International Centre for Settlement of Investment Disputes

In the arbitration proceedings under

THE AGREEMENT ON PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE REPUBLIC OF TYREA AND THE FEDERATION OF NOVANDA

AND

THE AGREEMENT ON PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE REPUBLIC OF TYREA AND THE UNION OF KITOA

(Collectively “BITs”)

BETWEEN

FRIENDSLOOK PLC.,

SPEAKUP MEDIA INC.,

WHISTLER INC. CLAIMANTS

AND

REPUBLIC OF TYREA RESPONDENT

ICSID CASE NO. ARB/18/155

MEMORIAL ON BEHALF OF THE RESPONDENT

Before the ARBITRAL TRIBUNAL consisting of:

DR. GABRIELLA UTTERSON (PRESIDENT)

DR. HENRY JEKYLL

MR. EDWARD HYDE QC
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STATEMENT OF FACTS

~Situation in Republic of Tyrea~

- The country was strife with civil war between the two ethnicities Tatyar and Minyar till 2013 after which the country witnessed the advent of a social media era after it passed the new Law on Media and Information No. 1125-L on Media and Information dated 10 September 2013 (the “Media Law”) liberalising the Internet and loosening its control over the media and the press.
- The country was marked by a temporary shift to a more open trade policy in the early 2000s, among them the BIT with the Federation of Novanda (“Novanda”) signed on 28 March 2000 (the “Tyrea-Novanda BIT”) and the BIT with the Union of Kitoa signed on 20 January 2001 (the “Tyrea-Kitoa BIT”). The Tyrea-Novanda BIT and the Tyrea-Kitoa BIT were ratified on 10 September 2000 and 25 May 2001, respectively. In the same period of its political history, Respondent also acceded to the ICSID Convention on 15 December 2000. Novanda and Kitoa had acceded to the ICSID Convention in January and October 1995, respectively.

~Actions of Respondent~

- On 12 January 2018, the Respondent passed Law 0808-L Amending the Law on Media and Communications, which required all social networks to implement certain safeguards aiding in identifying users and filtering content, to prevent the dissemination of hate speech, request Personal ID card details from both new and existing Tyrean users, and provide to the competent authorities of Tyrea access to such Personal ID card details and correspondence among users.
- Seeing the situation in Tyrea getting worse, the Respondent passed the new decree dated 11 February 2018 reducing the deadline for compliance with the new requirements to 45 days, setting the deadline for compliance to 28 February 2018. The timeline reduction left Claimants with only 10 more days to deploy the filtering algorithm (including its development and testing).
~Actions of the Claimants~

- Whistler, SpeakUp and FriendsLook are three social media platforms that together constitute the Claimants in the present dispute. Whistler and SpeakUp are incorporated in the Union of Kitoa whereas FriendsLook is incorporated in the Federation of Novanda.
- The three platform expanded their operations to the Republic of Tyrea in 2015. The three international social networks set up back offices and servers with the Republic of Tyrea.
- The Claimants failed to comply with the new deadline and due to improper implementation, they were blocked.
- Transgressing the boundaries of consent, the Claimants have brought the present claim against the Respondent despite the Respondent denouncing the ICSID Convention before the dispute even arose, i.e. on 5th January 2018.
- During the course of the Arbitration proceedings, the Claimants are engaging in a media propaganda war against the Respondent and are blatantly mischaracterising their position in the dispute. This entailed the Respondent’s request for Arbitration.
ARGUMENTS ADVANCED

PART-I: PROVISIONAL MEASURES

I. THE TRIBUNAL SHOULD GRANT THE REQUESTED PROVISIONAL MEASURES.

1. Article 47 of the ICSID Convention allows an arbitral tribunal to recommend provisional measures. It reads: “Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.”

2. Interim measures are temporary in nature and are traditionally intended to “preserve the respective rights of the Parties pending the decision”1 of a tribunal. It is accepted that provisional measures in the ICSID system are left to the appreciation of each tribunal,2 provided that they aim at the preservation of a right of a party.3

3. In accordance with the practice followed by a majority of international arbitral tribunals, the Respondents request should be granted as (A) the Respondent’s request for measures is in order to preserve its rights; (B) there is an urgent need for the measure requested; and (C) the Claimant have a prima facie case on the merits and prima facie jurisdiction.

A. The Respondent’s request for provisional measures is in order to preserve its rights.

4. The rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights, including the general right to the preservation of the status quo and to the non-aggravation of the dispute.4 The right to due process and the right to the non-aggravation of the dispute are vital procedural rights which are “self–standing rights”.5

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1 Anglo-Iranian Oil Co. (United Kingdom v. Iran), Interim Protection Order, 1951 I.C.J. (July 5), ¶ 93.
2 Victor Pey Casado and President Allende Foundation of Chile, ICSID Case No. ARB/98/2, Decision on Provisional Measures, (Sept. 25, 2001), (“Pey Casado v. Chile”), at ¶16.
3 GABRIELLE KAUFMANN-KOHLER & AURELIA ANTONETTI, INTERIM RELIEF IN INTERNATIONAL INVESTMENT AGREEMENTS – A GUIDE TO THE KEY ISSUES (Oxford Univ. Press, 2nd ed. 2018), at p. 514.
4 Quiborax v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, (Feb 26, 2010), (“Quiborax v. Bolivia”), ¶134; Biwater Gauff v. Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 3, (Sept. 29, 2006), (“Biwater Gauff v. Tanzania”), at ¶ 135.
5 Biwater Gauff v. Tanzania, at ¶¶ 136, 158-159; Lao Holdings N.V. v. Lao People’s Democratic Republic, ICSID Case No. ARB (AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order, (May 30, 2014), ¶ 13; Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order), (Jan. 29, 2010), at ¶¶ 102-104.
5. The requested measures should be granted in the present case in order to ensure (a) non-aggravation of disputes and maintenance of status quo and to (b) preserve the integrity of the proceedings.

   a. The provisional measures must be granted to protect the Respondent’s right to non-aggravation of the dispute.

6. The parties have an established right to preservation of the status quo and the non-aggravation of the dispute.\(^6\) The Claimants should refrain from any action of any kind which might aggravate or extend the dispute.\(^7\) Both Parties to a legal dispute should refrain, by the good and fair practice rule, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult.\(^8\) Any right to engage in public discussions is not unlimited but is qualified most notably by the duty to act in good faith and not to exacerbate the dispute.\(^9\)

7. The continuous misuse and misrepresentation of arguments and the dispute and domestic and international media will further inflame the socio-political situation in Republic of Tyrea, something which the measures in question were trying to prevent. The Claimants have hired lobbyists and have launched a large scale media campaign to disparage the Respondents. This is affecting the Respondent’s economy since its downgrading by Amnesty International, directly affects present investor confidence which is leading to loss in investments. Further, the unstable political climate in Tyrea is exacerbated directly by the claimant’s sponsoring of this content as “popular” on their own platforms. Thus, this Tribunal must grant provisional measures to prevent further aggravation of the dispute.

   b. The Claimants should refrain from actions that can compromise the integrity of the proceedings.

