INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE PROCEEDINGS BETWEEN

FRIENDSLOOK PLC
SPEAKUP MEDIA INC
WHISTLER INC
(CLAIMANTS)

v.

REPUBLIC OF TYREA
(RESPONDENT)

ARBITRATION NO 00/2019

MEMORANDUM FOR CLAIMANTS
TABLE OF CONTENTS

LIST OF AUTHORITIES........................................................................................................... iii
LIST OF CASES AND ARBITRAL AWARDS............................................................................ vii
LIST OF ABBREVIATIONS........................................................................................................ x
STATEMENT OF FACTS.............................................................................................................. 1
PART ONE: JURISDICTION ........................................................................................................ 2

I. THE DENOUNCIATION OF THE ICSID CONVENTION BY THE RESPONDENT HAS NO EFFECT ON THE TRIBUNAL’S JURISDICTION OVER THE PRESENT DISPUTE................................................................. 2
   A. The Respondent’s argument on the lack of jurisdiction.................................................. 2
   B. The question of consent................................................................................................. 2
   C. The effect of the denunciation of the ICSID Convention on the given consent........... 4
   D. Conclusion .................................................................................................................... 6

II. THE TRIBUNAL HAS JURISDICTION OVER THE MULTIPARTY ARBITRATION CLAIM......................................................................................................................... 7
   A. Multiparty claims are permitted under the ICSID Convention.................................... 7
   B. No special consent is needed for the Tribunal to have jurisdiction over the multiparty claim.... 8
   C. The fact that the Claimants base their case on two different BITs is no bar to the jurisdiction of the Tribunal.................................................................................................................. 10
   D. Conclusion .................................................................................................................... 10

III. THE TRIBUNAL SHOULD NOT GRANT THE PROVISIONAL MEASURES REQUESTED BY THE RESPONDENT............................................................ 11
   A. The test for granting provisional measures..................................................................... 11
   B. Prima facie jurisdiction of the Tribunal ......................................................................... 12
   C. The protection of a Respondent’s right .......................................................................... 12
   D. The urgency and necessity of the request...................................................................... 13
   E. Conclusion .................................................................................................................... 14

PART TWO: MERITS................................................................................................................ 16

I. THE BLOCKING OF THE CLAIMANTS’ PLATFORMS IS IN VIOLATION OF ARTICLE 6.1 OF THE TYREA-KITOA BIT AND TYREA-NOVANDA BIT ..................... 16
   A. Respondent’s actions do not fit within Respondent’s right to regulate ....................... 17
   B. The Respondent’s actions were discriminatory.............................................................. 18
   C. Respondent’s actions failed to comply with proportionate analysis............................. 18
II. THE BLOCKING OF THE CLAIMANTS’ PLATFORMS IS IN VIOLATION OF ARTICLE 3.1 OF THE TYREA-KITOA BIT AND TYREA-NOVANDA BIT ............................... 21
   A. The Republic of Tyrea has breached the Claimants’ legitimate expectations and has failed to ensure a predictable legal framework

   B. The Republic of Tyrea has given a discriminatory response by the execution of the Law 0808-L

   C. The execution of the Law 0808-L was not proportionate to Claimants’ investments .......................... 26

III. THE COMPENSATION REQUESTED BY THE CLAIMANTS IS NOT SPECULATIVE AND THE DCF MODEL IS AN APPROPRIATE METHOD TO USE .... 27
   A. The wording of the BITs refers to fair market value with a DCF approach .................................. 29

   B. The Claimants own going concerns with a proven track of profitability ........................................ 29

   C. The 5% discount rate is adequate in the light of the situation in Tyrea ........................................ 32

PRAYERS FOR RELIEF .................................................................................................................. 34
<table>
<thead>
<tr>
<th>Cited as</th>
<th>Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CHOUDHURY</strong></td>
<td>Choudhury, Barnali ‘Recapturing public power: is investment arbitration’s engagement of the public interest contributing to the democratic deficit?’ (2008) 41 Vanderbilt Journal of Transnational Law</td>
</tr>
<tr>
<td><strong>CRAWFORD</strong></td>
<td>Crawford, James, the International Law commission’s articles on state responsibility, introduction, text and commentaries, 2002</td>
</tr>
<tr>
<td><strong>DOMÍNGUEZ</strong></td>
<td>Domínguez, Marcos D. García, “Calculating damages in investment arbitration: Should tribunals take country risk into account?”, 2016</td>
</tr>
<tr>
<td>Hai Truong Van Thanh</td>
<td>Hai Truong Van Thanh, “Relationships between Web Traffic Ranks and Online Sales Revenue of E Retailers in Australia”, Professional Project-BUSN20019, 2018</td>
</tr>
<tr>
<td><strong>HENCKELS</strong></td>
<td>Henckels, C. “Proportionality and the standard of review in fair and equitable treatment claims: balancing stability and consistency with public purpose, Society of International Economic Law, 2012</td>
</tr>
<tr>
<td><strong>MARBOE</strong></td>
<td>Marboe Irmgard, Calculation of Compensation and Damages in International Investment Law Oxford University Press (2009)</td>
</tr>
<tr>
<td><strong>ORTIS</strong></td>
<td>Rodner, James Ortis and Jaime Martínez Estévez. BITs in Pieces: The Effectiveness of ICSID Jurisdiction after the ICSID Convention has been Denounced. Kluwer Law Online, 2012.</td>
</tr>
<tr>
<td><strong>Proportionality and Constitutional Culture</strong></td>
<td>Moshe Cohen-Elya and Iddo Porat, Proportionality and Constitutional Culture (Cambridge University Press 2012)</td>
</tr>
<tr>
<td><strong>SCHREUR FET</strong></td>
<td>Schreuer Ch „Fair and Equitable Treatment in Arbitral Practise“, The Jurnal of World investment and trade, Geneva, 2005. ISSN 1660_7112</td>
</tr>
<tr>
<td><strong>SCHREUER, KRIENBAUM</strong></td>
<td>Schreuer, Ch., Krienbaum, U. “At what time must legitimate expectation exist? ”</td>
</tr>
<tr>
<td>Author</td>
<td>Title and Reference</td>
</tr>
<tr>
<td>--------</td>
<td>---------------------</td>
</tr>
<tr>
<td>SONGMING YANG</td>
<td>Yang, S., „The Study of Customer Experience Design and Optimization of Shopping Website: Case Analysis of Amazon in China“ Asian Business Research, 2019 ISSN 2424-8479</td>
</tr>
<tr>
<td>VERHOOSE</td>
<td>Verhoosel, Gaëtan ‘Foreign direct investment and legal constraints on domestic environmental policies: striking a “reasonable” balance between stability and change’ (1997–1998) 29 Law &amp; Policy in International Business</td>
</tr>
</tbody>
</table>
# LIST OF CASES AND ARBITRAL AWARDS

