FOREIGN DIRECT INVESTMENT
INTERNATIONAL MOOT COMPETITION
24-26 OCTOBER 2014

ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE
ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

Calrissian & Co., Inc. (Claimant)

v.

The Federal Republic of Dagobah (Respondent)

MEMORIAL FOR RESPONDENT

20 September 2014
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ARTICLES

Amerasinghe

Baptista

Das

Delaume
Mann

Orakhelashvili

Sacerdoti

Schreuer, Article

Waibel

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**MISCELLANEOUS**

Black’s

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**ICSID Convention**  

**US-Ecuador BIT**  

**VCLT**  

**MISCELLANEOUS**

**Canada Model BIT**  
ILC Articles  

U.S. 2012 Model BIT  
## LIST OF ABBREVIATIONS

¶ / ¶¶  Paragraph(s)
Art(s.)  Article(s)
BIT  Corellia-Dagobah Bilateral Investment Treaty
Facts  Uncontested Facts
FDI  Foreign Direct Investment
FET  Fair and Equitable Treatment
GFH  *Global Financial Herald*
ICJ  International Court of Justice
ICSID  International Centre for Settlement of Investment Disputes
ILC  International Law Commission
p. / pp.  Page / Pages
PCA  Permanent Court of Arbitration
PCIJ  Permanent Court of International Justice
PO  Procedural Order
R  Record
RA  Request for Arbitration
SCC  Stockholm Chamber of Commerce
UNCITRAL  United National Commission on International Trade Law
WTO  World Trade Organization
STATEMENT OF FACTS

1. The Federal Republic of Dagobah (“Dagobah” or “Respondent”) is an emerging market whose government embarked on a program of privatization and internationalization to stimulate economic growth during the 1990s. These efforts to promote economic development led Dagobah to borrow heavily on international financial markets while massive tax evasion contributed to high government deficits. By 2001, Dagobah faced an unsustainable debt burden and suffered a financial crisis that lasted over two years.

2. Lacking other viable options, Dagobah restructured its debt on 7 May 2011, offering bondholders the option to exchange their bonds for new ones with a reduced face value. The International Monetary Fund (“IMF”) advised Dagobah in the implementation of the debt restructuring plan. Bondholders eventually accepted an offer from Dagobah that represented losses of less than 20% of the bonds’ net present value. By 2003, Dagobah was past the most difficult period of its financial crisis. While the country reiterated its “commitment to a more stable economy and financial sector,” it made no statement that it would never again restructure its debt.

3. During Dagobah’s economic crisis, nationals of the Corellian Republic (“Corellia”) pressured Corellia to commence arbitral proceedings against Dagobah before the Permanent Court of Arbitration (“PCA”) pursuant to Article 7 of the Agreement between the Corellian Republic and the Federal Republic of Dagobah for the Promotion and Protection of Investments (the “BIT”) to declare that Corellian bondholders were protected from Respondent’s restructuring under the BIT. On 29 April 2003, two arbitrators issued the majority decision (the “PCA Award”), stating that—despite its noticeable absence in the definition of investment—the
sovereign bonds at issue were investments under the BIT. One arbitrator fervently dissented and issued an opinion stating that sovereign bonds were not an investment under the BIT.

4. The bondholders had already accepted the restructuring offer from Respondent when the decision was released, and no Corellians filed suit against Respondent based on the PCA Award. Respondent publicly voiced its disagreement with the majority decision, but it did not challenge the Award because bondholders were satisfied with the restructuring.

5. In August 2003, Dagobah issued new bonds. Claimant, Calrissian & Co., Inc. (“Calrissian” or “Claimant”), a hedge fund located in Corellia, purchased these bonds from a third party on the secondary market in 2005. Dagobah governed these bonds, and they contained a forum selection clause granting to Dagobah’s courts exclusive jurisdiction over disputes arising from the bonds.

6. In 2010, Dagobah entered into a recession as a result of the 2008 global financial crisis. Investors became concerned that another sovereign debt restructuring would be necessary given rising government debt levels. Tax evasion continued to plague the country, robbing it of much-needed revenue.

7. On 14 September 2011, the IMF publicly acknowledged that Dagobah had followed most of its recommendations after the first crisis but that, nonetheless, Dagobah’s US$ 400 billion debt was unsustainable. The IMF suggested several measures to enable Dagobah to reduce its debt-to-GDP ratio, including a new sovereign debt restructuring. The IMF, supported by several other countries, also agreed to facilitate a bailout estimated at US$150 billion conditioned on Dagobah refinancing and reducing its debt through a bond exchange offer. Unable to secure

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11 Facts, ¶11, R-2.
12 Facts, ¶12, R-2.
13 Facts, ¶13, R-2.
14 PO2, ¶10, R-48.
15 Facts, ¶22, R-4.
16 Facts, ¶22; PO2, ¶11, R-49.
17 Facts, ¶20, 21, R-4
18 Facts, ¶14, R-3.
19 Facts, ¶14, R-3.
20 Facts, ¶15, R-3.
21 Facts, ¶15, R-3.
22 Facts, ¶15, R-3.
23 Facts, ¶16, R-3.
additional funds on the international financial markets, Dagobah had no choice but to turn to the IMF and execute any conditions precedent to receiving the bailout.  

8. On 28 May 2012, with the continued involvement of the IMF, Respondent enacted the Sovereign Restructuring Act (“SRA”), providing that if a majority of the owners representing 75% of the aggregate nominal value of all outstanding bonds governed by Dagobah law agreed to modify the terms of the bonds, that decision would bind the remaining bondholders. Bondholders were informed of the on-going draft, and versions of the legislation were available online throughout the drafting process. The SRA was deemed constitutional in a review conducted prior to its enactment.

9. After consulting a committee representing the owners of approximately 50% of the affected bonds’ aggregate nominal value, on 29 November 2012, Respondent offered bondholders the option to exchange their bonds for new ones worth approximately 70% of the net value of the outstanding bonds. More than 85% of the affected bondholders decided to participate in the offer. Almost all creditors who were not subject to the SRA also opted to participate in the exchange. Claimant was among the holdout minority.

10. On 12 February 2013, all bonds governed by Dagobah law, including those held by Claimant, were exchanged for new ones. The law of the Kingdom of Yavin governed the new bonds. The new bonds included collective action clauses requiring that a bondholder gather the consent of bondholders representing 20% of the nominal value of the bond issue in order initiate legal action.

11. On 30 August 2013, Claimant commenced these arbitral proceedings before the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”), alleging a violation of

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24 GFH Article, R-22.
25 PO2, ¶21, R-50.
26 Facts, ¶17; SRA, ¶3, R-25
27 PO2, ¶21, R-50.
28 PO2, ¶22, R-50.
29 PO2, ¶24, R-50.
30 Facts, ¶18, R-3.
31 Facts, ¶19, R-3.
32 Facts, ¶19, R-4.
33 Facts, ¶22, R-4; RA ¶5, R-28.
34 Facts, ¶19, R-3.
35 Facts, ¶20, R-4.
36 Facts, ¶21, R-4.
the BIT’s standards of protection.\textsuperscript{37} In its Answer to the Request for Arbitration, Respondent argued that Claimant is not entitled to pursue arbitration because sovereign bonds are not investments within the meaning of the BIT, because the forum selection clause in the bonds grants exclusive jurisdiction for disputes over the bonds to the Dagobah courts, and alternatively, because none of the BIT’s standards of protection have been violated.\textsuperscript{38}

\textsuperscript{37} Facts, ¶23, R-4.
\textsuperscript{38} Facts, ¶25–26, R-4-5.
SUMMARY OF ARGUMENT

12. This Tribunal does not have jurisdiction over this dispute. Claimant, a savvy hedge fund now remorseful for taking a risk that did not pay off, seeks to bring claims against Respondent, an emerging market following IMF counsel to guide its growth. However, neither Claimant, nor the bonds qualify as an investor or investment under the BIT or customary international law. Moreover, the PCA Award is immaterial to this matter and without effect, as it is only binding regarding the parties and specific bonds at issue in the specific dispute and is not a source of law (Section I).

13. In addition, the claims are barred by the forum selection clause embedded in the sovereign bonds. Claimant has, in effect, not submitted a breach of BIT claim but a breach of contract claim, which is governed by the forum selection clause and is non-justiciable by this Tribunal. The general dispute resolution clause of the BIT does not trump the forum selection clause in the bonds, and this Tribunal should respect the parties’ intent to resolve bond-related disputes in Dagobah courts by refusing to address Claimant’s demands (Section II).

14. Even if this Tribunal decides that it has jurisdiction over this matter and that the claims are not barred, the claims have no merit because Respondent has treated Claimant fairly and equitably in the 2013 bond restructuring, which over 85% of bondholders accepted peaceably. First, Respondent met Claimant’s legitimate expectations. The restructuring was a justified act in the public interest, and Claimant’s alleged expectations were not legitimate because they ignored normal business risks. In addition, Respondent has acted in good faith, with transparency, in a reasonable, non-discriminatory and non-arbitrary fashion in accordance with due process (Section III). Furthermore, Respondent’s actions are justified by the essential security provision of the BIT and the customary international law defense of necessity (Section IV).
ARGUMENTS

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THIS DISPUTE

15. Corellia and Dagobah agreed upon the language of Article 8(2) of the BIT, which provides that Respondent consents to binding arbitration on “any legal dispute between an investor of one Party and the other Party in connection with an investment.” The Tribunal lacks jurisdiction for three reasons. First, Claimant does not qualify as an “investor” under the BIT (Section A). Second, Claimant’s bonds do not qualify as investments under either the BIT definition or customary international law (Section B). And third, the 2003 PCA Award is irrelevant for the purposes of this dispute (Section C).