8. Parties have a right to protect the integrity of arbitral proceedings.\(^10\) The rights to be preserved by provisional measures must relate to the requesting party’s ability to have its claims in the arbitration fairly considered, and for any decision it seeks to be effective

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\(^6\) Burlington v. Republic of Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 1, (Jun. 29, 2009), ¶53; Biwater Gauff v. Tanzania, at ¶126; Quiborax v. Bolivia, at ¶126.
\(^7\) Tokios Tokelés v. Ukraine, Order No. 1 in ICSID Case No. ARB/02/18 of 1 July 2003, at ¶68.
\(^8\) Amco Asia Corporation and Ors. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Provisional Measures, (Dec. 9, 1983), at ¶412; Pey Casado v. Chile, at ¶15.
\(^10\) Biwater Gauff v. Tanzania, at ¶123.
and able to be carried out.\textsuperscript{11} The observance of a proper procedure is a requirement for the preservation of the integrity and legitimacy of the arbitration process.\textsuperscript{12} It is fundamental, as a matter of procedure that each party is given the right to be heard before an independent and impartial tribunal.\textsuperscript{13} The actions of the Claimants need to be restricted by the grant of provisional measures as

\begin{itemize}
\item[(i)] \textit{Claimants are putting undue pressure on the Respondent.}
\end{itemize}

9. The discussion of the case cannot be used to unduly pressure one of the parties, or render the resolution of the dispute potentially more difficult.\textsuperscript{14} The parties have a vital right to due process, the right not to have the dispute exacerbated, the right to protect the integrity of these proceedings to prevent external pressure on its representatives, witnesses, and experts and to avoid the kind of “trial by the media”.\textsuperscript{15}

10. No party is prevented from engaging in general discussion about the case in public, however, such public discussion should not be used as an instrument to antagonise any party, exacerbate the parties’ differences, aggravate the dispute, disrupt the proceedings or unduly pressure any party.\textsuperscript{16} Unilateral publication of pleadings, memorials, witness statements and expert reports must be restricted in order to protect these procedural rights, in particular so as to avoid publicising a “misleading picture” or “impression” of the dispute.\textsuperscript{17}

11. The Claimants have been waging a large-scale media campaign against the Tyrean government by issuing negative press information against the Respondents and mischaracterising the measures taken by the government. They are intentionally distorting the context of the actions of the Respondent and are thereby creating a misleading picture of the dispute.

\begin{itemize}
\item[(ii)] \textit{The Claimants are attempting to circumvent the arbitral proceedings.}
\end{itemize}

\textsuperscript{11} Churchill Mining v. Indonesia, at ¶58.
\textsuperscript{12} CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (Cambridge Univ. Press, 2nd ed. 2001), (“CHRISTOPH SCHREUER”), at p. 979.
\textsuperscript{13} Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on Annulment, (Feb. 5, 2002), at ¶56.
\textsuperscript{14} Biwater Gauff v. Tanzania, at ¶43.
\textsuperscript{15} Biwater Gauff v. Tanzania, at ¶56.
\textsuperscript{16} Tallin v. Republic of Estonia, ICSID Case No. ARB/14/24, Procedural Order No. 3, (May 3, 2016), at ¶ 11.
\textsuperscript{17} Biwater Gauff v. Tanzania, at ¶51; Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order), (Jan. 27, 2010), at ¶143.
12. The Tribunal provided authorization for the passing of provisional measures prohibiting any action that frustrates the effectiveness of the award or entails having either party take justice into their own hands. The jurisdiction of the tribunal is to the exclusion of any other remedy. This exclusion of any other remedy would go beyond judicial proceedings. It is possible that an investor may seek and find relief through the decision of an administrative authority of the host State rather than through its courts, possibly in the form of a negotiated settlement.

13. In addition to this media war, the Claimants have engaged in lobbyists to pressurise the Tyrean government to revoke its measures, circumventing the Respondents right to due process. Besides the undue pressure on Tyrean authorities, the global media war may affect the impartiality of the members of the Tribunal, seriously jeopardising the Respondents’ right to fair and impartial trial.

14. Therefore, a threat of substantial prejudice to the Respondent’s right to preserve the integrity of the proceedings requiring the provisional measures is made out in the present case.

(B) There is an urgent need to grant the requested provisional measures.

15. Urgency requirement for grant of provisional measures entails showing that the interim relief is required before a final award is made. If the measures are not granted before the actual award is given the execution of any future award will be rendered difficult. An aggravated dispute would be further difficult to adjudicate upon. Furthermore, when the issue is to protect the jurisdictional powers of the tribunal and the integrity of the arbitration, then the urgency requirement is met by the very own nature of the issue.

(C) The Claimants have prima facie case and prima facie jurisdiction.

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18 City Oriente Ltd. v. Republic of Ecuador, ICSID Case No. ARB/06/21, Decision on Provisional Measures, (Nov. 19, 2007), (“City Oriente v. Ecuador”), at ¶69.
20 CHRISTOPH SCHREUER, at p. 563.
21 Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Procedural Order No. 3 in of 18 January 2005, at ¶76.
22 City Oriente v. Ecuador, at ¶42.
16. The Tribunal in its Decision on Respondent’s Application under ICSID Arbitration Rule 41(5)\textsuperscript{23} ruled that the Claimants have *prima facie* jurisdiction and *prima facie* case on merits.

\textsuperscript{23} Decision on Respondent’s Application Under ICSID Arbitration Rule 41(5), at ¶55.
PART-II: JURISDICTION

II. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE PRESENT DISPUTES IN LIGHT OF THE RESPONDENT’S DENUNCIATION OF THE ICSID CONVENTION

17. The Tribunal does not jurisdiction to hear the present dispute since (A) the Claimants’ notice of arbitration is ineffective as it was issued after the denunciation of the ICSID Convention by the Respondent, and (B) Article 9 of the BITs does not independently create a binding obligation to arbitrate under the ICSID Convention.

A. The Claimants’ Notice of Arbitration is ineffective as it was issued after the denunciation of the ICSID Convention by the Respondent.

18. The Claimants’ notice of arbitration was issued after the denunciation of the ICSID Convention by the Respondent and such unilateral consent to arbitrate is not protected under Article 72 of the ICSID Convention.

a. Article 72 and not Article 71 is applicable in determining the Respondent’s rights and obligations post-denunciation of the ICSID Convention.

(i) Article 72 overrides the general rule that a denunciation of the ICSID Convention takes effect after six months.

19. Article 71 provides the general law for denunciation. Articles 71 and 72 have different critical dates further evidences that these Articles have different scopes of application and that there can be no overlap between the two provisions.24 Article 71 produces its effects six months after the date of receipt of the notice of denunciation whereas Article 72 applies to consent performed until the date of receipt of the notice of denunciation.25

20. Article 72 modifies the general rule of Article 71 in two ways:

(1) The critical date for the denunciation’s effect on consent is not the general rule on the taking of effect of the notice of denunciation (6 months after its receipt) but rather the date of its receipt.

(2) Rights or obligations arising from consent to jurisdiction remain unaffected by the denunciation even beyond the date the denunciation takes effect i.e. beyond the six-month period.

21. Article 71 does not extend to the rights or obligations arising out of State’s consent to the jurisdiction of the Centre. Since, the contention is with the effect of denunciation on consent, Article 72 and not Article 71 will be applicable in determining the effect of denunciation of the ICSID Convention by the Respondent.

(ii) Alternatively, the scope of Article 72 and Article 71 is different.