<table>
<thead>
<tr>
<th>Cited as:</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>AAPL v. Sri Lanka</strong></td>
<td>Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3</td>
</tr>
<tr>
<td><strong>Abaclat</strong></td>
<td>Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5</td>
</tr>
<tr>
<td><strong>ADC</strong></td>
<td>ADC Affiliate Limited and ADC &amp; ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16</td>
</tr>
<tr>
<td><strong>Alemanni</strong></td>
<td>Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/8</td>
</tr>
<tr>
<td><strong>Ambiente Ufficio</strong></td>
<td>Ambiente Ufficio S.p.A. and Others v. Argentine Republic, ICSID case no. ARB/08/9</td>
</tr>
<tr>
<td><strong>Amco v. Indonesia</strong></td>
<td>Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1</td>
</tr>
<tr>
<td><strong>AMT v. Zaire</strong></td>
<td>American Manufacturing &amp; Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1</td>
</tr>
<tr>
<td><strong>Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic</strong></td>
<td>Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01</td>
</tr>
<tr>
<td><strong>CME</strong></td>
<td>CME Czech Republic B.V. (The Netherlands) vs. Czech Republic, Partial award, UNCITRAL</td>
</tr>
<tr>
<td><strong>CME v. Czech Republic</strong></td>
<td>CME Czech Republic B.V. (The Netherlands) vs. Czech Republic, Award, UNCITRAL</td>
</tr>
<tr>
<td><strong>CMS v. Argentina</strong></td>
<td>CMS Gas Transmission Company v. The Republic of Argentina, Award. ICSID Case No. ARB/01/8</td>
</tr>
<tr>
<td><strong>CSOB v. Slovakia</strong></td>
<td>Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4</td>
</tr>
<tr>
<td><strong>EnCana Corp. v Republic of Ecuador</strong></td>
<td>EnCana Corp. v Republic of Ecuador (Award, 2006) LCIA Case No UN 3481, 45 ILM 901.</td>
</tr>
<tr>
<td>Case Name</td>
<td>Description</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Enron v. The Argentine Republic</strong></td>
<td>Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, Award, ICSID Case No. ARB/01/3</td>
</tr>
<tr>
<td><strong>Gold Reserve v. Venezuela</strong></td>
<td>Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1</td>
</tr>
<tr>
<td><strong>Guaracachi v. Bolivia</strong></td>
<td>Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17</td>
</tr>
<tr>
<td><strong>Metalclad</strong></td>
<td>Metalclad Corporation v. The United Mexican States, Award, ICSID Case No. ARB(AF)/97/1</td>
</tr>
<tr>
<td><strong>Mondev v. USA</strong></td>
<td>Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2</td>
</tr>
<tr>
<td><strong>National Grid Plc. v. Argentina</strong></td>
<td>National Grid Plc. v. Argentina, (UNCITRAL), Award of 03 November 2008</td>
</tr>
<tr>
<td><strong>Noble Energy v. Ecuador</strong></td>
<td>Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12</td>
</tr>
<tr>
<td><strong>OKO v. Estonia</strong></td>
<td>Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia, ICSID Case No. ARB/04/6</td>
</tr>
<tr>
<td><strong>Philip Morris</strong></td>
<td>Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, Award, ICSID Case No. ARB/10/7</td>
</tr>
<tr>
<td><strong>PSEG v. Turkey</strong></td>
<td>PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, Award. ICSID Case No. ARB/02/5</td>
</tr>
<tr>
<td><strong>Quiborax v. Bolivia</strong></td>
<td>Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplûn v. Plurinational State of Bolivia, Award, ICSID Case No. ARB/06/2</td>
</tr>
<tr>
<td>Case</td>
<td>Description</td>
</tr>
<tr>
<td>------</td>
<td>-------------</td>
</tr>
<tr>
<td><strong>Saluka</strong></td>
<td>Saluka v Czech Republic (Partial Award 2006), UNCITRAL, PCA</td>
</tr>
<tr>
<td><strong>Starrett Housing v. Iran</strong></td>
<td>Starrett Housing Corporation, Starrett Systems, Inc. and others v. The Government of the Islamic Republic of Iran, Bank Markazi Iran and others, IUSCT Case No. 24, Final Award (Award No. 314-24-1)</td>
</tr>
<tr>
<td><strong>Suez v. Argentina</strong></td>
<td>Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19</td>
</tr>
<tr>
<td><strong>TECMED</strong></td>
<td>Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, Award, ICSID Case No. ARB (AF)/00/2.</td>
</tr>
<tr>
<td><strong>Tidewater v. Venezuela</strong></td>
<td>Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, CA, et al. v. The Bolivarian Republic of Venezuela, Award, ICSID Case No. ARB/10/5</td>
</tr>
</tbody>
</table>
# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AR</td>
<td>Arbitration Rules</td>
</tr>
<tr>
<td>BIT</td>
<td>Bilateral investment treaty</td>
</tr>
<tr>
<td>BITs</td>
<td>Tyrea-Novanda BIT and Tyrea-Kitoa BIT</td>
</tr>
<tr>
<td>DCF</td>
<td>Discounted Cash Flow</td>
</tr>
<tr>
<td>FET</td>
<td>Fair and equitable treatment</td>
</tr>
<tr>
<td>ICISD</td>
<td>International Centre for Settlement of Investment Disputes</td>
</tr>
<tr>
<td>ICSID Convention</td>
<td>Convention on the Settlement of Investment Disputes between States and Nationals of Other States</td>
</tr>
<tr>
<td>ICSID Framework</td>
<td>ICSID Convention + AR</td>
</tr>
<tr>
<td>Law 0808-L</td>
<td>Law on Media and Communications NO. 0808-L</td>
</tr>
<tr>
<td>Media Law</td>
<td>Law on Media and Information NO. 1125-L</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
</tr>
<tr>
<td>TK BIT</td>
<td>Tyrea-Kitoa BIT</td>
</tr>
<tr>
<td>TN BIT</td>
<td>Tyrea-Novanda BIT</td>
</tr>
<tr>
<td>Tyrea</td>
<td>Republic of Tyrea</td>
</tr>
<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
</tr>
</tbody>
</table>
STATEMENT OF FACTS

At the beginning, there was a promise of a long-term partnership. Now, only a bitter aftertaste of the Respondent’s false promises remains.

Claimants are providers of the following international social networks: SpeakUp, FriendsLook and Whistler. At the beginning of the decade, the Republic of Tyrea, the Respondent in the present case, emerged from a civil war and has now transitioned into a democracy.

In 2014, when the Claimants were exploring a potential new market to expand to, the Respondent led them to believe that Tyrea was a state that was changing the way it was governed and lured them into investing in the country with hopes of it opening up to foreign investment and overcoming the hardships of dictatorship. The Claimants believed these promises and worked together to set up operations in Tyrea and optimize their platform for the local audience to generate revenue from future planned investments.

The Claimants were taken by surprise when, after a period of their successful and mutually profitable cooperation, the Respondent decided to adopt measures which resulted in the blocking of Claimants’ websites. Due to the political situation in Tyrea, the Claimants did not consider the requirements unreasonable, and proceeded to comply with the imposed measures, consisting of creating an algorithm for filtering hate speech in 60 days. However, when the Respondent adopted the amendment of the decree and thus shortened the time period to 45 days right in the middle of their developing of the said algorithm, the Claimants were deprived of the time limit needed to finish the task. After the execution of the Law 0808-L and the permanent blocking of their platforms, the Claimants were left shorthanded, as they had no possibility to defend themselves against Respondent’s actions.

Once the unexpected blocking broke out, the Respondent cut and ran from its contractual responsibilities under the BIT. In 2018, after seeing that any chance of sensible communication with the Respondent was slim to none, the Claimants decided to submit their request for arbitration with hopes of finally solving the problem.
PART ONE: JURISDICTION

I. THE DENONCIATION OF THE ICSID CONVENTION BY THE RESPONDENT HAS NO EFFECT ON THE TRIBUNAL’S JURISDICTION OVER THE PRESENT DISPUTE

A. The Respondent’s argument on the lack of jurisdiction

1. The Respondent claims that the Tribunal does not have jurisdiction over the present dispute as the offer to arbitrate under the ICSID convention no longer stands, since Tyrea has denounced the ICSID Convention on January 5, 2018. The Respondent further argues that, pursuant to article 72 of the ICSID Convention, the rights and obligations arising therefrom shall remain unaffected “only when the relevant Contracting State consented to the jurisdiction of the ICSID before the receipt of the notice of denunciation by the depositary”, while claiming that Tyrea has never actually given its consent to the jurisdiction of the ICSID in the first place. Therefore, the questions to be asked in this case are a) whether the Respondent has ever given its consent to arbitration and, if so, b) whether the denunciation of the ICSID Convention by the Respondent has had any effect on that consent. The claimants believe that consent to arbitration under the jurisdiction of the ICSID has in fact been given and that it has not been affected by Tyrea’s denunciation of the ICSID Convention.

B. The question of consent

2. Under the ICSID Convention, for a Tribunal to have jurisdiction over a dispute between a host State and the foreign investor, an agreement on arbitration between the parties to the dispute must exist. As provided in Art. 25 of the ICSID Convention, the consent to arbitration by both of the parties must be in writing.

3. In practice, three ways of giving consent to ICSID jurisdiction can generally be recognized. First, a consent clause in a direct agreement between the parties may exist. Second, there may be a provision to be found in the national legislation of the host State which envisions the possibility of ICSID arbitration. The provision itself is not enough to fulfil the condition of consent by both parties as mentioned above but can be considered an “offer” and may lead to arbitration, provided that it is accepted by the foreign investor in writing at any time while the legislation is in effect. The third possible option of giving consent is through a bilateral

---

1 Problem, page 23
2 UNCTAD, 2003, page 5
investment treaty, (hereinafter referred to as “a BIT”), between the investor’s national State and the host State. Just like in the case of consent through legislation, an acceptance of the “offer” to arbitrate contained in a BIT is required on the investor's side.\(^3\)

4. In the case of the present dispute, there is no record that a direct agreement between the Respondent and the Claimants exists. There is also no record of a provision in Tyrea’s legislation addressing the issue. There is, however, an ICSID clause in both of the BITs in question. Art. 9(1) of both the TN BIT as well as the TK BIT states that “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”.\(^4\) Paragraph 3 of the same article further states that the parties “hereby give unconditional consent to the submission of disputes as referred to paragraph 1 of this Article to international arbitration in accordance with the provisions of this article”. The two provisions together give rise to little doubt that the consent to the ICSID jurisdiction has been given by the Respondent at the time of the coming-into-effect of the two respective BITs.

5. As mentioned above, in the case of a consent to ICSID jurisdiction given through a BIT by the host State and the home State of the investor, an acceptance by the investor of the general offer made by the host State is required. Unless a BIT sets further conditions for the acceptance of the offer, it is established practice that the offer of consent within a BIT may be accepted by the investor simply by instituting ICSID proceedings.\(^5\)

6. Neither the TN BIT nor the TK BIT contain any provision setting such further conditions for the acceptance of an arbitration offer. When the Claimants decided to initiate the arbitration proceedings, both BITs were in force, and remain in force to this day. Therefore, the conditions set forth in Art. 25 of the ICSID Convention for a mutual consent to jurisdiction have been met the moment of the Claimants’ Request for arbitration submission.

---

\(^3\) Ibid. page 5-6
\(^4\) Art. 9 BIT
\(^5\) e.g. AMT v. Zaire; AAPL v. Sri Lanka; CSOB v. Slovakia…
C. The effect of the denunciation of the ICSID Convention on the given consent

7. To be able to provide an answer to the question of the effect of denunciation on the jurisdiction of the Tribunal in the given dispute, a joint interpretation of Articles 25, 71 and 72 of the ICSID Convention and the BITs is needed.

