

20. The 2012 Bonds also included a collective action clause (the “CAC”) that required a group of bondholders holding a minimum of 20% of the value of the bonds to initiate legal proceedings.

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24 App 6 (PO2), p 51, para 22.
25 Id., para 21.
26 Id.
27 App 5, p 25, Art 2 (3).
28 Facts, para 18.
29 Id., para 19.
30 Id., pp 3-4, para 19.
31 Id., para 20.
32 Id., p 3, para 21.
PART ONE: PRELIMINARY ISSUES

I. The Tribunal lacks jurisdiction over the dispute

21. The Tribunal lacks jurisdiction over the present case as this is not an investment dispute. Art. 8 (1) BIT grants the Tribunal sole jurisdiction over legal disputes “between an investor of one Party and the other Party” arising “in connection with an investment”.  

22. Therefore, for the Tribunal to have jurisdiction in the present case it must be established that the 2003 Bonds and their acquisition in the secondary market constitute an investment and the Claimant qualifies as an investor within the meaning of Art. 1 BIT. These requirements must be met cumulatively.

23. The Respondent argues that A. the 2003 Bonds are not an investment within the meaning of Art. 1 BIT; and B. even if they were, the Claimant is not an investor.

A. The 2003 Bonds are not an investment within the meaning of Art. 1 BIT

24. The 2003 Bonds cannot constitute an investment under Art. 1 BIT as they do not comply with the requirement of assumption of risk. For an asset to be accorded BIT protection, it must have characteristics of an investment. These must cumulatively include “commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”.

25. The Respondent argues that (i) the major risk connected with the 2003 Bonds is their non-repayment; (ii) the recovery of funds invested in them may be ascertained in advance; and (iii) does not depend on their successful application.

i. The major risk connected with the 2003 Bonds is their non-repayment

26. The greatest risk the bondholders of the 2003 Bonds are exposed to is the Respondent’s default, which is a commercial risk. An asset must involve an element of risk that transcends ordinary commercial risk to be awarded investment protection. A manifestly commercial transaction cannot be deemed an investment.

33 App 1, p 10, Art 8.
34 Id., p 7, Art 1.
35 Id.
36 Malaysian Historical Salvors SDN, BHD v Malaysia, ICSID Case No ARB/05/10, Award on Jurisdiction (17 May 2007) para 112.
27. Risk can be defined as “the uncertainty of a result, happening, or loss”\textsuperscript{38} or as “a future event, certain or uncertain, which may cause loss for the investor or a possibility for such event to occur”.\textsuperscript{39} A certain degree of risk is inherent in any economic activity.\textsuperscript{40} Therefore, to differentiate foreign direct investment from international commercial transaction, the risk connected with it must be a qualified risk, a risk “other than normal commercial risk”.\textsuperscript{41}

28. Commercial risks subsist in changes in transaction costs, in the invocation of \textit{force majeure} or complete or partial non-performance of the contract by the other party.\textsuperscript{42} BITs are not designed to protect the investors against these risks.\textsuperscript{43} They are to protect investors operating their investment \textit{in} the territory of the host State, within its jurisdiction.\textsuperscript{44} Their purpose is to shield foreign investors from the governmental intervention and against political or economic risks arising there from.\textsuperscript{45}

29. Sovereign bonds do not entail any such risks. They are “debt instruments issued by a state and acknowledging indebtedness and promising repayment of principal and interest on an earlier advance of money”\textsuperscript{46} - certificates of indebtedness.\textsuperscript{47}

30. The tribunal in \textit{Salini} observed that “risks of the transaction may depend on […] the duration of performance of the contract”.\textsuperscript{48} Consequently, the tribunals in \textit{Bayindir} and \textit{Saipem} held that investment risk is inherent in any long-term contract.\textsuperscript{49} Yet, the presence of an investment risk in a long-term contract is not automatic. Case-by-case assessment of specific risks connected with the contract must follow.\textsuperscript{50}

\textsuperscript{38} B Garner, Black’s Law Dictionary (8th, Thomson West 2004) 1353.
\textsuperscript{40} Romak SA(Switzerland) v The Republic of Uzbekistan, PCA Case No AA280, Award (26 November 2009) para 229.
\textsuperscript{41} MHS, para 112.
\textsuperscript{42} Baltag, p 11; Romak, para 229.
\textsuperscript{44} Z Douglas, \textit{The International Law of Investment Claims} (Cambridge University Press 2009) 171.
\textsuperscript{47} N G Mankiw, \textit{Brief Principles of Macroeconomics} (6th, South Western Dengage Learning 2011) 156.
\textsuperscript{48} Salini Costruttori SpA, and Italsstrade SpA. v Kingdom of Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001) para 53.
\textsuperscript{49} Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Republic of Pakistan, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) para 136; Saipem SpA v Bangladesh, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) para 109.
\textsuperscript{50} Baltag, p 10.
31. Sovereign bonds are not connected with any specific risks. Thus they differ from equity participation in an enterprise, from its management, concessions, construction contracts and turnkeys.

32. Firstly, bondholders do not condition the loan to the State on “[their] inclusion […] in the equity ownership of a project”\footnote{Black’s Law Dictionary, p 581.}, neither do they service the debt. They are not a party to “[a] contract in which a [host State] transfers some rights to a foreign enterprise, which […] engages in an activity […] contingent on [host State’s] approval”\footnote{Id., p 307.}. And most certainly they are not parties to a “construction contract […] in which the contractor agrees to a wide variety of responsibilities […] including construction of [a] facility and [training] people to operate the facility”\footnote{Id., p 344.}.

33. Bondholders do not engage in any specific undertaking to recover the funds they provided as a loan. They are merely required to provide the initial loan. Apart from this, they do not bear any other contractual obligations.\footnote{Waibel, p 240.} They are not bound to commit further resources with uncertain results for their rights from the bonds to mature. The principal and interest repayment do not depend on further outlays of bondholder’s funds. Sovereign bonds mature automatically. No cooperation from the side of the bondholder is required and long maturity does not change anything in this respect.

34. Secondly, unlike concessionaires, licensees or enterprise management, bondholders are not required to have a profound knowledge of how the venture they invest in precisely functions. They merely need to know how to structure their investment portfolio. Such know-how, however, is a general investment know-how that, if revealed, would not cause any serious damage to the bondholders.

35. Accordingly, the only risks the bondholders effectively assume is the non-repayment of the loan and possible litigation costs. However, possible default of the other party is “a counterparty risk, […] the risk of doing business generally”.\footnote{Romak, para 229; Waibel p 237.}

36. Because a risk of non-performance is an ordinary commercial risk for any investment transaction,\footnote{It is not sufficient to bring a transaction within the definition} it is not sufficient to bring a transaction within the definition

\footnote{51 Black’s Law Dictionary, p 581.} \footnote{52 Id., p 307.} \footnote{53 Id., p 344.} \footnote{54 Waibel, p 240.} \footnote{55 Romak, para 229; Waibel p 237.}
of an investment. Definition of an investment requires a qualified risk specific for foreign direct investment.\(^{57}\) The tribunal in *Fedax* clearly failed to make that distinction when it held that even a mere existence of “a dispute as to the payment of the principal and interest”, i. e. the danger of non-performance, evidences the qualified risk\(^{58}\).

37. In the present case, the Respondent issued the 2003 Bonds to finance expenditures forming a part of the general state budget.\(^{59}\) The bondholders were solely required to transfer the funds to the Respondent and to receive the interest and principal payment when the 2003 Bonds mature. These are common commercial activities, especially for a hedge fund, that do not presuppose any specific expertise. The maturity of the 2003 Bonds was twelve years.\(^{60}\) The occurrence of the day of maturity would have resulted from the lapse of time. It was not contingent upon successful completion of a specific activity by the bondholders. Also the recovery of funds invested in the 2003 Bonds did not depend on undertaking a specific activity but it would occur automatically as scheduled in the terms of the 2003 Bonds.

38. Consequently, the Claimant did not assume any specific risk connected with the 2003 Bonds. It was merely exposed to the possibility of non-repayment which is inherent to every commercial transaction.