A. Claimant Does Not Qualify As an Investor

16. According to Article 31 of the Vienna Convention on the Law of Treaties (“VCLT”), a treaty should be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The language of the pertinent BIT “serves as lex specialis,” and it is generally accepted that it should be left to the “sole discretion of each Contracting State” to determine what should be read into contract terms.

17. Claimant does not qualify as an investor under the BIT. Article 1(2) of the BIT defines the term investor as “a Party or a national of a Party that attempts to make, is making, or has made an investment in the territory of the other Party.” Claimant fails to qualify in two respects. First, it has not made an investment as discussed below. Second, it has not made an investment in the territory of Respondent.

18. The plain language of Article 1 of the BIT clearly prescribes that a qualifying investment should be “made in the territory” of the relevant party. It further clarifies that territory “means the territory of the Parties, as well as the territorial sea and any maritime area situated beyond the territorial sea of the Party.” It is clear that territory means the physical territory of Respondent,

39 BIT, Art. 8(2), R-10.
40 VCLT, Art. 31.
41 Fraport, ¶305.
42 See, e.g., Delaume, p.242; Philip Morris, ¶203.
43 BIT, Art. 1(2), R-8.
44 See Section I.B.
45 BIT, Art. 1, R-8.
and that an investor must have \textit{made} the investment \textit{in} the territory. Consequently, the purchase of sovereign bonds, which Claimant made on secondary markets outside of the territory of Respondent, cannot qualify Claimant as an investor, even if the bond purchase allegedly had some remote effects in the territory of Respondent. Such a conclusion would lead to absurd outcomes where any purchase made abroad that has some impact on Respondent could qualify the purchaser as an investor. This is neither a logical interpretation, nor does the language the parties agreed upon indicate in any way that they consented to it.

19. Furthermore, the nature of sovereign bonds, especially those traded on secondary markets, does not allow for the purchase to be felt in the territory of the issuing country. When sovereign bonds are purchased abroad there is “typically no flow of even financial resources into the issuing country,”\textsuperscript{46} since the state that issues the bonds only receives funds on such issuance at a single time.\textsuperscript{47} Therefore, repeat sales of sovereign bonds on secondary markets abroad do not constitute a contribution in the territory of the issuing state.

20. In any event, even flows of financial capital cannot satisfy the physical presence required, and sovereign bonds, as intangible capital flows, are even further removed from satisfying the territorial link requirement. In \textit{LESI v. Algeria}, the tribunal adopted a territorial interpretation of “substantial contribution” \textit{in the country concerned}.\textsuperscript{48} While the tribunal noted the requirement is not absolute, it concluded that at least some of the contribution has to occur in the territory of the host country.\textsuperscript{49} Even if a part of the funds is committed from abroad, they have to be “allocated to the project to be carried out” in the host country.\textsuperscript{50} This again suggests that either the funds have to be committed in the issuing state’s territory or the contribution should directly go to a physical project or tangible investment with a substantial contribution in that territory. Sovereign bonds bought abroad on secondary markets in which the funds do not directly go to the issuing state can neither be “made in the territory” of Respondent, nor can they directly make a significant contribution in its territory.

\textsuperscript{46} Waibel, p.727.
\textsuperscript{47} Waibel, p.727.
\textsuperscript{48} \textit{LESI}, ¶13(iv)(a).
\textsuperscript{49} \textit{LESI}, ¶14(i).
\textsuperscript{50} \textit{LESI}, ¶14(i).
21. Giorgio Sacerdoti confirms this understanding, concluding that sovereign bonds would not meet the territorial link requirement with the host country, and therefore, tribunals would lack jurisdiction, *ratione loci*.\(^{51}\)

22. In the cases where territorial connection has been established, such as *SGS v. Philippines* and *SGS v. Pakistan*, the tribunals concluded that some related business activity had to occur in the host state or the injection of funds had to occur in the host state following the expenditures abroad.\(^{52}\) Neither of these tests is met in the present case, as explained above. The *Fedax* tribunal discussed an alternative interpretation of the territorial requirement. It concluded that the territorial link is satisfied when the place where the benefit of the transaction is felt is the respondent state. However, *Fedax* has been heavily criticized and is inapposite here. *SGS v. Philippines*, as well as other tribunals, criticized the *Fedax* decision as having a “very broad definition of territoruality.”\(^{53}\) Michael Waibel similarly criticized it as unnecessarily broad and circular given that the BIT had clearly outlined a territorial requirement.\(^{54}\) Additionally, the facts underlying *Fedax* are entirely different from the case before this tribunal. In *Fedax*, the promissory notes sold by the state financed a specific portion of the state budget under a specific law of public credit. Therefore, there was a direct territorial impact in the physical boundaries of the respondent with the purchase of each promissory note. Additionally, the notes were not bought on secondary markets after numerous resales, but were endorsed to the claimant by the party who directly contracted with the State to issue the notes.\(^{55}\) In the current case, the sole monetary benefit happened on issuance, and further resales on secondary markets do not have an impact in the territory of Respondent.

23. Even if the original purchaser of the sovereign bonds made a contribution to Respondent’s development, Claimant, having repurchased the bonds on the secondary market abroad, certainly did not contribute to Respondent’s development. Because Claimant did not make any investment in the territory of Respondent, Claimant does not qualify as an investor and this Tribunal lacks jurisdiction.

\(^{51}\) Sacerdoti, p.308.


\(^{53}\) Waibel, p.731.

\(^{54}\) Waibel, p.731.

\(^{55}\) *Fedax*, ¶13.
B. Sovereign Bonds Are Not Qualified Investments Under the BIT Nor Under Customary International Law

24. Claimant’s sovereign bonds do not qualify as investments under the BIT or customary international law and therefore are not entitled to the BIT’s protections. First and foremost, the language of the BIT does not indicate that sovereign debt or any other financial obligations should be included as investments (Section 1). The vast majority of scholars and tribunals have let the parties to BITs determine whether “investment” should include sovereign debt (Section 2). Finally, sovereign bonds do not meet the typical characteristics of an investment (Section 3).

1. The BIT Does Not Include Or Suggest That Sovereign Bonds Are an Investment

25. In accordance with VCLT Article 31, the Tribunal should look to the plain and ordinary meaning of the term investment as defined in the BIT. The definition of investment under Article 1 of the BIT does not suggest in any way that the contracting parties wanted to consider debt instruments as investments. Article 1 refers to assets “an investor owns or controls” that have “the characteristics of investment.”56 The BIT provides a sample list of qualifying investments, which is entirely comprised of equity instruments or tangible and intangible property.57 Debt instruments or capital unrelated to an enterprise or property are notably absent from the list.

26. The absence of reference to debt instruments or capital is critical because BITs under which tribunals have found sovereign debt to be an investment specifically listed bonds and debt instruments as potential “investments.” For example, in Ambiente the definition of investment referred to “any other right to benefits or services of an economic value, as well as capitalized income”58 and listed as examples of investments “bonds” and “public or private securities.”59 Similarly, in Abaclat, the relevant BIT specifically listed “bonds, private or public financial instruments or any other right to performances or services having economic value, including capitalized revenues” as well as “any right of economic nature conferred under any law or agreement.”60

27. Respondent does not argue that sovereign debt can never be considered an investment. However, the determination as to whether sovereign debt is an investment is properly left to the

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56 BIT, Art. 1, R-7.
57 BIT, Art. 1, R-7.
58 Ambiente, ¶402.
59 Ambiente, ¶400.
60 Abaclat, ¶336.
parties to the BIT, and in this case, the parties clearly did not intend to cover sovereign debt as a protected investment under the BIT.

2. Sovereign Bonds Do Not Meet the Basic Characteristics of an Investment

28. The Salini tribunal outlined a test of five typical hallmarks of investments, which has become commonly applied to address the uncertainty surrounding the definition of investment under the ICSID Convention. Respondent acknowledges that the Tribunal need not apply the Salini test, because the language of the BIT already excludes sovereign bonds. The Salini test, however, makes clear that sovereign bonds lack the basic criteria of an investment, underscoring that sovereign bonds should not be considered investments absent explicit language in the treaty.

29. The five factors of the Salini test require (1) a substantial contribution on the part of the investor, (2) a certain duration, (3) the existence of operational risk, (4) regularity of profit and return, and (5) a contribution to the development of the host state.

30. First, Claimant’s individual purchase of sovereign bonds could not have possibly constituted a “substantial contribution” as compared to the entire sovereign debt of Respondent. Claimant is a hedge fund purchasing a variety of financial instruments on a regular basis. As the tribunal in Joy Mining noted, where the activity the alleged investor conducted was the regular type of business activity for the company and there was no specific or tangible contribution to the host state, the company has not made an investment. There is no reciprocity or risk sharing in the purchase or repurchase of a small set of sovereign bonds abroad.

31. Second, the bonds must have a significant duration. The duration element refers to the duration of the continued investment. With sovereign bonds, the totality of the price is paid in its entirety early on, and there can be no continued commitment. This reasoning was confirmed by the Joy Mining tribunal, which found that where the totality of the price for promissory notes was paid early on, the duration element had not been satisfied. Additionally, once purchased, sovereign bonds can be held for only a short period of time and then resold on secondary

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61 See Amerasinghe, p.181; Schreuer, 2009 pp.121, 149.
62 Abaclat, ¶341.
63 Joy, ¶¶55–56.
64 Waibel, pp.723–24.
65 Ambiente, ¶484.
66 Joy, ¶57.
markets. Because sovereign bonds are purchased at a singular point in time and can be resold shortly thereafter, the duration of the commitment in the current case is insignificant.

