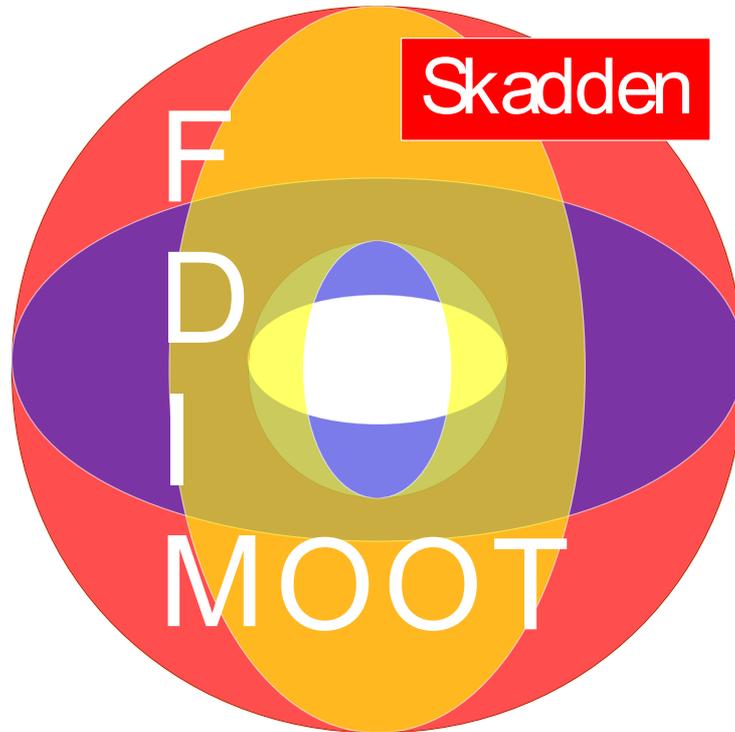


BENCH BRIEF
FOR THE FDI MOOT CASE 2019



Foreign Direct Investment
International Arbitration Moot

– ANALYSIS OF THE PROBLEM FOR THE USE OF ARBITRATORS –

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I. Introduction

The purpose of this Bench Memorandum is to provide arbitrators of the 2019 FDI Moot with an outline of the potential arguments that could be raised by the participants in the written memorials and during the oral hearings. To that effect, in this Bench Memorandum you will find a short explanation and the main authorities for the relevant legal issues.

This Bench Memorandum is only intended as an aid for arbitrators. Please note that the Bench Memorandum does not offer an exhaustive list of relevant cases and scholarly writings and is not a comprehensive treatise on the legal issues raised in the 2019 FDI Moot Case.

Also, the arbitrators are strongly encouraged to keep in mind that the key purpose of arbitrators is to evaluate the quality of each argument and assess the advocates' knowledge of the FDI Moot Case and the relevant law, as well as the participants' advocacy skills. Thus, arbitrators' personal evaluation of the merits of the Case or the views of the authors of the Bench Memorandum expressed herein should not be confused with the independent assessment of each argument which should be the determining factor in assessment of the teams' performance.

Please also note that this Bench Memorial does not provide guidance of the FDI Moot Rules and the criteria typically used for the evaluation of teams, which may be found in separate materials that will be provided by, or may be requested from, the organisers or found on the official FDI Moot website at <http://fdimoot.org>.

II. Facts

Dramatis Personae

- **Claimants:**
 - **FriendsLook plc**, one of the most popular and widespread social networks in the world incorporated in, and in accordance with, the laws of Novanda;
 - **Whistler Inc.**, a global social network constituted in accordance with the laws of Kitoa, which allows users to express their thoughts through short posts;
 - **SpeakUp Media Inc.**, an international social network incorporated in and in accordance with the laws of Kitoa, which hosts blogs led by its users.
- **Respondent:** The Republic of Tyrea, a state that in 2012 emerged from a civil war caused by the conflict between the two major inhabiting ethnicities, the Minyar and the Tatyar;.and underwent internationally supervised elections in January 2013 to transition from a military dictatorship to a democracy.
- **Third parties:**
 - **TruthSeeker:** a social network established by the Respondent in 2014 to promote free speech; allows users to share news posts accompanied with a short expression of opinion or correction of the facts.
 - **Wink:** a Tyrean local messenger application, the popularity of which was significantly reduced after the advent of the Claimants.

The Case: An executive summary

The below is intended to be a brief summary of the case scenario for the purposes of initial introduction only. The facts presented herein are not exhaustive and are entirely based on the official FDI Moot 2019 Case.

The 2019 case involves the Respondent State blocking social media platforms for their alleged part in fomenting civil unrest. The three Claimants allege expropriation and violation of fair and equitable treatment, while the Respondent objects to the ICSID tribunal's jurisdiction on the basis of its denunciation of the ICSID Convention and the plurality of Claimants. The Respondent also seeks to enjoin the Claimants' international media campaign against it while the proceedings are in progress.

Timeline

DATE	EVENT
28 March 2000	Tyrea-Novanda BIT was signed (ratified on 10 September 2000).
20 January 2001	Tyrea-Kitoa BIT was signed (ratified on 25 May 2001).
2004	SpeakUp was incorporated in Kitoa. [RFA, Line 114]
2012	Saraid Anne Parlante was appointed as the Regional Vice President of SpeakUp. [Claimant's Exhibit 6, Line 435]
September 2012	End of civil war in Tyrea. [Uncontested Facts, Line 1459]
January 2013	Elections were held in Tyrea resulting in a transition from military dictatorship to democracy. [Uncontested Facts, Line 1461]
10 September 2013	Law on Media and Information No. 1125-L was enacted in Tyrea. [Uncontested Facts, Line 1475].
February 2014	TruthSeeker was created by the Respondent. [Uncontested Facts, Line 1561]
January 2015	FriendsLook expanded its operations in Tyrea and established a local branch. [RFA, Line 108; Uncontested Facts, Line 1500]
June 2015	Whistler launched a localized version of its website in Tyrea. [RFA, Line 112]
June 2015	SpeakUp sets up an office in Tyrea. [RFA, Line 116]
Late 2016	Claimants started negotiations with Alcadia and Larnacia (neighbour states of Tyrea) for expansion of business operations. [RFA, Line 171]
25 November 2016	A pro-Tatyar blog post was published on Truthseeker.
28 November 2016	A Communal message was published on FriendsLook by a user named Madoga Freevoice. [Respondent's Exhibit 3] A Click bait link posted on wink claiming threat to Minyar Community. [Respondent's Exhibit 3]
30 November 2016	Hate Message against the Tatyar Community published on SpeakUp by a user named MinyarFreedomLeague
1 December 2016	Hate message on Whistler by a user named rbl6x. [Respondent's Exhibit 3]
Early 2017	Street fights and violent altercations between the Minyar and the Tatyar were reported for the first time since summer 2012. [Uncontested Facts, Line 1565]