\(\text{ii. The recovery of funds connected with the 2003 Bonds can be ascertained in advance and investor’s losses are limited}\)

39. The returns from the 2003 Bonds are not uncertain. The recovery of funds invested in them may be ascertained with high probability in advance and there is a clear limit to losses an investor can incur.

40. Foreign direct investments transactions are characterized by uncertainty of returns. These are postponed and depend on future profitability of a project an investor undertakes.\(^{61}\) The BIT protection is triggered when “total costs [of an investment]

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\(^{56}\) Waibel, p 237; Baltag, p 12.

\(^{57}\) *MHS*, para 112.

\(^{58}\) *Fedax NV v The Republic of Venezuela*, ICSID Case No ARB/96/3, Decision of the Tribunal on Objections the Jurisdiction (11 July 1997) para 40.

\(^{59}\) App 7, p 55, para 30.

\(^{60}\) App 6 (PO2), p 50, para 14.

cannot be established in advance”\textsuperscript{62} and the investor “cannot predict the outcome of the transaction”\textsuperscript{63}. Such uncertainty is absent in sovereign bonds.

41. Firstly, the terms of the bonds provide for the method of interest rate calculation and for conditions under which the interest payment may be postponed or suspended. Thus an investor may predict the outcome of the transaction and also calculate with high degree of probability the approximate point in time when the purchase price for the bonds will be recovered.

42. Secondly, there is a limit as to the extent of losses an investor may incur. The greatest risk connected with the sovereign bonds is their non-repayment. An investor’s loss is thus limited to the purchase price it paid for the bonds. An investor cannot lose more money on the bonds than it paid for them in the first place.

43. In the present case, the purchase of the 2003 Bonds lacked any element of uncertainty. The bondholders could calculate from the 2003 Bonds terms what profit the 2003 Bonds are likely to bring as well as the time span, in which it may be achieved. Furthermore, any loss arising from the ownership of the 2003 Bonds was limited to the purchase price paid by the bondholders.

\textit{iii. The recovery of funds invested in the 2003 Bonds is not tied to their successful application}

44. The 2003 Bonds cannot constitute an investment as the recovery of the funds invested in them is guaranteed to the bondholders irrespective of the profitability of their application.

45. Bondholders who provide a loan to the issuing State do not assume any specific risk regarding the successful application of provided funds.\textsuperscript{64} It is assumed solely by the issuing State. It decides how they will be used and bears eventual losses if their application was not profitable.

46. In fact, the principal and interest payment are unconditional.\textsuperscript{65} Consequently, the bondholders are subject to the terms of the bonds, entitled to it irrespective of the actual profitability of the undertaking the lump-sum invested in the issuing

\textsuperscript{62} Salini, para 56.
\textsuperscript{63} Romak, para 229.
\textsuperscript{65} Waibel, p 237.
Accordingly, the only risk the bondholders are exposed to is the possibility of the non-repayment, i.e. mere commercial risk.67

47. In the present case, the 2003 Bonds were unconditional promises, their interest payment was, subject to the terms of the 2003 Bonds and did not depend on their successful application by the Respondent. The bondholders would be repaid even if the projects funded from the 2003 Bonds yielded no profit at all, which, effectively eliminates the uncertainty of returns.

48. For all the above mentioned reasons, the 2003 Bonds do not meet the requirement of the assumption of risk and do not constitute an investment. As a result, the Tribunal lacks jurisdiction over the dispute.

B. Even if the 2003 Bonds constituted an investment, their purchase was not made in the Respondent’s territory

49. Even if the 2003 Bonds were held to constitute an investment, the Claimant may not rely on the investor under the BIT as the investment was made “in the territory” of the Respondent.

50. Under Art. 1 BIT, a claimant may rely on the investor protection of the BIT provided that it made an investment “in the territory” of the alleged host State. “Territory of the other Party” is defined as a actual territory of the other Party as well as its territorial sea and the maritime area beyond it.68

51. It follows from the plain reading of Art. 1 BIT that if an investment is to be made “in the territory” of the host State, an alleged investor must acquire ownership or least control over the asset in the territory as defined in Art. 1 BIT.

52. In the present case, the Claimant maintains that it made an investment by acquiring the 2003 Bonds in the secondary market.69 The Claimant, however, acquired them in Corellia70 and not in Dagobah as required by the BIT. Consequently, since the Claimant did not make an investment in the Respondent’s territory, as explicitly required by Art. 1 BIT, it cannot be accorded investor protection under the BIT.

66 Id.
67 Waibel, p 237; Scheitering, p 321.
68 App 1, p 8, Art 1.
69 App 6 (RfA), p 29, para 6.
70 App 6 (PO2), p 50, para 11.
53. In conclusion, the 2013 Bonds are not an investment under the BIT. Even they were, the Claimant cannot rely on the investor protection under the BIT. As a result, the case at hand does not constitute a dispute within the meaning of Art. 8 (1) BIT and the Tribunal lacks jurisdiction over the present case.

II. The PCA Award has no significant effect on the decision of the Tribunal

54. Arbitral tribunals in international investment arbitrations are not bound by decisions of other tribunals as there is no doctrine of precedent established in international arbitration. Moreover, as said in AES case:

“Repeating decisions taken in other cases, without making the factual and legal distinctions, may constitute an excess of power and may affect the integrity of the international system for the protection of investments.”

55. The PCA Award does not have any significant effect on the Tribunal in the present case because A. the PCA Award amounts to impermissible amendment of the BIT; B. res judicata principle is not applicable in the present case; and C. the PCA Award should not be followed due to the PCA Tribunal’s errors in consideration.

A. The PCA Award amounts to impermissible amendment of the BIT

56. The PCA Award should have no effect on this Tribunal as it represents a breach of international law. The PCA Award amends the BIT. This is contrary to the international law principle that only the States are entitled to amend treaties concluded between them.

57. “The power to make treaties with other nations is an inherent attribute of the sovereign power of an independent nation.” According to Art. 39 VCLT, only States which are parties to a treaty can amend it through their mutual agreement. Therefore, if anyone but the States attempts to amend the treaty, it amounts to an impermissible breach of the States’ sovereignty and breach of international law.

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72 AES Corporation v The Argentine Republic, ICSID Case No ARB/02/17, Decision on Jurisdiction (26 April 2005) para 22.
74 VCLT, Art 39.
58. Furthermore, “[t]he right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it.”\textsuperscript{75} The reason for that is based on the theory of subjects of international law as it is the State who has legal capacity under international law, not the arbitral tribunal.\textsuperscript{76} To connect the dots, it is only the State, which is the party to the treaty, that has the power of giving the authoritative interpretation, and not the tribunal. Such power, however, may be delegated.\textsuperscript{77}

59. In the present case, the PCA Tribunal (i) impermissibly amended the BIT by rendering general \textit{pro futuro} decision without the power to do so; and (ii) the PCA Tribunal's unreasonable interpretation of Art. 1 BIT amounted to an amendment.

   \textit{i. The PCA Tribunal exceeded its powers by not basing its decision on a concrete legal dispute}

60. A State is an entity possessing the power to interpret its international treaties together with the other parties to it.\textsuperscript{78} This power to interpret is often delegated to an arbitral tribunal and tribunals are then acting based on the principal-agent relationship.\textsuperscript{79} Such power “delegated to investment tribunals is implied and partial, rather than express and exclusive”.\textsuperscript{80} Tribunals in this relationship should act as agents and are restricted by the will of the States expressed in BIT.\textsuperscript{81}

61. In the present case, Art. 7 BIT states that in case of a dispute concerning the interpretation or application of the BIT, the parties to the BIT shall first negotiate through diplomatic channels and if the dispute cannot be settled a tribunal shall be requested for decision.\textsuperscript{82} This article provides for two requirements that must be fulfilled before a tribunal may interpret the BIT: first, there must be a dispute and second, there must be inability of parties to settle such dispute through diplomatic negotiations.