22. Articles 71 and 72 of the ICSID Convention have different scopes and they have to reconcile two different objectives.

(1) Article 71 governs the consequences of a denunciation on the Contracting State’s position as a State party to the ICSID Convention.

23. Article 71 clearly establishes the right of any Contracting State to denounce the ICSID Convention and thus to terminate its obligations towards the remaining Contracting States under the ICSID Convention. A Contracting State’s withdrawal from the ICSID Convention takes effect six months after the Bank’s receipt of the notice of denunciation.

24. From that date onwards, the State in question will no longer have the right to participate in the Administrative Council or to nominate individuals to the panel of conciliators and arbitrators or to propose amendments to the ICSID Convention. That State will also no longer be under a duty to contribute to the financing of the Centre, or to accord

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26 Christoph Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, THE BACKLASH AGAINST INVESTMENT ARBITRATION 355 (Michael Waibel, Asha Kaushal, eds., 2010).
27 *Fabrica v. Venezuela*, at ¶269.
28 *Fabrica v. Venezuela*, at ¶289.
29 ICSID Convention, Art. 4-7.
30 ICSID Convention, Art. 13.
31 ICSID Convention, Art. 65.
32 ICSID Convention, Art. 17.
immunities and privileges to the Centre within its territory (Article 19), or to refrain from exercising diplomatic protection in respect of its nationals\textsuperscript{33}, or to recognize and enforce ICSID awards within its territory\textsuperscript{34}, or to submit to the jurisdiction of the International Court of Justice in respect of any dispute concerning the interpretation or application of the ICSID Convention\textsuperscript{35}.

25. The object of Article 71 is to facilitate a Contracting State’s orderly exit from the ICSID Convention in case of a denunciation.

(2) Article 72 governs the consequences of a denunciation on the Contracting State’s position as a party in an ICSID arbitration.

26. Article 72 addresses consequences of a Contracting State’s denunciation of the ICSID Convention pursuant to Article 71 on that Contracting State’s or its nationals’ acceptance of the jurisdiction of the Centre. Article 72 thus preserves the consent to the jurisdiction of the Centre that has been given by the denouncing Contracting State itself, its constituent subdivisions or agencies.

27. The object of Article 72 is to protect the legitimate expectations of those who have relied upon that Contracting State’s consent to ICSID arbitration. Article 72 is not to be interpreted to extend to potential agreements to arbitrate in addition to existing agreements to arbitrate, it would follow potentially the Respondent party in an unlimited and unforeseeable number of future ICSID arbitrations for decades after its denunciation comes into effect. This would be antithetical to an orderly exit from the ICSID Convention. Thus, Article 72 and not Article 71 is applicable in determining the effect of Respondent’s denunciation of the ICSID Convention.

\textbf{b. Under Article 72, the Respondent is not obligated to submit to the jurisdiction of the ICSID Tribunal.}

28. The notice of Republic of Tyrea’s denunciation of the ICSID Convention was served by the Respondent on 5\textsuperscript{th} January 2018\textsuperscript{36}, whereas the Request for Arbitration was filed

\textsuperscript{33} ICSID Convention, Art. 27.  
\textsuperscript{34} ICSID Convention, Art. 54.  
\textsuperscript{35} ICSID Convention, Art. 64.  
\textsuperscript{36} Respondent’s Exhibit 1: Notice of ICSID Convention Denunciation, at p. 37.
on 29th June 2018\textsuperscript{37}, which is a date subsequent to the date of notice of denunciation. It is the date of Request for arbitration that marks the date of perfected consent and not the date of Registration of the dispute before the ICSID Tribunal.\textsuperscript{38}

29. The Request for arbitration reads-

"By submitting this Request for Arbitration, the Claimants accept the standing offer made by Tyrea to arbitrate."

30. It is the offer and acceptance which creates the mutual consent of the parties to arbitrate, which gives rise to rights and obligations including the right to arbitrate before the Tribunal.\textsuperscript{39}

31. In the present case the Respondent is not obligated to resolve the dispute under the ICSID Convention as (i) under Article 72, only when consent to arbitrate ‘perfected’ before the receipt of notice of denunciation by the depository gives rise to rights and obligations, and (ii) Article 72 does not refer to unilateral consent. Additionally, (iii) such an interpretation is not contrary to the principle of legal certainty and (iv) the Claimants are not left remediless.

\begin{itemize}
\item[(i)] Under Article 72, only ‘perfected’ consent before the receipt of notice of denunciation by the depository gives rise to rights and obligations.
\end{itemize}

32. Article 72 is to be interpreted in accordance with Article 31 of the VCLT\textsuperscript{40} which codifies the customary rule of treaty interpretation. It provides for an interpretation in accordance with the ordinary meaning in good faith and in light of the object and purpose.

33. In its ordinary meaning, Article 72 provides that only where consent to arbitration to the jurisdiction of the Centre is perfected, such that it generates rights and obligations under the ICSID Convention that those rights and obligations persist following the receipt of a notice of denunciation by a Contracting State pursuant to Article 71.\textsuperscript{41}

\textsuperscript{37} Request for Arbitration, at p. 2.
\textsuperscript{38} Tradex v. Albania, ICSID Case No. ARB/94/2, Decision on Jurisdiction, (Dec. 24, 1996), at ¶ 47, 63; Fabrica v. Venezuela, at ¶298.
\textsuperscript{39} CHRISTOPH SCHREUER, at p. 731; Fabrica v. Venezuela, at ¶289.
\textsuperscript{41} Fabrica v. Venezuela, at ¶282.
34. Alternatively, the same can be inferred from travaux preparatoires of the ICSID Convention. Prof. Broches was unequivocal in stating that consent may not be perfected once the denunciation of the Convention when he explained-

“If the State withdraws its unilateral statement by denouncing the Convention before it has been accepted by any investor, no investor could later bring a claim before the Centre.”

ii. Article 72 does not refer to unilateral consent.

35. The term “one of them” in Article 72 refers to the Contracting party capable of giving its consent, i.e. the Denouncing State. It does not refer to unilateral consent since-

(1) Unilateral consent does not give rise to rights and obligations.

36. Unilateral consent given by the Contracting State in an investment treaty or legislation cannot generate “rights and obligations under the ICSID Convention for the purposes of Article 72. Rights and obligations under the ICSID Convention as a party or potential party to ICSID arbitration only arise at the point of perfected consent, i.e. when there is an arbitration agreement in existence.

(2) An interpretation to the contrary would render words of the BIT as effet futile.

37. Reference to unilateral consent rather than perfected consent would mean no utility in including the words “any nationals of the Contracting State” in Article 72. Where a national of the Contracting State gives its “consent to the jurisdiction of the Centre” that will always be as perfected consent, either in the form of an arbitration agreement in an investment contract or in the form of an arbitration agreement that comes into existence when a national of one Contracting State accepts another Contracting State’s offer to arbitrate.

38. The principle of effet utile requires that the Tribunal interpret Article 72 in such a way so as to give effect to all its terms. The interpretation suggested by the Claimants

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would deprive the words “agencies or of any national of that State” in Article 72 of any utility.

iii. Such an interpretation is not contrary to the principle of legal certainty.