10 April 2017	Article titled The Social Media ‘Violence Effect’ published in the Watchmen.
December 2017	Respondent blamed the Claimants for its inability to curb ethnic tension. [RFA, Line 123]
5 January 2018	Notice of renunciation of the ICSID Convention by the Respondent was received by the Depository. [Response to RFA, Line 721]
12 January 2018	Respondent enacted Law No. 0808-L. [RFA, Line 126]
12 January 2018	Pursuant to Decree No. 0578/201-D, Respondent granted the Claimants a period of 60 days for the development and implementation of the algorithm.
28 January 2018	A meeting took place between Vice President of SpeakUp and Minister of Telecommunications, Information Technology and Mass Media of Tyrea. [Claimants’ Exhibit 6, Line 452]
11 February 2018	Respondent slashed the 60-day period to 40 days by way of Decree No. 0599/201-D. [RFA, Line 135] The new deadline was shifted to 28 February 2018 [Claimants’ Exhibit 3, Line 355]
28 February 2018	Tyrean Communications Authority’s Ordinance blocked FriendsLook. [Claimants’ Exhibit 4]
1 March 2018	Tyrean Communications Authority’s Ordinance blocked Whistler. [Claimants’ Exhibit 4]
2 March 2018	Tyrean Communications Authority’s Ordinance blocked SpeakUp. [Claimants’ Exhibit 4]
29 June 2018	Request for Arbitration.
July-December 2018	Claimants had allegedly launched a media campaign launched against the Respondent. [Request for Provisional Measures, Line 1133]
16 July 2018	Case registered with ICSID as ICSID Case No. ARB/15/155. [Line 585]
3 September 2018	Response to Request for Arbitration.
20 December 2018	Acceptance of Appointment by all the members of the Tribunal.
21 December 2018	Respondent submits Request for Provisional Measures.
1 February 2019	Procedural Order No. 1 was issued by the Tribunal.

III. Requests of the Parties and issues identified by the Tribunal

Claimants

In the Request for Arbitration [RfA], Claimants request the Tribunal to:

- a. find that the Republic of Tyrea has expropriated Claimants' investments by the implementation of the TCA's ordinance and the consequent blocking of their websites since 28 February 2018, pursuant to Article 6 of the Tyrea-Kitoa BIT and Tyrea-Novanda BIT;
- b. find that the Republic of Tyrea has breached the Fair and Equitable Treatment standard under Article 3.1 of the Tyrea-Kitoa BIT and Tyrea-Novanda BIT;
- c. award the Claimants compensation in the amount of no less than 69,134,875 USD for FriendsLook plc, 26,760,460 USD for Whistler Inc., and 27,094,600 USD for SpeakUp MediaInc., plus interest as of the date of issuance of the award; and
- d. find that Claimant is entitled to compensation by Respondent of all costs and fees related to these proceedings.

Respondent

In its Response to the RfA, Respondent requests the Tribunal to:

- a. it has no jurisdiction to hear this dispute under the Tyrea-Kitoa BIT and Tyrea-Novanda BIT in light of Respondent's denunciation of the ICSID Convention;
- b. it has no jurisdiction to hear Claimants' case jointly in a multi-party arbitration;
- c. if the Tribunal finds that it has jurisdiction to hear this dispute:
 - i. Respondent's actions do not amount to expropriation of Claimants' investment within the meaning of Article 6 of the Tyrea-Kitoa BIT or Article 6 of the Tyrea-Novanda BIT respectively, and in any event were a lawful exercise of Respondent's regulatory powers;
 - ii. Respondent's actions did not in any event constitute a violation of the fair and equitable treatment standard set out in Article 3.1 of the Tyrea-Novanda BIT and Article 3.1 of the Tyrea-Kitoa BIT;
 - iii. in the event that the Tribunal does not grant the above requests for relief, that Claimants' claim for damages lacks legal basis and evidentiary support and is based on incorrect factual and legal assumptions.

In a separate Request following the constitution of the Tribunal, Respondent requested that the Tribunal grant provisional measures, ordering the Claimants to refrain from any conduct that could further aggravate the dispute and/or jeopardize the integrity of the proceedings.

Tribunal

In Procedural Order No. 1 (p. 39 of the Case), the Tribunal establishes that the following issues will be dealt with during the main stage of the proceedings (p. 41 of the Case):

- a. Whether the Tribunal should grant the provisional measures requested by Respondent;
- b. Whether the Tribunal has jurisdiction over the dispute, given that the Respondent has denounced the ICSID Convention;
- c. Whether the Tribunal has jurisdiction over the multi-party arbitration claim brought against the Respondent;
- d. Whether the blocking of the Claimants' platforms is in violation of Articles 3(1) and 6 of the Tyrea-Novanda BIT and Articles 3(1) and 6 of the Tyrea-Kitoa BIT;
- e. Whether the compensation requested by the Claimants is speculative and which is the appropriate method for the quantification of damages in this case.

IV. The Issues: Arguments and Analysis

1. JURISDICTION

A. Whether the Tribunal should grant the provisional measures requested by Respondent

With its request of 21 December 2018, Respondent requested the Tribunal to grant provisional measures ordering Claimant to refrain from unilaterally disseminating any arbitration material to the press, from disclosing case-related information and from any other conduct (such as intense lobbying) that could further aggravate the dispute and jeopardize the integrity of the proceedings. The request was triggered by the publication of multiple press articles and commentaries in local and international media outlets accusing Tyrea of censorship and violating basic freedoms of expression, which started at the same time as the arbitration proceedings, as well as the dissemination to the press of case documents, such as witness statements, and the selective publication of excerpts from the parties' submissions that gave an one-sided picture of the dispute (in favor of the Claimants).

The legal basis for Respondent's request is Article 47 of the ICSID Convention, which stipulates that: “[e]xcept as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to the respective rights of either party”. This provision is supplemented by Rule 39 of the ICSID Arbitration Rules, which requires that “[t]he request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures”. Note that while the use of the verb “recommend” in Art. 47 and the negotiating history of the ICSID Convention appear to suggest that any provisional measures decided will be non-binding, ICSID tribunals have consistently considered the measures “legally compulsory” [see indicatively *Maffezini v Spain*, ICSID Case No ARB/97/7, Procedural Order No 2 (28 October 1999), ¶9; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador*, ICSID Case No ARB/06/11, Decision on Provisional Measures (17 August 2007), ¶58; *Tokios Tokelés v Ukraine*, ARB/02/18, Procedural Order No 3 (18 January 2005), ¶4]

Participants will likely focus on whether the prerequisites to grant the provisional measures are met in the present case. These requirements under Art. 47 ICSID Convention, are the following (although formulated in different ways by different tribunals):

- a. prima facie jurisdiction of the Tribunal;
- b. prima facie existence of a right susceptible of protection;
- c. urgency of the measure requested; and
- d. necessity of the measure requested.

The Claimants are expected to argue that some or all of these requirements are not satisfied in the present case.

A.1. General considerations

Claimants' position

The Claimants could first deny that they are involved in orchestrating any kind of “aggressive media campaign” against Respondent and that they are not to be prevented from engaging in general public discussion about the case [see e.g. *United Utilities and Aktsiaselts Tallinna Vesi v. Estonia*, ICSID Case No. ARB/14/24, *Decision on Respondent's Application for Provisional Measures*, 12 May 2016, ¶112; *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, *Procedural Order No. 3*, 27 January 2010, ¶¶84-85]. As to the dissemination of arbitration documents particularly, the Claimants could invoke the absence of a general duty of confidentiality in ICSID arbitration [see e.g. *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, *Award*, 4 October 2006, ¶16; *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, *Procedural Order No. 3*, 29 September 2006, ¶¶121-125; *Churchill v. Indonesia*, ICSID Case No. ARB/12/14, *Procedural Order No. 3*, 4 March 2013, ¶46], as well as broader transparency considerations.