\textsuperscript{75} Jaworzyna, PCIJ, Advisory Opinion (1923) Series B, No 8, para 14.
\textsuperscript{78} Jaworzyna, para 14.
\textsuperscript{79} Roberts – Power and Persuasion, pp 185-186.
\textsuperscript{80} \textit{Id.}, p 188.
\textsuperscript{81} \textit{Id.}, p 186.
\textsuperscript{82} App 1, p 10, Arts 7 (1), 7 (2).
62. To have a dispute capable of judicial settlement

“the disagreement between the parties must have some practical relevance to their relationship and must not be purely theoretical. It is not a task of international adjudication to clarify legal question in abstracto.”

63. A situation similar to the present case happened in Ecuador, where Ecuador as the Claimant sought an interpretation of the USA-Ecuador BIT after being dissatisfied with the interpretation rendered by tribunal in investor-State arbitration. The award was not made public, but the majority reportedly dismissed the claim because there was no concrete dispute with practical consequences as the Ecuador’s claim was purely theoretical.

64. Here, the PCA Tribunal found that:

“sovereign debt bonds issued by State parties to the treaty qualify as 'investments' within the meaning of the BIT.”

65. To interpret this decision, general rules for interpretation stated in the Vienna Convention on the Law of Treaties (“VCLT”) should be used. Art. 31 (1) VCLT provides for interpretation in good faith and in accordance with the ordinary meaning of the terms and in the light of its object and purpose. By looking at the ordinary meaning of the language used, nothing indicates that the meaning should be restricted only to the 2001 Bonds or sovereign debt bonds issued by the Respondent. Quite the contrary, the PCA Award is generally worded and refers not only to 2001 Bonds that were disputed, but also to any sovereign debt bonds issued by either party to the BIT.

66. The PCA Tribunal exceeded its interpretative powers delegated to it in the BIT by disregarding its limits set forth by the parties to the BIT. Deciding about any future sovereign bonds, the PCA Tribunal clarified legal question in abstracto and did not based the decision solely on the concrete dispute. The bonds disputed were only the 2001 Bonds and the practical consequence of this dispute was the protection

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83 C Scheuer, 'What is a legal dispute?' in I Buffard, J Crawford, A Pellet, S Wittich (eds), International Law between Universalism and Fragmentation (1st, Netherlands 2008), 970.
86 App 2, p 16.
of Corellian bondholders who could rely on this award with respect just to the 2001 Bonds.  

67. Moreover, sovereign bonds differ from each other. They differ in their maturity period, in their issuer, governing law etc. These are important facts for considering whether a sovereign bond can be an investment within the meaning of the BIT. To provide an example, a bond with maturity of one year might not be considered as risky as a bond with maturity of thirty years. Therefore, it is not possible to provide general interpretation based on the 2001 Bonds and prohibiting the parties to the BIT from their own decision whether some future bonds will be deemed an investment.

68. Furthermore, the object and purpose of Art. 7 BIT is preserved. The award still helps in protection of investors and in providing effective means of asserting claims and enforcing rights, because all bondholders of the 2001 Bonds are entitled to rely on the PCA Award in claiming their rights. The interpretative powers, however, cannot be interpreted as extensively as the PCA Tribunal did.

69. For all these reasons, the PCA Tribunal rendered an award that is against the international law because by excessing its interpretative powers, it rendered an award that was not based on a concrete dispute and thus amended the BIT.

   ii. The PCA Tribunal's unreasonable interpretation of Art. 1 BIT amounted to an amendment

70. When the PCA Tribunal issued the PCA Award, it effectively amended the BIT. The PCA Tribunal gave a new and unreasonable meaning to the term “investment” when it interpreted the word too extensively.

71. An unreasonable interpretation is “an interpretation that falls outside the range of reasonable textual reading and is better characterized as a de facto amendment”.  
Some academics even argue that it is not an amendment de facto but de jure.  

72. As proven in above in paras 24-48, sovereign bonds are not and cannot be deemed an investment within the meaning of Art. 1 BIT. By stating the opposite, the PCA Tribunal rendered unreasonable interpretation of the BIT and thus modified it.

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88 Facts, p 2, paras 6-9.  
90 Id.
Hence, the PCA Tribunal amended the BIT by stating that sovereign bonds are to be considered an investment under the BIT.

73. For these reasons, the PCA Award is against the international law as it amounts to an impermissible amendment of the BIT. Therefore, this Tribunal cannot follow or rely on the PCA Award.

**B. The *res judicata* principle is not applicable**

74. Alternatively, should the Tribunal find that the PCA Award is not against international law, it is still not bound to follow it as *res judicata* principle does not apply.

75. The PCA award does not have *res judicata* effect on the Tribunal because the disputes lack identity. *Res judicata* principle requires a strict identity between the two proceedings.\(^91\) There must be (i) the identity of cause of action; (ii) the identity of parties; and (iii) the identity in the matter sued.\(^92\) Here, the Respondent submits that none of these were fulfilled.

\(i\). *There is not an identity of cause of actions*

76. The claims do not fulfil the identity of cause of actions as both of them are based on different cause of actions. To be able to prove the identity of the cause of action the claims must be based on the same legal grounds.\(^93\) At the same time “where new rights are asserted, there is a new case which ought not to be barred by a previous decision”.\(^94\)

77. Here, the PCA Arbitration was commenced under Art. 7 BIT whereas the present arbitration constitutes an investor-State arbitration based on Art. 8 BIT.\(^95\) Furthermore, the PCA Arbitration concerned just interpretation. However, the primary object of this arbitration is a claim for damages.

78. For these reasons, there cannot be an identity of cause of actions as both claims are based on different articles and have different objects.

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\(^93\) Martinez-Fraga/Samra, p 421.


\(^95\) Facts, pp 2.4, paras 8, 22.
ii. Parties are not identical

79. The present case does not fulfill the requirement of the identity of parties since the present arbitration was commenced by a different claimant than in the PCA Case.\(^\text{96}\) In order to fulfill the requirement of identity of parties, the same claimant must bring suit against the same respondent as basic legal principle *res inter alios acta aliis neque nocet neque potest* (a thing done between others does not harm or benefit others) is applicable.\(^\text{97}\)

80. There are rare exceptions to this strict rule. These exceptions are made in favor of mother-daughter companies or based on a privity theory.\(^\text{98}\) These exceptions are, however, not applicable in the present case. First, Corellia is a government and the Claimant is a company incorporated in Corellia, no mother-daughter relationship is present.\(^\text{99}\) Second, the privity theory is based on identification through interest in the proceedings.\(^\text{100}\) The interest of the parties, although partly same, is not identical as Corellia commenced the PCA Arbitration concerned with the effects that Dagobah’s restructuring might have on its own economy.\(^\text{101}\) Therefore, no identification based on the interest in arbitration is present.

81. In the case at hand, the requirement of the identity of parties is not met since the only party identical with the proceedings before the PCA is the Respondent. The PCA award was rendered between Corellia and Dagobah, but the present dispute is between Calrissian, a private company incorporated in Corellia, and Dagobah.\(^\text{102}\)

82. Hence, the requirement of identity of parties is not met.

iii. The matter sued is not identical

83. If this Tribunal finds that the PCA Award is not against the law as it shall be interpreted restrictively as being concerned just with the 2001 Bonds as those were the bonds

\(^{96}\) Id.

\(^{97}\) Cheng, p 340.


\(^{99}\) Facts, pp 1, 4, paras 2, 22.

\(^{100}\) CME - Legal Opinion, p 16.

\(^{101}\) Facts, p 2, para 6.

\(^{102}\) Id., p 4, para 22.
at dispute, the identity of matter sued is not fulfilled. The *res judicata* principle applies only when the “matter in dispute” or “*petitum*” of two claims is the same.\(^{103}\)

84. Under circumstances described in paras 60-69, the PCA Award concerns only the 2001 Bonds. The present dispute is, however, about the 2003 Bonds.\(^{104}\) The matter sued is then different in both disputes.

85. For all these reasons, the PCA Award does not have *res judicata* effect and this Tribunal is, therefore, not bound by it.