32. Third, investments should have some commercial or operational risk.\textsuperscript{67} Waibel clarifies that investment risks relate to the risk of success or failure on the merits of the commercial undertaking or the special purpose to which the capital has been committed.\textsuperscript{68} By contrast, sovereign bonds are “mainly tied to the general macroeconomic condition of the issuing country.”\textsuperscript{69} The repayment profit on sovereign bonds is fixed, unconditional, and independent of the success of a commercial undertaking or capital project.\textsuperscript{70} It does not depend on where the host country decides to put the resources. The only risk that bondholders face is that of “any contractor doing business with the government;”\textsuperscript{71} therefore, sovereign bonds simply face the risk of ordinary default or commercial risk as compared to the risk associated with investments. From a treaty point of view, it would be unthinkable that Respondent would have agreed to protect any commercial activity under the BIT. “Risk sharing” between the investor and the host country is an essential element that defines the existence of an investment.\textsuperscript{72}

33. Fourth, there must be profit and return associated with payments related to the success or failure of an investment. The term “profit” as understood in the investment context relates to the expectation of increase in profits or returns based on the success or failure of the investment. In the case of sovereign bonds, the terms of any payments are predefined, and there can be no profit and return as understood in the context of investments.

34. Fifth, Claimant has failed to demonstrate how Claimant’s purchase of bonds on the secondary markets outside the territory of Dagobah has allegedly contributed to Respondent’s development. As Waibel puts it, if a transaction displayed duration, risk sharing, and a territorial link, it is likely that it affected the host country’s development.\textsuperscript{73} As these three factors are not present in the case of these sovereign bonds, it is unlikely that the purchase of sovereign bonds has contributed to the development of the host state. The tribunal in \textit{LESI v. Algeria} confirmed

\textsuperscript{67} \textit{Abaclat}, ¶341; Waibel, p.726.
\textsuperscript{68} Waibel, p.726.
\textsuperscript{69} Waibel, p.726.
\textsuperscript{70} Waibel, p.726.
\textsuperscript{71} Waibel, p.726.
\textsuperscript{72} Waibel, p.726.
\textsuperscript{73} Waibel, p.724.
this and suggested that retail bondholders are less likely to satisfy the “substantial commitment” and “contribution to host state development” factors.74

35. For the reasons listed above, even if this Tribunal decides to apply the Salini test in the current arbitration, Claimant’s bonds do not qualify as an investment.

C. The PCA Award Has No Effect on the Current Arbitral Proceedings

36. The PCA Tribunal, an ad hoc tribunal, issued an award on 29 April 2003 (the “PCA Award”) to resolve a dispute between Respondent and Corellia regarding particular sovereign bonds, which Respondent restructured during its 2001 financial crisis.75 That decision has no bearing here. First, this Tribunal should give no weight to the PCA Award because its application is limited to the context in which it was rendered—namely, the particular dispute between Respondent and Corellia regarding the particular sovereign bonds at issue in the 2001 financial crisis (Section 1). Second, the PCA Award should not influence this Tribunal because the PCA Tribunal’s decision is not a source of law (Section 2). Third, the ad hoc PCA Tribunal did not have the authority to issue an interpretation divorced from and applicable beyond the specific facts of the dispute, which would effectively amend the BIT (Section 3). Finally, the purpose and structure of the international investment law regime requires that the inter-state and investor-state arbitration tracks remain completely separate, meaning that inter-state tribunal decisions cannot be binding on investor-state tribunals (Section 4).

1. The Ad Hoc PCA Tribunal’s Decision is Not Binding on This Arbitration Proceeding Because It Was Restricted to Its Context

37. The PCA Tribunal was an ad hoc tribunal, established under Article 7 of the BIT to resolve a dispute between the BIT parties. It is a commonly accepted principle of international law that ad hoc arbitration tribunal decisions are not binding beyond the parties and facts of the dispute:

There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals.76

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74 LESI, ¶72(iv).
75 PCA Award, R-13–17.
76 SGS v. Philippines, ¶97.
It is also widely accepted that there is no doctrine of *stare decisis* or rule of precedent in international arbitration.\(^{77}\)

38. Indeed, the ICSID Convention specifically limits the reach of investment arbitration tribunals’ awards to the parties of the dispute, specifying in Article 53 that “the award shall be binding on the parties”—and only the parties.\(^{78}\) As Christoph Schreuer explains in his treatise, Article 53(1) precludes the principle of binding precedent in successive ICSID cases.\(^{79}\) Moreover, nothing in the Convention’s *travaux préparatoires* indicated that *stare decisis* applies in ICSID arbitrations.\(^{80}\) Other ad hoc tribunals and committees have reinforced this rule by noting that they are not bound by the decisions of previous tribunals and committees.\(^{81}\)

Thus, the PCA Tribunal’s decision, issued in a dispute between Respondent and Corellia regarding the restructuring of particular bonds issued pre-2001 during the 2001 financial crisis, cannot control this Tribunal, which must now decide a dispute between different parties, Respondent and Calrissian, regarding the restructuring of different bonds issued in 2003 during a different financial crisis.

40. If this Tribunal were to relinquish its independent judgment to rely on the PCA Tribunal’s decision, it would begin a revolutionary practice of judicial law-making by unconditionally adopting an earlier tribunal’s decision. However, “[i]n a legal order whose rules are created by inter-state agreement, judicial law-making and predecential force of awards is conceptually impossible.”\(^{82}\) Instead, “[t]he solution”—and the practice—“is that every tribunal should carefully apply law to facts in every individual case, without according legitimacy to whatever had been decided by tribunals.”\(^{83}\) Adopting other ad hoc tribunals’ treaty interpretations would be a veiled attempt at judicial law-making where the tribunal has no authority to do so.\(^{84}\) Thus, this Tribunal should rely on its own judgment in deciding this case.

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\(^{77}\) *SGS v. Philippines*, ¶97; *AES*, ¶23; Salacuse, p.155.

\(^{78}\) ICSID Convention, Art. 53.

\(^{79}\) Schreuer 2001, p.1101; *see also Wintershall*, ¶¶187, 194.

\(^{80}\) Schreuer 2001, p.1101.

\(^{81}\) *Amco*, Jurisdiction, ¶14(ii); *Amco*, Annulment, ¶44; *LTCO*, p.653; *Feldman*, ¶107; *Enron*, ¶40; *Enron*, Ancillary ¶25; *AES*, ¶¶17–33; *Bayindir*, Jurisdiction ¶76; *El Paso*, ¶39; *ADC*, ¶293.

\(^{82}\) Orakhelashvili, p.168.

\(^{83}\) Orakhelashvili, pp.169–70.

\(^{84}\) Orakhelashvili, p.170.
2. **The PCA Tribunal’s Decision Is Not a Source of Law and Is Thus Not Instructive to This Tribunal**

41. Not only is there no doctrine of precedent on which this Tribunal can rely to defer to the PCA Tribunal’s decision, but the PCA Award also is not a source of law on which this Tribunal may rely to issue its award. As the CME tribunal stated, decisions by other tribunals “cannot be considered as ‘international law,’” particularly because they “represent opinions of the individual persons.”

85 Similarly, in Mytilineos, the dissenting arbitrator explained that other arbitration decisions were not a source of law upon which the tribunal could rely. 86 According to Article 38 of the Statute of the International Court of Justice, judicial decisions can be a subsidiary means of determining international rules of law, but they themselves do not constitute international law. 87 ICSID tribunals have also limited their reliance on other arbitration decisions as auxiliary sources—not direct sources—for determining what the law is. 88

42. Deference to the PCA Award would, in fact, violate Articles 31 and 32 of the VCLT, which govern treaty interpretation. Article 31 instructs that, when interpreting a treaty, one may take into account: 1) any agreement relating to the treaty made by all the parties, 2) any instrument made by one or more of the parties in connection with the treaty and accepted by the other parties as an instrument related to the treaty, 3) any subsequent agreement between the parties regarding the treaty’s interpretation, 4) any subsequent practice applying the treaty that establishes the parties’ agreement as to the treaty’s interpretation, and 5) relevant rules of international law applicable to the parties’ relationship. 89 The PCA Tribunal’s decision does not fit into any of those categories. It is not an agreement made by the parties, nor a treaty instrument accepted by the parties, nor subsequent practice of the parties establishing agreement as to the BIT’s interpretation, nor a rule of international law. At best, it is a subsequent interpretation by unrelated third parties (the PCA Tribunal).

43. Article 32, in turn, permits reference to “supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion,” where the meaning of a treaty is ambiguous or manifestly unreasonable. However, tribunal decisions are

87 ICJ Statute, ¶ 38(1)(d).
89 VCLT, Art.31.
not supplementary means of treaty interpretation under Article 32. Previous decisions are qualitatively different than the supplementary means defined in Article 32, which precede the treaty’s coming into force and are exclusively aimed at demonstrating the content of the treaty.\(^{90}\) In short, “the use in the award of previous decisions as an interpretive factor has no conceptual and legal justification.”\(^{91}\)

3. **This Tribunal Should Not Apply the PCA Tribunal’s Award Because It Did Not Have Authority to Amend the BIT**

44. The BIT did not grant the ad hoc PCA Tribunal authority to amend the BIT by issuing an abstract interpretation applicable beyond the dispute before it and to which the BIT parties did not mutually agree. Indeed, if this Tribunal agreed that ad hoc inter-state tribunals have the power to interpret treaties outside the context of a particular dispute, it would enable state parties to renegotiate entire treaties through inter-state arbitration and leave the ultimate decision on treaty amendments in the hands of ad hoc tribunals, rather than the state parties to the treaty.\(^{92}\) If such law-making by judges were permitted, it would eventually undo the VCLT’s achievement of transparency in treaty modification.\(^{93}\)

45. The authority to provide an abstract, authoritative interpretation of a treaty provision is reserved for the mutual agreement of the treaty parties.\(^{94}\) In this context, a leading French commentary observes that “[t]he expression ‘authentic interpretation’ designates that which is furnished directly by the parties” while “an unauthentic interpretation . . . is given by a third party.”\(^{95}\) Similarly, Linderfalk’s treatise on treaty interpretation states that “[a]n authentic interpretation exists when all parties to a treaty reach an agreement . . . to henceforth understand the treaty in some specific way.”\(^{96}\) Likewise, Mustafa Kamil Yasseen, a principal drafter of the VCLT, observed that, “more than anyone, the parties to the treaty are best situated to understand the sense of the treaty that they concluded and what they truly intended.”\(^{97}\) The treaty parties remain the masters of the meaning of the BIT, and nowhere in the BIT did they share that authority with ad hoc inter-state tribunals.