39. The denunciation of the ICSID Convention is a major step for any State to take. The decision is not usually made without debate in the relevant political organs of the State. The possibility of investors being caught completely by surprise by a Contracting State’s denunciation is therefore remote. In the present case also there were deliberations in the Tyrean Parliament on the possibility of denunciation of the ICSID Convention starting from November 2017.

iv. The Claimants are not left remediless.

40. International Arbitration is solely consent based. Even in the face of policy considerations, the jurisdiction of the Tribunal cannot be obtained in the absence of this consent. Additionally, ICSID arbitration is a special recourse and not a default recourse, the investors may always seek the default recourse in absence of consent, i.e. domestic courts.

41. Moreover, the arbitration in the ICSID Additional Facility is possible when a State has consented to ICSID jurisdiction and then subsequently denounces the Convention. Additionally, an investor could try to seek jurisdiction in another investor-State forum or through a different set of rules (such as UNCITRAL) by invoking the most favoured-nation (MFN) clause of the basic treaty. The extension of commitments is in the very nature of MFN clauses.

B. Article 9 of the BITs does not independently create a binding obligation to arbitrate under the ICSID Convention.

45 Fabrica v. Venezuela, at ¶290
46 Procedural Order No. 3, at ¶3.
51 Renta 4 v. The Russian Federation, SCC Case No. 24/2007, Award, (Jul. 20, 2012), at ¶129.
42. Article 9, the dispute resolution clause in the BITs, does not create a binding obligation to arbitrate under the ICSID Convention since a. the offer to arbitrate does not give rise to rights and obligations in order for it to be binding and b. the Respondent is not a party to the ICSID Convention.

   a. The offer to arbitrate does not give rise to rights and obligations in order for it to be binding.

43. A binding Treaty obligation does not exist in the present case as the principle of pacta sunt servanda “only relates to the fulfilment of existing obligations”.52 The dispute resolution clause in a BIT does not create rights and obligations as it is a mere offer to arbitrate.53

44. An expression of consent to ICSID arbitration does not constitute the necessary consent under the Convention. The requirement of the consent of the parties does not disappear with the existence of the Treaty. The Convention envisages an exchange of consents between the Parties.54

   b. Ratification of the ICSID Convention by the State parties is necessary to invoke the Tribunal’s jurisdiction.

45. The consent of the Respondent in Article 9 of the BIT is affected by actions taken by the Respondent with respect to the ICSID Convention. It is evident from the text of Article 9 itself, which in subsection 1 refers to the submission of disputes “under the” ICSID Convention.

46. Additionally, ICSID arbitration has a different juridical character than consent to other forms of arbitration for a simple reason: ICSID arbitration is directly regulated by a multilateral treaty. The multilateral treaty in question—the ICSID Convention—has a legal existence entirely separate from the BIT. In contrast UNCITRAL Rules do not impose obligations upon anyone unless they are adopted by parties to an arbitration agreement, whereas the ICSID Convention imposes obligations on the Contracting

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52 Land and Maritime Boundary Case (Cameroon v. Nigeria), 1998 ICJ 301 (Jun. 11), at ¶49.
54 AMT v. Republic of Zaire, ICSID Case No. ARB/93/1, Award, (Feb. 21, 1997), at ¶¶ 5, 18.
States regardless of whether they are simultaneously parties to arbitration agreements referring to ICSID arbitration.\textsuperscript{55}

47. ICSID arbitration is only available if the conditions for access to ICSID arbitration in the investment treaty and the ICSID Convention have been satisfied. In the present case, denunciation of the ICSID Convention by the Respondent entails that the pre-requisite conditions are not met and therefore, the Tribunal does not have jurisdiction to hear the present dispute.

\textsuperscript{55} \textit{Fabrica v. Venezuela}, at ¶261.
III. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE PRESENT MULTI-PARTY CLAIMS.

48. A third party funder required for the Claimants to bring their claims together. This indicates that the Claimants have not brought their claims together on any legal basis but only because it was a precondition set by the third party funders.

49. The fundamental principle and basic rule in international adjudication, is that of the consensual basis of jurisdiction. Jurisdiction of the Tribunal cannot go beyond the objective limits of the consent of the parties. The Tribunal does not have jurisdiction over the present claims as (A) the multi-party claims are outside the scope of the consent of the parties. Alternatively, (B) the conditions required for admitting multi-party claims are not fulfilled in the present case.

A. The multi-party claims are outside the scope of the consent of the parties

50. The consent of the parties cannot go beyond the objective limits of the general jurisdiction under the ICSID Convention. Multi-party claims cannot be admitted by the Tribunal as the consent in the two instruments from which consent is obtained by the ICSID Tribunal do not envisage multi-party claims. The claims are beyond Tribunal’s jurisdiction as (a) the ICSID Convention does not provide for multi-party claims and (b) the BITs do not envisage multi-party claims.

a. The ICSID Convention does not provide for multi-party claims

51. The ICSID Convention does not contain any provision that talks about multi-party claims and therefore multi-party disputes are not inherently within the purview of the ICSID Tribunal. The ICSID Convention does not have specific provisions dealing with the procedure and admission of multi-party claims. If a particular proceeding does not, by reason of its nature, fall within the system set up by the ICSID Convention, then it be cannot brought within that system through the medium of an extra consent given to that effect by one of the States Party to the Convention.

57 Abaclat and Others v. Argentina ICSID Case No. ARB/07/5, Dissenting Opinion, Georges Abi-Saab (Decision on Jurisdiction and Admissibility), (Oct. 28, 2011), (“Dissenting opinion in Abaclat”), at ¶ 10.
58 Dissenting opinion in Abaclat, at ¶13.
59 Schill & Briese, If the State Considers: Self-Judging Clauses in International Dispute Settlement, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW (2009).
52. Additionally, Article 25(1) of ICSID Convention\textsuperscript{61} uses the expression “a national”. Applying Article 31 of the VCLT\textsuperscript{62} and using ordinary meaning of the expression, it can be stated that ICSID Convention does not allow multi-party arbitration.\textsuperscript{63} Furthermore, the requirement of additional consent is not a novel concept under ICSID Convention and has also been mentioned in the literature concerning international law.\textsuperscript{64}

\textbf{b. The BIT does not envisage multi-party claims by investors.}

53. Article 9 of the Tyrea-Kitoa and Tyrea-Novanda BIT reads-

\textit{“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.”}

54. To understand the extent of consent we turn to the quintessential rule of treaty interpretation by its ordinary meaning in good faith as contained in Article 31 of the VCLT.\textsuperscript{65} The plain meaning of the text clearly states that the parties have only agreed to disputes between one contracting party and one national, i.e., bilateral disputes. The jurisdictional clause of the BITs does not envisage multi-party claims.\textsuperscript{66}

55. Even on adoption of the most favourable standard for the Claimants that has been laid down in the case of \textit{Alemanni v. Argentine Republic, which held that} on the proper interpretation of the BIT, the Respondent’s consent is to be wide enough in scope to cover the proceedings brought by the multiple group of co-claimants.\textsuperscript{67} The Tribunal in that case inferred from the use of investors in plural sense in the heading of the dispute resolution clause, as multi-party claims being within the contemplation of the parties.