**C. The PCA Award should not be followed due to the PCA Tribunal’s errors in consideration**

86. This Tribunal should not follow the PCA Award just for it being factually close to the present dispute. The PCA Award should not be followed as the PCA Tribunal erred in its reasoning.

87. Furthermore, by blindly following the PCA Award, the Tribunal is risking the annulment of the award as it is entirely possible to annul an award because a tribunal failed to state reasons for award because it simply relied on earlier decisions without making an independent decision or developing its own reasons.\(^{105}\)

88. Moreover, by developing its own reasons, the Tribunal will see that there are serious flaws to the PCA Award that indicate the errors the PCA Tribunal made in deciding the case. These flaws of the PCA Award are mainly “that it refers generally to any type of bond while at the same time its analysis focuses on the specific circumstances of the First Crisis and the 2001 Bonds”.\(^{106}\) For the reasons of not providing persuasive reasoning and by not taking into account more general factors, the PCA Award should not be followed.

89. For all the above stated reasons, the PCA Award has no significant effect on this Tribunal as it is against international law due to the fact that it amounted to the impermissible amendment of the BIT. Furthermore, the Tribunal is not prohibited from deciding about the issues covered by the PCA Award, because the *res judicata*

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\(^{104}\) App 6 (PO2), p 50, para 12.

\(^{105}\) C Schreuer, M Weiniger, 'Conversation Across Cases - Is There a Doctrine of Precedent in Investment Arbitration?' [2007] 1, 8.

\(^{106}\) App 3, p 19, para 94.
principle is not applicable to the present dispute. Finally, the PCA Award should not be followed because the PCA Tribunal erred in reasoning that led it to issue the PCA Award.

III. The claims are inadmissible by virtue of the forum selection clause contained in the 2003 Bonds

90. The Respondent was very surprised when it found that the Claimant completely disregarded its obligations arising out of the 2003 Bonds. The forum selection clause (the “FSC”) mandates that disputes arising out of the 2003 Bonds will be resolved exclusively by Dagobah’s courts.107 The Claimant’s neglect of contractual terms should not be honored by the Tribunal.

91. The existence of the FSC renders the claims inadmissible since A. the wording of the FSC is broad enough to constitute a waiver of the Claimant’s right to initiate arbitration. Alternatively, Calrissian’s claims are inadmissible as B. the claims are of contractual nature and thus should be raised under the contract as a whole; and C. the umbrella clause contained in Art. 8 (2) BIT does not override the contractual choice of forum.

A. The Claimant waived its right to initiate international arbitration

92. When Calrissian acquired the 2003 Bonds, it accepted all their provisions including the FSC. The precise and extensive formulation of this clause represents a waiver of the right to resolve related disputes at forums other than Dagobah’s courts.

93. The contemporary system of investment protection allows the investors to waive their right to initiate international arbitration.108 As it is the individual investor who is the direct and main beneficiary of the rights provided by a bilateral investment treaty, it is possible for it to give these rights up.109 It is also recognized that a waiver of an international right can be contained in a domestic contract.110

107 App 6 (PO2), p 50, para 16.
109 Douglas, p 36, para 75.
Moreover, in case the State parties to a bilateral investment treaty want to prevent their nationals from waiving international arbitration, they simply state in the respective treaties that the provided rights cannot be validly waived.111

The issue of waiver of international arbitration was thoroughly examined by the *Aguas del Tunari* tribunal.112 The tribunal found that a forum selection clause could constitute a waiver of arbitration if this was clearly intended by the parties.113 A careful examination of each individual case is thus required. Where a forum selection clause has an exclusive character, it is to be interpreted as an express waiver of other forums.114

By agreeing to the FSC, Calrissian has waived its right to arbitrate disputes relating to the 2003 Bonds. This broadly worded and exclusive FSC states that: “Any dispute arising from or relating to this contract will be exclusively resolved before the Courts of Dagobah.”115 The BIT does not exclude the possibility of a waiver.

Regarding the scope of the FSC’s effect, it refers to disputes *arising out* of the 2003 Bonds as well as disputes *relating to* them.116 As an eventual arbitration would be a dispute *relating to* the 2003 Bonds, it is apparently encompassed by the FSC’s wording.117

The intention to waive arbitration is to be inferred from the exclusive character of the FSC. Accepting a provision that grants jurisdiction only to Dagobah’s courts implies that the Parties did not wish to present related disputes to any other judicial authorities, including arbitral tribunals.

Furthermore, Calrissian purchased the 2003 Bonds in 2005118 while the BIT was concluded in 1992.119 As a professional hedge fund,120 the Claimant must have known

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111 *Accord entre le gouvernement de la République française et le gouvernement de la République populaire de Chine sur l’encouragement et la protection réciproques des investissements*, Art. 9.
112 *Aguas del Tunari v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent’s Objections to Jurisdiction (21 October 2005), paras 109-123.
113 Id., para 119.
114 *Azurix Corp v The Argentine Republic*, ICSID Case No ARB/01/12, Decision on Jurisdiction (8 December 2003), para 80.
115 App 6 (PO2), p 50, para 16.
116 Id.
117 See the reasoning at *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Annulment (3 July 2002) para 55.
118 App 6 (PO2), p 50, para 11.
119 Facts, p 1, para 2.
about the BIT’s offer of arbitration at the time of the purchase. If the exclusive FSC was not meant to waive arbitration based on the earlier BIT, it should have clearly stated it. Since it did not, the Claimant cannot argue that there was no intention to waive arbitration on its part.

100. In conclusion, the extensive formulation of the FSC fulfils the criteria required to be interpreted as a waiver of international arbitration. The Claimant and the Respondent clearly expressed their desire to resolve all disputes relating to the 2003 Bonds exclusively in front of Dagobah’s courts. Such agreement amounts to a rejection of the BIT’s offer to arbitrate. Based on this waiver, the claims are inadmissible.

B. Calrissian raises contractual claims, hence it must abide by the forum selection clause

101. In the event that the Tribunal would not find the waiver to be effective, Dagobah submits that the nature of Calrissian’s claims is contractual. The Respondent still maintains, as described in paras 24-48, that the 2003 Bonds do not represent an investment and that the BIT is not applicable. However, in case the Tribunal decides otherwise, it should nevertheless consider that the essential basis of the claims is contractual. Such claims must be raised with respect to the entire contract, including the FSC. As a result, the claims should be dismissed as inadmissible.

102. Certain facts can give rise to both treaty and contractual claims.121 In such situations, tribunals determine the nature of the claims by looking for their essential basis.122 It is of high importance to the present dispute that claims labeled by a claimant as treaty-based can still be deemed essentially contractual.123

103. A contractual claim is a claim that is grounded in a contract. If a claim essentially concerns a breach of a contract, the claim is a contractual one.124 On the other hand, treaty-based claims have to be self-standing.125

120 Id., p 4, para 22.
121 SGS Société Générale de Surveillance v Republic of Pakistan, ICSID Case No ARB/01/13, Jurisdiction (6 August 2003) para 147.
124 Vivendi I Annulment, para 98.
125 Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Republic of Pakistan, ICSID Case No ARB/03/29, Jurisdiction (14 November 2005) para 167.
104. Calrissian is wrong in submitting its claims to this Tribunal. Raising a contractual claim requires applying the contract in its entirety, including any forum selection clause contained therein.\textsuperscript{126} In accordance with this principle of unity of contractual bargain, Calrissian is not allowed to claim under some provisions of the 2003 Bonds and ignore another ones.\textsuperscript{127}

105. The \textit{Vivendi I}. Annulment Committee confirmed this principle when it held 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."\textsuperscript{128}

106. The present claims are essentially contractual. Firstly, it is because of the nature of sovereign bonds. Calrissian alleges that the Respondent has interfered with its 2003 Bonds.\textsuperscript{129} The 2003 Bonds are a contract. Therefore, any intrusion of the 2003 Bonds represents an intrusion of a contract and as such is subject to the dispute resolution mechanism of the contract. The 2003 Bonds are the essential basis of the present claims and hence these claims do not stand independently on their own and do not qualify as treaty claims.