Respondent's Position

The Respondent will likely argue that Claimants' conduct is not limited to a mere general discussion of the case (see also the fact that Claimants hired PR professionals for that purpose), and further that such public discussion does not include the publication of arbitration documents [see *United Utilities*, ¶¶113-114] (note that the above points and arguments could also be incorporated in the discussion of the prerequisites of Art. 47 ICSID Convention, see below). With respect to the dissemination of documents and in response to the absence of a general duty of confidentiality of the parties, Respondent could argue that there is neither a general right of disclosure [see e.g. *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, *Procedural Order No. 3*, 27 January 2010, ¶79; *Biwater Gauff*, ¶121].

The Respondent could also use in the context of its argumentation good faith considerations, and particularly para. 9 of Procedural Order 1, where the parties accepted that “*that they have a duty to arbitrate in good faith, which includes an obligation to cooperate with the opposing parties and the Tribunal*”.

A.2. Requirements of Article 47 of the ICSID Convention

a. Prima facie jurisdiction

This requirement is not expected to raise much controversy. In case the Claimants, raise this objection, the Respondent could argue that the fact that Respondent has raised jurisdictional objections on other grounds does not mean that the tribunal cannot find prima facie jurisdiction, the latter being based on the consent between the Respondent and the Claimants [see e.g. *Pey Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, *Decision on Provisional Measures*, 25 September 2001, ¶13; *United Utilities*, ¶89]

b. Prima facie existence of a right susceptible of protection

Claimants' Position

The Claimants can argue that Respondent has failed to establish the existence of a right susceptible to protection and that provisional measures are not to be granted in connection to every procedural circumstance of the case, without a specific impact on the underlying substantive dispute [*cf. tribunals repeatedly holding that the type of rights susceptible to protection by provisional measures are not only substantive rights but also procedural rights, e.g. Biwater Gauff v. Tanzania, Procedural Order No. 1, 31 March 2006, ¶71; Quiborax v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶117; Burlington v. Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶60*]. They could question, for instance, how the publication of the said articles and some extracts of the parties' submissions would negatively affect the quality of the Tribunal's decision making. The Claimants could refer in this regard to *Amco Asia v. Indonesia*, in which the tribunal held that while "a large press campaign" might have an influence on the State's economy (in this respect it could also be invoked by the Respondent), it would not be an influence on the rights actually in dispute [*Amco v. Indonesia, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures, 9 December 1983, ¶3*].

Respondent's Position

There are several ways in which Respondent can address the rights to be protected with the request for provisional measures, but they would fall within the ambit of the non-aggravation of the dispute and/or the integrity of the proceedings. To illustrate, the ICSID Tribunal in *Biwater Gauff v. Tanzania*, held that

"both concerns [i.e. the non-aggravation of the dispute and the integrity of the proceedings] have a number of aspects, which can be articulated in various ways, such as the need to:

- *preserve the Tribunal's mission and mandate to determine finally the issues between the parties;*
- *preserve the proper functioning of the dispute settlement procedure;*
- *preserve and promote a relationship of trust and confidence between the parties;*
- *ensure the orderly unfolding of the arbitration process;*
- *ensure a level playing field;*
- *minimise the scope for any external pressure on any party, witness, expert or other participant in the process;*
- *avoid 'trial by media'."* [¶135]

Most, if not all, the above aspects, could be used by the Respondent to frame the rights that are susceptible to protection in the present case.

c. Urgency

The urgency requirement is related to the imminent possibility that the rights of a party be prejudiced before the tribunal has rendered its award (Azurix). In practice, often conflated with the necessity requirement (see below).

Claimants' Position

The Claimants could contest the urgency of any decision concerning the potential publication of other case materials, given that they do not intend to publish anything other (argument made in *United Utilities* by the claimant, but not accepted, see ¶¶37, 103-106).

Respondent's Position

The Respondent will submit that the urgency requirement is clearly met in the present case. It can demonstrate that ICSID Tribunals have generally used a low threshold, allowing this requirement to be satisfied easily in practice. For instance, according to the *Quiborax* Tribunal, “if measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, they are urgent by definition” [*Quiborax v. Bolivia, Decision on Provisional Measures, ICSID Case No. ARB/06/2, 1 Feb. 2010, ¶153; see also similar wording in City Oriente v. Ecuador, Decision on Provisional Measures, 19 Nov. 2007, ¶69*]. Further, the Claimants’ “current intention” argument does not prevent the Claimants from unilaterally deciding to, directly or indirectly, publish further arbitration documents without further warning.

d. Necessity

Claimants' Position

The Claimants will likely argue that necessity constitutes a high threshold, requiring the existence of serious and irreparable harm to the rights invoked, a standard widely accepted by tribunals [*see indicatively, CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on the Claimant's Request for Provisional Measures, 3 March 2010, ¶56; Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, ¶ 8; Occidental v. Ecuador, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶59; Phoenix Actum v. Czech Republic, ICSID Case No. ARB/06/5, 6 Apr. 2007, ¶33*]. They are expected to argue that this threshold is not met in the present case by any of the alleged media activities and the respective conduct attributed to the Claimants.

Respondent's Position

The Respondent could argue that the ICJ-inspired irreparable prejudice test is not the appropriate one for granting provisional measures under the ICSID Convention; rather, the Tribunal should adopt a lower threshold test of “significant harm or threat” [*see D. Sharooshi, Provisional Measures and Investment Treaty Arbitration, 29(3) Arbitration International 361*

(2013); *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petroleos Del Ecuador* arbitration, ICSID Case No. ARB/06/21, *Decision on Revocation of Provisional Measures and Other Procedural Matters*, 13 May 2008, ¶¶70-72; *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 Jun. 2009, ¶ 81].

The Respondent could alternatively argue that even the “irreparable harm” test is met in the present case.

e. Proportionality

Participants could also argue about the proportionality of the measures requested to the alleged harm to be suffered by the Respondent (balance of inconvenience), either as a standalone requirement [see *United Utilities*] or as part of necessity [*Quiborax v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 158; Burlington v. Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 82*].

B. Whether the Tribunal has jurisdiction over the dispute, given that the Respondent has denounced the ICSID Convention

The Respondent’s notice of denunciation of the ICSID Convention was received by the depositary on January 5, 2018, whereas the Claimants had sent the RfA on June 29, 2018. The main issue here is whether the Tribunal has the jurisdiction to hear the claim given that Respondent had denounced the ICSID Convention before the Claimants had sent the RfA.

The ICSID Tribunal and scholarly opinions on this issue are sharply divided. On one hand, there are scholars who argue that the Claimants can bring a claim within the six-months’ period after the denunciation of the ICSID Convention. On the other hand, some scholars argue that denunciation of the ICSID Convention becomes effective on the date the notice of denunciation is received by the Depositary.

B.1. Applicable Law

The arguments between the parties will surround the interpretation of Articles 71 and 72 of the ICSID Convention:

Article 71: *Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.*

Article 72: *Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions*

or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

B.2. Potential arguments of the Claimants

1. The Claimants will likely argue that the denunciation of the ICSID Convention will have no effect on the investments concluded before the ICSID Convention. Article 70(1)(b) of the VCLT states that the termination of a treaty “*does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination*”. A combined reading of the ICSID Convention and BITs leads to the conclusion that for investments completed prior to effective date of denunciation in most BITs, the ICSID jurisdiction would survive the denunciation of the ICSID Convention (*Murphy Exploration and Production Company International v. Republic of Ecuador, ICSID Case no. ARB-08-4, Award of December 2010 on jurisdiction; James Otis Rodner; Jaime Martínez Estévez, BITs in Pieces: The Effectiveness of ICSID Jurisdiction after the ICSID Convention Has Been Denounced; ME Villiger Commentary on the 1969 Vienna Convention on the Law of Treaties (Nijhoff Leiden 2009) 872-873*). The right to arbitrate under Article 9 of the BITs constitutes a ‘right vested as a result of performance’ and such a right cannot be disturbed by withdrawal of the Respondent from the ICSID Convention (*G Fitzmaurice ‘Second Report on the Law of Treaties’ (1957) II YILC 16, 67 [205]*).

