TEAM LACHS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Case No. ARB/18/155

FRIENDSLOOK PLC

WHISTLER INC.

SPEAKUP MEDIA INC.

(Claimants)

V.

THE REPUBLIC OF TYREA

(Respondent)

MEMORIAL FOR RESPONDENT

23rd September 2019
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STATEMENT OF FACTS

Parties to the dispute

1. The Claimants comprised of three major international social media network namely Friendslook, Whistler and Speakup. Friendslook was incorporated under the laws of Novanda whereas Whistler and Speak were incorporated under the laws of Kitoa. Novanda acceded to the ICSID Convention in January 2015 whereas Kitoa acceded to the same in October 1995.

2. The Respondent, Republic of Tyrea is an emerging country. It has ratified the Tyrea-Novanda BIT on 10 September 2000 and also the Tyrea-Kitoa BIT on 25 May 2001.

Historical Background

3. Tyrea emerged from a civil war in September 2012. In January 2013, the State transitioned from a military dictatorship to a democracy. Nevertheless, the tension still remains in Tyrea even after the hostilities are over especially to the two major ethnicities named Minyar and Tatyar.

Origins of the Dispute

4. The Respondent has a population of 120 million and on September 10, 2013, they passed the new Law on Media and Information No. 1125-L on Media and Information with the intention to liberalise the Internet and loosen its control over the media and the press. Due to this, Tyrea was regarded by the Claimants as a new strategic market. The statements by Tyrean public figures also strengthened the Claimants’ belief in fruitful cooperation in the future.

5. In January 2015, Friendslook established their local branches in Tyrea as well as launch the Tyrean version of their platform and both Whistler and SpeakUp followed suit in June 2015.

6. At the end of 2016, sporadic posts began appearing as national extremist groups of Tyrea commenced their campaign through social media platforms including local
platforms such as Wink and Truthseeker. Such online movement had invoked the
tensions of the two ethnicities of Tyrea; the Minyar and Tatyar. This ethnic violence
had resulted in hundreds of casualties in Tyrea.

7. The Respondent decided to denounce itself from ICSID Convention on 5\textsuperscript{th} January
2018 due to the long lasting imbalance between the interest of the investors and States.

8. As an emerging country, the Respondent decided to promote freedom of expression by
passing the new Law on Media and Information No. 1125-L on Media and Information
dated on September 10, 2013.

9. However, this law was amended on 12\textsuperscript{th} January 2018 to filter the hate speech within
the Republic of Tyrea due to the campaign on social network by the national extremist
groups in Tyrea. Hence, the Respondent passed the Law Amending the New Media
Law No. 0808-L which required all social networks to implement safeguards allowing
identification of users and filter content by introducing an algorithm preventing the
dissemination of hate speech. The deadline of compliance was 60 calendar days.

10. Due to the lack of time to prepare the algorithm, the Regional Vice President of
SpeakUp, Ms Saraid Parlante had a meeting with the Minister of Telecommunications,
Information Technology and Mass Media of Tyrea, Mr Fredrick Woodlant on January
28, 2018. They discussed the requirements of the new amendment and Mr Woodlant
acknowledged the importance of allowing sufficient time for algorithm development
and testing.

11. However, on 11\textsuperscript{th} February 2018, the Respondent has to take a drastic measure by
reducing the deadline of compliance to 45 days to control the violent incident
happening in Tyrea.

12. The Claimants have managed to comply with the requirement on 28\textsuperscript{th} February 2018,
however, the algorithm was found to be not effective.
13. Therefore, due to the resultant fear of slipping back into the civil war, Friendslook was blocked on February 28, 2018. Followed by the blocking of Whistler and SpeakUp in the next following days respectively.

Arbitration

14. On June 29, 2018, the Claimants jointly filed their request for arbitration before the International Centre for Settlement of Investment Disputes in accordance with the ICSID Convention.