8. Art. 25(1) in fine states that “when the parties have given their consent, no party may withdraw its consent unilaterally”, meaning that once the parties have consented to the jurisdiction of the ICSID, their consent becomes irrevocable. This rule embodied in this provision is consistent with the generally applicable maxim when it comes to undertakings to arbitrate, “pacta sunt servanda”, or “good faith”.6

9. The prohibition to revoke the consent to arbitration includes indirect revocation through an attempt to remove any of the other jurisdictional requirements. To this end, Art. 72 of the ICSID Convention, which provides that a notice of its denunciation by a Contracting State, provided for by Art. 71, shall not affect the previously given consent to the jurisdiction of the ICSID and the rights and obligations under the ICSID Convention arising therefrom.7

10. When considering the relationship between the respective ICSID Convention provisions and a BIT, recent opinions on the topic have come to the conclusion that Articles 25(1), 71 and 72 of the ICSID Convention should be interpreted in harmony with the BIT’s articles providing for ICSID arbitration.8

11. The basis of their approach lies within the fact that the joint application of the ICSID Convention together with the BIT needs to be interpreted using various sources of international law and interpretation principles enshrined within them – these include general principles of law, such as good faith, lex specialis derogate generali, the goal of a peaceful settlement of international disputes etc., or international conventions, such as the VCLT.9

12. Art. 31(1) of the VCLT, of which both of the Claimants’ home states are a party to, provides that the main guide for the interpretation of a treaty is its purpose. As recognized from the Preamble, the purpose of the ICSID Convention is “to contribute to economic development by facilitating private international investments”.10 As for the BITs, generally speaking, the purpose of a

6 UNCTD, page 37
7 Ibid.
8 ORTIS, page 447
9 Ibid., page 445
10 Ibid.
BIT is the promotion as well as protection of investments coming from one state to another.\textsuperscript{11} In the present case, a more specifically defined purpose of both the BITs in question can also be recognized from their Preambles. The TN BIT Preamble suggests that the purpose of the BIT is the reciprocal protection of investments with an aim of stimulating individual business initiative and increasing prosperity in the Contracting States. The Preamble of the TK BIT similarly suggest that the BIT’s purpose is to extend and intensify the economic relations between the Contracting States with respect to investments by nationals of one of them in the territory of the other while ensuring a fair and equitable treatment of such investments, with the objective of a mutual economic development.\textsuperscript{12}

13. Having established the purpose of both BITs, the ICSID Convention must be interpreted in a way which would avoid conflict with the provisions of the BITs in order to comply with the obligation of performing the BIT in good faith. Therefore, it cannot be concluded that by denouncing the ICSID Convention, the Respondent has been stripped of its obligation to accept the submission of disputes arising out of the investment made by the Claimants to arbitration.

14. The Respondent together with the Claimants’ home states have, through the two respective BITs, expressed their will to protect international investments, while explicitly giving their unconditional consent to the submission of potential disputes arising out of such investments to international arbitration under the ICSID Convention.\textsuperscript{13} The fact that one of them has denounced the ICSID Convention cannot result in an indirect amendment of the BITs which would affect investments made prior to the notice of denunciation and thus revoke a right of an existing investor to submit a claim for settlement by arbitration to the ICSID. It can be argued that had the parties intended this result, they would have expressly included it in the BITs. What further supports this argument is the fact that both BITs provide for arbitration under the Additional Facility Rules “\textit{as long as the Republic of Tyre has not become a Contracting State of the [ICSID] Convention}”, but lack a similar provision for \textit{after} either of the BITs’ Contracting Parties has denounced the ICSID Convention.\textsuperscript{14} Because the BITs only contemplate arbitration under the ICSID Convention for any time \textit{after} the Contracting Parties have become Contracting States of the ICSID Convention, eliminating this possibility would mean taking away one of the investors’ principle rights and the respective article of the BITs providing for

\textsuperscript{11} Ibid.
\textsuperscript{12} BIT
\textsuperscript{13} Art. 9(1) BIT
\textsuperscript{14} Art. 9(2) BIT
ICSID arbitration would remain useless. The unconditional consent to arbitration contained within the BITs would lose any value.

15. Finally, it is worth noting that the Respondent may argue that the rule of the irrevocability of the consent applies only after the consent has been perfected, i.e. after the offer to arbitrate has been accepted by the investor. This argument would find support in Professor Schreuer’s interpretation of Art. 72.\textsuperscript{15} However, he himself offers an alternative interpretation of the respective article, which represents a different approach to the issue.

16. According to SCHREUER, literal reading of Art. 72 which refers to “consent … given by one of them” in the light of Art. 25(1) which talks about consent by “parties to the dispute” leads to the conclusion that Art. 72, in contrast to Art. 25, covers the unilateral expression of consent by the host state, above referred to as an offer, which as such does not necessarily have to be accepted by the investor for the rights and obligations to remain unaffected by a notice under Art. 71. This would mean that even after such notice, the investor retains the right to accept the offer of consent previously given by the host state. For the investor to lose this right, the host state would have to withdraw the offer, i.e. revoke the consent separately.\textsuperscript{16} In this case, since the consent of the host state is embodied within the respective BITs which the Respondent has entered into with the Claimants’ home states, the revocation of the offer could not be done without those home states’ consent.

D. Conclusion

17. After taking all of the arguments above into consideration, it cannot be accepted that the denunciation of the ICSID Convention by the Respondent represents a revocation of the previously given consent causing the Claimants to miss out on their right for ICSID arbitration.

18. The Claimants are firm in their belief that the denunciation of the ICSID Convention has no effect on their right to bring about an arbitration claim. Therefore, the tribunal does have jurisdiction over the present dispute.

\textsuperscript{15} SCHREUER, page 1281
\textsuperscript{16} Ibid.
II. THE TRIBUNAL HAS JURISDICTION OVER THE MULTIPARTY ARBITRATION CLAIM

19. The second issue which according to the Respondent results in a lack of jurisdiction of this Tribunal is the multi-party claim brought by the investors in this dispute. The Respondent believes that there are no sufficient legal and factual grounds for the Tribunal to hear the claims in a single arbitration. Furthermore, it argues that the Claimants cannot pursue this case on a multiparty basis since Tyrea has never agreed to multiparty arbitration. Finally, the Respondent is of the opinion that the Tribunal does not have jurisdiction over the multiparty claim because the Claimants base their case on two different BITs. The Claimants on the other hand believe that the multi-party claim is no limit to the jurisdiction of the Tribunal and are confident that there is enough precedent to support their position.

A. Multiparty claims are permitted under the ICSID Convention

20. Multiparty claims represent one of the possible ways of ensuring that like cases are decided in a like manner and as cost-effectively as possible.\textsuperscript{17} Even though the ICSID Convention and the AR do not address the issue of multiparty claims expressly, the possibility of such claims was in fact anticipated by the drafters of the Convention, as the \textit{travaux préparatoires} show.\textsuperscript{18} Just as well, it has been consistently found by tribunals that the ICSID Convention and AR allow multiparty proceedings.\textsuperscript{19}

21. In reality, multiparty arbitration under ICSID is not a rare phenomenon, as nearly half of all ICSID cases have involved multiple claimants.\textsuperscript{20} The relationship between the claimants in multiparty cases varies, with such cases ranging from multiple claims brought by closely affiliated investors to claims brought by unaffiliated investors challenging the same measures.\textsuperscript{21} Generally, consistent with Art. 36(3) of the ICSID Convention, claims submitted by more than one claimant in a single Request for arbitration are in practice likely to be registered unless they are manifestly outside the jurisdiction of the ICSID.\textsuperscript{22}

22. When considering whether a specific claim falls within the jurisdiction of the ICSID, Tribunals have considered various factors, \textit{“including whether (i) a single dispute exists; (ii) the investment is the}

\textsuperscript{17} ICSID Amendment Proposal, page 833
\textsuperscript{18} Ibid.
\textsuperscript{19} e. g. Ablacat; Ambiente Ufficio; Alemanni…
\textsuperscript{20} ICSID Amendment Proposal, page 834
\textsuperscript{21} Ibid.
\textsuperscript{22} Ibid.
same…; (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”. After evaluating these factors, the Tribunal can decide whether the together-brought claims are in its view sufficiently related to be treated together.23

23. This factor test can be easily applied to any ICSID arbitration claim, including the one at hand, which revolves around three disputes concerning three separate investments. The non-affiliation of the claims, within the sense of the factor test, will likely be the core of Respondent’s argument against the jurisdiction of this Tribunal to hear the claims jointly. Nevertheless, the Claimants argue that an evaluation of the rest of the above-mentioned factors, when applied to this case, speaks in their favour.

24. The Claimants are indeed individual investors, but the nature of their investment is similar to one another to say the least, since they are all providers of a global social network. Also, the context of their investment in Tyrea hardly differs. They all entered the Tyrean market in the year of 2015, following the 2014 government-sponsored conference for representatives of social network platforms titled “A New Web Era in Tyrea”, which sought to assure the participants that “a new internet era has begun for Tyrea” and that the government was determined to do their absolute best “to facilitate the establishment and use of new internet possibilities for the people of Tyrea”.24 Moreover, all three Claimants are affiliated through a number of mutual shareholders.25 Also, their claims go against the same Respondent and they are challenging the same measure consisting of the blocking of their websites.

25. The Claimants consider the aforesaid circumstances to be a sufficient ground for bringing a joint claim against the Respondent. In other words, having considered the factors above, the Claimants conclude that the Tribunal does have jurisdiction over the multiparty claim brought by them against the Republic of Tyrea.

B. No special consent is needed for the Tribunal to have jurisdiction over the multiparty claim.

26. As mentioned above, one of the arguments raised by the Respondent is that Tyrea has never agreed to multi-party arbitration. The Respondent claims to have never given consent to such proceedings. The Claimants disagree, as they believe that by giving consent to arbitration as
such, the Respondent has given its consent to the possible multiparty proceeding as well. The ICISD framework contains no reference to multiparty proceedings as a possible form of arbitration. Thus, the absence of such provision represents a gap in the ICISD framework and should be interpreted as such.

