TEAM BRAVO

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

CALRISSIAN & CO., INC

(CLAIMANT)

V.

FEDERAL REPUBLIC OF DAGOBAH

(RESPONDENT)

SKELETON BRIEF FOR RESPONDENT
Unless otherwise stated, Respondent adopts all abbreviation used in the Record.

I. JURISDICTION AND ADMISSIBILITY

1. The Tribunal does not have jurisdiction over the present dispute for the following grounds.

A. Sovereign bonds acquired by the Claimant does not constitute a protected investment under Article 1 BIT

2. The sovereign bonds are not only expressly included in the list of illustration forms of investment stipulated in Article 1 BIT, but also do not possess certain investment characteristics.

3. By stipulating “including such characteristics as” in Article 1 BIT, it is clear that Contracting Parties intended to leave international practice indentifying all other investment characteristics. However, the acquisition of bonds is a merely commercial acts (Michael Waibel, ‘Sovereign Defaults before International Courts and Tribunals’, CUP, 2001, Chapter I, ¶717&721), and the risk of acquisition of bonds is only as far as non-payment or decrease in value (Dissenting Opinion in Abaclat v Argentina).

4. Moreover, the acquisition of sovereign bonds by the Claimant also does not constitute a “contribution” to the host State. In order to be a protected investment, the acquisition of sovereign bonds by the Claimant must make contribution to the economy of Dagobah (Salini test).

- Acquiring bonds is merely “creating value”, which should be distinguished from “making contribution” as the value of purchased bonds is generated for the Claimant’s account in Correllia, not Dagobah (Nolan, Sourgens, and Carlson, ‘Leviathan on life support? Restructuring sovereign debt and international investment protection after Abaclat’, p.492)

- Duration is one of the basic features of an investment (*Fedax v Venezuela*, 1998, ¶43), and this feature is contrary to the characteristics of bonds, which is under a speeded placement and circulation in the market (Dissenting Opinion in *Ambiente v Argentina*, ¶159). In other words, bonds could be sold immediately after acquisition should the price is right.

5. Lastly, sovereign bonds acquired by Claimant lacks territorial link. BIT’s Preamble expressly shows the BIT’s purpose to protect “investment by national of one [State] Party made in the territory of the other Party” (emphasis added). In this present case, the bonds in dispute were acquired in the secondary market in Correllia so that were outside of
BIT’s protection and scope. Even if the investment beneficial to Respondent State, such investment would not be covered by the BIT on the ground that it made outside the territory of the Respondent State in accordance with normal principles of treaty interpretation (SGS v Philippines, 2004, ¶99).

B. The Tribunal has no legal basis to take account of the PCA’s award in deciding the present case

6. Although Article 7.2 BIT speaks of “binding decision” which plainly means binding on the Contracting States to the procedure which produces the decision, it says nothing about whether such a decision is binding on subsequent tribunal acting under Article 8 BIT. Moreover, deeming the PCA’s award binding is also contrary to a widely-accepted view that international law contains no doctrine of binding precedent making the decisions of an international judicial or arbitral body in one case binding upon international judicial or arbitral bodies deciding similar, future cases (G Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’, 2007, p.357&378).

7. States’ power to mutually interpret their treaties which results from Article 31.3(a) Vienna Convention on the Law of Treaties shall never apply to this case since after the PCA’s award, Dagobah’s representatives publicly voiced their disagreement with the PCA majority’s decision. This indicates that there was never an agreement between Dagobah and Corellia on the interpretation of the definition “investment” under BIT.

C. The Tribunal must find the dispute inadmissible since the dispute is purely contractual and shall be settled under the bonds’ terms.

8. Claimant has no concrete legal basis to bring the dispute to this Tribunal. The pre-SRA bonds provide that, inter alia, “[a]ny dispute arising from or relating to this contract will be exclusively resolved before” the Yavin’s courts (emphasis added). Moreover, the BIT provides no umbrella clause for Claimant to rely on to bring a pure contract claim into this Tribunal.