\textsuperscript{61} ICSID Convention, Art. 25(1).
\textsuperscript{62} VCLT, Art. 31.
\textsuperscript{63} Dissenting opinion in \textit{Ambiente}, at ¶15.
\textsuperscript{64} CHITTHARANJAN AMERASINGHE, \textit{LOCAL REMEDIES IN INTERNATIONAL LAW}, (Cambridge Univ. Press, 2nd ed. 2004).
\textsuperscript{65} VCLT, Art. 31.
\textsuperscript{66} \textit{GIOVANNI ALEMMANI AND OTHERS v. THE ARGENTINE REPUBLIC, ICSID CASE NO. ARB/07/8, DECISION ON JURISDICTION AND ADMISSIBILITY}, (NOV. 17, 2014), (ALEMMANI v. ARGENTINA), ¶ 269; \textit{AMCO ASIA CORP. v. REPUBLIC OF INDONESIA, ICSID CASE NO. ARB/81/1, AWARD}, (SEPT. 25, 1983), ¶14.
\textsuperscript{67} Alemanni v. Argentina, ¶231.
56. The Italy-Argentine BIT the heading of the dispute resolution clause read “Dispute Resolution between Investors and Contracting Parties”.68 In the present case however there is no heading to the dispute resolution clause and in fact there is no such plural reference to investors in the dispute resolution clause at all. Therefore, it cannot be said that the BIT envisages multi-party claims.

B. Alternatively, the conditions required for admitting multi-party claims are not fulfilled in the present case.

57. While the Claimants might argue that the Tribunals in the past have allowed for multi-party claims, for ‘a dispute’ to have more than one party on the claimant’s side, the interest represented on each side of the dispute has to be in all essential respects identical for all of those involved on that side of the dispute.69

58. The present dispute does not satisfy the characteristics of the multi-party claims that have been admitted by the ICSID Tribunals and considered as constituting a “dispute”. This is because (a) the consent of the parties is obtained from two different unconnected sources, (b) the claims are unaffiliated and (c) the investments are different.

a. The consent of the parties is obtained from two different unconnected sources.

59. The parties derive their consent from two different BITS. The consent of the parties if obtained from two different sources, the sources should have sufficient connection,70 which is not present in this dispute.

60. Additionally, the scope of rights and obligations obtained from the two BITs are very different because of different Preambles in the two BITs, and different Preambles entail different extent of rights and obligations.71 When scope of right and obligations is different, the claims cannot be adjudged together.72

69 Alemanni v. Argentina, ¶232.
70 Noble Energy and Machala Power v. Ecuador and Conelec, ICSID Case No. ARB/05/12, Decision on Jurisdiction, (Mar. 05, 2008), at ¶130.
71 Enron Corp. v Argentine Republic, ICSID Case No. ARB/01/13, Decision on Jurisdiction, (Jan. 14, 2004), at ¶78.
72 MDT Equity v. Republic of Chile, ICSID Case No. ARB/01/7, Award, (May 24, 2004), at ¶213.
b. The claims are unaffiliated.

61. In allowing multi-party claims, the Tribunals have noted the Claimants as being affiliated with each other.73 The Claimants in the present case are incorporated in two different countries, have different objects of interest at stake and have different causes of action by the virtue of different orders passed on case to case analysis. The claims are therefore unaffiliated.

c. The investments are different.

62. In allowing multi-party claims, the Tribunals have noted the investments are same, related or the overall economic transaction is the same.74 This indicates towards are common interest and not a similar interest, pre-condition to allowing multi-party claims. The Claimants’ investments in the present case are unrelated and the overall economic transactions are different.

63. The claims are thus not sufficiently homogenous for the Claimants to invoke common jurisdiction of the Tribunal.

73 Noble Energy and Machala Power v. Ecuador and Conelec, ICSID Case No. ARB/05/12, Decision on Jurisdiction, (Mar. 05, 2008); Von pezold and Ors.v. Zimbabwe, ICSID Case No. ARB/10/15, Award, (July 28, 2015).

74 OKO Pankki Oyj et al v. Estonia, ICSID Case No. ARB/04/6, Award, (Nov. 19, 2007); Von pezold and Ors.v. Zimbabwe, ICSID Case No. ARB/10/15, Award, (July 28, 2015); Suez et al and others v Argentina, ICSID Case No. ARB/03/17, Decision on Liability, (July 30, 2010); Antoine Goetz and others v. Republic of Burundi, ICSID Case No. (ARB/95/3), Award, (Feb. 10, 1999); Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award, (Apr. 22, 2009); Flughafen Zürich and Gestión e Ingeniería v. Venezuela, ICSID Case No. ARB/10/19, Award, (Nov. 18, 2014).
PART-III: MERITS

IV. The blocking of the Claimants’ platform was not in violation of Art. 3(1) and 6 of the Tyrea-Novanda BIT and Art. 3(1) and 6 of the Tyrea-Kitoa BIT.

IV.I. The blocking of the Claimants’ platform is not in violation of the promise of Fair and Equitable Treatment under Art. 3(1) of the Tyrea-Novanda BIT and the Tyrea-Kitoa BIT.

64. It is submitted before the ICSID Tribunal that the Respondent in the present case has not violated the Promise of Fair and Equitable Treatment and non-discrimination as provided under Art. 3(1) of the BIT.

65. The Claimants in the present case may content that the reduction of the time limit from 60 to 45 days has violated the promise of Fair and Equitable on the grounds that:
   (i) At the time of investment, the Respondent never made a specific representation stating that they not bring a change in their Law on Media and Information
   (ii) The Claimants should have had been aware of the general regulatory environment in the host state.
   (iii) Furthermore, the State contains the right to exercise its general regulatory authority in order to protect the interests of its citizens.

66. Further, the Respondent contends that by Blocking the Claimants and not blocking the domestic websites such as Wink and Truthseeker, the Respondent has not committed any act which may be discriminatory in nature as the reason for not blocking the domestic websites had a valid reasoning.

(A) That the Respondent has not violated the Legitimate Expectations of the Claimants’.

67. The Respondent contends that the Representations made by the Host state by the introduction of Media and Information Law No. 1125-L dated 10 September 2013, the speech of Mr. Anderson wherein he had stated that,
   “it has become known that major international social networks such as FriendsLook, SpeakUp, Whistler, and others, are considering Tyrea
as a new market, and that some of them have even approached Tyrean ambassadors in Novanda and Kitoa to better understand the investment climate in Tyrea” and that “by the new Media Law Tyrea expects to lay down the ground for the advent of such prominent international players and for fruitful collaboration with them in the future.”

68. Further, the representations made by the Tyrean Government in the International Conference “A New Web Era in Tyrea” wherein the government had stated that they would do the absolute best to facilitate the establishment and use of new internet possibilities for the people.

69. However, the Respondent contends that the usage of the words such as fruitful collaboration and absolute best does not amount to specific inducement, the representations made by the Respondent State should be specific to the Claimants. A mere reference to them by stating their names in the speeches is not enough. If the host state’s intention was to induce the Claimants, the host state would have had approached them specifically for the same. A general inducement does not amount to representation as it needs to be specific for it to be reasonable enough to be relied upon.