\(^{90}\) Orakhelashvili, p.168.
\(^{91}\) Orakhelashvili, p.168–69.
\(^{92}\) Ecuador, Opinion, ¶53.
\(^{93}\) Ecuador, Opinion, ¶53.
\(^{94}\) Ecuador, Memorial, n.162.
\(^{95}\) Dihn et al., p.251; see also Dörr & Schmalenbach, p.532.
\(^{96}\) Linderfalk, p.25 n.31.
\(^{97}\) Yasseen, p.47.
46. Moreover, the decision of an inter-state tribunal binds the state parties with respect to the specific dispute at issue in the inter-state arbitration, but the decision does not become an integral part of the treaty.\textsuperscript{98} If the parties had intended interpretive inter-state decisions rendered by tribunals under Article 7 to bind investor-state tribunals with their treaty interpretations, the parties could have included a provision providing for future substantive treaty interpretations by inter-state tribunals under Article 7, as found in NAFTA Article 1131(2).\textsuperscript{99} NAFTA Article 1131(2) gives explicit notice \textit{ex ante} to all parties that “[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.” Thus, the United States, Mexico, and Canada, in the case of NAFTA, explicitly established a procedure for consenting to a new interpretation of the treaty,\textsuperscript{100} which the Respondent and Corellia have not done. Thus, had the parties intended that the ad hoc inter-state tribunals have broader powers to address abstract interpretive questions, they would have had to state this expressly in the BIT.\textsuperscript{101}

47. To accept that ad hoc tribunals could issue treaty interpretations binding upon the state parties beyond a particular dispute would be to enable ad hoc tribunals to engage in judicial law-making. International tribunals have warned against the international “government of judges” that would rule—“a notion so opposed to the present international community”—if arbitral tribunals engaged in the legislative function.\textsuperscript{102} Likewise, another tribunal cautioned:

[A] tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations – or to modify a contract…[its] powers are restricted. It is not open to doubt that an arbitral tribunal – constituted on the basis of a “compromissory” clause contained in relevant agreements between the parties to the case, and seized in the matter unilaterally by one of the parties only – could not, by way of modifying or completing a contract, prescribe how a provision . . . must be applied.\textsuperscript{103}

48. There has been no mutual agreement between Respondent and Corellia that the BIT covers sovereign bonds. Respondent objected to the PCA’s decision publicly, and noted that the only reason it was taking no further legal action at the time to challenge the PCA Tribunal’s

\textsuperscript{98} See Ecuador, Opinion, ¶52.
\textsuperscript{99} Ecuador, Opinion, ¶19.
\textsuperscript{100} Ecuador, Opinion, ¶43.
\textsuperscript{101} See Dual Nationality, p.34-35.
\textsuperscript{102} Nuclear Test, p.297.
\textsuperscript{103} AMINOIL, pp.1015-16.
award was because the negotiations with the Corellian bondholders had reached a successful conclusion. At no point has Respondent tacitly approved of the PCA Tribunal’s decision.

49. It is this Tribunal’s responsibility to evaluate the intent of both BIT parties based on the text of the BIT and state practice. Indeed:

The role of the treaty interpreter is not to look for the will of one of the parties or the intended will of one of the parties, but the consensual will of all of the parties, which stems from the text they agreed to and upon which the agreement was built.

Respondent has been abundantly clear and consistent in its position that it did not intend for the BIT to govern sovereign bonds. Thus, the PCA Tribunal’s interpretation of the BIT does not apply beyond the dispute in which it was rendered, nor has it ever been mutually accepted by the BIT parties as an authoritative interpretation of the BIT to apply in all cases.

4. The Purpose and Structure of the International Investment Law Regime Requires That the Inter-State and Investor-State Arbitration Tracks Remain Separate

50. The BIT is a treaty for the benefit of third parties—investors—and there is special concern that interpretation by one or both of the state parties does not undermine the rights and expectations of third-party beneficiaries. To ensure this, the BIT has created two independent jurisdictional tracks—the inter-state track governed by Article 7 of the BIT and the investor-state track governed by Article 8 of the BIT. The decisions in the inter-state track may not force amendments to the provisions falling within the investor-state jurisdictional track.

51. Article 7 says nothing about whether inter-state tribunal decisions are binding on investor-state tribunals acting under Article 8. As discussed above, the BIT parties would have included an express provision stating that inter-state tribunal decisions are binding on investor-state tribunals if they had so intended, just as other state parties have done in other treaties. Similarly, the parties could have allowed standing for investors or states in inter-state and investor-state disputes, respectively, on questions of interpretation of the BIT, as NAFTA Article

104 PO2, ¶10, R-48.
105 Baptista, p.135.
106 Ecuador, Opinion, ¶3.
107 Ecuador, Opinion, ¶¶3, 16.
108 Ecuador, Opinion, ¶3.
109 Ecuador, Opinion, ¶19.
1128 provides, if the parties had intended to integrate the two jurisdictional tracks. Instead, the BIT provides no overlap between investor-state and inter-state tribunals, as Reisman pointed out in the context of the near identical U.S.-Ecuador BIT.

52. Keeping the inter-state and investor-state dispute resolution tracks completely independent is crucial to the BIT’s purpose of providing relief for investors independent from the inter-state process. The effect of the innovation proposed by claimant—namely to make inter-state arbitral decision controlling over investor-state decisions—“would be to erode the effectiveness of BIT’s investor-state arbitration.” The principal goal of providing investors with the authority to initiate arbitration proceedings against states was to depoliticize the investment dispute resolution process. Investor-state arbitration aims to replace the traditional system of investor-state dispute resolution by diplomacy, whereby investors were subject to the “caprice of sovereign-to-sovereign politics,” ultimately discouraging foreign investment by private investors.

53. Making inter-state arbitration decisions superior over investor-state arbitration decisions would have several negative consequences that would ultimately impede the purpose of investor-state arbitration. First, allowing inter-state tribunals to make decisions binding on investor-state tribunals would re-politicize the investor-state dispute resolution process, for it would once again subject investors’ rights to the whims of inter-state politics. If investor-state tribunals are not independent, then a state which is unhappy with an award may try to undermine the decision by reinitiating the issue at the inter-state level. Similarly, investors who are dissatisfied with their awards will press their governments to initiate inter-state arbitrations to undermine the legitimacy of the awards rendered by the investor-state tribunals.

54. Second, allowing inter-state tribunals to make decisions binding on investor-state tribunals would threaten parties’ ability to achieve finality in arbitration. Effectively, allowing inter-state dispute resolution to alter investor-state tribunal decisions would create a de facto

110 Ecuador, Opinion, ¶21.  
111 Ecuador, Opinion, ¶22.  
112 Ecuador, Opinion, ¶24, 35.  
113 Ecuador, Opinion, ¶54.  
114 Ecuador, Opinion, ¶24.  
115 Ecuador, Opinion, ¶25.  
116 Ecuador, Opinion, ¶37.  
117 Ecuador, Opinion, ¶29.  
118 Ecuador, Opinion, ¶29.
advisory or appeals process where the BIT provides for none.\(^{119}\) Thus, altering the independence of the two dispute resolution tracks would frustrate investors’ rights under the treaty and the possibility of a final, binding investor-state arbitration.\(^{120}\) As Reisman explained:

> Instead of an independent system of investor-initiated investor-state arbitration, which is the essential foundation of contemporary international investment law, any arbitral award adverse to a host-state could henceforth be undermined by the losing state re-raising it at the inter-state level.\(^{121}\)

55. Thus, any decision by this Tribunal that would recognize the PCA Tribunal’s decision as binding on it to any degree would risk destabilizing the two track inter-state and investor-state system and would ultimately return investors to the mercy of inter-state politics.

II. The Claims Are Barred by the Forum Selection Clause Contained in the Old Sovereign Bonds

56. Claimant purchased bonds that contained a provision explicitly stating, “Any dispute arising from or relating to this contract will be exclusively resolved before the Courts of Dagobah.”\(^{122}\) The broad language of this forum selection clause precludes the Tribunal from exercising its jurisdiction over these claims—which are “related to” the sovereign bonds—as the proper jurisdiction for these claims is the courts of Dagobah.\(^{123}\) The essential basis of the claims Calrissian has submitted before this Tribunal is a breach of contract, not a breach of the BIT (Section A). The forum selection clause in the bonds should control over and is not overridden by the general dispute resolution clause of the BIT, which has not overridden it (Section B). Furthermore, the BIT does not contain an umbrella clause, leaving Claimant with no treaty claim for a simple breach of contract (Section C). The Tribunal should respect the intent and autonomy of the parties and decline jurisdiction so that the claims can be brought before the forum agreed upon between the parties (Section D).

A. Claimant’s Essential Claims Are for Breach of Contract, Not a Breach of the BIT

57. Although Claimant has framed its claims as breaches of Article 2 of the BIT,\(^{124}\) the alleged claims are fundamentally for a breach of the terms of its sovereign bond contract and are

\(^{119}\) Ecuador, Opinion, ¶32.

\(^{120}\) Ecuador, Opinion, ¶32.

\(^{121}\) Ecuador, Opinion, ¶38.

\(^{122}\) PO2, ¶16, R-49 (emphasis added).