27. This issue was first raised in *Abaclet*. The Tribunal in *Abaclet* mentioned that Art. 44 of the ICSID Convention provides that when a procedural question arises which is not covered by the ICSID framework or any rules agreed by the parties, the Tribunal shall decide the question. The rule embodied within Art. 44 of the ICSID Convention is complemented by Rule 19 of the AR, according to which “the Tribunal shall make the orders required for the proceeding”. These two provisions together represent an expression of the inherent power of any tribunal to resolve procedural questions in the event of *lacunae* or a *gap*. In *Abaclet*, the Tribunal considered the procedural question to conduct collective proceedings to be a gap in the ICSID framework. Furthermore, the Tribunal determined that its authority to decide any questions of procedure which are not covered by the ICSID framework or subject to the parties’ agreement arises from the consent to ICSID arbitration as a dispute resolution method for disputes arising out of a BIT. By consenting to ICSID arbitration, the parties pre-approved the exercise of inherent powers. Therefore, no additional consent is needed.

28. The case at hand is no different. By not excluding the possibility of multiparty proceedings explicitly, the parties have pre-allowed the Tribunal to exercise its inherent power to consider its jurisdiction over the multiparty claim. The Claimants believe that the sole fact that the parties have not excluded the possibility of multiparty proceedings explicitly in the respective BITs and thus created a “gap” should not prohibit the Tribunal’s jurisdiction over the present dispute. In any case, as concluded above, the parties to this dispute have consented to ICSID arbitration. In light of this fact, the Respondent’s objection to the Tribunal’s jurisdiction on the basis that it has not consented to multiparty claims seems rather void. Therefore, the Claimants are of the opinion that no additional consent is needed for the Tribunal to have jurisdiction over the multiparty claim.

---

26 CABRERA COLORADO, page 180
27 Ibid.
28 Abaclet
C. The fact that the Claimants base their case on two different BITs is no bar to the jurisdiction of the Tribunal.

29. Finally, the Respondent argues that the Tribunal cannot hear these claims in a single arbitration, since the Claimants base their case on two distinct BITs. However, there is nothing in the ICSID Convention which would prevent Tribunals from exercising jurisdiction over such cases. The practice of basing a multiparty claim on different BITs is not unprecedented, as Tribunals under the ICSID Convention have affirmed jurisdiction over such claims in the past.29

30. Guaracachi v. Bolivia was similar to the case at hand in the respect of an objection to the jurisdiction of the Tribunal actually being raised by the host state over the fact that the multiparty claim was brought under two separate BITs. The Tribunal in Guaracachi held that “the relevant BITs could not be interpreted as containing some limitation of scope preventing a claimant from submitting an arbitral claim together with another claimant when (1) both claims are based on the same alleged facts and (2) on the same alleged breaches although brought under different BITs, provided that (3) each claimant provides its own independent matching consent to arbitration”.30

31. The Claimants believe that the issue of a joint claim based on different BITs should not be viewed any differently in the present case. As already mentioned above, the context of the dispute is the same with all three Claimants and the facts of their claims only differ in the slightest, while the breach on the Respondent’s side affected all three of them – they were all deprived of their investment in consequence of the Respondent’s blocking of their websites. It has also been concluded above that they all gave their consent to arbitration (even if by initiating the arbitration proceeding). What is more, in this case, the two BITs are identical.31 Thus, the Claimants assume that there is no reason to prevent them from the submission of a joint claim.

32. Given the above, the Claimants believe that in the present case, the Tribunal should not find the fact that their claims are based on different BITs to be an issue preventing its jurisdiction over the dispute.

D. Conclusion

33. Considering all of the above, the Claimants strongly believe that the Tribunal does have jurisdiction over their multiparty claim.

29 e. g. OKO v. Estonia; Suez v. Argentina; Guaracachi v. Bolivia
30 Guaracachi v. Bolivia
31 Problem, page 3
III. THE TRIBUNAL SHOULD NOT GRANT THE PROVISIONAL MEASURES REQUESTED BY THE RESPONDENT

34. On December 21 2018, the Respondent submitted a Request for provisional measures, through which it requested the Tribunal to order the Claimants “to refrain, for the duration of the arbitration proceedings, from taking any steps which might aggravate this dispute or exacerbate Tyrea’s position in it”, accenting in particular that the Claimants “abstain from promoting, stimulating, or instigating the publication of propaganda, presenting their case selectively outside this Tribunal, or otherwise jeopardizing Tyrea’s rights in this dispute”. 32 The Respondent claims that the Claimants have taken part in various actions with an aim of aggravating the present dispute, talking of a “media campaign” 33 or even a “media war” and a “direct attack on Respondent” 34.

35. By submitting its request, the Respondent exercised its right arising out of Art. 47 of the ICSID Convention and AR 39(1). The purpose of provisional measures, as stated in the respective provisions, is to preserve the rights of the parties to the dispute (or rather the requesting party). 35 However, the Claimants believe that the Respondent’s rights have not been affected in any way for the Respondent to succeed with its Request for provisional measures.

A. The test for granting provisional measures

36. The objective of granting provisional measures is “to induce behaviour by the parties that is conducive to a successful outcome of the proceedings”. 36 They are widely recognized as “extraordinary measures which should not be recommended lightly”, which is why tribunals tend to analyse the requests for provisional measures thoroughly in order to decide whether they should or should not be granted. 37

37. In Occidental v. Ecuador, the Tribunal held that “in order for an international tribunal to grant provisional measures, there must exist both a right to be preserved and circumstances of necessity and urgency to avoid irreparable harm”. 38 This corresponds to the generally applied “test” for provisional measures, which consists of four key requirements to be satisfied. First, the tribunal must have prima facie jurisdiction in relation to the dispute. Second, the requested
provisional measures must be in relation to the applicant’s right. The third and fourth requirements are the urgency and necessity of the request. The Claimants are of the opinion that the Respondent cannot satisfy three of these four requirements and thus obtain the requested provisional measures.

B. Prima facie jurisdiction of the Tribunal

38. The first requirement which must be satisfied for a party to be able to obtain provisional measures is prima facie jurisdiction of the tribunal. The Claimants have repeatedly stated that they believe the Tribunal does in fact have jurisdiction over the present dispute. This issue is to be resolved during the “Stage 1” hearing, which is when the Tribunal will decide on the question of jurisdiction. But the sole fact that the Respondent is contesting the Tribunal’s jurisdiction should not prevent this requirement to be satisfied. According to the Claimants’ belief, a prima facie jurisdiction can be established.

C. The protection of a Respondent’s right

39. As mentioned above, the Claimants believe that the Tribunal does have prima facie jurisdiction over the dispute and thus has the power to decide on the Respondent’s request. However, according to the Claimants, the second requirement is more problematic.

40. Provisional measures can be requested in order to seek protection for substantial rights that are the subject matter of the dispute. Arbitration Rule 39(1) provides that the rights which the requesting party seeks to protect by obtaining provisional measures must be specified in such request. The Respondent’s Request for provisional measures, however, does not fulfil this condition. It does not seem from the Respondent’s argumentation that there even is a substantial right in question which it would feel the need to protect and sought protection for. That being the case, the Respondent cannot satisfy the second requirement.

41. It could be argued that “self-standing” procedural rights, such as the non-aggravation of the dispute mentioned by the Respondent, can be considered for protection as well. This has been the case in Amco v. Indonesia, which is in this sense similar to the case at hand. In Amco, Indonesia requested provisional measures in order to keep the Claimants from publication of propaganda, arguing it might aggravate the dispute. The alleged propaganda consisted of

39 COLEMAN, page 3-4
40 Problem, page 41
41 COLEMAN, page 3
42 STERN, page 2
43 Problem, page 36
publishing an article in a Hong Kong newspaper, which Indonesia considered to be a “one-sided version of the Claimant’s story”. The request was declined, as the Tribunal found that the article could not have actually aggravated the dispute, nor do any actual harm to Indonesia. The Claimants believe the situation does not differ in their case. Out of the alleged propaganda consisting of various news articles, the Claimants’ role has not been proven in the publishing of any of them.

The Respondent further argues that the Claimants were wrong to have made the Request for Arbitration public through an article in the Global Herald. But in reality, there is nothing prohibiting them from doing so. In Mondev, the Claimant objected to a publication of the Notice of Arbitration by the Respondent. The Tribunal held that “the Respondent had the right to publish the Notice of Arbitration by any medium it chose”, since it was already a public document, pursuant to NAFTA Article 1126(10)(b) and (13). Therefore, just like in Mondev, the Claimants in this case were free to provide to any newspaper the Request for Arbitration in order to have it published.

In any case, it seems from the Respondent’s Request for provisional measures that rather than the keeping the Claimants from aggravating the dispute, it seeks to protect its economic interests instead, as it emphasizes the potential damage that the Claimants’ actions could inflict on Tyrea’s economic growth and its international position. This is not an objective to be protected through provisional measures, which are only in place in exceptional circumstances where there is a risk of seriously affecting the arbitration proceedings. The future economic situation in Tyrea or its position on the international market is not a factor to be considered for this purpose.