70. Further, the Respondent cannot state that the statements made by the Respondent were the sole reason which induced the Claimants in order to invest in the host state. It is very well known that the other aspects such as lack of competition and untapped large potential audience were also some of the reasons which had lead the Claimants to invest in the host state. Further, no specific promises were made to the Claimants, and general words like fruitful collaboration and absolute best cannot have reasonably created legitimate expectation in minds of the Claimants.

71. Further, it would be wrong on the part of the Claimants to state that the expectations formed by the Claimants at the time of investing were legitimate other than the Media Law which was supposedly relied on by the Claimants at the time of investing, the Claimants should also have had relied on all the circumstances such as political,

75 Page No. 48, Statement of Uncontested Facts.
76 Methanix v. USA, Final Award, Para. 161.
77 Ibid.
78 Ibid.
79 Page No. 49, Statement of uncontested facts.
socioeconomic, and historical conditions. The requirement of taking into consideration the political, socioeconomic and historical conditions prevailing at the time of investing in the host state was provided in the case of Duke Energy v. Ecuador and such a requirement has been commonly accepted by many tribunals.80

72. Historically, Tyrea was a country strife with civil war between two rival communities-Minyar and Tatyar. At the time of investing, tensions were still prevalent between the communities, and a gestation period of less than 2 years was insufficient for Claimants to sufficiently determine the same would not happen again, and the Govt would not take any steps to regulate or decrease time period for public purpose.

73. Therefore, the Claimants at the time of investing in the host state should have had taken all such factors into consideration and therefore should have had legitimately expected that the Respondent would take measures in the future which would take measures in order to bring the rivalry between the Tatyars and the Minyars under control.

74. Further, the Respondents contend that in any case regardless of the expectations which the Claimants might have derived, the host state has the power to regulate its own affairs and so there has been no breach of the standard of Fair and Equitable Treatment.81

(B) That the actions of the Claimants were not Arbitrary in nature.

75. The Respondents contend that their actions were not arbitrary in nature. The claimants have argued that they were not consulted before the Respondent took the decision of decreasing the time limit for implementation of the algorithm from 60 to 45 days. However, the Respondents argue that in light of the increasing violence in the country and the fact that the Respondents were aware of the fact that the Claimants would require a time period of 45 days in order to implement the time period and it was not an unreasonable expectation from the Respondents to expect the Claimants to complete the algorithm within 45 days.

(C) That the Claimants did not act in a Discriminatory Manner.

76. In the Instant case, the Respondents contend that they have not acted in a Discriminatory manner.

80 Duke Energy v. Ecuador, Final Award, Para. 248; Parkerings-Compagniet v. Lithuania, Award, Para 167.
81 Saluka v. Czech Republic, Final Award, Para 303.
77. As per the guidelines laid down in the case of Pope and Talbot v. Canada, discrimination can be determined through the following checks; (1) Whether the Claimants and the alleged companies are Comparators, (2) Whether there is a difference in treatment between these companies, (3) Whether such difference in treatment is justified.

78. The Domestic Companies i.e Truthseeker and Wink have not been blocked by the Respondent. In the instant case, the Respondent agrees that the Claimants and the Domestic Companies were comparator and that there was a visible difference in treatment.

79. However, such a difference in treatment was justified on the part of the Respondents as the website Truthseeker was a government owned website and the Respondents had planned to use the website of Truthseeker for its program #TyreaForAll and the Respondents had not blocked the website of Wink as its reach was very less as compared to the websites of the Claimants and had the Government of the host State had to act in a reasonable manner so as to ensure that all the websites for communications in Tyrea were not blocked.

80. Therefore, the acts of the Respondents were justified and hence it cannot be stated to be discriminatory.

IV.II. Article 6 of the BITs was not violated by the Respondent.

81. It is our submission that Article 6 which deals with expropriation has not been violated as (A) there was no indirect expropriation, (B) it was a non-compensable regulatory measure covered under the police powers of the State, and (C) In any case, it meets the requirements of legality under the BIT.

(A) There was no indirect expropriation.

82. We submit that there was no expropriation, direct or indirect, in the present case. The tests relied upon by the Claimants to allege an indirect expropriation have not been met.

a. There was no effective neutralization of the investment.
One of the most widely recognized test to determine whether an indirect expropriation took place is to determine whether there was an effective neutralization of the benefits that could have been realised by the investment in the future. Several tribunals, such as that in CME v Czech Republic have stated that a deprivation or taking occurs whenever a State takes steps that “effectively neutralize the benefit of the property for the foreign owner.”

The transfer of physical property into the hands of the government or any third party is only a requirement under direct expropriation- under indirect expropriation a taking could be said to have taken place even when the physical assets remain intact. Even though the legal title remains with the original owner, i.e. the investor, if the assets are rendered so useless that they must have been deemed to have been expropriated and that all possible revenue streams have been blocked. If by the actions of the respondent state the commercial value of the investment goes down, it would amount to indirect expropriation.

In the present case, there has been a loss in profits and not a complete neutralisation. This is so as the Claimants retain their building and the same can be used for transactions. In the social media industry, it is a common practise to use customer care or other support infrastructure in other countries. Outsourcing is a very common practise. The domain name still exists with the Claimants.

b. There was no substantial deprivation to use, control or dispose their assets.

The tribunal in Azurix v Argentina finding other breaches of the BIT, including fair and equitable treatment, denied the existence of an indirect expropriation, as the Claimants had retained control over the enterprise: the impact on the investment attributable to the Province’s actions was not to the extent required to find that, in the aggregate, these actions amounted to an expropriation; Azurix did not lose the attributes

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82 CME Czech Republic B.V. (The Netherlands) v The Czech Republic, Partial Award, , para. 150.

83 Suez v. Argentina, Decision on Liability, para. 121

84 Starrett Housing v. Iran, Interlocutory Award, Iran-United States Claims Tribunal Reports 122, ¶ 154.

85 CME v Czech Republic , partial awards on merits, ¶ 591.
of ownership and always continued to control ABA and the shares were unaffected. No
doubt the management of ABA was affected by the Province’s actions, but not
sufficiently for the Tribunal to find that investment was expropriated.86

87. In the NAFTA context, in the Pope & Talbot case, the Tribunal found that although the
introduction of export quotas resulted in a reduction of profits for the Pope & Talbot
company, sales abroad were not entirely prevented and the investor was still able to
make profits. It stated: “…mere interference is not expropriation; rather, a significant
degree of deprivation of fundamental rights of ownership is required”.87

88. In the present case as well, the Claimants retain full control of their enterprises. They
wound up their operations on their own in the second half of April 201888, an act which
cannot be attributed to the Respondent. Thus there was no substantial deprivation to
use, control or dispose their assets.

c. The measures were temporary in duration.

89. Another approach to determine whether expropriation took place is to look at the
duration of the measure. In CME (the Netherlands) v. the Czech Republic., the Tribunal
opined that if there is no immediate prospect at hand that the asset will be restored in
its original position to enjoy the rights it did before, expropriation is said to have taken
place.89 Such time factor of the blocking is to be factored on a case-to-case basis. The
duration is thus an important criteria to determine whether an action was so severe so
as to warrant the tag of expropriation.90

90. In the present case, the measures were clearly temporary in nature. The ordinances
dated 28 February, 1 and 2 March provide for a blocking “pending further notice” and
the measures will be revoked when the Claimants are able to comply with the law and
make the requisite algorithms. It is pertinent to notice that they stopped making the

86 At para 322.
87 In addition, the Tribunal stated that: “Regulations can indeed be characterised in a way that would
constitute creeping expropriation….Indeed, much creeping expropriation could be conducted by
regulation, and a blanket exception for regulatory measures would create a gaping loophole in
international protection against expropriation”, see Award paragraph 99
88 Compromis, page 63, clarification 13.
89 CME Czech Republic B.V. (The Netherlands) v The Czech Republic, Partial Award, ¶ 607.
90 Sornarajah, p. 301, and R.Dolzer at 51-52.
algorithm after the blocking.\(^{91}\) They wound up their operations on their own in the second half of April 2018\(^{92}\), which was again a voluntary action.