2. The Claimants will likely argue that the consent given by the Respondent in the BIT cannot be unilaterally withdrawn. As per Article 25(1) of the ICSID Convention, “*no party may withdraw its consent unilaterally*”. This is a restatement of principle of *pacta sunt servanda* and is complemented by Article 72 which ensures that the agreement to arbitrate, once concluded, cannot be vitiated even through a state’s withdrawal from the ICSID Convention (*Antonius Tzanakopoulos, Denunciation of ICSID Convention under the General International Law of Treaties, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1735495; George R. Delaume, The Finality of Arbitrations Involving States: Recent Developments, 5 ARB. INT’L 21, 24 et seq. (1989)*)

3. The Claimants will likely argue that their right to initiate arbitration is protected under the six-months’ period provided under Article 71 of the ICSID Convention. Article 71 of the ICSID Convention states that “*The denunciation shall take effect six months after receipt of such notice.*” Therefore, the host State is a party to the ICSID Convention (Contracting State) up to the expiration of the six-month period (*M.D. Nolan & F. Sourgens, A Preliminary Comment – The Interplay between State Consent to ICSID Arbitration and the Denunciation of ICSID Convention: The (Possible) Venezuela Case Study, available at www.milbank.com/images/content/9/5/956/TDM_Nolan_Sourgens_Milbanki.pdf*)

The Claimants would further argue that The Claimant further submits that the jurisdiction of this Tribunal is not affected by Article 72 of the ICSID Convention (*E. Gaillard and Y. Banifatemi, “The Denunciation of the ICSID Convention” (2007) New York Law Journal, Vol. 237, No. 122 (26 June 2007)*) and that the interpretation of Article 72 of the ICSID Convention as adopted by the Respondent renders Article 9 of the BITs nugatory.

4. The Claimants will likely argue that refusal of the Tribunal to exercise would amount to denial of justice as the news of denunciation of the ICSID Convention was made public only on January 5, 2018 (*Venoklim Holding B.V. v. Bolivarian Republic of Venezuela. ICSID Case No. ARB/12/22*).

B.3. Potential arguments of the Respondent

1. The Respondent will likely argue that the Tribunal does not have jurisdiction over the claim as the Respondent is no longer a Contracting Party to the ICSID Convention. Article 25(1) of the ICSID Convention extends the jurisdiction of the Centre to a “*legal dispute between a Contracting State... and a national of another Contracting State*”. Once the denunciation of the ICSID Convention becomes effective, ICSID is no longer an available forum, because the denouncing State ceases to be a Contracting Party and, therefore, an important condition for jurisdiction under Article 25(1) of the ICSID Convention is not satisfied. Further, the relevant date for determining whether a State is a Contracting Party is the date on which the proceedings are instituted. (*R. Dolzer & C. Schreuer, Principles of International Investment Law, 42 (Oxford University Press 2008)*).

2. The Respondent will likely argue that there is no mutual consent to arbitrate. As per Article 25(1) of the ICSID Convention, the existence of mutual consent of the parties is the *sine qua non* of establishing jurisdiction of the Tribunal the ICSID Convention and Article 9 of the BITs does not amount to mutual consent of the parties (*Report of the Executive Directors on the ICSID Convention, ¶23; C Schreuer ‘Denunciation of the ICSID Convention and Consent to Arbitration’ in M Waibel et al (eds) The Backlash against Investment Arbitration: Perceptions and Reality (Kluwer Alphen aan den Rijn 2010); Aron Broches, Bilateral Investment Protection Treaties and Arbitration of Investment Disputes, in The Art of Arbitration, Liber Amicorum Pieter Sanders 63, 67 (Jan Schultz & Albert van den Berg eds., 1982)*). It is only when an agreement to arbitrate is concluded between the parties that the consent becomes mutual and the Respondent had revoked its consent to arbitrate before the Claimants consented to arbitrate under the BIT (*AMT v. Zaire, ICSID Case No. ARB 93/1, Award (Feb. 21, 1997), ¶¶5.17–5.23*).

The Respondent will further argue that the Respondent could revoke its unilateral consent before such consent was perfected by Claimant’s acceptance of Respondent’s consent (*Blue Bank International & Trust (Barbados) Ltd. v. The Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/20), Separate Opinion by Christer Söderlund, 3 April 2017; UNCTAD; “Denunciation of the ICSID Convention and BITs: Impact on Investor-State claims”, IIA Issues number 2, Geneva 2010*).

After, establishing its power to revoke the consent, the Respondent will then argue that the denunciation of the ICSID Convention became effective from the date on which the notice was received by the Depository. Article 72 of the ICSID Convention safeguards the rights and obligations “*arising out of consent to the jurisdiction of the Centre... before such notice was received by the depositary.*” This implies that unless the offer under the BIT has already been taken up, denunciation of ICSID means that investors can no longer accept the withdrawing state’s offer of consent to ICSID arbitration expressed in a BIT that continues in force

(‘Consent to Arbitration’ in P Muchlinski et al (eds) *The Oxford Handbook of International Investment Law* (OUP Oxford 2008) 830, 835).

The Respondent will then argue that the Claimant’s right to initiate arbitration is not saved by Article 71 of the ICSID Convention as this is a right which arises out of consent of parties which becomes ineffective from the date on which the notice of denunciation is received by the Depository (*Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/21, ¶271*).

3. The Respondent will likely argue that, in the event the Tribunal refuses to exercise jurisdiction over the claim, Claimants will not suffer denial of justice as alternative remedy is available to the Claimants under Article 9(2) of the BIT (*Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/21, ¶261*).

C. Whether the Tribunal has jurisdiction over the multiparty arbitration claim brought against the Respondent

The main issue here is whether the Tribunal should have jurisdiction to hear the multiparty arbitration claim without the express consent of Respondent to multiparty arbitration. Additionally, there could be discussions about whether this issue concerns the Tribunal’s jurisdiction or rather admissibility of the claims.

It should be noted that the Respondent’s position on this issue is weaker both in terms of law and in terms of facts. Therefore, the Tribunal is invited to pay particular attention to the reasoning rather than at the merits of the arguments presented by the teams.

C.1. Summary of the main facts

The following circumstances may be taken into account by the teams when assessing the possibility of multi-party arbitration in the present case:

- a) There are three claimants: FriendsLook plc (incorporated in Federation of Novanda), Whistler Inc. and SpeakUp Media Inc. (both incorporated in Union of Kitoa).
- b) FriendsLook is the biggest and most popular of the three, it created a local branch in Tyrea and launched the Tyrean version of its website in January 2015. Whistler and SpeakUp followed suit in early summer 2015 employing the same model of operation in Tyrea.
- c) In the beginning of 2018, Expedia, FinanceHub and TurboFin, three international financial corporations, cumulatively owned 9.5% of FriendsLook’s shares, 5% of Whistler’s shares and 4.5% of SpeakUp’s shares.