107. Secondly, the claims in fact concern the amount of money that will be paid to the Claimant once the bonds mature. Because disputes concerning non-payment or relating to the exact size of debt are typical contractual disputes, the Claimant is making contract-based claims.

108. Therefore, Calrissian is not allowed to raise a contractual claim under a different dispute resolution clause than the one provided in the 2003 Bonds. As it is claiming under the 2003 Bonds, it cannot disregard the FSC merely because it does not suit it. The unity of contractual bargain must be preserved and the claims should be ruled inadmissible.

\textsuperscript{126} SGS Société Générale de Surveillance v Republic of Philippines, ICSID Case No ARB/02/6, Jurisdiction (29 January 2004) para 155.
\textsuperscript{127} Waibel, pp. 261-262.
\textsuperscript{128} Vivendi I Annulment, para 98.
\textsuperscript{129} Facts, p 4, para 23.
C. The umbrella clause in Art. 8 (2) BIT does not override the contractual choice of forum

109. Even if the Tribunal held that Art. 8 (2) BIT grants it jurisdiction over contractual claims, the exclusive FSC would still prevent it from hearing Calrissian’s claims. The Respondent submits that the FSC prevails over the umbrella clause and the claims are thus inadmissible.

110. The same issue has appeared in the BIVAC case, where the claimant raised contractual claims related to the payment of invoices. An umbrella clause gave the tribunal jurisdiction to hear such claims. The contract however contained a forum selection clause in favour of Paraguay’s courts. The tribunal in BIVAC ultimately held that the umbrella clause internationalizes all contractual rights and obligations – not only the right to be paid for services rendered, but also the obligation to have the contract-related claims heard by Paraguay’s courts. Thus, the tribunal gave effect to the forum selection clause and concluded that the claims were inadmissible.

111. Similarly to the BIVAC case, Calrissian is raising contractual claims. However, the umbrella clause cannot grant international protection to contractual rights and at the same time disregard the contractual FSC.

112. By submitting the dispute to this Tribunal, Calrissian is also violating the general principles of law which govern the relationship between different legal instruments. The generalia specialibus non derogant principle states that rules with a special relation to a dispute should be applied with precedence over more general rules. According to Schreuer:

"[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."

113. All provisions of the 2003 Bonds were specifically designed to regulate their future existence. On the other hand, the BIT is a document of general character, encompassing many possible cases. The generalia specialibus non derogant principle, applicable

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130 Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v The Republic of Paraguay, ICSID Case No ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction (29 May 2009), para 9.
131 Id., para 142.
132 Id., para 8.
133 Id., paras 147-148.
134 Id., para 159.
135 Douglas, p 380, para 712.
by virtue of Art. 8 (3) BIT,\textsuperscript{137} thus favours the FSC before international arbitration based on the BIT.

114. In conclusion, the BIT’s umbrella clause does not allow the Claimant to disregard the FSC. Only Dagobah’s courts can decide contractual disputes relating to the 2003 Bonds.

115. For all the aforementioned reasons, Calrissian waived its right to initiate international arbitration. Furthermore, the present claims are essentially contractual and the 2003 Bonds’ FSC mandates that they must be decided by Dagobah’s courts. As a result, the Tribunal should rule the claims inadmissible.

\textsuperscript{137} App 1, p 11, Art 8 (3).
PART TWO: MERITS

IV. Dagobah’s action complied with Art. 6 (2) BIT and CIL necessity principle

116. With limited resources and an economy crippled by the global financial crisis of 2008 (the “Financial Crisis”), Dagobah was forced to restructure its debt by enacting the SRA. The Financial Crisis wrecked Dagobah’s fragile economy. The Claimant contends that Dagobah’s enactment of the SRA violated the BIT.

117. The Respondent submits that the SRA did not violate the BIT because A. it complied with its Art. 6 (2) BIT obligations. Furthermore, B. the Respondent can invoke CIL necessity because it satisfied all six necessity requirements.

A. The Respondent complied with its Art. 6 (2) BIT obligations

118. When a State’s essential security interest is threatened and it has no other option but to adopt measures to protect its essential security interest, Art. 6 (2) BIT allows the state to adopt protective measures. The Respondent complied with its Art. 6 (2) BIT obligations because: (i) the Second Crisis threatened Dagobah’s essential security interest; and (ii) the SRA was a necessary measure.

i. The Second Crisis threatened Dagobah’s essential security interest

119. The catastrophic Financial Crisis almost destroyed Dagobah. It pushed Dagobah’s economy and public service sector to the brink of collapsing and created an environment in which social unrest thrived. Inspired by its need to protect its population, economy, to maintain order and to control civil unrest, Dagobah enacted the SRA.

120. Art 6 (2) BIT allows Dagobah to protect its essential security interest. The BIT is silent on what State interests can be classified as essential security interest. The LG&E tribunal has explained that economic interest can be classified as an essential security interest. An economic interest will receive essential security interest classification if it is so severe that it threaten total collapse of the State. Accordingly,

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138 LG&E Energy Corporation and ors v Argentina, ICSID Case No ARB/02/1, Award, (5th July 2007) para 238.
139 Id., para 231.
only extremely severe crisis that threaten the existence of a State will receive essential security interest classification.\textsuperscript{140}

121. In \textit{LG&E}, the tribunal had to determine whether an extremely sever crisis threatened Argentina’s existence.\textsuperscript{141} The tribunal examined many factors such as Argentina’s high employment rate, civil unrest, high inflation, the government’s decreased support for social services, Argentina’s inability to borrow on the international market and high debt to GDP ratio.\textsuperscript{142} Satisfied that all the above factors were present during Argentina’s crisis, the tribunal concluded that Argentina’s devastating conditions in the aggregate triggered the protection afforded by Art. XI of the bilateral investment treaty between Argentina and United States of America.\textsuperscript{143}

122. Art. XI of the bilateral investment treaty between Argentina and United States of America contains similar language as the present BIT as it provides:

“This Treaty shall not preclude the application by either party of measures necessary for maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or protection of its own essential security interest.”\textsuperscript{144}

123. Art. 6 (2) BIT states:

“Nothing in this Treaty shall be construed: to preclude a party from applying measures that are necessary for fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”\textsuperscript{145}

124. Dagobah’s devastating conditions in the aggregate triggered Art. 6 (2) BIT protection. Dagobah and Argentina shared many of the same devastating conditions. Both had high unemployment. During the Second Crisis, 10.9\% of Dagobah’s population was unemployed.\textsuperscript{146} Both suffered high inflation.\textsuperscript{147} As the Respondent’s social conditions deteriorated, social unrest increased. After the Second Crisis took control of Dagobah’s
economy, social unrest exploded in the capital and other large cities.\textsuperscript{148} There were many demonstrations.\textsuperscript{149}

125. Dagobah’s economic conditions were as devastating as its social conditions. The Second Crisis crippled the Respondent’s economy. After 2003, investors believed that Dagobah was a safe investment.\textsuperscript{150} Unfortunately, after the Financial Crisis, investors became extremely cautious.\textsuperscript{151} It made it very difficult for Dagobah to borrow money on the international market on reasonable terms.\textsuperscript{152} Furthermore, by 2011 Dagobah had accumulated USD 400 billion in debt.\textsuperscript{153} The situation was so bad Dagobah had an unacceptable debt-to-GDP ratio of 124\%.\textsuperscript{154}

126. Dagobah’s devastating social and economic conditions in the aggregate threatened its maintenance of public order and threatened the total collapse of its economy. Accordingly the Second Crisis was an extremely severe crisis that threatened Dagobah’s existence.

\textit{ii. The SRA was a necessary measure}

127. The Financial Crisis created devastating conditions that decreased the Respondent’s ability to generate sufficient revenue to service its debt and prevent the public service sector from collapsing. To prevent the calamity of defaulting on its debt and a collapsed public service sector, the Respondent enacted the SRA.

128. Once a State has established that its essential interest is threatened, Art. 6 (2) BIT allows the State to use necessary measures to protect its essential security interest.