**(B) The measures were non-compensable regulatory measures covered under the police powers of the State.**

91. The doctrine of police powers, also known as ‘non-compensable regulatory measures’ act as an exception to non-payment of compensation for the expropriatory measure.

92. The doctrine of police powers is invoked to defend a sovereign's inherent right to regulate its affairs. It is a well-established principle of international law, and the same has been upheld in various cases – that an expropriation was allowed as long as it was well within the police powers of the State. In Feldman v Mexico\(^{93}\), the Tribunal held that non-payment of compensation for regulatory measures has been recognised as a customary international law. Emphasis on the host state's sovereignty supports the argument that the investor should not expect compensation for a measure of general application.

93. Each State has a sovereign right to take actions to defend its nation and its people and the payment of compensation would defeat the very purpose. While the term ‘Police Powers’ originated from USA as mentioned in US Restatement of foreign Relations Law\(^{94}\), several tribunals such Tecmed v Mexico have used it.

94. Nothing in the language of bilateral investment treaties purports to undermine the permanent sovereignty of States. The same view has been endorsed by eminent authors like Sornarajah, Brownlie and Newcombe.

95. Tribunals such as Sedco, Inc. v. National Iranian Oil Co., the Iran–United States Claims Tribunal referred to “an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide ‘regulation’ within the accepted police power of States”\(^{95}\).

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\(^{91}\) Compromis, page 61, clarification 4.

\(^{92}\) Compromis, page 63, clarification 13.

\(^{93}\) Feldman v Mexico, Award, ¶103.


96. General regulations commonly included within the accepted police powers of a state a. must be for a public purpose, b. applied in a non-discriminatory manner and c. must follow the due process requirement. Additionally, d. the requirement of proportionality is not valid.

a. Measures were for a public purpose.

97. Public purpose is the first criterion to be met for regulatory measures to fall within the scope of police powers of a state. The concept of public purpose under international law is broadly defined and falls within the discretion of the host state. Thus, the host state must be accorded a wide margin of discretion in deciding what constitutes public purpose.

98. As noted in the Draft Convention on the International Responsibility of States for Injury to Aliens (1961), “this unwillingness to impose an international standard of public purpose must be taken as reflecting great hesitancy upon the part of tribunals and of States adjusting claims through diplomatic settlement to embark upon a survey of what the public needs of a nation are and how these may best be satisfied”.

99. Tyrea emerged out of a situation of civil war between two rival communities – Tatyar and Minyar – in September 2012. Even then tensions still persisted, and these were severely aggravated by the use of the Claimants websites, which incite people by spreading fake information.

100. The screenshot of FriendsLook on page number 29, incites people to end the war by continuing to fight by saying – “It is time to end this war ourselves and in our favour - and we can only do this if we continue fighting” and even started a hashtag- #TyreaforTatyar. This same hashtag has been used by Whistler on the next page while saying things like time to end this any means justified.

101. Speakup also incites violence by saying “Time to uncover the truth behind the disappearances of Minyar teenagers in Takodana’s nightclubs owned by Tatyar - things you will never read in official newspapers! A tale of secrets, threats, ransom and slavery

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96 Brownlie, 509; Myers, ¶ 281; Methanex, Part IV Ch. D ¶ 7; Continental Casualty, ¶ 276
97 LIAMCO, ¶ 194; Reinish, 182.
98 Amoco, ¶ 145; Goetz, ¶ 126
100 Compromis, page 48, para 1.
- hear it all from us and see for yourself that it is time to act!” and further intriguing the people.

102. This led to hundreds of deaths in the country. The Respondent gave them a time period to comply with the laws of developing new the algorithm, and seeing as they failed to do that we blocked them, fearful that the situation would spin more out of control and we would slip back to a situation of civil war.101

**b. The measures were not discriminatory in nature.**

103. While we concede that the claimants and the domestic websites are comparable to each other and there was a difference in treatment, we submit that the same was justified.

104. The tribunal in Pope & Talbot suggested the importance of considering the policy justifications in measures that have a discriminatory effect when it stated that ‘[d]ifferences in treatment will presumptively violate Article 1102(2) unless they have a reasonable nexus to national policies.

105. Wink, a local messenger application, widely popular before the advent of the three global networks but now waning due to its lack of interactivity, was swamped with messages automatically delivered to the users and containing links to radicalist posts. 102 And it was a one on one platform, which used spam messages automatically sent and people had choice to open or not. Respondent launched a national program “Tyrea for All”, which involved developing legislative initiatives targeting discriminatory actions and fostering dialogue between the ethnic groups and the State to promote mutual understanding and search for amicable resolution of conflicts on the platform of Truthseeker.103

**c. The requirements of due process were met.**

106. Members, we came up with a requirement to develop algorithms according to our domestic laws and gave Claimants a certain time period, and although it was reduced still a period of 15 days was given. We also attended meetings as requested by the claimants. Moreover, they were free to approach the domestic courts and international

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101 Compromis, page 52, Para 21.
102 Compromis, page 50, para 13.
103 Compromis, page 63, para 15.
tribunals such as this one and nothing in the case file suggests otherwise and thus all elements of due process were met.  

**d. Police powers is not subject to the test of proportionality.**

107. The Claimant may contend that in addition to the above tests a state’s exercise of police powers in the form of regulatory measures is also subjected to a proportionality test, as stated by the ECtHR. 

108. The proportionality test is applied by the ECtHR exclusively because of the text of Article 1 Additional Protocol I to the ECHR, which explicitly limits a state’s power to execute regulatory measures to merely controlling the use of property. Whereas the police powers doctrine extends to regulatory measures that may be tantamount to deprivation of property. 

109. In the present case, the BIT does not in any manner constrict how a Contracting Party may exercise its regulatory powers. Therefore, the legitimacy of the Respondent’s exercise of its police powers is not subject to the proportionality test.

**(C) The requirements of BIT under Art 6 have been met.**

110. Aside from the requirements of public purpose, non-discrimination, legitimate expectations and due process, which have been elucidated above, another requirement is payment of just compensation.

111. We submit that a mere non-payment of compensation, without looking into the other requirements of legality does not render the expropriation unlawful in nature.

112. Most of the claims revolve around the label of compensation, and not the amount. If States do not recognize that an expropriation has taken place-and the same is disputed before this Tribunal – they cannot be expected to pay compensation at the time of taking. If this view were to be followed, most cases involving expropriation would become unlawful as the States would not pay compensation at that time. Thus we submit that if the other requirements are met, non-payment of compensation would not make the expropriation unlawful, and the same view has been taken in various cases.