\(^{123}\) Facts, ¶20, R-4; PO2, ¶16, R-49; see BIVAC, ¶145.

\(^{124}\) RA, ¶11, R-29.
inappropriately brought before the Tribunal. The ad hoc committee in the Vivendi Annulment stated:

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.\footnote{Vivendi, ¶98; Woodruff, p. 213.}

As highlighted by the American-Venezuelan Mixed Claims Commission in the Woodruff case, the very agreement that formed “the fundamental basis” of the claimant’s claims forced it to withdraw from its jurisdiction because it contained an exclusive forum selection clause.\footnote{Woodruff, p. 223.} Here, the bonds clearly form the essential and fundamental basis of Claimant’s allegations. The terms of the bonds purchased by Claimant required the agreement of all bondholders prior to amendment.\footnote{Facts, ¶17, R-3.} As part of its necessary and IMF-backed restructuring, Respondent exchanged Claimant’s bonds for new bonds—in essence, modifying the original bonds—with the agreement of 85% of bondholders rather than 100%.\footnote{Facts, ¶19, R-3.} Claimant’s claims do not go beyond this allegation of breaching the terms of its contract with Respondent. Claimant’s purported “investment” has not brought it into the territory of Dagobah,\footnote{See Section I.A.} and none of its claims relate to Respondent’s treatment of Claimant not directly related to the modification of the bonds. Where all that has been alleged in a so-called treaty claim is merely that a contract has been violated, Professor Abi Saab rightly points out that “such a nominal trick does not suffice to transform the contract claim into a treaty claim or to create a parallel treaty claim.”\footnote{Saab, ¶5.}

58. Because Claimant is contending nothing more than a breach of the terms of the bond, its claims should be dismissed, as was done by the tribunal in SGS v. Philippines. In that case, there was a dispute over the amount of money owed under a contract—specifically the failure to pay the money owed amounted to a breach of the Philippines-Switzerland BIT’s fair and equitable treatment standard.\footnote{SGS v. Philippines, ¶¶159, 162.} Similarly, here, the question is whether Dagobah can change the percentage of bondholders required by the terms of the bond to enact an exchange offer. The basis of Claimant’s argument is that by failing to adhere to the modification provision of the

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\footnote{Vivendi, ¶98; Woodruff, p. 213.}
\footnote{Woodruff, p. 223.}
\footnote{Facts, ¶17, R-3.}
\footnote{Facts, ¶19, R-3.}
\footnote{See Section I.A.}
\footnote{Saab, ¶5.}
\footnote{SGS v. Philippines, ¶¶159, 162.}
\end{flushleft}
contract, Respondent has failed to treat it in a fair and equitable manner. Such a claim does not transform a basic breach of contract claim into a breach of the BIT.

59. In contrast, tribunals that have ignored a forum selection clause have only done so where the claims allege actions beyond a breach of contract. For example, in the *Vivendi* case, the actions of the Argentine provincial government at issue went well beyond breaches of the concession contract it had with the claimant. The municipality had incited consumers not to pay their water bills and levied unauthorized tariffs and fines on the company. The claimant in *Vivendi* was arguing that the combined effect of all these bad faith measures was to frustrate the concession and violate the fair and equitable treatment standard of the Argentine-France BIT. Here, Claimant alleges no harassment on the part of any Dagobah governmental entity; its only arguments rest on the government not adhering to the terms of the bonds.

60. If the fundamental basis of the claim were in treaty, the *Vivendi* ad hoc committee states that the contract might “at most . . . be relevant.” The bonds are more than just relevant to Claimant’s claims—they are essential. As a result, the basis of the claims is contract and not treaty, and effect should be given to the contract’s forum selection clause.

61. Finally, Respondent’s actions have not risen to the requisite level of sovereign interference that some tribunals have deemed necessary to distinguish between contract claims barred by a forum selection clause and treaty claims properly brought before a tribunal. Respondent did nothing more than amend Claimant’s bonds with the agreement of 85% of bondholders rather than 100%. This measure was taken during an IMF-initiated restructuring to prevent Dagobah from defaulting on its obligations. Such action is no different than the action any commercial party might take when facing bankruptcy. As a result, there has been no sovereign interference to potentially elevate the contract claim into a treaty claim.

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133 *Vivendi*, ¶106.  
134 *Vivendi*, ¶106.  
135 *Vivendi*, ¶106.  
137 *Vivendi*, ¶101.  
138 E.g. *Daimler*, ¶62.
B. The Exclusive Forum Selection Clause in the Bond Has Not Been Overridden by the BIT and Remains the More Specific Provision with Respect to This Dispute

62. The exclusive jurisdiction clause has not been overridden by a provision of the BIT or the SCC Rules and should therefore be respected. As suggested by the tribunal in *SGS v. Philippines*, the Tribunal must ask whether the BIT or the applicable rules grant investors “the right to pursue contractual claims under the BIT disregarding the contractually chosen forum.” Article 8 of the BIT is a general provision whereby Corellia and Dagobah consent to arbitration for “any legal dispute between an investor of one Party and the other Party in connection with an investment.” The forum selection clause in the bonds, on the other hand, specifically mentions “disputes arising from or relating to this contract.” The BIT dispute resolution clause is a general provision, written without any specific agreement or dispute in mind, while the forum selection clause of the bond was specifically negotiated and drafted with bond-related disputes in mind. Schreuer has stated that the latter should be “given precedence over a document of more general application.” Such a result also comports with the legal maxim of *generalia specialibus non derogant*, meaning “the general does not detract from the specific,” upon which the tribunal in *SGS v. Philippines* relied. Therefore, Article 8 of the BIT cannot override the forum selection clause, which should be respected by the Tribunal. Nor do the SCC Rules contain any provision that might suggest that submission to arbitration under the rules is to the exclusion of any other remedy, as stated in Article 26 of the ICSID Convention.

63. As a result, this Tribunal is faced with “a valid and applicable forum selection clause affecting the substance of [Claimant’s] claim.” Respondent submits that the clause should thus preclude the Tribunal from hearing the claims—or at the least, stay them pending proceedings on the contract claims before a Dagobah court. Claimant should not be allowed to accuse Respondent of breaching one term of the contract while it seeks to ignore another term of the contract.

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139 *SGS v. Philippines*, ¶139; see also *Bosh*, ¶253.
140 BIT Art. 8, R-10.
141 PO2, ¶49, R-49 (emphasis added).
143 *SGS v. Philippines*, ¶141.
144 *SGS v. Philippines*, ¶149; *BIVAC*, ¶142.
C. The BIT Does Not Contain an Umbrella Clause, Leaving Claimant with No Path to Argue That a Simple Breach of Contract Is a Breach of the BIT

64. Tribunals that have inquired into whether the forum selection clause was overridden only considered the question because the BIT at issue contained an “umbrella clause.” Umbrella clauses place an obligation on the host state to observe all obligations it enters into in relation to an investment or with an investor of the other contracting state. In essence, they function to elevate contractual breaches into treaty breaches. The Corellian-Dagobah BIT does not contain an umbrella clause. The absence of such a provision in the BIT further solidifies Respondent’s argument that Claimant’s claims are not properly brought before this Tribunal, and Respondent respectfully requests that the Tribunal dismiss the claims.

D. Respect for Party Autonomy and Intent Should Lead the Tribunal to Decline Jurisdiction So the Claims Can Be Heard in the Agreed-Upon Forum

65. The forum selection clause in the bonds evinces a clear and explicit statement of the parties’ intent to hear disputes related to the bonds in Dagobah courts. Tribunals that have ignored a forum selection clause have usually done so when faced with a contract between a state entity and the claimant or the state and a subsidiary of the company. Thus the forum selection clause is less directly relevant for determining the intent of the parties before the tribunal. Here, the sovereign bond is a direct contract between the two parties before the Tribunal—the state of Dagobah and Calrissian. In signing the contract, they agreed to be bound by an exclusive forum selection clause, and this Tribunal should hold Claimant to that agreement.

66. The fact that the BIT existed at the time the bond was drafted evinces that the parties intended to hear contract-related disputes in accordance with the contract’s forum selection clause. The BIT was agreed upon in 1992 while Claimant’s sovereign bonds were issued in 2003. Dagobah undoubtedly was aware of the BIT’s existence and the fact that Corellian nationals would end up as bondholders, yet it chose to include an exclusive and broadly worded forum selection clause in the contract. Had it wanted to allow investors the option to ignore the forum selection clause and bring claims before an arbitral tribunal under the BIT, it could have

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146 See, e.g. SGS v. Philippines; Bosh; BIVAC.
147 OECD, p.5.
148 See, e.g., Noble Ventures, ¶53.
149 BIVAC, ¶148; see also SGS v. Philippines.
150 E.g., Daimler.
151 BIVAC, ¶146.
included a provision “to the effect that the obligations it imposed were without prejudice to any rights under the BIT, including the possible exercise of jurisdiction” by a tribunal constituted under the SCC Rules.\textsuperscript{152} As pointed out by the tribunal in \textit{BIVAC v. Paraguay}:

\[\text{T}he \text{ fact that they did not do so is not without relevance: it indicates, at the very least, that the parties to the Contract…intended the exclusive contractual jurisdiction of the [Courts of Dagobah] to be absolute and without exception, and for it to mean what it says.}\textsuperscript{153}

In sum, the autonomy and will of the parties must be respected, and Claimant should not be allowed to claim Respondent has breached one provision of the contract while it ignores a valid provision of the contract it agreed to relating to the proper forum for dispute resolution.\textsuperscript{154} Respondent rightfully expected that Claimant would respect this commitment, and that the Tribunal will as well, given that Claimant has not presented any “powerful reason” for why it should not.\textsuperscript{155} The fundamental basis of Claimant’s claims are the contract, and no matter how “many more layers of claims one tops it with, it remains a contract claim, which has to be settled according to the terms of the contract and in the forum chosen in that contract.”\textsuperscript{156}

\textbf{III. Respondent Has Accorded Claimant’s Investments Fair and Equitable Treatment}

67. Claimant has the burden of proving that FET has been violated (Section A). Respondent has accorded Claimant’s investments fair and equitable treatment for all of the following reasons: Respondent has met the investor’s reasonable and legitimate expectations (Section B); Respondent has acted in good faith without harassment or coercion (Section C); Respondent has acted with transparency (Section D); Respondent has treated Claimant’s investment in a manner which is not unreasonable, discriminatory, or arbitrary (Section E); and Respondent has accorded Claimant due process of law (Section F).