129. When a crisis is so catastrophic that it gives the State only one option to preserve its existence as a State then any measures taken by a State is deemed necessary.\textsuperscript{155} According to the \textit{LG&E} tribunal, Art. XI of Argentina’s BIT, which is similar to the current BIT, “refers to situation in which the State has no choice but to act”.\textsuperscript{156} Furthermore, the necessary measure must be a legitimate way of protecting the State’s

\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id., p 22.
\textsuperscript{152} App 4, p 22.
\textsuperscript{153} Facts, p 3, para 14.
\textsuperscript{154} App 7, p 57, para 38.
\textsuperscript{155} LG&E, para 239.
\textsuperscript{156} Id.
interest.\textsuperscript{157} The \textit{LG&E} tribunal stated that a necessary measure is legitimate when the devastating conditions forced the State to take unilateral action against the economic crisis.\textsuperscript{158}

130. Just like Argentina\textsuperscript{159}, Dagobah had to deal with thousands of investors, whose interest could not be individually assessed during the crisis. Dagobah’s investors were scattered all over the world. Some were unknown to the Respondent because they bought their bonds in the secondary market, as the Claimant did.\textsuperscript{160}

131. Furthermore, the catastrophic social and economic conditions decreased the Respondent’s ability to generate sufficient revenue to service its debt. The international community including the IMF would not provide the Respondent with financial support unless it restructured its debt.\textsuperscript{161} Moreover, during the Second Crisis, access to foreign investment was restricted and the Respondent found it extremely difficult to secure new foreign investment on favourable terms.\textsuperscript{162}

132. The urgency of protecting its economy from total collapse forced the Respondent to enact the SRA and allowed it to renegotiate with investors. Argentina used similar methods as Dagobah to protect its economy. Argentina enacted “across-the-broad solutions” then it renegotiated with investors.\textsuperscript{163} The \textit{LG&E} tribunal found Argentina’s measures necessary and legitimate.\textsuperscript{164}

133. In conclusion, the extremely severe Second Crisis made the SRA the only option Dagobah could use to protect its economy and population. Therefore, the SRA was necessary and legitimate. Accordingly, the Respondent has demonstrated that it complied with its Art. 6 (2) BIT obligations.

B. The Respondent can invoke CIL necessity

134. Dagobah complied with all six requirements of the CIL principle of necessity. Dagobah can invoke necessity because: (i) preservation of Dagobah’s economy is an essential interest; (ii) restructuring of sovereign bonds was the only available measure that could

\textsuperscript{157} Id., paras 239-240.
\textsuperscript{158} Id., para 240.
\textsuperscript{159} Id., para 241.
\textsuperscript{160} App 6 (PO2), p 50, para 11.
\textsuperscript{161} Facts, p 3, para 16.
\textsuperscript{162} App 4, p 21.
\textsuperscript{163} \textit{LG&E}, para 241.
\textsuperscript{164} Id.
safeguard Dagobah’s economy; (iii) the Respondent face a grave and imminent peril; (iv) the BIT does not prevent the Respondent from invoking necessity; (v) The Respondent’s action did not seriously impair the essential interest of the other State; and (vi) the Financial Crisis caused the Second Crisis.

i. Preservation of Dagobah’s economy is an essential interest

135. During the Second Crisis, Dagobah implemented the SRA to protect its economy. A healthy economy is vital to Dagobah’s survival as a country.

136. Interests that are vital to a State’s political or economic survival may be treated as an essential interest. Maintenance of internal peace, the survival of a sector of the population and the continued functioning of essential services are factors a tribunal should consider when determining the existence of an essential interest.

137. Some tribunals have accepted preservation of economy as an essential interest.

138. Dagobah’s public service sector almost collapsed. Had the public service sector collapsed it would have affected the lives of those members of Dagobah’s population whose survival depend on the public service sector. Accordingly, the Second Crisis threatened the survival of Dagobah’s population and its ability to provide essential services.

139. Therefore, Dagobah had an essential interest to protect.

ii. Restructuring of sovereign bonds is the only way Dagobah could protect its economy

140. Restructuring of sovereign bonds was the only measure available that could protect Dagobah’s economy. Had Dagobah not restructured its sovereigns bonds it would not have had the necessary revenue for servicing its debt and saving the public service sector.

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166 Ago, p 15.
167 LG&E, para 251; Impregilo SPA v Argentina, ICSID Case No ARB/07/17, Award (21 June 2011) para 346.
168 App 6 (PO2), p 51, para 20.
169 Id.
141. The “only means” criterion of the necessity principle states that if other measures that were available could safeguard a State’s vital interest and the State failed to use those other measures then it cannot rely on the necessity principle.\(^{170}\) It is important to highlight that the other available measures must have the ability to safeguard the State’s vital interest.\(^{171}\)

142. Other measures adopted by Dagobah were unsuccessful at generating sufficient revenue and the international community was reluctant to offer any financial support to the Respondent unless it refinance and reduce its debt.

143. On 14 September 2011, the IMF suggested to Dagobah that it implement new sovereign debt restructuring.\(^{172}\) Before it followed the IMF’s suggestion, Dagobah adopted austerity measures such as reducing investment in infrastructure that failed to generate sufficient revenue.\(^{173}\) About a year after receiving the IMF’s suggestion, Dagobah enacted the SRA on 28 May 2012. If austerity measures adopted after the IMF’s suggestion were successful at generating revenue, the Respondent would not have enacted the SRA.

144. In addition to unsuccessful austerity measures, the Respondent could not secure help from the international community unless it restructured its debt. The IMF and other States have advised the Respondent that if it restructured its debt they will provide financial support.\(^{174}\) With no other options to generate revenue or secure financial support, Dagobah enacted the SRA.

145. Consequently, the Respondent used the only measure available that could safeguard its economy.

\textit{iii. The Respondent faced a grave and imminent peril}

146. Faced with the inability to generate enough revenue to service its debt, the Respondent restructured its debt.\(^{175}\) Other austerity measures adopted by the Respondent proved

\(^{171}\) \textit{Id}.
\(^{172}\) Facts, p 3 para 15.
\(^{173}\) App 6 (PO2), p 51, para 20.
\(^{174}\) Facts, p 3, para 16.
\(^{175}\) App 6 (PO2), p 51, para 20.
to be unsuccessful at generating revenue and protecting the continued functioning of essential services.\textsuperscript{176}

147. The \textit{LG&E} tribunal described imminent peril as a grave and present danger.\textsuperscript{177} Uncertain threat or grave danger that will occur in the future will not receive necessity protection.\textsuperscript{178} Threat to a State’s essential interest must be present at the time the State takes protective action.\textsuperscript{179}

148. The clear and present danger of insufficient revenue presented an imminent peril to the Respondent’s economy and population. The limited resources the Respondent generated were insufficient to support its public service sector and service its debt.\textsuperscript{180} Moreover, austerity measures adopted by Dagobah were unsuccessful at generating substantial revenue.\textsuperscript{181} By the time the Respondent enacted the SRA it had accumulated USD 400 billion in unsustainable debt\textsuperscript{182} and had a debt to GDP ratio of 124\%.\textsuperscript{183} Faced with this imminent peril, Dagobah enacted the SRA, to prevent the public service sector from collapsing and to allow Dagobah to pay its debt.\textsuperscript{184}

149. Therefore, the Respondent implemented protective measure to prevent a present and imminent peril.

\hspace{1cm} \textit{iv. The BIT does not prevent the Respondent from invoking necessity}

150. The BIT between Dagobah and Corellia does not prohibit the parties from invoking the CIL necessity principle.

151. An international agreement can restrict a party’s right to invoke necessity.\textsuperscript{185} Any explicit or implicit prohibition of the principle of necessity by an international agreement makes the principle unavailable to the parties.\textsuperscript{186}

152. The BIT contains no provisions or clauses that prohibit the parties from invoking the necessity principle.

\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{LG&E}, para 253.
\textsuperscript{178} Gabčíkovo-Nagymaros Project, Hungary v Slovakia, Merits, ICJ GL No 92 (25th September 1997) 42.
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} App 6 (PO2), p 51, para 20.
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} Facts, p 3, para 15.
\textsuperscript{183} App 7, p 57 para 37.
\textsuperscript{184} App 6 (PO2), p 51, para 20.
\textsuperscript{185} Crawford, p 185.
\textsuperscript{186} \textit{Id.}
v. The Respondent’s action did not seriously impair the essential interest of the other State

153. The Respondent’s restructuring of its debt did not seriously impair the essential interest of the international community or the other State.