- d) There are two BITs which Claimants invoke: Tyrea-Novanda BIT, Tyrea-Kitoto BIT
- e) Arbitration agreement is identical in both BITs (Article 9):

“Disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter, shall at the request of the national concerned be submitted to the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965.”

C.2. Potential arguments of Claimant

1. Claimants will likely argue that applicable procedural instruments allow multi-party arbitration:

- Although the ICSID Convention does not contain a specific provision setting forth a procedure for multiparty arbitrations, the Convention’s *travaux préparatoires* indicate that the drafters did contemplate submission of claims by multiple parties. During negotiations, the British expert presented at the drafting expressed the view that it was implicit in the text that there may be more than two parties to a dispute (*History of the ICSID Convention, Documents Concerning the Formulation of the Convention on the Settlement of International Investment Disputes between States and Nationals of Other States (1968), Volume II-1, 400, 413*).

In addition, as at least one commentator suggests, *‘provided that the jurisdictional limitations as to the parties to proceedings under the Centre are observed, and the consent of all parties concerned is secured, there is no reason why appropriate multi-partite proceeding cannot be carried out pursuant to the Convention’* (P. Szasz, *‘Je Investment Disputes Convention—Opportunities and Pitfalls (How to Submit Disputes to ICSID)’*, 5 *Journal of Law and Economic Development* (1970) 26).

In practice, Tribunals have consistently found that the ICSID Convention and Arbitration Rules, and the A(AF)R, allow multiparty proceedings and current procedural rules have accommodated such claims. For example, in *Funnekotter and others v. Zimbabwe* (ARB/05/6), Award (April 22, 2009), apparently unrelated investors brought a claim alleging expropriation due to land acquisition legislation of Zimbabwe.

- The fact that the BIT uses the term “investor” in a singular form does not indicate lack of consent for multiparty arbitration. To support this statement Claimants may rely on the *Alemanni v. Argentine Republic* case where the tribunal decided that focusing primarily on whether the bilateral investment treaty in question used the word “investor” in the singular or plural was inappropriate. Instead, the tribunal considered the key question to be whether “the words ‘dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State’ as they appear in Article 25(1) of the ICSID Convention [are] to be understood as meaning ‘dispute

between a Contracting State and one, but only one national or another Contracting State.” The tribunal concluded that there was nothing in the context of the ICSID Treaty or additional materials to support importing the phrase “but only one” into the analysis.

2. Claimants will likely argue that invoking two different BITs does not constitute a problem:

Some multiparty claims invoke a single instrument of consent (a treaty, law or contract), but many rely on multiple sources of consent, including different BITs (see e.g., *OKO Pankki Oyj and others v. Estonia* (ARB/04/6), Award (November 19, 2007) or combine a BIT claim with a claim based on contract or legislation (see e.g., *Goetz and others v. Burundi* (ARB/01/2), Award (June 21, 2012)).

3. Claimant will have to show that a single dispute exists between all three Claimants and Respondent:

Tribunals considering whether a multiparty claim can be maintained have considered various factors, including whether: (i) a single dispute exists; (ii) the investment is the same or was made jointly by the claimants; (iii) the underlying facts or the overall economic transaction are the same; (iv) the investors or the claims are affiliated; (v) the challenged measures are the same; (vi) the same respondents are named; or (vi) the remedies sought are aligned. The more related the cases are, the more likely a Tribunal is to treat them together - even over a party’s objection (see e.g., *Noble Energy and Machala Power v. Ecuador and Conelec* (ARB/05/12), Decision on Jurisdiction (March 5, 2008), ¶¶186-207).

Here the teams are expected to elaborate on facts trying to establish the close connection between the different claims making them a single dispute.

4. Claimant may try to refer to certain policy considerations:

- Claimants may argue that coordination of multiparty arbitration can help promote procedural efficiency by centralizing the resolution of related disputes. The greater degree of connection between the parties’ factual or legal issues, the more policy considerations weigh in favour of coordination in order to capture the potential efficiencies (*Y. Shany, ‘Consolidation and Tests for Application: Is International Law Relevant?’*, 21 *ICSID Review* (2006) 143-4);
- Claimants may argue that in investment treaty arbitration, the threat of contradictory awards is a particular risk when a State party is faced with a multitude of claims from investors stemming from the same event or government measure. Examples of such contradictory results also can be seen in the *CMS v Argentina* and *LG&E v Argentina* ICSID arbitrations, where the respective tribunals reached inconsistent conclusions over the validity of Argentina’s use of a ‘state of necessity’ defence as justification for the economic measures it undertook during the severe domestic economic downturn. In

considering these similar governmental measures, the CMS tribunal rejected the emergency defence, whereas the LG&E tribunal accepted it to a limited extent;

- As an additional point Claimants may also rely on the fact that in practice respondents have rarely objected to the institution of a single proceeding by multiple claimants (see e.g., *Goetz and others v. Burundi* (ARB/95/3), Award (10 February 1999); *LG&E Energy Corp. and others v. Argentina* (ARB/02/1), Decision on Objections to Jurisdiction (April 30, 2004); *Funnekotter and others v. Zimbabwe* (ARB/05/6), Award (April 22, 2009)). In the few cases in which an objection was raised, it has been rejected (see e.g., *Noble Energy and Machala Power v. Ecuador and Conelec* (ARB/05/12), Decision on Jurisdiction (March 5, 2008), ¶¶186-207; *Ambiente Ufficio and others v. Argentina* (ARB/08/9), Decision on Jurisdiction and Admissibility (February 8, 2013); *Flughafen Zürich and Gestión e Ingeniería v. Venezuela* (ARB/10/19), Award (November 18, 2014)).

C.3. Potential arguments of Respondent

While arguing the absence of consent for multiparty arbitration Respondent will likely rely on the following propositions demonstrating absence of the Respondent's consent for multiparty arbitration:

- The BIT expressly use the term “*investor*” in a singular form thereby indicating lack of consent for multiparty arbitration (see, for example, Article 8(3) of the Argentina-Italy BIT which uses the terms “*investors*”);
- Neither BITs nor the Arbitration Rules contain provisions addressing consolidation of the proceedings/joinder which might have indicated the Respondent's consent for multiparty arbitration (see, for example Article 33 of 2004 US Model BIT and Article 1126(2) NAFTA regarding the consolidation and Article 15 UNCITRAL Rules regarding the joinder);
- Silence on the matter of multiparty arbitration in the ICSID Convention means that the Tribunal cannot extend its jurisdiction over multi-party proceedings (see e.g. . Dissenting opinion of Georges Abi-Saab in case *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5)
- The teams will likely rely on the different reasonings provided by Mr Georges Abi-Saab in his Dissenting opinion in case *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5).

2. MERITS

D. Whether the blocking of the Claimants' platforms is in violation of Articles 3(1) and 6 of the Tyrea-Novanda BIT and Articles 3(1) and 6 of the Tyrea-Kitoa BIT

While tackling this submission, the participants are invited to discuss two issues relating to the alleged violations of the BITs by the Respondent:

- breach of Articles 3(1) of the BITs granting fair and equitable treatment; and
- breach of Articles 6 of the BITs prohibiting expropriation.

Below is the summary of facts and arguments that may be employed by the teams to advocate the positions of the Claimants and the Respondent, divided for convenience by logical sub-issues of this submission to be addressed by the participants: expropriation and fair and equitable treatment standard. It should be noted that in some cases arguments used in the two sub-issues may coincide.