\textbf{A. Claimant Has the Burden of Proving That FET Has Been Violated}

68. In interpreting the language of the FET clause, the Tribunal must first look to the ordinary meaning of the treaty language.\textsuperscript{157} In their ordinary meaning, “the terms ‘fair’ and

\textsuperscript{152} \textit{BIVAC}, ¶146.
\textsuperscript{153} \textit{BIVAC}, ¶146.
\textsuperscript{154} \textit{BIVAC}, ¶148.
\textsuperscript{155} \textit{BIVAC}, ¶¶148, 159.
\textsuperscript{156} Saab, ¶5.
\textsuperscript{157} VCLT, Art. 31.
‘equitable’ [...] mean ‘just’, ‘even-handed’, ‘unbiased’, ‘legitimate’.”158 However, the only thing that can be inferred based on these definitions is that the standard is breached only by “treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”159

69. For this reason, the Tribunal is likely to look at some or all of the following elements: whether Respondent has met Claimant’s reasonable and legitimate expectations; whether Respondent has acted in good faith without harassment or coercion; whether Respondent has acted with transparency; whether Respondent has treated Claimant’s investment in a manner which is not unreasonable, discriminatory, or arbitrary; and whether Respondent has accorded Claimant due process of law.

70. In assessing these elements, Claimant has the burden of “bringing sufficient proof that he did not receive treatment amounting to FET.”160 However, a judgment of fair and equitable treatment “cannot be reached in the abstract; it must depend on the facts of the particular case.”161 Moreover, “the fair and equitable treatment standard is not a laundry list of potential acts of misconduct.”162 Thus, the burden falls on the claimant to show not only that one element of fair and equitable treatment may have been violated, but that the standard has been breached as a whole when looking at all the facts and elements.

71. Respondent notes that whether the phrase “fair and equitable treatment” takes an autonomous meaning or a meaning under customary international law, the substantive elements required to be satisfied by the Respondent may be the same.163 For instance, “the Treaty standard is not different from that required under international law.”164 Therefore, the Tribunal is not obligated to enter into a discussion of the distinction between the minimum standard of treatment and an autonomous treaty standard because—as shown below—Respondent has satisfied its responsibilities regardless of which standard is adopted.

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158 MTD, ¶113.
159 S.D. Myers, ¶263.
160 Tudor, p.138.
161 Mondev, ¶118.
162 Micula, ¶517.
163 See, e.g., Schreuer, FET, p.17; CMS, ¶284; Saluka, ¶291; Azurix, ¶361.
164 Occidental, ¶190.
B. Respondent Has Met the Investor’s Reasonable and Legitimate Expectations

72. Tribunals have agreed that FET “protects the reasonable expectations of the investor at the time it made the investment.” Respondent notes that although tribunals have at times adopted this standard along with language about stable legal or business framework, it either conflates legitimate expectations with the standard of transparency or remains ultimately dependent on legitimate expectations. For instance:

[The host state] has failed to ensure a predictable and transparent framework for [the investor]’s investment, if it has frustrated [the investor]’s legitimate expectations . . . without reasonable justifications.

Therefore, the focus of the Tribunal should be on whether Claimant’s expectations were reasonable and legitimate and if so, whether Respondent had a reasonable justification for not fulfilling them.

1. Claimant’s Expectations Are Not Legitimate Because Claimant Seeks to Recoup Losses Arising from Normal Business Risk

73. A crucial element of the test is whether Claimant’s expectations were in fact reasonable and legitimate. In order for an investor’s expectations to be protected, they must “rise to the level of legitimacy and reasonableness in light of the circumstances.” Conversely, “it is often relatively easy for a claimant to postulate an expectation to condemn the very conduct that it complains of in the case before it,” and this concern is exemplified by Claimant’s claims before the Tribunal.

74. The risk of a potential default is one that a bond investor must evaluate before making an investment, and is therefore factored into the investment decision. For instance, riskier states will generally have to pay higher rates to attract investors. To this end, “a degree of independent judgment as to the scope of an investment risk will be expected from the investor.” For bonds, this independent judgment includes an assessment of the probability and magnitude of bond restructuring and default—namely the credit risk of the investment—is part of the investor’s

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165 National Grid, ¶173.
166 See, e.g., LG&E, ¶131.
167 See, e.g., Yannaca-Small, p.130; Diehl, p.367; Continental, ¶258; Duke Energy, ¶340.
168 Saluka, ¶348.
169 Saluka, ¶304; see also Duke Energy, ¶340.
170 Arif, ¶533.
171 Diehl, 415.
responsibility. Given that Claimant had the opportunity to evaluate the risk of a possible economic downturn and potential restructuring before making its investment, and obtained or should have obtained higher interest rates in order to be compensated for this risk, Claimant cannot now claim that it had a reasonable and legitimate expectation that the bonds would never be restructured.

75. Claimant’s expectation of whether or not Respondent’s bonds would be restructured relate to a business risk properly born by Claimant especially because the restructuring was necessitated by legitimate macroeconomic circumstances. Where an economic crisis has a significant impact on an investor’s business, “this impact must to some extent be attributed to the business risks the Claimant took when investing.”[^2]

76. Furthermore, Claimant is a sophisticated hedge fund and knew or should have known the added risks of investing in the sovereign bond of an emerging market economy, and the Tribunal must “take into account . . . the ‘existing conditions of the [host] country’ when applying the standards of a bilateral investment treaty.”[^3] Similarly, it is appropriate to expect a high level of due diligence in the foreign direct investment (“FDI”) context, since “FDI may be said to carry a higher risk than purely domestic investment.”[^4] Even basic due diligence would have revealed that Respondent’s government was forced to restructure its bonds in a previous economic crisis not even a decade prior.[^5] In fact, a survey of sovereign defaults between 1998 and 2010 by the IMF shows that the average haircut suffered by creditors was 40%, higher than the 30% haircut faced by the Claimant,[^6] demonstrating that Claimant’s losses may be even better than expected.

77. Even more fatal to Claimant, the bonds were rated B+ by Standard & Poors, a rating agency, at the time of purchase by Claimant.[^7] This rating is deemed “highly speculative” and lies below investment grade, a fact that would have put even an unsophisticated investor on notice of the possibility of default. In fact, reimbursing Claimant for its losses will create a moral hazard incentivizing investors to ignore both adequate due diligence and differentiation between

[^2]: CMS, ¶248.
[^3]: MTD, ¶171, citing American Manufacturing, at 1553.
[^4]: Diehl, 415.
[^5]: Facts, ¶¶3–4, R-1.
[^6]: See Das, p.10.
[^7]: PO3, ¶31, R-56.
sovereign bonds of varying credit risks. As one tribunal wrote, BITs “are not insurance policies against bad business judgment.”  

78. Because Claimant seeks an award for losses that are properly part of Claimant’s business as a hedge fund, as an insurance against risks that Claimant did or should have evaluated before making the investment, the Tribunal should find for the Respondent.

2. The Restructuring Was a Justified Act in the Public Interest

79. Another important consideration in the reasonable and legitimate expectations review would be the rationale behind the state’s conduct. FET “involves a balancing exercise that might take into account ‘the host State’s legitimate right subsequently to regulate domestic matters in the public interest.’”

80. This is especially true of general legislative acts such as the SRA, since “[i]t would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose.” Moreover:

The economic crisis is relevant to the interpretation of the FET standard . . . [t]he investor’s expectations must be balanced against the host state’s need to take action in the public interest at a time of crisis.

81. Given the needs of Respondent to implement legislation in the public interest, Respondent has satisfied its treaty obligations even if Claimant’s expectations were to be found reasonable and legitimate.

82. Indeed, legislation restructuring the bonds was passed in response to a financial crisis, pursuant to recommendations by the IMF and respecting IMF policies. The IMF support demonstrates that Respondent had a legitimate public interest need to enact legislation to deal with an economic crisis and unsustainable debt levels. Additionally, the legislation Claimant now challenges did not mandate any specific haircut of the bonds, but instead provided for a wide-ranging mechanism whereby a 75% majority-by-value of bondholders could agree to a

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178 Maffezini ¶64; see also MTD, ¶178.
179 Arif ¶537, citing Saluka, ¶305.
180 Continental ¶258.
181 EDF ¶1005.
182 Facts ¶15, 18, R-3.
restructuring in all bonds governed by Dagobah law.\textsuperscript{183} Both conformance with IMF policies and the voluntary nature of the restructuring mechanism, which resulted ultimately in a haircut below the average in sovereign defaults, show that Respondent acted to ameliorate—to the best of its ability—the effects of its policy on Claimant.

83. Even if Claimant’s expectations that Respondent’s bonds would not be restructured were reasonable and legitimate, they must be balanced by the legitimate need of Respondent to regulate affairs in the public interest. Therefore, Respondent’s actions did not breach the standard of fair and equitable treatment.