154. According to ILC Art. 25 “the invocation of necessity must not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”\(^ {187}\) Tribunals have not clearly explained how States actions can impair the essential interest of the other State. In investor-state dispute cases, some tribunals did not address this criterion and other tribunals have determined that a State’s action did not impair another State’s essential interest without providing its explanation.\(^ {188}\) Accordingly, the inconsistent application of this criterion emphasizes the fact that ILC Art. 25 was not designed to be used in the investor-State context.\(^ {189}\)

155. Given that this is an investor-State dispute this criterion is inapplicable.

vi. The Financial Crisis caused the Second Crisis

156. The Financial Crisis substantially contributed to the situation of necessity.

157. Any State whose actions substantially contributed to the situation of necessity is precluded from using necessity as a defence.\(^ {190}\) No clear definition of substantial contribution exists.\(^ {191}\) The facts and circumstances of each case will guide the tribunal’s search in determining whether a State substantially contributed to the situation of necessity.\(^ {192}\)

158. Unlike some of the states that were affected by the Financial Crisis, Dagobah was still recovering from its First Crisis that begun in 2001.\(^ {193}\) During this recovery period, Dagobah’s economy was vulnerable to external threat, such as the Financial Crisis.\(^ {194}\)

\(^{187}\) *Id.*


\(^{189}\) Muchlinski/Ortino/Schreuer, p 487.

\(^{190}\) Crawford, p 185.

\(^{191}\) Muchlinski/Ortino/Schreuer, p 491.

\(^{192}\) *Id.*

\(^{193}\) App 4, p 21.

\(^{194}\) *Id.*
Given its vulnerable status, Dagobah’s financial policies and decisions could not prevent the Financial Crisis from causing the Second Crisis.

159. The cumulative effect of the Financial Crisis destroyed Dagobah’s fragile economy. The Financial Crisis created a harsh financial environment in which the Respondent had difficulties securing additional international financing. International financing is a critical component of Dagobah’s economy.\(^{195}\) For emerging markets such as the Respondent, international financing is a vital source of capital that supports the growth of the economy and government.\(^{196}\) Prior to the Financial Crisis, investors considered Dagobah a safe investment.\(^{197}\) Unfortunately, the Financial Crisis changed investors’ perception of Dagobah.\(^{198}\) Investors became cautious about investing in Dagobah.\(^{199}\) Their cautious attitude made it difficult for Dagobah to secure international funds on terms it could reasonably fulfil.\(^{200}\) By 2011, the Respondent had accumulated unsustainable debt of USD 400 billion\(^{201}\) and had a debt to GDP ratio of 124%.\(^{202}\)

160. Moreover, the Financial Crisis created a very unpleasant social environment. It contributed to the increase of unemployment.\(^{203}\) During this time, 10.9 % of Dagobah’s population was unemployed.\(^{204}\) In addition to unemployment, the inflation rate increased.\(^{205}\) Unhappy with Dagobah’s economic situation, Dagobah’s citizens organized several demonstrations.\(^{206}\) Furthermore, the economic hardship and difficulties caused by the Financial Crisis incited social unrest in Dagobah’s capital and other large cities.\(^{207}\)

161. The Financial Crisis crippled Dagobah’s fragile economy, thereby, causing the Second Crisis. Accordingly, the Respondent can invoke necessity because it satisfied all six-necessity requirements.

\(^{195}\) Id., p 22.
\(^{196}\) App 7, p 55, para 30.
\(^{197}\) App 4, p 21.
\(^{198}\) Id., p 22.
\(^{199}\) Id.
\(^{200}\) Id.
\(^{201}\) Facts, p 3, para 15.
\(^{202}\) App 7, p 57, para 37.
\(^{203}\) Id., para 38.
\(^{204}\) Id.
\(^{205}\) Id.
\(^{206}\) Id.
\(^{207}\) Id.
V. Respondent’s measures did not amount to a violation of the fair and equitable treatment standard pursuant to Art. 2 (2) BIT

162. The Respondent submits that A. the fair and equitable treatment (the “FET”) standard must be construed under the customary international law. The Respondent treated the Claimant’s alleged investment fairly and equitably at all times as B. Dagobah preserved stability of the legal environment because its actions were transparent, predictable and Dagobah did not make any representations the Claimant could legitimately rely on; and C. the Respondent adopted reasonable measures in the public interest.

A. The fair and equitable treatment standard must be construed under the customary international law

163. Art. 2 (2) BIT refers to the elements of unreasonable or discriminatory measure and further provides no definition of what the fair and equitable treatment means. The FET clause must therefore be construed in accordance with customary international law. No additional elements but the ones in the BIT and under customary international law apply.

164. Art. 2 (2) BIT states:

“Investments of each Party or of nationals of each Party shall at all times be accorded fair and equitable treatment [...] Neither Party shall in any way impair by unreasonable or discriminatory measures the [...] investment [...].”

165. The scope and content of the standard depends on the specific wording of the applicable agreement. However, the inherently subjective terms “fair and equitable” provide no guidance as to their content. Consequently, diversified case law has provided inconsistent interpretation resulting in uncertainty regarding the FET meaning. To avoid this unpredictability, the FET is to be interpreted as the minimum standard set by customary international law, even where the wording of the FET provision does

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208 App 1, p 8, Art 2 (2).
210 Id., p 261.
211 UNCTAD Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II [2012] TDM, 6; Picherack, pp 261-262
not contain a link to international law. Custom provides much needed boundaries, lack of which would create leeway for total discretion regarding the scope of the standard.

166. Accordingly, a State’s conduct fails to provide the minimum standard if it is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety, as might be the case of a complete lack of transparency and candour.

167. In addition, the terms “fair and equitable” suggest a balancing process that must be applied “with a view to doing justice to all interested parties that may be affected by a State’s decision, including the host State’s population at large.”

168. In the case at hand, the wording of the BIT explicitly identifies only the elements of unreasonable and discriminatory measures. By specifically listing these elements, the Parties indicated their wish to additionally include them in Art. 2 (2) BIT along the minimum standard. Accordingly, no other elements than the ones in the BIT apply.

169. In any event, should the Tribunal decide to interpret the FET as an independent standard, the Respondent’s measures do not amount to a breach even in that case. The Claimant alleged a failure to maintain a stable environment, breach of previous warranties that the Claimant relied on and unreasonable and coercive nature of Dagobah’s measures. As will be demonstrated below, even if construed broadly to include these additional elements, the Respondent treated the Claimant’s alleged investment fairly and equitably at all times in accord with Art. 2 (2) BIT.

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214 Picherack, p 261

215 Waste Management Inc v United Mexican States, ICSID Case No ARB(AF)/00/3, Award (30 April 2004) para 98.

216 UNCTAD - FET Series, p 7.
B. The Respondent’s measures preserved a stable legal environment

170. To an extent, a host State is under an obligation to provide a stable legal environment for investors to operate in. To honour this obligation, it must act in a transparent and predictable way and not frustrate investors’ legitimate expectations.

171. Dagobah submits that (i) Art. 2 (2) BIT is not a stabilization clause; (ii) it acted in a completely transparent and predictable way when it enacted the SRA and consequently restructured its debt; and (iii) it did not give rise to any legitimate expectations that the legal and economic framework of the 2003 Bonds would not be modified.

i. Art. 2 (2) BIT is not a stabilization clause

172. The FET standard cannot lead to the same outcome as a stabilization clause, because such approach would diminish a State’s sovereign powers.

173. Stabilization clauses are specific guarantees by a State embodied in contracts to preserve legal framework for a particular investment. At the same time, it is every State’s sovereign right to adapt its legal framework to new circumstances. Only where a stabilization clause is present may a change of legal framework entitle investors harmed by such changes to compensation. Otherwise, appropriate balance between the interests of host states for regulatory flexibility and legal predictability would be diminished.