D.1. Expropriation

Claimants argue that the blocking of their websites in the territory of Tyrea by Respondent's ordinances for their alleged violation of recent regulatory framework (Law No. 0808-L) aimed at counteracting dissemination of hate speech in social media amounted to expropriation of their investments in Tyrea. Due to the blocking, which is in force at the time of the proceedings, Claimants were forced to cease their operations in Tyrea.

Article 6 of the Tyrea-Novanda BIT and Article 6 of the Tyrea-Kitoa BIT are identical and read as follows:

“Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:

- (a) the measures are taken in the public interest and under due process of law;*
- (b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;*
- (c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.”*

Outlined below are the points which may be raised by the participants arguing for the side of the Claimants and the Respondent.

1. Are Claimants deprived of their investment (directly or indirectly)?

It is important to note that, even though in real-life proceedings certain additional issues would have been addressed, such as, for instance, the existence of an “investment”, the Case limits the discussion to a different aspect most closely connected with the issue of expropriation. Whereas the teams are not supposed to discuss whether there was an “investment”, they are free to argue whether Claimants’ assets were susceptible of expropriation, i.e., in the wording of both BITs, whether Claimants were actually “deprived” of their investments.

Claimants’ Arguments

In the situation described in the Case direct expropriation would be complicated to argue, considering that the physical assets of Claimants suffered no actual harm and, arguably, may still be put by Claimants to profitable use. Thus, most probably the teams acting for Claimants will seek to argue indirect expropriation, pointing out that:

- a. Assets susceptible to expropriation: Claimants will need to demonstrate that intangible assets of similar nature may be expropriated. Expropriation of intangible assets, including rights arising from contracts (e.g., *SPP v. Egypt*, *Wena Hotels v. Egypt* etc.) is not a novel concept, though it would be impossible to deny that Claimants’ investment is significantly further from the traditional understanding than investments examined in the precedent cases. It is up to the teams to draw parallels and demonstrate comparability of circumstances.
- b. Respondent’s measures effectively neutralized Claimants’ enjoyment of their property: Due to the blocking by Respondent, Claimants lost their revenue streams from advertising contracts and paid subscriptions, as well as became unable to enjoy the intangible assets created specifically for Tyrea.
- c. Respondent’s blocking had a substantial and irreversible economic impact on Claimants’ investment:
 - i. The substantial nature of the impact Respondent’s measures had on Claimants’ investments in Tyrea follows from the fact that Claimants became entirely unable to continue their operations in Tyrea in any way, losing all revenues they could have continued to receive from their investment. The blocking of Claimants, if recognized as permanent, may, considering the nature of Claimants’ business, be regarded as the complete destruction of their investment in Tyrea.
 - ii. A contentious point, however, is the irreversible character of such blocking. It is apparent from the ordinances on the blocking [*Claimants’ Exhibit 4*] that the websites were blocked “pending further notice”. The notices appearing on Claimants’ websites [*Claimants’ Exhibit 5*] contain no such clarification. Law No. 0808-L refers to the possibility of both temporary and permanent blocking (p. 8, lines 310-311) without determining any criteria. In conjunction with the alleged desire of Tyrean politicians to eliminate the problem of hate speech entirely by closing social networks responsible (para. 24 p. 53) rather than by developing a

filtering solution, this may allow the teams to interpret the facts and demonstrate that the blocking might be permanent or at least long-term.

- iii. A separate point is whether a measure needs to be permanent to be irreversible. Even in case the blocking is temporary, Claimant may attempt to hold Respondent liable for the damages caused.

Respondent's Arguments

- a. Assets susceptible of expropriation: The nature of Claimants assets raises the questions of whether the traditional concept of expropriation may cover any measures of the host state affecting businesses like those of Claimants'. Although there are recent examples of investments of similar nature raised in arbitration (e.g., *beIN v. Saudi Arabia*, *Talal Al Awamleh et ors. v. Qatar*), no arbitral awards have been issued yet. Teams are invited to argue whether the creation of conditions that render continuation of the same business impossible qualifies as expropriation of Claimants' assets.
- b. Indirect expropriation: As Claimants' physical assets were not affected by Respondent's measures, and loss of income was the only consequence, Respondent may refer to decisions where tribunals were reluctant to recognize expropriation in such situations [e.g., *Pope & Talbot v. Canada*, *Peter A. Allard v. Barbados*].
- c. Substantial and irreversible economic impact on Claimants' investment:
 - i. The substantial nature of the impact Respondent's measures had on Claimants' investments in Tyrea follows from the fact that Claimants became entirely unable to continue their operations in Tyrea in any way, losing all revenues they could have continued to receive from their investment. The blocking of Claimants, if recognized as permanent, may, considering the nature of Claimants' business, be regarded as the complete destruction of their investment in Tyrea.
 - ii. A contentious point, however, is the irreversible character of such blocking. It is apparent from the ordinances on the blocking [*Claimants' Exhibit 4*] that the websites were blocked "pending further notice". The notices appearing on Claimants' websites [*Claimants' Exhibit 5*] contain no such clarification. Law No. 0808-L refers to the possibility of both temporary and permanent blocking (p. 8, lines 310-311) without determining any criteria. In conjunction with the alleged desire of Tyrean politicians to eliminate the problem of hate speech entirely by closing social networks responsible (para. 24 p. 53) rather than by developing a filtering solution, this may allow the teams to interpret the facts and demonstrate that the blocking might be permanent or at least long-term.
 - iii. A separate point is whether a measure needs to be permanent to be irreversible. Even in case the blocking is temporary, Claimant may attempt to hold Respondent liable for the damages caused.

2. Are the criteria for lawful expropriation met?

Another major part of the analysis will revolve around the criteria for determining expropriation.

(1) Public interest

Claimants' arguments

Respondent justifies the blocking with the necessity to protect public interests. Claimants may argue, however, that underlying public interests do not automatically justify the measures, which still need to be proportionate and necessary to achieve such public purpose (Quiborax S.A. v. Bolivia, ADS v. Hungary). Claimants will need to discuss if Respondent had other viable alternatives of achieving the same purpose (such as, e.g., extension of the deadline for the establishment of the filtering algorithm, temporary blocking etc.) and how justified Respondent's measures were to achieve the particular public purpose. Teams may refer to some real-life examples, such as the events related to conflicts in Sri Lanka and Facebook's policy in that country, to boost their argumentation.

Respondent's arguments

Respondent's position on this point is likely to be based on Tyrea's history of ethnic violence and the relatively recent emergence from the civil war, which may provide justification for the reduction of the deadline for algorithm development and for the blocking of Claimants' websites. Among other things, Respondent may point out that after the blocking ethnic violence diminished, which may be interpreted as evidence that the measures adopted by Respondent were the only ones capable of being efficient in the circumstances.

(2) Discrimination

Claimants' arguments

To demonstrate discrimination, Claimants need to show that in similar cases States treats investors differently without reasonable justification. Claimants may point out that only three of five social networks operating in Tyrea were blocked, however, it is necessary to demonstrate that the circumstances were indeed similar (even though TruthSeeker was less popular and thus posed a lesser threat, and though the algorithms would not be effective in case of Wink) and that the difference in treatment was not justified. The facts used in arguments may vary, e.g., a reference may be made to, among other things, the fact that although an algorithm would not work for Wink, this network was still a platform for dissemination of hate speech and that, even though it might not have violated the law, the blocking (or at least any other measures) against it would have probably been justified in light of the dire circumstances.