9. Additionally, accepting the dispute will undermine the primary purpose of CACs provided in the bonds, i.e. to facilitate the debt restructuring process by reducing the risk of ‘holdout’ litigation (NML Capital v Argentina, 2012, ¶27). Because a swift and orderly debt restructuring serves the purpose of the BIT to “stimulate ... the economic development of [Contracting] Parties”, the BIT regime, including the investment arbitration, shall respect the need to conduct the debt restructuring process in an orderly and efficient manner (Preamble of BIT – Appendix 1).

II. MERITS

A. Respondent did not contravene the fair and equitable treatment
10. **Respondent did not treat the restructuring act in a discriminatory manner, imposing more stringent measures on foreign bondholders than other domestic ones.** Moreover, Claimant failed to prove that the act and the collective action by Respondent were aimed at Claimant’s investment specifically as foreign investment. Obviously, both native and non-native bondholders were affected by the economic crisis and by the Government’s measures (LG&E v Argentina, Decision on Liability (LG&E), 2006, ¶147-148).

11. **The measures are taken in terms of public purpose which should be taken into account by the tribunal** (Total v Argentina, Decision on Liability, 2010, ¶123). Respondent has the right to regulate domestic matters within its power with its motivation desired to avoid its full economic collapse (LG&E, ¶162). The actions conducted by Respondent were a reasonable response to the financial hardships with which it had to resolve (Pope&Talbot v Canada, Award on the Merits of Phase 2, 2001, ¶125).

12. **Legitimate expectations of Claimant are not disrespected.** It is uncontested that Claimant cannot expect the legal and statutory regime of bond security remained stable throughout the crisis. Despite stabilization clause of the legal framework is mentioned in the BIT’s Preamble, it is not considered as a legal responsibility by nature for the Contracting Parties, nor can it be properly defined as an object of the Treaty. Indeed, it is employed to promote investment flow rather than being related to its other targets (Continental Casualty v Argentina, 2008 (Continental), ¶258).

**B. Respondent’s actions are justified according to Article 6 of the BIT**

13. **The Dagobah – Correllian BIT does not preclude the defence of state of necessity.** Respondent could allude to necessity for its exemption from international obligations (CMS v Argentina, 2005 (CMS), ¶317). The essential security interests exception in the BIT was satisfactorily sufficient for Respondent to be absolved from its accountability (LG&E, ¶245).

14. **The measures were taken to protect essential interests of the host State when it was on the verge of economic recession and were ‘the only ways’ by nature for Respondent in terms of the purpose of dealing with sovereign debts.** Indeed, there are a range of interests invoked as essential interests as ‘safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population’ (Commentary on Article 25 ILC, ¶14). Respondent’s crisis was of sufficient magnitude to render necessary the enactment of measures for the protection of its essential security interests (Aikaterini Titi, ‘The Right to Regulate in International Investment Law’, 2014, Nomos Verlagsgesellschaft, p.83&242; LG&E, ¶226). It is not required whether a ‘total collapse’ might occur afterwards that since ‘there is no point in having such protection if there is nothing left to protect’ (Continental, ¶180). Thereby, the severity of the economic crisis shall be scrupulously considered by the Tribunal to recognize that the enactment of a new bond mechanism and the restructure of sovereign debt are the only means to respond to the
crisis whereas a number of ways to draft the economic recovery plan may have been possible but the across – the – board responses were the most necessary (LG&E, ¶257).

15. **Respondent conducted measures recommended by IMF to forestall the ‘grave and imminent peril’**. The intensity of difficult circumstance suffices to justify Respondent’s actions to avert a worsening of the situation and the danger of a forthcoming total economic collapse (CMS, ¶322).

16. **Respondent did not substantially contribute to the state of necessity**. Since Respondent expressed a desire to diminish the grievousness of the crisis by all available means and thus, there has been a lack of evidence to prove that the state had made a substantial contribution towards the crisis (LG&E, ¶256).

17. **There was no serious impairment of an essential interest engendered towards Claimant**. Indeed, the interests of approaches pursued by Respondent outweigh all other considerations not only the point of view of Respondent but on a reasonable assessment of the competing interests of the contracting party. In epitomical cases, the tribunals readily concluded that they did not appear that such an essential interest had been impaired (CMS, ¶325&358; Enron v Argentina, 2007, ¶310&341; Sempra v Argentina, 2007, ¶390; LG&E, ¶257; AWG v Argentina, Decision on Liability, 2010, ¶261).