174. In the current case, there is no such guarantee in the BIT. Dagobah therefore was under no obligation to preserve its legal framework as in a stabilization clause.

ii. The enactment of the SRA and the debt restructuring was highly transparent and predictable

175. The whole process of the enactment of the SRA and following debt restructuring was highly transparent and predictable. Dagobah provided constant updates on the on-going SRA draft on official governmental websites and consulted the restructuring process with a half of the affected bondholders.

218 Id., p 10.
219 Id.
220 Id.
176. Transparency and predictability of the environment mandate that an investor can expect beforehand the State’s intended regulations and policies so that it may comply and adjust its activities connected with the investment.\textsuperscript{221}

177. The process of enactment of the SRA was completely transparent to bondholders because numerous versions of the draft were published online on official governmental websites.\textsuperscript{222} The Respondent was under no obligation to broadly consult its legislative and regulatory measures with the Claimant and other foreign investors. Such approach would allow needs of an investor to supersede the government’s legislative role.

178. Moreover, Dagobah consulted a committee representing owners of a half of the aggregate nominal value of the bonds in regard to the debt restructuring process.\textsuperscript{223} Direct consultations via creditor committees are a recognized instrument that promotes transparency.\textsuperscript{224} Creditor committees were consulted in sovereign debt restructurings in Argentina in 2005, Grenada in 2005 and Belize in 2007, all representing 50% or more of the outstanding debt holders.\textsuperscript{225}

179. Furthermore, the Second IMF Recommendation suggesting a debt restructuring and a bailout offer contingent upon bond exchange offer was issued on 14 September 2011.\textsuperscript{226} Previously, after the First Crisis, the Respondent followed the First IMF Recommendations,\textsuperscript{227} which was made publicly known through a widely circulated international newspaper.\textsuperscript{228} Since the Second IMF Recommendation, it took nine months to the enactment of the SRA and more than a year to launch the exchange offer. Based on the above, it was predictable that Dagobah would restructure its debt.

180. The Respondent therefore indeed achieved to preserve a completely transparent and predictable environment.

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\textsuperscript{221} Técnicas Medioambientales Tecmed, SA v The United Mexican States, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 154.
\textsuperscript{222} App 6 (PO 2), p 50, para 21.
\textsuperscript{223} Id.
\textsuperscript{224} UNCTAD – FET Series p 72.
\textsuperscript{226} Facts, p 3, paras 15-16.
\textsuperscript{227} Id., para 15.
\textsuperscript{228} App. 4, p 21.
iii. The Claimant could not legitimately expect that modification of the legal and business framework of the 2003 Bonds would not occur

181. Investor’s legitimate expectations are based on representations made by the agents of the host State.229 Dagobah made no representations that could give rise to legitimate expectations.

182. Except where specific promises or representations are made by the State to the investor, the latter does not have the right or legitimate expectation that the legal and economic environment will not change, possibly to its disadvantage.230

183. In the present case, Dagobah made no representations suggesting that the legal framework governing the 2003 Bonds would not be modified,231 nor that it would not undertake another debt restructuring.232 The only representation Dagobah expressed was its commitment to a more stable economy and financial sector,233 which is a very broad statement that cannot be read as a specific promise to the Claimant. Accordingly, Dagobah created no misleading expectations upon which Claimant could legitimately rely.

184. Dagobah’s actions were transparent, predictable and Dagobah did not make any representations the Claimant could legitimately rely on. Therefore, Dagobah preserved stability of its legal environment.

C. Dagobah undertook reasonable measures in order to protect its public interest

185. A measure is reasonable if it bears a relationship to a State’s rational policy. It is a State’s undeniable right to enact regulations to protect its public interest, even if the changes negatively affect a foreign investor.234 Dagobah’s debt restructuring meets all of the criteria.

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229 ADF Group Inc v United States of America, ICSID Case No ARB(AF)/00/1, Award (9 January 2003) para 189.
230 EDF (Services) Limited v Romania, ICSID Case No ARB/05/13, Award (8 October 2009) para 217; EnCana Corporation v Republic of Ecuador, LCIA Case No UN3481, Award (3 February 2006) para 173; AES Summit Generation Limited and AES-Tisza Erőmű Kft v The Republic of Hungary, ICSID Case No ARB/07/22, Award (23 September 2010) para 9331; Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v The Kingdom of Thailand, UNCITRAL, Award (1 July 2009) para 11.
231 App 7, p 56, para 32.
232 App 6 (PO 2), p 49, para 18.
233 Id.
234 UNCTAD – FET Series, p 74.
186. In order to be deemed reasonable, a State’s conduct must bear a relationship with an underlying rational policy.\textsuperscript{235} A rational policy protects interest of a “self”, where “self” with regard to sovereigns encompasses its population.\textsuperscript{236} Therefore, a policy adopted in the public interest of a State’s population is rational.

187. Black’s Law Dictionary defines public interest as “the general welfare of the public that warrants recognition and protection” and “interest that justifies governmental regulation”.\textsuperscript{237} It is in the State’s power to define what constitutes its public interest, as long as its judgment is not manifestly without foundation.\textsuperscript{238} A State will act in the best interest of itself and its population.\textsuperscript{239}

188. In the instant case, Dagobah undertook reasonable measures in order to protect its public interest. Firstly, it was rational of Dagobah to undergo debt restructuring. In fact, reduction of Dagobah’s outstanding debt in bonds through an exchange offer constituted a condition precedent to receive the offered financial aid from the IMF in the amount of USD 150 billion and write-off of some of the debt by several creditor countries.\textsuperscript{240} Dagobah therefore followed the Second Recommendation from the IMF, an international organization whose aim is to assist States in precisely the same conditions, which the Respondent was facing. Consequently, the supported deal took place\textsuperscript{241} and Dagobah reduced its debt.

189. Secondly, the adopted debt restructuring was reasonable because it was undertaken in the public interest. Dagobah was led by an effort to safeguard preservation of public services, which were on the verge of collapse\textsuperscript{242} and provide means to combat high unemployment and inflation rate.\textsuperscript{243} Therefore, Dagobah acted reasonably and rationally when it restructured its debt.

190. In conclusion, Dagobah’s actions were in accord with Art. 2 (2) BIT. Firstly, Dagobah preserved stability of the environment because the enactment of the SRA and ensuing debt restructuring were highly transparent and predictable. It never made any

\textsuperscript{235} \textit{Salaka Investments BV v Czech Republic}, PCA Case, Partial Award (17 May 2006) paras 460-461.
\textsuperscript{236} J Rawls \textit{Political Liberalism} (Harvard University Press, Massachusetts, 1991) 51.
\textsuperscript{237} Black’s Law Dictionary, p 1266.
\textsuperscript{239} \textit{Id.}, 791.
\textsuperscript{240} Facts, p 3, para 16; App 6 (PO 2), p 50, para 19.
\textsuperscript{241} App 6 (PO 2), p 50, para 19.
\textsuperscript{242} App 6 (PO 2), p 50, para 2.
misleading representations regarding legal framework governing the 2003 Bonds or possible debt restructuring that the Claimant could legitimately rely on. Secondly, the Respondent acted reasonably when it restructured its debt because it did so in the public interest of its population to reduce its debt and preserve public services. Dagobah treated the Claimant’s alleged investment fairly and equitably at all times.
PRAYER FOR RELIEF

On the grounds of the aforementioned reasons, the Respondent respectfully asks this Tribunal to rule that:

(1) it does not have jurisdiction over this dispute;
(2) the PCA Award does not bind the Tribunal; and
(3) the submitted claims are inadmissible.

Alternatively, in case the Tribunal would assert its jurisdiction and found the claims admissible, the Respondent respectfully requests the Tribunal to issue an award:

(1) dismissing all of the Claimant’s claims; and
(2) granting such other relief as counsel may advise or the Tribunal may deem appropriate.

Respectfully submitted,

/s/

Team Xue,

Counsel for the Respondent