Respondent's arguments

Respondent's position would be to differentiate between the circumstances of Claimants and the social networks which were not blocked. Investment tribunals recognize that some circumstances may justify differential treatment (e.g., *Parkerings v. Lithuania*). In the case of Claimants, Respondent will seek to rely on the alleged lack of popularity of the network (in case of TruthSeeker) or lack of efficiency an algorithm may have (in case of Wink).

(3) Legitimate expectations (“any undertaking which the former Contracting Party may have given”)

Claimants' arguments

Frustration of investment-backed expectations has been recognized in some cases as an indicator of indirect expropriation (e.g., *Grand River v. US*, *Azurix v. Argentina*). Claimants may seek to rely in this regard on the statements made by Tyrean officials assuring the networks of stable legal framework and beneficial infrastructure (see, e.g., line 1475 and further on p. 48 and para. 5 on the same page).

Respondent's arguments

Frustration of investment-backed expectations is up to the parties' discussion. Among the points that may be mentioned are the specific nature of representation, reliability of political statements (e.g., *Continental Casualty v. Argentine* questions reliability of such in principle), especially in light of Tyrea's historical situation, the circumstances in which the statements were made and who made them, etc.

D.2. Whether the blocking of the claimant's platforms violates Article 3(1) of the Tyrea-Novanda and Tyrea-Kitoa BITs

This issue revolves around balancing the investor's entitlements to fair and equitable treatment against the host State's right to regulate in the public interest. Note that the cases cited below are mostly illustrative of cases the teams are likely to cite, and by no means are exhaustive.

Possible Claimant Arguments

1. Legitimate Expectations

The first argument the claimant is likely to make is regarding legitimate expectations, which are well established in investment arbitration.¹ Specifically, the Claimant is likely to rely on a

¹ See for example, *Tecnicas Medoambientales, TECMED SA v. Mexico*, Award (29 May 2003) at para 154; *Southern Pacific Properties v. Egypt*, Award on Merits (20 May 1992) at para 83; *Enron Corp. and others v. Argentina*, Award (22 May 2007) paras 262-4; *MTD Equity Sdn. Bhd. and MTD. Chile S.A. v. Republic of Chile*, Award (25 May 2004) at para. 114; *Occidental Exploration and Production Company*, Final Award (1 July 2004) at para 185; *Eureko B.V. v. Republic of Poland*, Partial Award (19 August 2005) at para 235; *LG&E Energy Corp., LG&E Capital Corp., LG&E*

number of representations made by Tyrea at the time of the making of the investment, such as its liberal, pro-freedom of speech and pro-foreign investor legislation as well statements made by government officials as establishing legitimate expectations in favour of the investor (lines 1469-1489 of the moot problem). It will then argue that the Respondent's amendment to the media legislation violated these representations by removing the pro-freedom of speech (and thus pro-foreign investor) aspects of the Media law, and therefore that this amendment, the subsequent executive orders establishing and then shortening the deadline and finally the blocking of the investment have frustrated these expectations.

Furthermore, it can attempt to preclude a "public interest" defence by arguing that the Respondent's legal framework violates the rights to freedom of expression and privacy established under the International Covenant on Civil and Political Rights, and that while the right to freedom of expression has a public order exception, the right to privacy does not (it only has a reasonableness and non-arbitrariness requirements)² and further that neither of the exceptions' criteria are met.

2. Arbitrariness and Unreasonableness

Claimant may contend that the measure is arbitrary and unreasonable.³ There are two facts that support this determination by the claimant. The first is that the deadline was decreased by 15 days which is solely responsible for the blocking of the websites, and that a 15 day decrease in the time limit is unlikely to have had a significant impact on the domestic situation. The second is that any diminishment in the situation was inadequate and occurred only in cities, which can be attributed to the stated increase in security in these areas (see clarification 15). Furthermore, the Claimant is also likely to contend that the measures were not in the "public interest" as the Respondent aimed to curtail freedom of speech and expression and privacy, both of which are enshrined in the ICCPR; this is similar to the public interest defence above. Furthermore, the public order defence can be rebutted on the grounds that the measures did not significantly restore public order (clarification 5).

3. Discrimination

Finally, the Claimant is likely to contend that the respondent has committed discrimination.⁴ Discrimination in essence is a differentiation between like persons in like circumstances on impermissible or unreasonable grounds. In this case, the Statement of Uncontested Facts

International, Inc. v. Argentine Republic, Decision on Liability (3 October 2006) at para 127; Christof Schreuer and Rudolf Dolzer, "Principles of International Investment Law" (Oxford University Press, 2008) at 134.

² Articles 19 and 17.

³ *Waste Management v. United Mexican States*, Award (30 April 2004) at para 98; *National Grid v. Argentina*, Award (3 November 2008) at para 197; *Plama Consortium v. Bulgaria*, Award (27 August 2008) at para 184; *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, Award (7 June 2012) at para 157; *Joseph Charles Lemire v. Ukraine*, Award (28 March 2011) at para 262.

⁴ See for example, *Plama Consortium v. Bulgaria*, Award (27 August 2008) at para 183; *Saluka Investments BV v. Czech Republic*, Partial Award, 17 March 2006 at para 460.

clearly notes that Wink and Truthseeker were both swamped with radicalist messages, yet they were not blocked. While the SOUF notes that both were less popular (Truthseeker was a fifth as popular as FriendsLook), both were still used to spread radicalist messages, and if the domestic situation was as dire as the Respondent has represented, it is unjustifiable for the Respondent to have blocked foreign investors' but not domestic sites. Reliance can also be placed on the fact that the TCA did not even attempt to justify why Truthseeker was not blocked.

Possible Respondent Arguments

1. Rebutting Legitimate Expectations

Respondent is likely to argue that no legitimate expectations have been formed in the first place. This can be done by reliance on the fact that legitimate expectations are formed based on circumstances at the time of investment.⁵ At the time of the investment (early-mid 2015), Tyrea had only been without ethnic conflict for two years; therefore the Claimant cannot legitimately expect that the Respondent will not have to take measures restricting freedom of speech (and thus, of foreign internet enterprises), as two years is not a sufficient period of time to offer a guarantee that civil strife will not re-emerge and therefore that the Respondent will not have to introduce legislation to curb such strife. The Respondent can in particular rely on the *Saluka*⁶ and *Continental Casualty*⁷ cases which emphasized on balancing legitimate expectations against the right to regulate in the public interest, especially in times of crisis.⁸

2. Rebutting Arbitrariness and Unreasonableness

Respondent can rebut Claimant's arbitrariness and unreasonable arguments on a number of grounds. The first is that Respondent may contend that the measures were not arbitrary and unreasonable as they were the only alternative possible in the situation, demonstrated from the fact that the Respondent, per clarification 15, took a number of measures prior to blocking the websites. Secondly, it will likely note that a finding of arbitrariness can be resisted if the measures reflect a legitimate public purpose⁹ or if they were the best available response at a time of crisis.¹⁰ It will likely argue that they reflect a public purpose as they are in the interest of public order, and further that the ICCPR allows for constraints on freedom of expression in the interest of national security, public order, public health and public morals,¹¹ while

⁵ *Saluka Investments BV v. Czech Republic*, Partial Award, (17 March 2006) at para 306; *Parkerings Compagniet AS v. Lithuania*, Award (11 September 2007) at paras 331-3; *EDF (Services) Ltd v. Romania*, Award (8 October 2009) at paras. 216-9.