C. Respondent Has Acted in Good Faith and Without Harassment or Coercion

84. Respondent’s only action was to enact legislation in good faith for the purpose of addressing an economic crisis and unsustainable debt levels, and in particular pursuant to recommendations by the IMF.\textsuperscript{184} Actions amounting to bad faith include:

the use of legal instruments for purposes other than those for which they were created[,] . . a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the one put forth by the government, and expulsion of the an investment based on local favoritism.\textsuperscript{185}

The standard for proving bad faith, on the other hand, is a “demanding one.”\textsuperscript{186} Here, Respondent took good faith measures to address an economic crisis. It did so with the IMF’s support, and with the support of bondholders representing approximately 70% of the aggregate value outstanding.\textsuperscript{187}

85. Similarly, harassment and coercion—or abusive treatment, more generally—involve “unwarranted and improper pressure, abuse of power, persecution, threats, intimidation and use of force” such as:

arresting or jailing of executives or personnel; threats of or initiation of criminal proceedings; deliberate imposition of unfounded tax assessments, criminal or other fines; arresting or seizing of physical assets, bank accounts and equity; interfering with, obstructing or preventing daily business operations; and

\begin{itemize}
\item \textsuperscript{183} Facts ¶17, R-3.
\item \textsuperscript{184} Facts ¶¶ 15, 18, R-3.
\item \textsuperscript{185} Frontier Petroleum, ¶300.
\item \textsuperscript{186} Bayindir, Award ¶143.
\item \textsuperscript{187} Facts, ¶18, R-3.
\end{itemize}
deportation from the host State or refusal to extend documents that allow a foreigner to live and work in the host State.\textsuperscript{188}

Claimant has provided no evidence that Respondent made any threats, or engaged in any other act listed above. As such, Respondent has met its duties to act in good faith and without harassment or coercion.

\textbf{D. Respondent Has Acted with Transparency}

86. Some tribunals have found a separate requirement of transparency under FET, declaring that a foreign investor “expects the host State to act in a consistent manner, free from ambiguity and totally transparently.”\textsuperscript{189} Later tribunals, however, have turned away from this view, stating that “if their terms were to be taken too literally, they would impose upon host States’ obligations which would be inappropriate and unrealistic.”\textsuperscript{190}

87. In this vein, the 2012 \textit{UNCTAD Series on Issues in International Investment II} found that the notions of transparency and consistency “may not be said to have materialized into the content of fair and equitable treatment with a sufficient degree of support.”\textsuperscript{191} This was a direct and intentional departure from an earlier edition, which Rudolf Dolzer and Schreuer had cited as establishing that requirement of transparency is “firmly rooted in arbitral practice.”\textsuperscript{192} Similarly, the above statement from Dolzer and Schreuer is no longer available in the second edition of their book.\textsuperscript{193}

88. One reason for this change may be that the scholars mistook a textual, treaty-specific decision for a general principle. One of the few decisions to import the notion of transparency, \textit{Metalclad v. Mexico}, relied on the fact that “[p]rominent in the statement of principles and rules that introduces the Agreement is the reference to ‘transparency’.”\textsuperscript{194} The present BIT, to the contrary, does not contain an explicit reference to transparency.

89. For the above reasons, the Tribunal should not read in transparency a stand-alone element of fair and equitable treatment.

\begin{flushright}
\textsuperscript{188} UNCTAD Series II, p.82.
\textsuperscript{189} Tecmed, ¶154.
\textsuperscript{190} Saluka, ¶304.
\textsuperscript{191} UNCTAD Series II, p.63.
\textsuperscript{192} Dolzer & Schreuer, 1st ed., p.134.
\textsuperscript{193} See Dolzer & Schreuer, 2nd ed.
\textsuperscript{194} Metalclad, ¶76.
\end{flushright}
90. Regardless, Respondent’s actions met the standard for transparency, defined as:

the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors.  

Claimant knew that restructuring was a possibility, not only because of a similar restructuring ten years prior by the Respondent, but more generally since an investor of bonds should know that their investment is subject to such risk. Furthermore the manner in which Claimant’s bonds were restructured was made public during the period leading up to the enactment of the SRA. The bondholders were “informed of the on-going draft and the different versions of the text were constantly published on relevant agencies’ websites.” The restructuring took place pursuant to both the content of the SRA and IMF policies. Given the foreseeability of a possible restructuring and the public manner under which such restructuring was conducted, Respondent has acted with transparency.

E. Respondent Has Not Acted In an Unreasonable, Discriminatory, or Arbitrary Fashion

91. The BIT specifically provides:

Neither Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investment.

Despite overlap with the standard of fair and equitable treatment, the criteria for such measures are “sufficiently distinct to form the basis of a separate standard of treatment.”

92. In an authoritative definition, the International Court of Justice defined arbitrary to mean “a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.” Nothing about Dagobah’s actions constitutes a willful disregard of due process, or surprises a sense of judicial propriety.

195 *Metalclad*, ¶76.
196 *Facts*, ¶13, R-3.
197 *Facts*, ¶17, R-3.
198 *PO2*, ¶21, R-51.
199 *Facts*, ¶18, R-3.
200 *BIT Art. 2*, R-8.
201 Schreuer, Article, p.192.
202 *See, e.g., Siemens*, ¶318.
203 *ELSI*, ¶15.
93. The restructuring was done in response to a global financial crisis, after the IMF declared that Dagobah had to reduce its debt burden. It was a necessary and well-considered decision to rescue a nation from the brink of a fiscal crisis brought about by a global crash. Rather than being a willful disregard of due process, it instead followed public legislative discussion. Moreover, it impacted all bondholders alike and was supported by over 75% of the bondholders. Thus, it does not offend a sense of juridical propriety and was not arbitrary.

94. Respondent likewise did not act unreasonably, since “the plain meaning of the terms ‘unreasonable’ and ‘arbitrary’ is substantially the same in the sense of something done capriciously, without reason.” Although one tribunal has suggested that it is not appropriate “to equate ‘unreasonableness’ and ‘arbitrariness’,” this view is generally not supported in scholarship. For instance, “[t]here does not appear to be a relevant distinction between the terms ‘arbitrary’, ‘unjustified’, and ‘unreasonable’.” Therefore, the Tribunal should focus on arbitrariness in its analysis of fair and equitable treatment.

95. If, however, the Tribunal were to adopt a separate element of reasonableness, tribunals that have ruled on this issue have stated that a state’s conduct is reasonable if it “bears a reasonable relationship to some rational policy.” There are two elements in this standard: “the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy.” In the present case, the rational policy undertaken by Respondent was that of addressing an economic crisis and unsustainable debt levels. There is a reasonable relationship to the enactment of the SRA and the restructuring of Claimant’s bonds, since such action was targeted expressly towards addressing Respondent’s macroeconomic difficulties, as supported by IMF recommendations. Consequently, Respondents actions were reasonable.

96. Nor did Respondent act in a discriminatory fashion. Discrimination could be based on “race, religion, political affiliation, disability, and a number of other criteria,” although “the most frequent problem is discrimination on the basis of nationality.” In other words, non-

\[204\] Facts, ¶14, R-3.
\[205\] Facts, ¶17, R-3.
\[206\] National Grid, ¶197.
\[207\] BG Group, ¶341.
\[208\] Schreuer, Article p.183.
\[209\] Saluka, ¶309, 460.
\[210\] AES, ¶10.3.7.
\[211\] Schreuer, Article, p.193.
discrimination “requires a rational justification of any differential treatment of a foreign investor.”\textsuperscript{212} For instance, a measure in breach of national treatment or MFN treatment may be “unavoidably also be ‘discriminatory’.”\textsuperscript{213} Furthermore, a measure may be discriminatory if “the intent of the measure is to discriminate or if the measure has a discriminatory effect.”\textsuperscript{214}

97. The restructuring of Respondent’s bonds had neither discriminatory intent nor effect. For instance, discrimination requires “capricious, irrational or absurd differentiation in the treatment accorded to the Claimant as compared to other entities or sectors.”\textsuperscript{215} In the present case, all bondholders were treated the same since the SRA provided only that bonds could be restructured upon agreement of 75\% or more of the bondholders.\textsuperscript{216} Notably, it did not distinguish between bondholders of different nationalities, or between bondholders of any differing characteristics. Furthermore, all bondholders were entitled upon restructuring to the same modified bonds.

98. For these reasons, Respondent has acted non-arbitrarily, reasonably, and non-discriminatorily.

F. Respondent Has Accorded Claimant Due Process of Law

99. Due process and denial of justice generally deal with the administrative decision-making process and the judicial system, and are not applicable to the facts present here. For instance, denial of justice may include:

(a) Denial of access to justice and the refusal of courts to decide; (b) Unreasonable delay in proceedings; (c) Lack of a court’s independence from the legislative and the executive branches of the State; (d) Failure to execute final judgments or arbitral awards; (e) Corruption of a judge; (f) Discrimination against the foreign litigant; (g) Breach of fundamental due process guarantees, such as a failure to give notice of the proceedings and failure to provide an opportunity to be heard.\textsuperscript{217}

100. None of these are present in the instant case. Furthermore, with the exception of a claim for unreasonable delay, there is a requirement that the Claimant exhaust local remedies.\textsuperscript{218} Claimant did not bring claims to Respondent’s courts or administrative bodies, and chose instead

\textsuperscript{212} Saluka, ¶460.
\textsuperscript{213} BG Group, ¶355.
\textsuperscript{214} LG&E, ¶146.
\textsuperscript{215} Sempra, ¶319.
\textsuperscript{216} Facts, ¶17, R-3.
\textsuperscript{217} UNCTAD Series II, p.81.
\textsuperscript{218} See, e.g., Jan ¶¶ 256-61.
to seek remedies in arbitration. Given that Claimant never availed itself of Respondent’s legal institutions, it cannot claim now that there has been a lack of due process or a denial of justice.

101. For all the above reasons, Respondent has satisfied its obligations under the BIT to provide fair and equitable treatment.