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104 ADC v Hungary, Award, para 435.
105 James v United Kingdom, ¶ 50, 63; Sporrong and Lonnroth, ¶ 61.
107 Saluka, ¶ 262; Methanex Pt. 4, Ch. D, ¶ 7.
such as Tidewater v Venezuela\textsuperscript{108}, Goetz v Burundi\textsuperscript{109}, where payment was not made at the time of expropriation but as the other elements of lawfulness were met, no compensation was directed by the Tribunal.

113. These are also consistent with the World Bank Guidelines\textsuperscript{110}, where part IV dealing with expropriation has said that as long as a forum exists between the parties to determine the amount of compensation, the elements of legality under the BITs are not violated.

114. Thus we submit that Article 6 of the BITs was not violated.

\textsuperscript{108} Tidewater v Venezuela award p 138
\textsuperscript{109} Goetz v Burundi (RL-112), [130].
\textsuperscript{110} World Bank Guidelines on the Treatment of Foreign Direct Investment
PART-IV: COMPENSATION

V. The Discounted Cash Flow (“DCF”) method is speculative in nature and the Net Book Value (“NBV”) method is the most appropriate method.

115. The amount of compensation is asking based on its lost profits is nearly 20 times of their direct damages, and we submit that the same is based on utter speculation as its based on the discounted cash flow or the DCF method.

116. Another possible reason for arbitrators’ rejection of the DCF method is political sensitivity to large awards against states and a perception of the DCF method “as putting too much of a burden on the respondent state.”

117. We submit, the DCF method is speculative in nature as it relies on a lot of variables, that there are numerous moving parts, such as in building up the model of revenue, or in terms of WACC. The same inherent speculativity is recognized by the ILC articles on state responsibility in article 36, para 26. It provide that: “Themethod analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks).”

118. The same used by the tribunal in Siag & vecci v Egypt, where DCF was rejected on its inherent speculative nature.

(A) There are certain requirements to be fulfilled for using this method, which are a. The Claimants should be a going concern with a proven record of profitability, and b. That country risk should be accounted for.

111 RIPINSKY & WILLIAMS, supra note 5, at 231. Sergey Ripinsky provided this explanation in a presentation to the Investment Treaty Forum of the British Institute of International and Comparative law.

112 ILC Articles on State Responsibility, supra note 6, art. 36, ¶ 26.

113 113 Siag v. Egypt, supra note 83, ¶ 583
a. The Claimants are not going concerns with a proven record of profitability.

119. The DCF can only be used when the Claimants are a going concern with a proven record of profitability.

120. We submit that the claimants do not come under this requirement as a period of 2-3 years is not considered sufficient as it cannot prove a proven record of profitability. Even though initially the Claimants have earned profits in the first 2 years, it is not sufficient a trend of such profits for the future, as it is only after a business has been through all business cycles and has earned consistently, that it can be said that there is a proven record of profitability.

121. In Tecmed v. Mexico, the tribunal rejected the DCF method as the landfill had operated as an ongoing business for a short period (two and a half years) and there was no sufficient historical data to prepare reliable estimates.114

122. Instead tribunals have relied on a period of 5 years in the case of ADC v Hungary, and even authors such as Walde and Sabahi have endorsed that a period of 5-10 years is necessary.

123. Further there are no business plans submitted before the Tribunal. Tribunals have recognized that business plans “constitute the best evidence before the Tribunal of the expectations of the parties at the time of expropriation for the expected stream of cash flows.”115

b. The adequate country risk premium has not been factored in the DCF.

124. The risk generated by country specific factors is referred to as ‘country risk.’ Country risks include business risks (arising, for example, from macroeconomic factors, financial market factors or local demand/supply factors)9 and political risks (arising, for example, from the prospect of State actions such as expropriation, tax and policy changes, including currency convertibility, and the risk of political violence such as civil war, mass strikes and civil strife).116

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114 Tecmed v. Mexico, Award, 29 May 2003.

115 ADC v. Hungary, supra note 4, ¶ 507; see also Walter Bau v. Thailand, supra note 83

116 Sergey Ripinsky and Kevin Williams, Damages in International Investment Law (British Institute of International and Comparative Law 2008) 326
125. In part as a result of these competing considerations, investment tribunals have applied widely varying country risk premiums, ranging from 6 per cent (OI Group) to 14.75 per cent (Tidewater) for the same country and for effectively the same period.\textsuperscript{117} The tribunal in Saint Gobain considered that the BIT and the arbitration did ‘not serve the purpose of insuring Claimant against the general risks of investing in Venezuela that a willing buyer would take into account in its assessment of the purchase price it would pay’, and, therefore, ‘the country risk premium must reflect all political risks associated with investing in Venezuela, including the alleged general risk of being expropriated without payment of (sufficient) compensation.’\textsuperscript{118} In Venezuela Holdings\textsuperscript{119} and Tidewater,\textsuperscript{120} the tribunals also decided to include expropriation risk for determination of country premium.

\textbf{(B) DCF would lead to double recovery in the present case.}

127. When a single measure entails or demands both the assets’ value and the lost future profits, as well as every other aspect of value of the expropriated enterprise - A former owner who receives compensation measured on this basis will be able to purchase an enterprise of equal value to the one that was expropriated, from which he will receive cash flows worth the same as those of the expropriated enterprise. The former owner, in short, is restored to his position before the expropriation.\textsuperscript{121}

128. In Himpurna California v PLN, the damnum emergens consisted in the investments and expenditures undertaken by the claimant in view of compliance with the contract.\textsuperscript{122} For the calculation of lucrum cessans, the tribunal rejected the DCF method and explained: “To ask for the full amount of the future revenue stream when


\textsuperscript{118} Saint Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/13, Award, 30 December 2016, paras. 718–719, 723

\textsuperscript{119} Venezuela Holdings BV & Others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, 9 October 2014, paras. 364–354.

\textsuperscript{120} Tidewater Investment SRL and Tidewater Caribe CA v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Award, 13 March 2015.


\textsuperscript{122} Himpurna California Energy Ltd v PT (Persero) Perusahaan Listruik Nagara (PLN), Final Award of 4 May 1999 (2000) 25 YCA 13, p. 287.
also claiming recoupment of all investments is wanting to have your cake and eat it too”. 123

129. Thus we submit that only the Net Book Value method should be used.

123 Ibid., Para 242.
REQUEST FOR RELIEF

In light of the submissions made, the Respondent hereby respectfully requests the Tribunal to find and order that:

1. The Respondent’s request for provisional measure should be granted;
2. The Tribunal does not have jurisdiction over the present the dispute, despite the Respondent’s denunciation of the ICSID Convention;
3. Additionally, the Tribunal does not have jurisdiction over the multi-party arbitration claim brought against the Respondent;
4. Alternatively, the blocking of the Claimants’ platforms is in violation of Articles 3(1) and 6 of the Tyrea-Novanda BIT and Articles 3(1) and 6 of the Tyrea-Kitoa BIT; and
5. Alternatively, The DCF method of calculation of compensation is not the appropriate method for the quantification of damages in this case;

And accordingly order the Claimants to pay bear the legal costs and interests, or such amount as it finds reasonable and just by a determination at the Costs Stage.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sd/-

(Counsels on behalf of the Respondent)

23 September, 2019.