⁶ *Saluka Investments BV v. Czech Republic*, Partial Award, (17 March 2006) at para 305-6.

⁷ *Continental Casualty v Argentina*, Award (5 September 2008) at para 258.

⁸ See also *Impregilo S.p.A v. Argentine Republic*, Award (21 June 2011) at paras 290-1.

⁹ *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, Award, (25 June 2001) at para 370.

¹⁰ *Enron Corp. and Ponderosa Assets, L. P. v. Argentine Republic*, Award (22 May 2007), at para 281.

¹¹ Article 19(3).

constraints on privacy need only not be arbitrary or unreasonable.¹² It should therefore argue that the constraints on privacy are not arbitrary or unreasonable as they are in the interest of public order.

3. Rebutting Discrimination

Respondent can rebut the Claimant's discrimination argument only on the ground that there were marked differences between Truthseeker and Wink. Reliance can be placed on the fact that Truthseeker and Wink are both substantially less popular than the Claimants, and so they are likely to experience significant less use as a means of disseminating extremist content. Respondents may also argue that this is justified in light of the fact that Tyrea's new pro-freedom of expression approach implies that it would seek to minimize infringement of the population's rights.

E. Whether the compensation requested by the Claimants is speculative and which is the appropriate method for the quantification of damages in this case

Important Note: *The claim in question requires teams to argue on whether the amounts claimed by the Claimants are speculative, also taking into consideration the different quantification methods proposed by the experts of the parties. It is not the intention of the case committee to have the teams proceed with any calculations; however, if teams wish to present such calculations, they are welcome to do so, albeit not required. Same goes for arguments on interest.*

Having argued on the FET/expropriation alleged breaches, the teams will proceed to the final claim of the case, which relates to damages. Some teams may opt to make their case with regard to the law applicable to the valuation of the investment depending on the breach (FET and/or expropriation), it being the BIT or customary international law.

With regard to the heads of damages claimed and the parties arguments, the teams will need to take into consideration information provided in the Statement of Uncontested Facts, the responses to the clarification requests as provided in Procedural Orders 2 and 3, as well as on the expert reports submitted by the Claimants and the Respondent.

Claimants' position

The Claimants are requesting compensation for direct damages, lost profits in Tyrea, as well as lost profits resulting from the Claimants' expansion to other neighbouring markets. More specifically, the overall amounts requested are as follows:

¹² Article 17.

- FriendsLook plc: **USD 69,134,875**
- Whistler Inc.: **USD 26,760,460**
- SpeakUp Media Inc.: **USD 26,094,600**

In connection to the **direct damages**, the Claimants can argue that due to the blocking of their websites by the Tyrean government, their investments were nullified and rendered obsolete. As a result, they are due the amounts they spent for their establishment in the Tyrean market, which include market research, website localization, legal and regulatory compliance, induction marketing campaigns, and equipment. The amounts for each one of the Claimants are as follows:

- FriendsLook plc: **USD 2,769,000**
- Whistler Inc.: **USD 1,760,500**
- SpeakUp Media Inc.: **USD 1,703,000**

Regarding the Claimants' **lost profits in Tyrea**, their expert is opting for the DCF method in order to calculate the amounts due for each one. The teams may argue that the DCF method has been well-established in arbitration practice¹³ and recognized as a '*sound tool*' to value corporations and their investments.¹⁴ Teams may argue that the Claimants' expert is attempting to establish a demonstrated track of profitability in the Tyrean market and makes future projections relying on this profitability record in order to prove that the Claimants were set to continue to be profitable in Tyrea had the blocking not taken place.¹⁵ Some teams may also argue that the Claimants have also been planning on expanding to neighbouring markets, which also serves as an indicator that they were expecting their local profitability to either increase or remain as is.

As elaborated in the Claimants' expert report, the lost profits in Tyrea for each one are as follows:

- FriendsLook plc: **USD 49,365,875**
- Whistler Inc.: **USD 15,999,960**
- SpeakUp Media Inc.: **USD 16,891,000**

Concerning the Claimants' **lost profits from their market expansion**, teams may argue that since the Claimants were planning to expand to other neighbouring markets by 2022¹⁶ relying on their physical presence in Tyrea,¹⁷ the blocking by Respondent and the obsolescence of the

¹³ *CME v. The Czech Republic*, Final Award (14 March 2003), para 161; *CMS v. The Republic of Argentina*, Award (12 May 2005), para 411; *El Paso v. The Argentine Republic*, Award (31 October 2011), para 711; *Guaracachi v. The Plurinational State of Bolivia*, Award (31 January 2014), para 445; *Sempra v. The Argentine Republic*, Award (28 September 2007), para 416.

¹⁴ See *Enron v. Argentine Republic*, Award (22 May 2007), para 385.

¹⁵ Alonso Expert Report, para 535 (Claimants' revenue projections for 2018 in Tyrea).

¹⁶ PO 2, clarification 2.

¹⁷ Alonso Expert Report, para 555.

Claimants' investments in Tyrea halted their expansion. As a consequence, the Claimants lost significant amounts of profits from operating in these markets.

The projected amounts are as follows:

- FriendsLook plc: **USD 17,000,000**
- Whistler Inc.: **USD 9,000,000**
- SpeakUp Media Inc.: **USD 8,500,000**

Respondent's position

Regarding the **direct damages** claimed by the Claimants that include costs to first establish their presence in Tyrea, the Respondent can argue that they can be discarded by the Tribunal since the Claimants did not incur such costs as a result of the blocking. Therefore, there is no causal link between the Respondent's alleged wrongful act and the alleged damage suffered by the Claimants in this regard.

With regard to the **lost profits in Tyrea**, the Respondent's expert is arguing that the lost profits claimed by the Claimants are speculative,¹⁸ since no hard evidence has been presented that would suggest that it was somewhat certain that the aforementioned profits were to be achieved. Instead, the Respondent's expert proposes a cost-based valuation approach and concludes that the Claimants should only be compensated for their proven expenditures,¹⁹ i.e. the total of costs incurred by the Claimants in 2018 until the blocking (which include taxes, salaries, operations, administrative, legal and marketing costs):

- FriendsLook plc: **USD 2,654,125**
- Whistler Inc.: **USD 1,482,040**
- SpeakUp Media Inc.: **USD 1,162,000**

Concerning the **profits lost from the Claimants' expansion to other markets**, no evidence has been provided that these new investments were underway, other than the numbers provided by the Claimants' expert,²⁰ as well as the fact that the Claimants were planning to complete their expansion efforts by 2022 with no business plans having been submitted to the Tribunal.²¹ Hence, the future profits to be accumulated from such projects as projected using the DCF method can be ruled out as speculative.

¹⁸ There is a plethora of authorities in support of this position, such as *Tecmed v. Mexico*, *Amoco International Finance Corporation v. Iran*, *Wena Hotels Ltd. v. Egypt*, *BG Group PLC v. Republic of Argentina*, *Metalclad v. Mexico*, *Enron v. Argentine Republic*. See also Mark Kantor's *Valuation for Arbitration - Compensation Standards, Valuations Methods and Expert Evidence* (2008), at pages 70-71.

¹⁹ DiMarco Expert Report, para 1055.

²⁰ Alonso Expert Report, paras 555-565.

²¹ PO2, clarification 2.