D. The urgency and necessity of the request

The third and fourth requirements are urgency and necessity, where it is up to the Tribunal to review whether the grant of the requested provisional measures is needed with respect to the “necessity and urgency to avoid irreparable harm”. Urgency is constituted “in situations where there is a risk of definitive loss of the right claimed in the arbitration before the award is rendered”. For provisional measures to be deemed necessary, the

44 Amco v. Indonesia
45 Problem, page 67
46 Problem, page 37
47 Mondev v. USA
48 Problem, page 38
49 STERN, page 2
50 Ibid.
actions of the respective party to the dispute must be “capable of causing or threatening irreparable prejudice to the rights invoked”\textsuperscript{51} The Claimants believe that in the given dispute, urgency, as interpreted above, is not the case, and even if it were, the request for provisional measures cannot be viewed as necessary.

46. The Claimants argue that none of their engagement with the media could cause irreparable harm to any of Respondent’s rights, nor did they have any intention of such effect. The reason for the Claimants’ actions consisting mainly of publicising the problem was the lengthy timeline leading up to the arbitration proceeding, which left them with no other means of restoring their rights which had been invaded by the Respondent.\textsuperscript{52} Their actions simply represented a way of communicating to the world the unjust situation that the Claimants have found themselves in, and they do not see any reason why they should be prevented from doing so, especially given the fact that the Respondent may equally utilize its own media and social networks, which, unlike the Claimants’ websites, have not been blocked.\textsuperscript{53}

47. Furthermore, the Respondent argues that the Claimants’ actions could not only aggravate the dispute, but also “affect the impartiality of the Tribunal” and “further inflame the social and political situation” in Tyrea.\textsuperscript{54} The Claimants consider these arguments pointless. Firstly, they believe it is rather inappropriate to question the integrity of the Tribunal by assuming its members could be affected by any actions on the Claimants’ side. Secondly, they doubt that their utilization of media outlets, those that were not affected by the contested legislation on the Respondent’s side, could have any significant negative effect on the social and political situation. Were that the case, the Respondent would have presumably implemented restrictive measures on these sources of information as well, just like it has taken other measures to manage the ethnic conflicts (in addition to the blocking of the Claimants’ social networks). There has been no restrictive measure applied to press in circulation in the Respondent’s country. This reaction to the alleged power of other media to “inflame” the situation in Tyrea seems rather belated.

E. Conclusion

48. The Claimants conclude that the Respondent cannot satisfy the conditions set out in the test for granting provisional measures. They also believe that the Respondent’s arguments concerning the possible effects of the Claimants’ actions on the impartiality of the members

\textsuperscript{51} Ibid.
\textsuperscript{52} Problem, page 53
\textsuperscript{53} Ibid.
\textsuperscript{54} Ibid., page 38
of the Tribunal and on the social and political situation in Tyrea lack any grounds. Therefore, the Tribunal should not grant the provisional measures requested by the Respondent.
PART TWO: MERITS

I. THE BLOCKING OF THE CLAIMANTS’ PLATFORMS IS IN VIOLATION OF ARTICLE 6.1 OF THE TYREA-KITOA BIT AND TYREA-NOVANDA BIT

49. By pursuing the Law 0808-L adopted by the Respondent on 12 January 2018, the Respondent required all social networks to implement within 60 days safeguards aiming to identify users and filter exceptionable content; failure to meet this requirement was to be charged with penalties, e.g. a fine in the amount ranging from TKC 50,000 to 100,000 or/and temporary or permanent blocking.51

50. Article 6 of the BITs states that “neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments”, unless the deprivation is “taken in the public interest and under due process of law,”, carried out “non-discriminatorily and is not contrary to any undertaking which the former Contracting Party may have given”, and is “accompanied by just compensation”.56

51. The Respondent decided to block the Claimants’ websites without any discussion or consideration of executing other penalties under the Article 117 of the Law 0808-L and thus removed the economic benefits the Claimants had from their investments.58 In particular, the Respondent blocked their websites which were fitted specifically for Tyrea, deprived them of their advertisement profits and of a possibility to expand. The Claimants could not get a return by commercializing and also lost their money invested into the development of the new algorithm and further optimization of their networks for Tyrea.59 Moreover, the Claimants have lost control over their local branches which were built to facilitate the maintenance from the host state. This has resulted in a complete loss of their possibility to generate profits. In other words, Claimants’ investments were depreciated. Considering the loss of the economic value and capacity to earn the commercial return, it is more than clear that the Respondent was not able to honour its obligations under Article 6 of the BITs. The deprivation associated with the Claimants’ investments took place.

55 Problem, page 51.
56 Problem, page 56
57 Problem, page 61
58 Problem, page 52
59 Problem, page 52
60 TECMED, ¶ 115
52. Furthermore, the Claimants incurred significant losses over the period of time, since their desire from the beginning was to commercially expand into Alcadia and Larnacia, which is now irretrievably lost. The Respondent has been blocking the Claimants’ website for months. The Claimants would like to mention that the Respondent’s actions are permanent, since there is no prospect that the Respondent would rectify its measures or re-evaluate its decision.

53. The Respondent stated that no compensation is owed to the Claimants and indeed, no compensation was ever paid. Based on this fact, absence of compensation for indirect expropriated investments of the Claimants and discriminatory behaviour caused the deprivation to be unlawful as per the terms of Article 6 of the BITs.

A. Respondent’s actions do not fit within Respondent’s right to regulate

54. The Respondent might argue that it has a right to regulate, which lies in the principle that legitimate measures of a state interfering with investor’s rights does not compose compensable expropriation. The Claimants wish to point out that the right to regulate has its tightly bound limits. Firstly, Respondent’s right to regulate is limited by the treaty obligations which it undertook by entering into the BITs. Secondly, although the Respondent claims that it has adopted the Law 0808-L and exercise it in public interests, but it is not the only criterion which needs to be fulfilled. The Respondent also needs to comply with the proportionality test. The Respondent’s execution of the Law 0808-L does not fit within its right to regulate and thus constitutes compensable deprivation of Claimants’ investments.

55. The Respondent argues that the implemented measure fits within its right to regulate because of its purpose, i.e. protecting the safety of its citizens. The Claimants beg to differ. The investment tribunal in the case Philip Morris identified 3 criteria which must be achieved in order to fit under its right to regulate: (1) bona fide regulation for the purpose of protection of the public welfare, (2) non-discrimination and (3) proportionality. The failure to fulfil any of these requirements will result in rescindment of the Respondent’s right to regulate. The Claimants claim that the actions of the Respondent, especially the execution of the Law 0808-L, were highly discriminatory and non-proportionate.

---

61 Problem, page 24
62 TECMED, ¶ 122, ADC, ¶ 423.
63 TECMED, ¶ 121-120
64 Philip Morris, ¶ 305
B. The Respondent’s actions were discriminatory

56. The test for non-discriminatory treatment states that if a state favours national interests by favouring domestic companies over foreign competition, it leads to discriminatory behaviour.\(^\text{65}\) Even though the Law 0808-L urged all social platforms to provide the algorithm, only the Claimants’ websites were blocked because of malfunctions. In other words, domestic competitors were allowed to continue operating.\(^\text{66}\) This was certainly discriminatory on the Respondent’s part, since the Claimants’ as well as other domestic social media platforms such as Wink and TruthSeeker were used by anti-nationalists.\(^\text{67}\)

57. From the Claimants’ point of view, the blocking seems like a targeted measure, which was designed in advance to give domestic social media networks market exposure to the audience it once failed to capture, and to control the flow of information. The Respondent clearly failed to provide a legitimate justification for not blocking these websites as well.

C. Respondent’s actions failed to comply with proportionate analysis

58. Proportionate measures can be justified under certain conditions, such as suitability, necessity and finally, there needs to be a balance among the conflict of interests of the state and the investors.\(^\text{68}\)

59. Suitability refers to making sure that the measures taken are apt or suitable, in other words rational and appropriate, taking into consideration the means chosen and the ends.\(^\text{69}\) It is clear that the measures taken by the Respondent in this case were not suitable, since the situation in Tyrea has remained unchanged and is not getting any better. This is yet another indicator that the Claimants’ websites were not responsible for either starting, nor aggravating the situation in Tyrea. However, the Respondent is yet to lift the ban on the Claimants’ websites or come up with a different measure to tackle the issue it faces within the country.

60. The Respondent should have rather engaged in a discussion with the Claimants to try and find a suitable solution, i.e. instead of shutting down social media completely in the country, the Respondent shall shut down social media temporary only in those parts of the country that were affected by the spreading of messages by radicals and Internet vandals. During the timeframe of the temporary ban, the Respondent and the Claimants could have worked together on the algorithm to ensure first that people have a platform to freely express their

\(^\text{65}\) YANNACA-SMALL, p. 563
\(^\text{66}\) Problem, page 53
\(^\text{67}\) Problem, page 50
\(^\text{68}\) STONE SWEET, page 917
\(^\text{69}\) STONE SWEET, page 917
voice and opinion\textsuperscript{70} but at the same time, do not spread incorrect or false information that would cause panic or spread hate within the country.

61. Second part of the “test” is a necessity analysis, which provides an explanation on whether the purpose declared by the state can be achieved even with the implementing of the least restrictive measure.\textsuperscript{71} Instead of having a conversation, working together on the malfunctions, the Respondent blocked the entire websites permanently across the entire country. If the Respondent wanted to act proportionately, it would have implemented less restricting measures, e. g. the measures mentioned above. The Respondent failed to pass the test of necessity, as it certainly was not necessary to block the websites across the whole country for a period of months, if not more. What seemed like a blocking for a few days now looks like a targeted permanent blocking of the Claimants’ websites, as the Respondent is yet to reach out to the Claimants regarding the ban it has placed.