IV. Respondent’s Actions Are Exempt Under Both the Essential Security Provision of the BIT and the Customary International Law Defense of Necessity

102. Even if Respondent had breached Article 2 of the BIT, its actions are exempt under the BIT and customary international law. Due to Dagobah’s financial catastrophe, the debt restructuring was a measure necessary to safeguard the essential security interests of Dagobah under both the essential security provision found in Article 6(2) of the BIT (Section A) and the customary international law defense of necessity (Section B).

A. Respondent’s Actions Are Exempt Under the BIT

103. Respondent’s actions are exempt under Article 6(2) of the Corellia-Dagobah BIT. The provision, agreed upon by both parties, was intended to allow a party to derogate from its treaty obligations when its essential security interests are at risk. The dire crisis undoubtedly threatened Dagobah’s essential security interests, triggering Article 6(2) (Section 1). The provision’s power to discharge BIT protections generally afforded to the investor has been referred to as “self-judging,” in that the decision rests with the state alone and is exempt from scrutiny by the tribunal (Section 2).

104. The text of Article 6(2) of the BIT clearly allows a party to apply measures that are necessary for the protection of its own essential security interests. Article 6(2) states:

[Nothing in this treaty shall be construed] to preclude a Party from applying measures that are necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.\(^{219}\)

In order for Respondent’s derogations to be exempt from the BIT, the measures taken by the party must be necessary either to protect an essential security interest or to restore international peace or security.\(^{220}\) Respondent’s actions were essential to the protection of its own essential

\(^{219}\) BIT Art. 6(2), R-10.
\(^{220}\) Continental, ¶¶163–64, 169.
security interests, which were threatened by the economic crisis, and thus meet the requirements of Article 6(2).

1. A Situation of Economic Crisis Qualifies As an Essential Security Issue

105. Dagobah’s economic crisis qualifies as an essential security issue under the BIT. The test is the severity of the crisis, not its nature.\(^{221}\) Past tribunals have held that the gravity of the situation is what matters most, and have qualified economic emergencies as essential security issues protected under BIT emergency clauses.\(^{222}\)

106. The facts establish that the severity of the crisis qualified as security interest under the BIT provision.\(^{223}\) Dagobah’s crisis was not just a financial recession, but rather a two-and-a-half year long economic crisis that had spillover political and social effects, crippling the state enough to be destroyed once again by the 2008 global recession.\(^{224}\)

2. The BIT’s Essential Security Provision Is Self-Judging

107. Some BITs—like this one—contain essential security provisions that allow the state to determine when the security situation arises. A clause is deemed self-judging when it contains language such as “which it deems necessary,” as seen in the U.S.-Bahrain BIT, U.S.-Russia BIT,\(^{225}\) ICJ in Nicaragua and Oil Platforms cases,\(^{226}\) and in Article XXI of GATT.\(^{227}\)

108. While Article 6(2) of the BIT does not contain this exact language, Article 6(1), which is the first clause in the Article devoted to emergency measures, states:

[Nothing in this treaty shall be construed] to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests.\(^{228}\)

109. The inclusion of “which it determines” is clear evidence of the parties’ intent to enable themselves to self-determine when essential security issues were threatened and respond accordingly. The purpose of the BIT, and the Article 6 emergency clause specifically, was to encourage investment but allow each party to retain its sovereign immunity during crises.

\(^{221}\) CMS, ¶354.
\(^{222}\) Sempra, ¶374
\(^{223}\) LG&E, ¶226.
\(^{224}\) GFH Article, R-21.
\(^{225}\) Salacuse, p.344.
\(^{226}\) CMS, ¶339
\(^{227}\) Enron, Award, ¶327
\(^{228}\) BIT Art. 6(1), R-10 (emphasis added).
Construing Article 6(2) as non-self-judging would thus defeat the purpose the emergency clause and void it of any meaning. Accordingly, Respondent’s judgment is protected by the Article 6 emergency clause is exempt from scrutiny by the tribunal.

B. Respondent’s Actions Are Exempt Under the Necessity Defense of Customary International Law

110. Even if the tribunal finds that Respondent’s actions are not exempt under Article 6(2) of the BIT, Respondent’s actions are exempt under the necessity defense as outlined by the International Law Commission in Article 25 of the Draft Articles on State Responsibility (the “ILC Articles”). Many tribunals cite the ILC Articles as representative of customary international law on necessity. Dagobah’s crisis and its response satisfy the four requirements for a state to claim necessity. The requirements are as follows:

(i) The measures were the only way to avoid a grave and imminent peril; and,
(ii) The measures don’t impair other states’ or international community’s essential interests.

The measures were not exempt if:
(a) The obligation excludes the possibility of invoking the necessity defense; or,
(b) If the state contributed to the situation of necessity.

111. While the defense of necessity is a restrictive approach, it is not wholly objective. Past tribunals have explained that it is essentially a subjective approach, not meant to eliminate a state’s right to self-determination and its sovereign power to protect itself during times of emergency. Rather, the purpose of Article 25 is to allow states only to apply the defense in restrictive ways and reduce a state’s subjectivity so it is not too broad.

1. The Debt Restructuring Was the Only Way for Dagobah to Avoid a Grave or Imminent Peril

112. Respondent’s measures were the only way for Dagobah to avoid grave and imminent peril. Past tribunals have interpreted “only way” to mean state action overall rather than specific measures, and found the first requirement of the necessity defense was satisfied where state action was the only way to avoid the grave and imminent peril. Attempting to analyze and

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229 See e.g., Gabčíkovo-Nagyamaros, ¶ 32
230 ILC Articles.
231 CMS, ¶317.
232 LG&E, ¶248.
233 LG&E, ¶248.
compare each specific measure taken by a state in order to combat a crisis is too complicated and attenuated; thus, past tribunals have found that as long as the measures taken were necessary and legitimate, the state satisfied the first requirement. Respondent’s restructuring was a necessary and legitimate measure, one that was actually suggested and supported by the IMF and several states.

113. Moreover, past tribunal decisions, such as the award in *SAUR v. Argentina* that rejected necessity because there was no cause and effect relationship between the emergency and measures taken, can be distinguished from the instant case. Here, there is a clear cause and effect relationship; the debt-restructuring act and other policies were specifically initiated in order to mitigate the crisis.

2. **The Measures Did Not Impair Other States’ or International Essential Interests**

114. There is no evidence that Corellia or the international community suffered severe consequences due to the debt restructuring. Over 85% of the bondholders agreed to the exchange offer and are not involved in the arbitral proceedings. The only party whose essential security interests are at risk is Dagobah.

3. **The Obligation Did Not Preclude the Possibility of Invoking the Necessity Defense**

115. Dagobah’s obligations under the BIT clearly allowed the possibility of invoking the necessity defense. The inclusion of Article 6(2) is clear evidence that both parties intended to retain the possibility of derogating from their treaty obligations in situations of emergency.

4. **Dagobah Did Not Contribute Substantially to the Situation of Necessity**

116. There is a high bar when analyzing whether a state contributed to the situation of necessity because of the realistic approach that many exogenous and endogenous factors act together and affect each other. For instance, the award in *Enron* was overturned because the tribunal failed to undertake a complete analysis of whether or not Argentina substantially contributed to its crisis. Two past tribunals found in Argentina’s case that the state did not contribute substantially to the situation of necessity because of the inherent difficulty in

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235 *Continental*, ¶¶227-230.
236 Facts, ¶15, R-3.
237 *SAUR*, ¶463.
238 BIT Art. 6(2), R-10.
239 *Enron*, Jurisdiction ¶393.
separating exogenous and endogenous factors acting together in causing the crisis and biases in evaluating a state’s decision with hindsight.\textsuperscript{240}

117. Rather than contribute to the crisis, Dagobah did everything in its power to mitigate it. The IMF explicitly stated that Dagobah followed most of its recommendations and concludes that Dagobah did not contribute to the second financial crisis of 2008, which was entirely caused by the global effects of the recession.\textsuperscript{241}

\textbf{5. Dagobah Does Not Owe Compensation for an Ongoing Period of Necessity}\textsuperscript{242}

118. While past tribunals have found that necessity applies strictly to the period of the crisis and the offending party must compensate the injured party for all losses falling outside the period of necessity,\textsuperscript{243} the crisis here is inapposite. The first financial crisis was so grave that only in 2003 did the state begin to recover.\textsuperscript{244} In fact, the state remained so fragile that even five years later in 2008, it was immediately thrust back into another economic crisis. This is evidence that the state of Dagobah never recovered from the initial crisis.

119. There is also no evidence that the parties intended for losses to be compensated because there are no loss-compensation provisions in the BIT under Article 6(2) for derogations from treaty obligations under situations of emergency. Where both parties intended to retain the security of being able to derogate during a crisis without having the additional burden of compensation, it is unfair for a party to claim later that it is owed compensation.

\textsuperscript{240} Continental, ¶235-236; LG&E, ¶257.
\textsuperscript{241} GFH Article, R-21.
\textsuperscript{242} GFH Article, R-21.
\textsuperscript{243} See e.g., LG&E; Continental; Total SA.
\textsuperscript{244} GFH Article, R-21.
REQUEST FOR RELIEF

120. For the aforementioned reasons, Respondent respectfully asks the Tribunal to find that:

(1) It does not have jurisdiction over this dispute; or
(2) It should decline jurisdiction due to the forum selection clause in the bonds.

121. If the Tribunal finds that it has jurisdiction, Respondent asks the Tribunal to conclude that:

(3) Respondent has not violated Article 2 of the BIT; or
(4) Even if Respondent has violated the BIT, its actions are exempt under the BIT’s essential security provision or the customary international law defense of necessity.

Respectfully submitted on 20 September 2014 by

YUSUF

On behalf of Respondent

THE FEDERAL REPUBLIC OF DAGOBAH