62. Besides, the Law 0808-L provides for different types of measures in case of non-compliance or failure to create the said algorithm, which range from less adverse measures like fines to more severe measures, such as a permanent blocking of the website. The Respondent chose the most adverse measure, blocking the Claimants’ websites, even though it must have been aware that by reducing the time-period for compliance from 60 days to 45 days, it made it impossible for the Claimants’ to comply with the requirement of the creation of the algorithm in time.

63. The last part of the proportionality test examines the balance between the effect of the Law 0808-L on the Claimants’ investments and the aim sought by this law.\textsuperscript{72} The Respondent has a right to regulate, however, it is still bound by the BITs, and thus, the Respondent has to take Claimant’s rights connected to the investment seriously and is under the obligation to consider it.\textsuperscript{73} It is clear that the Respondent did not consider the interests of the Claimants at all when it banned all their websites without reasonable explanation of the necessity of doing so.

64. A blocking of an entire website is an extreme measure which can be justified only in accordance with international standards. It is true that the protection of the national security can be considered an international standard justifying blocking a website, but on the other hand, it should not be used freely. Shutting down social networks or otherwise controlling the free flow of information violates the freedoms of expression, guaranteed by the Article 19

\textsuperscript{70} United Nation, ¶ 13
\textsuperscript{71} STONE SWEET, page 918.
\textsuperscript{72} TECMED, ¶ 122
\textsuperscript{73} TECMED, ¶ 122
ICCPR, of which the Respondent is a member. It also threatens the democracy, as the free uncensored media are the essential part of a democratic state. The Claimants assert that the Respondent puts its people to a greater risk of spreading hate in the country, since it is violating their rights to freely participate in social life of their choice. Moreover, the Respondent must have been aware of the fact that shutting down the internet usually leads to even more severe violence.

65. In 2011 the UN Special Rapporteur laid down the minimum criteria which should be met to justify blocking under the international law: the blocking should be clearly established by the law, the blocking must be limited under the standard of necessity and proportionality, and most importantly, the list of the blocked websites together with full details regarding the necessity and justification for blocking each individual website should be published. The Respondent never explained clearly why it was necessary to block all Claimants’ websites and not use other measures instead, such as the other possible penalties for non-compliance with the Law.

66. The purpose of the BIT is to protect the interests of all parties that are subject to it. By executing of the Law 0808-L, blocking the Claimants’ websites, the Respondent did not consider the conflict of interest within its decision. This law does not mention anything on the Respondent’s duty to inform the Claimants regarding the updated situation in the country or any effective tool for the Claimants to subject the issue to an independent court which would provide an objective opinion on the issue. The Respondent did not offer a reasonable timeline, explanation or cooperation to make sure that the Claimants could carry on performing their business. This only leads to a failure to balance the conflicting interests on the side of the Respondent.

67. After going through the proportionality test, the Claimants conclude that the blocking of Claimants’ websites does not fulfil the requirements to trigger the police power doctrine.

---

74 Freedom of expression unfiltered, page 11
75 Problem, page 62
76 United Nation, ¶ 13
77 Problem, page 66
78 Access Now, p. 4
79 Freedom of expression unfiltered, page 13-14
II. THE BLOCKING OF THE CLAIMANTS’ PLATFORMS IS IN VIOLATION OF ARTICLE 3.1 OF THE TYREA-KITOA BIT AND TYREA-NOVANDA BIT

68. The behaviour of the state, which was unreasonable and discriminatory, considering the circumstances surrounding the permanent blocking of Claimants’ websites, resulted in the Respondent’s impairment of the Claimants’ investments and thus in a violation of Article 3.1 of the BITs which contains the FET standard. Article 3.1 of the BITs requires the signatory states to treat the investments of investors of the other contracting party according to the standards of “fairness” and “equity”, and to avoid any impairment of the operation, management, maintenance, use, enjoyment or disposal of their investment by measures which are unreasonable and discriminatory.80

69. Considering that the FET standard is not uniformly defined, Article 3.1 of the BITs is subject to an autonomous interpretation.81 For a better understanding of this provision, the tribunals have developed a table of contents of the FET standard: legitimate expectation, fair due-process and transparency, non-arbitrariness, non-discrimination and proportionality.82

70. The Claimants found a breach of the FET in the following measures:

(a) the Republic of Tyrea has breached the Claimants’ legitimate expectations and has failed to ensure a predictable legal framework;
(b) the Republic of Tyrea has given a discriminatory response by executing the Law 0808-L;
(c) the execution of the Law 0808-L was not proportionate to Claimants’ investments.

A. The Republic of Tyrea has breached the Claimants’ legitimate expectations and has failed to ensure a predictable legal framework

71. Legitimate expectation and its protection are the key elements of the FET standard83 and goes hand in hand with the stable and predictable environment.84 As explained above, the Respondent as a signatory state is bound by the BITs and has to act consistently, i.e. pre-

80 Problem, page 55
81 TECMED, ¶ 155, SCHREUR FET, page 361
82 UNCTAD 2012, page 12, KLAGER, page 117-118, VANDELVELDE, page 52, Saluka, ¶ 293
83 SCHREUR FET, page 374
84 UNCTAD 2012, page 66
existing decision by the state should not be arbitrarily revoked, as the Claimants were relying upon them to plan its business actions.85

72. Since 2013, the Respondent has provided a hospitable climate and its territory was regarded by major international social networks as a strategic new market.86 Moreover, the spokesperson for the Tyrean parliament ensured that the Republic of the Tyrea’s intention was to become a fully liberalised country87 and to do the absolute best to facilitate the establishment and use of new internet possibilities.88 The Claimants made their investment to the Respondent’s democratic country after evaluating its laws and regulations.89 Based on their due diligence and the assurances, they strongly believed that the protection to their investments is fully safeguarded.

73. After the issuing of the Law 0808-L, the Claimants still wished to believe that the Respondent wanted to provide a hospitable climate for their operations, but after reducing the timeframe from 60 days to 45 days by Presidential decree on 11 February 2018,90 in the middle of their development of the algorithm, the expectations of the Claimants were irretrievably broken, as the modifications introduced by the Respondent have affected the legal and economic regimes in the country, established by previous regulations which the Claimants relied upon in carrying out their investments.

74. The Claimants allege that legitimate expectations are violated when the host state makes commitments upon which the investor relies at the time of the investment and later changes its position.91 Legitimate expectations usually arise at the moment the investor makes an investment in the host state. On the other hand, the Claimants did not make just a one-off investment to the country. They were developing features tailor-made to the Tyrean public and facilitated networks fully suitable for Tyrean people over the time.92 Therefore, the Claimants’ investment cannot be taken as a one-off transaction, but rather as a complex of investments and thus without any time limitation.93

85 TECMED, ¶154
86 Problem, page 48
87 Problem, page 48
88 Problem, page 49
89 Problem, page 13
90 Problem, page 52
92 Problem, page 50
93 UNCTAD 2012, page 63, SCHREUR, KRIENBAUM, page 5, 8
75. The Claimants would like to point out that the Respondent’s domestic legislation, namely the Law 0808-L, can be treated as a promise to foreign investors. This law in the context of its background, including official audience, should be considered a promise that has been made to the Claimants. The Claimants would also like to stress that it is not essential that the official statements have legal force.

76. By issuing the Law 0808-L on 12 January 2018, the Respondent required all social networks to implement a specific algorithm and to provide Personal ID card details and correspondence of the network users. The very same day, the Respondent provided 60 days to comply with these requirements. The Claimants believed 60 days to be a sufficient time period to provide the algorithm, with 45 days for completing the algorithm and 15 days for its testing and adjustment. The Claimants even highlighted that these 15 days are crucial for the algorithm to work. One of the Claimants even spoke with the Tyrean minister and together, they came to the conclusion that it is indeed important to have a sufficient amount of time for testing the algorithm. The Respondent made the Claimants believe that they had a set number of days, in this case 60, to comply with the above mentioned requirement. In the middle of developing the algorithm, the Respondent, without any prior notice, reduced the timeline to 45 days. The Claimants were suddenly left with only 10 days to finish and test the algorithm. The shortened time period made it impossible to successfully finish the job in time, even though the Claimants tried their hardest to comply to the new shortened time period.

77. The Respondent breached the FET stated in Article 3.1, as stability could not exist in a situation where the law kept changing. The Claimants are aware that the legal framework may change and be adapted to specific circumstances, but the Respondent should not have breached the guarantee (60 days period) that had been given, as the Claimants are supposed to plan their future business and rely on the promises made by the state. In other words, the Respondent’s outlook on sovereignty to regulate its internal affairs freely should not be transformed in a way which would leave the Claimants with no possible outlook at all.

---

94 DOLZER, SCHREUR, page 134-135, Enron v. The Argentine Republic ¶ 266, HENCKELS, page 4
95 Problem, page 52
96 Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, ¶ 366
97 Problem, page 51
98 Problem, page 51
99 Problem, page 52
100 Problem, page 51
101 PSEG v. Turkey ¶ 254
102 HENCKELS, page 2
103 PSEG v. Turkey ¶ 254
B. The Republic of Tyrea has given a discriminatory response by the execution of the Law 0808-L

78. The non-discrimination principle is an essential element of the FET standard. It is defined as ‘treating a person less favourably than others on grounds unrelated to merit, possibly including harassment’. The Claimants, as foreign investors protected by the BITs, expect that the Respondent implements its policies bona fide. Any different treatment needs to be based on a rational, reasonable distinction, and should not favour domestic investments over the foreign-owned investments. The Claimants underline that the Respondent breached the FET standard by its discriminatory behaviour towards the Claimants in order to favour Respondent’s national website platforms.

79. The Respondent argues that the Law 0808-L was not discriminatory, since it established a universal standard without any distinction. The Claimants would like to clarify that the issue here is not the Law 0808-L itself, but rather the Respondent’s actions, consisting of the executing of the law mentioned above, which were discriminatory. The Law 0808-L covered similar social networks as well, but during the execution of this law, the foreign and the domestic media were treated differently, without any reasonable justification.

80. The Claimants claim that Wink and TruthSeeker, the domestic social media platforms, were in a comparable position to the Claimant’s social networks in terms of the Law 0808-L. The Claimants’ social networks as well as Wink and TruthSeeker were used by radicals and have provided them with a space to spread hate speech. Moreover, all the media provided to the users the place for electronic communication through which people can share information, ideas and send messages. The Law 0808-L should be applied to all media with a content “likely to prejudice public order and morality, to incite disrespect for the laws in force, and to incite animosity towards any political, social, racial, ethnic and other groups”.

81. The Respondent might argue that Wink is not a social medium at all, but rather a local messenger. Claimants beg to differ. Firstly, Wink connects people just like the other mentioned social media, and not just by private messages, but also by creating groups. Secondly, through short messages (the Law 0808-L is not limited to a specific amount of content), Wink provides

\[\text{Page 187}\]
\[\text{Page 188}\]
\[\text{Page 307}\]
\[\text{Page 313}\]
\[\text{Page 50}\]
\[\text{Page 8}\]
a place for hate speech, and even though these messages are limited, they may still contain a link to much larger articles or to another social media post. In case of TruthSeeker, the Claimants supposed that there is no dispute that TruthSeeker provides public content and should be recognized as a social medium.

82. On 28 February, 1 March and 2 March 2018, the TCA issued the ordinance blocking Claimants’ platforms. At the same time, the Respondent did not block the above-mentioned platforms of domestic providers, Wink and TruthSeeker. The Respondent has never explained why TruthSeeker was not blocked. In case of Wink, the Respondent stated that a different treatment was justified for Wink’s lack of popularity and further argued that short links could not fall within the filter’s reach.\(^{110}\) The Claimants would like to point out that the Law 0808-L clearly states that it is not dependent on the number of characters in a text message that is shared or on the audience size\(^{111}\), and therefore, even though Wink only provides for short messages, it should still be obligated to have an effective algorithm in place. Wink has never provided such algorithm, but was not blocked, nonetheless. The Claimants would like to point out that any distinction has to be made without arbitrariness and must be based on a rational foundation.\(^{112}\) There was no rational foundation not to block Wink, since it was also used by radicals, the Law 0808-L does not consider the length of the message, and Wink clearly failed to provide an effective algorithm.

83. The TCA, the agency which issued the ordinance blocking the websites, is an official institution of the Republic of Tyrea\(^{113}\), which is therefore responsible for its action, as the state is responsible for the wrongful acts of its instrumentalities or agents.\(^{114}\) The TCA provided a statement in which it explained the non-blocking of local platforms by claiming their non-popularity and non-convenience for spreading hate speech. The Claimants believe that the argument that other social networks are less popular and therefore non-convenient for spreading hate speech and thus less dangerous cannot justify the different treatment, because the Law 0808-L clearly states that it is not limited to the audience size and amount of content published.\(^{115}\)

84. The above-mentioned points to the fact that the Respondent has blocked foreign social networking entities to promote domestic companies, despite the fact that the Claimants have

\(^{110}\) Problem, page 53
\(^{111}\) Problem, page 8
\(^{112}\) KLAGER, page 193
\(^{113}\) Problem, page 52
\(^{114}\) CME, ¶ 163
\(^{115}\) Problem, page 8
spent a significant amount of time and resources on helping the Respondent establish a better, more modern form of media communication after the Media Law was passed. Consequently, in the present case, the Respondent has not offered a reasonable justification for a different treatment of the individual social networks. The Claimants are of the opinion that their treatment by the Respondent was discriminatory.

C. The execution of the Law 0808-L was not proportionate to Claimants’ investments

85. Reasonableness and proportionality are widely known principles, present in the FET standard. They tend to be “associated with a full review on the merits.” and are not aimed towards a win-lose situation but rather towards a compromise and an amicable settlement. Like proportionality, reasonableness is based on “a culture of justification” which “requires that governments should provide substantive justification for all their actions […]” In this particular case, we are dealing with a state conduct, or more precisely, with the executing of the Law 0808-L, which had made a major impact on Claimants’ operations in Respondent’s country.

86. In EnCana v. Ecuador, concerning value-added tax refunds which the investor claimed he was entitled to, the tribunal held that under the FET, “the State must act with reasonable consistency and without arbitrariness in its treatment of investments.” In Saluka v. Czech Republic, the tribunal stated that “[t]he determination of a breach of [the fair and equitable treatment standard by the host state] … requires a weighing of the Claimant’s legitimate and reasonable expectations on the one hand and the Respondent’s legitimate regulatory interests on the other.”

87. The Claimants began the development of an algorithm and were prepared to launch it as originally scheduled, in 60 days. But since the Respondent noted its volatile security situation, it began with the issuing restrictive policy towards its investors, such as the reduction of the deadline for compliance with the new requirements to 45 days, setting the new deadline to 28 February 2018. After the launch of the new algorithm and ID data collection system and its almost immediate failure, the Claimants were banned on the grounds of the Law 0808-L. The Respondent’s reaction was inadequate and excessive and even if taking into account the specific circumstances, the Claimants see it as a breach of Article 3.1. of the BITs and also as

116 WTO law in comparative perspective, page 17, VERHOOSEL page 451, 478
117 Proportionality and Constitutional Culture, page 1
118 EnCana Corp. v Republic of Ecuador
119 EnCana Corp. v Republic of Ecuador ¶ 158
120 Saluka ¶ 305
121 Problem, page 51
a breach of the principle of reasonableness, since the host State did not act with reasonable consistency.

88. Without any explanation whatsoever, the Claimants were blocked and pushed off, nor was it explained why the Respondent chose the option of blocking instead of a fine. No measurement of public interest on one side and the interests of investors on the other took place. The Respondent has also refused to discuss its future approach to the issue. Besides, the Respondent has failed to provide any further development on the situation that led to the blocking of the Claimants’ websites in order to re-evaluate its decision.

89. The combination of a media fuss supported by the Respondent and a lack of intention to communicate indicates a breach of reasonableness and proportionality, while any amicable settlement of the dispute currently seems to be impossible.

III. THE COMPENSATION REQUESTED BY THE CLAIMANTS IS NOT SPECULATIVE AND THE DCF MODEL IS AN APPROPRIETE METHOD TO USE

90. The Respondent has clearly stagnated the investments of the Claimants and thus the Claimants submitted an expert report on the damages incurred, where the Mr. Alonzo, the expert, decided to use the DCF method. In Respondent’s Response to the request for arbitration, the Respondent has refuted the use of the DCF method, the evaluation of the lost profit due to the failure of the planned expansion to Alcadia and Larnacia, the 5% discount rate and the decision to wind down operations in Tyrea.

91. The Respondent has disputed among others the decision of the Claimants to wind down their operation in Tyrea. The Tribunal should take into account the entire picture, the Claimants were deprived of any control of their operations in the country for almost two months and no further discussion was ever held by the Respondent with regards to the future outlook of the Claimants’ websites. The Claimants who had invested heavily in Tyrea were still facing fixed and variable costs due to the non-communication of the future of their concerns in Tyrea and have therefore decided to wind down their operations in the country due to the inability to actually operate under the said circumstances.

92. The expert opinion submitted on behalf of the Respondent states that the compensation requested by the Claimants is based on a hypothetical value of Claimants’ investments, and hence the use of the DCF model would be inappropriate as it would result to damages on

---

122 Problem, page 61
123 Problem, page 6
sheer speculation.\textsuperscript{124} To this argument, the Claimants would like to state that the most appropriate method of evaluation depends on the type of asset, its profitability at the time of expropriation, its duration and the stage of operation.\textsuperscript{125}

93. According to Nikiema (2013), there are three categories of methods of evaluation. The first method focuses exclusively on market value. The second involves methods based on assets (adjusted book value, net book value, liquidation value). The third brings together methods based on revenue (discounted cash flow, capitalized cash flow, adjusted present value).\textsuperscript{126}

94. The Market value method as stated by the Tribunal in the CMS v. Argentina award, is the price “at which the property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm’s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.”\textsuperscript{127} This method has been used in different international arbitrations where the investment has shown proven profitability.\textsuperscript{128}

95. The second method, the net book value of an asset, is generally adopted by tribunals for investor’s investment where the profitability has not been proven in the past for different reasons, e. g. if the host state made it impossible for investors to start their operations or the investments turned out to be in deficit.\textsuperscript{129}

96. The third method requires the estimation of future cashflows and applying a discount rate. This method is known as the discounted cash flow (DCF) model.\textsuperscript{130} The World Bank describe the DCF model and discount rate in its guidelines as follows: The cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year’s expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances. Such discount rate may be measured by examining the rate of return available in the same market on alternative investments of comparable risk based on their present value.\textsuperscript{131}

97. The DCF method should be used for a going concern with a proven record of profitability.\textsuperscript{132} Mr. Alonzo in his “Damages report for the case applied” has used the DCF method to value

\textsuperscript{124} Problem, page 33
\textsuperscript{125} Expropriation in Investment Treaty Arbitration, page 318
\textsuperscript{126} Compensation for expropriation, page 12
\textsuperscript{127} CMS v. Argentina ¶ 402
\textsuperscript{128} Compensation for expropriation, page 12
\textsuperscript{129} Compensation for expropriation, page 13
\textsuperscript{130} Compensation for expropriation, page 13
\textsuperscript{131} World Bank Guidelines. page 42
\textsuperscript{132} MARBOE, 4.14, Quiborax v. Bolivia, ¶ 344
the Claimants’ lost profits. The Claimants consider the DCF method as suitable for the present case for the following reasons:

i) The wording of the treaty refers to fair market value with a DCF approach

ii) The Claimants own going concerns with a proven track of profitability

A. The wording of the BITs refers to fair market value with a DCF approach

98. The Respondent had deprived the Claimants of their investment and breached Article 6 of the BITs. The Claimants, for the damage made by the Respondent, require the compensation to be “just” and a true representative of the “genuine value of the investment” as per Article 6 c) of the BITs.

99. The wording of the respective provision provides that a genuine value of the investment can be determined by fair market value of the property lost.\(^\text{133}\) The most logical and appropriate method for determining the fair market value is the DCF method.\(^\text{134}\)

100. Besides, the World Bank Group’s Guidelines on Legal framework for the treatment of foreign investment contain some of the most commonly used methods to deal with a valuation of assets in different international arbitrations.\(^\text{135}\) and many of the experts prefer to use the DCF method to value the compensation.\(^\text{136}\)

101. For the reason mentioned above, and especially for its flexibility, the Claimants claim that the DCF method is the most suitable method to use in order to provide the Claimants’ fair market value.

B. The Claimants own going concerns with a proven track of profitability

102. The Claimants established a name for themselves in the industry within Tyrea. The proof of this facts can be owed to the fact that within months of their launch in 2017, all three Claimants gained millions of new users and FriendsLook was recognized as being synonymous with the internet itself.\(^\text{137}\)

103. All three Claimants are established and well recognized social networks globally.\(^\text{138}\) The fact they have a long-standing history in the social media network industry and have set up branches in multiple countries with features made towards their users, is a pillar to the fact

\(^\text{133}\) CRAWFORD, page 218, CME v. Czech Republic ¶ 497

\(^\text{134}\) Starrett Housing v. Iran, ¶ 280, International Investment Arbitration - Substantive Principles, page 423

\(^\text{135}\) Expropriation in Investment Treaty Arbitration, page 319, Tidewater v. Venezuela ¶ 156

\(^\text{136}\) Expropriation in Investment Treaty Arbitration, page 319

\(^\text{137}\) Problem, page 50

\(^\text{138}\) Problem, page 49
that all three companies had the expertise in delivering projects. The reach, size and profits of the three companies are also symbolic of the financial backing each of them have in delivering such projects.

104. According to prof. Marboe the opportunity of the possible profits, in the future must be compensated, if it was sufficiently proved that such profits would have been made. The Respondent claims that the Claimants’ reliance on lost profits is based on the numerous assumptions and most favourable future business operations. The Claimants argue that the Respondent is mistaken for the following reasons.

105. The Claimants were going concerns at the time of the deprivation. All of them had been in operation for a sufficient period of time to generate income. As was stated by the Tribunal in the case Metalclad Corporation v. The United Mexican States, the presence on the market for at least two or three years, is sufficient to establish continuing business connections. The Claimants note that they operated in Tyrea between 2015 and 2018, for almost 3 years and during that time they have proven that they are highly profitable. If we look at the financial track record of the Claimants, they have proven to show that they were not only operational but were also generating growth in profits year over year. FriendsLook plc grew it’s profit by 197% in 2017 versus 2016. Whistler Inc. grew it’s profit by 340% in 2017 versus 2016. SpeakUp Media Inc. grew it’s profit by 257% in 2017 versus 2016.

106. The traffic towards an internet-based platform is one of the determinants of the revenue generated by the platform. Truong Van Thanh (2018) in his study “Relationships between Web Traffic Ranks and Online Sales Revenue of E-Retailers in Australia” found out that there was a significant and positive correlation between web traffic and online sales.

107. Customer experience is very important for the growth of any web platform. A greater customer experience leads to growth in traffic towards the website and hence revenue. Yang(2019) in his study “The Study of Customer Experience Design and Optimization of Shopping Website: Case Analysis of Amazon in China” found out that Amazon’s competitors were doing better and generating more revenue and traffic due to localized and tailor-made content.

---

139 MARBOE, 3.225
140 World Bank Guidelines, Article IV-6
141 Metalclad ¶ 120
142 Problem, page 15-18
143 Hai Truong Van Thanh, 6.1., p. 11
144 SONGMING YANG, 5 page 9
108. The Claimants were already working on different ways to address, engage and grow the outreach of their platforms towards the audience in Tyrea.\footnote{Problem, page 50} FriendsLook was working on a new feature to help users discover new videos and shows that were reflective of what their users was watching. Whistler on the other hand was working on launching an in-app video streaming and recording function for its users. Similarly, SpeakUp Media was working on a new product tailor-made towards the audience in Tyrea.\footnote{Problem, p. 50} 109. By investing in future projects, the Claimants were not only looking to have an on-going business in Tyrea, but also working on an expansion of the business opportunity they currently were engaged in. This is reflected in their financial growth over the years. 110. In the present case, regarding the valuation of the opportunity for market expansion, the Claimants believe that a fair market value and the DCF method should include the possible future prospects.\footnote{Enron v. The Argentine Republic ¶ 384} The Claimants provided enough information to forecast the future revenue of this expansion. From the above mentioned, it is clear that the Claimants have developed a profitable environment in Tyrea, and it is more than reasonable to predict that it would develop similarly in Alcadia and Larnacia, the neighbouring countries with the same ethnic population in Tyrea.\footnote{Problem, page 48} Moreover, the possible future profit can be demonstrated by the fact that when the Claimants entered to the other countries, the revenue margin appeared and gradually increased in each of them.\footnote{Problem, page 61} 111. Since 2016, the Claimants have been meaning to expand to the markets of the above mention neighbouring countries. This desire was supported by those states themselves, but after the situation in Tyrea has changed the officials of Larnacia and Alcadia put a halt to any expansion of the Claimants’ websites to their countries, which resulted in the deprivation of the possibility for the Claimants’ expansion.\footnote{Problem, page 5-6} 112. The Respondent also argues that the Claimants did not adopt any business plan.\footnote{Problem, page 33} However, the Respondent is mistaken, because the Claimants do have plans for expansion in dated until 2022.\footnote{Problem, p. 61} To summarize, the Claimants did have a long-term prospect business and, had a proven track record of successful investment in the country.
113. All three Claimants are going concerns with a proven track of profitability and are also able to prove that their investments to neighbouring countries will turn out to be profitable. For these reasons the DCF method seems to be the most suitable for the compensation sought.

C. The 5% discount rate is adequate in the light of the situation in Tyrea

114. The Respondent is arguing that a 5% discount rate is not adequate given the adverse of the political, economic, financial risks and the country risk premium. However, the Claimants strongly believe that a 5% discount rate is more than generous, as it incorporates the country risk, tax and currency risk, business risk and force majeure risk.

115. The country risk consists of two sub-risks: political and economic. The sub-items of the economic risks are “reduction or slowdown of economic growth, deficit in the balance of payments, depreciation of the exchange rate, inflation, interest rate increase, and poor infrastructure.” The political risk is described as “the exposure to a change in value of an investment or cash position resultant upon government action.”

116. The Claimants believe that there was no political risk in the Respondent’s country present as it is a country with a democracy regime. Already in 2013 Tyrea passed the Media law, which liberalised the internet and loosened the government’s control over the media. In order for the Claimants to double check the situation in Tyrea, they carried out a thorough analysis of its legal framework. Not only did the analysis assure the Claimants about their intention to invest in Tyrea but Tyrean public figures also strengthened the Claimants’ beliefs in a long-term and stable cooperation. Through the years the Claimants were not in any way restricted in their investments and Tyrea declared with an absolute certainty that the new internet era has begun. Thus, the Respondent ensured the Claimants that Tyrea has become a democratic and liberal country with respect to social media and therefore without any high political risk.

117. Besides, as was stated by the Tribunal in Gold Reserve Inc. v. Venezuela, the respondent should not benefit from the wrongful act which it had committed on the claimant.

---

153 Problem, page 34
154 Problem, page 66
155 DOMÍNGUEZ, page 99
156 DOMÍNGUEZ, page 100
157 DOMÍNGUEZ, page 99
158 Problem, page 48
159 Problem, page 13
160 Problem, page 13, 48
161 Problem, page 49
162 Gold Reserve INC v Venezuela ¶ 841
present case, the Respondent violated Article 6.1 of the BITs, acted unlawfully and imposed measures as well as a general behaviour constituted an indirect deprivation. Even if the Tribunal finds that Tyrea had a certain degree of political risk, as per the above argument it should be excluded from the discount rate. Considering the rate adopted by the tribunal in Gold Reserve Inc. v. Venezuela under the extreme political crisis, the Claimant believe that the 5% discount rate is rather generous in their case.
PRAYERS FOR RELIEF

The Claimants hereby request the Arbitral Tribunal:

(1) deny the Provisional Measures requested by the Respondent;

(2) find that it has jurisdiction over the present dispute;

(3) 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;

(4) 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;

(5) 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 27,094,000 USD for SpeakUP Media Inc., plus interest as of the date of issuance of the award;

(6) find that the Claimants are entitled to a compensation by the Respondent of all costs and fees related to these proceedings.