15. Pending the determination of the arbitration proceedings, provisional measures were sought by the Respondent to stop the Claimants unofficial measures.
SUMMARY OF PLEADINGS

**JURISDICTION** In the event that this tribunal do have jurisdiction pending the determination of this proceeding to the second stage, the Respondent submits that the tribunal have the jurisdiction to recommend provisional measures requested by the Respondent. The request was sought due to the unofficial measures taken by the Claimants. Nevertheless, in the first stage proceeding, the Respondent submits that this tribunal does not have jurisdiction over this present dispute in light of the Respondent’s denunciation from ICSID Convention. This is due to the fact that the notice to arbitrate under ICSID Convention was send after the date of the denouncement of the Respondent from ICSID. Moreover, if this tribunal disagree with the denunciation of the Respondent, the Respondent submits that this tribunal does not have jurisdiction to hear multi-party claims from different nationals in one single proceeding as it would be contrary to the jurisdiction conferred to the tribunal under ICSID itself.

**MERITS** The Respondent had accorded the Claimants with FET whereby they are not treated differently and that their legitimate expectation was still safeguarded. With that, the Respondent did not violate Art. 3 of both BITs when they had introduced the Decree. Moreover, under any circumstances, the action of the Respondent did not amount to an expropriation as it was carried out under the expression of the Respondent’s police power. Alternatively, if the tribunal disagree with such a contention, it is our submission that the measures taken by the Respondent is still in compliance with both BITs as it satisfies all the requirements under Art.6 of both BITs allowing for a lawful expropriation to take place. Another point of argument is on the terms of compensation. The Respondent would accept the fact that they are required to pay compensation in the event where the Tribunal arrives to such a decision. However, the amount of compensation is disputed as the DCF method employed by the Claimants is inappropriate to be applied in the present case.
ARGUMENTS ON JURISDICTION

I. THE TRIBUNAL SHOULD GRANT PROVISIONAL MEASURES ORDERING THE CLAIMANTS TO REFRAIN FROM AGGRAVATING THE DISPUTE

16. The Claimant’s unilateral decision to engage with the media had no legitimate basis, was designed to offer a one-sided picture of the dispute and turning the arbitration into a trial by media.

17. Therefore, in order to preserve the Respondent’s rights in the arbitration proceeding until the dispute has been adjudicated on the merits, the Respondent requests the Tribunal to order provisional measures pursuant to Art. 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.

18. The requested provisional measures shall be granted as [A] the tribunal have prima facie jurisdiction to hear the request for provisional measures, [B] the Respondent’s self-standing right which includes preserving the status quo and the rights to the non-aggravation of the dispute warrant preservation and [C] the requirements of provisional measures have been fulfilled.

A. The tribunal has prima facie jurisdiction to hear the request for provisional measures

19. The Tribunal’s authority to recommend provisional measures is unaffected by objections to its jurisdiction.\(^1\) ICSID tribunals have consistently recommended provisional measures before determining their jurisdiction.\(^2\)

20. In any event, the Tribunal has the inherent jurisdiction and powers required to preserve the integrity of its own process and the duty to ensure that the parties comply with their obligation to arbitrate fairly and in good faith.\(^3\)

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1 Pey Casado v Chile ¶ 13.
2 Holiday v Morocco ¶ 136.
3 Libananco v. Turkey, ¶ 78; Caratube v. Kazakhstan II, ¶ 113.
21. Provisional measures may be recommended by the tribunal as governed under Art. 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules to guarantee the protection of rights whose existence might be jeopardized in the absence of such measures.\(^4\)

22. It has been recognized by the jurisprudence of ICSID tribunal that provisional measures which can be ‘recommended’ by an ICSID tribunal are legally compulsory and they are in effect ‘ordered’ by the tribunal and the parties are under a legal obligation to comply with them.\(^5\) This is in line with Rule 19 of the ICSID Arbitration Rules as regards the Tribunal’s authority to make such orders is considered required for the conduct of the arbitrations proceeding.

B. The Respondent’s right to the integrity of the proceeding and the self-standing right warrants preservation

23. As a number of tribunals have found, the rights which may be protected include procedural rights, such as the preservation of the integrity of the proceedings and also the self-standing rights. Although it is a merely procedural right, it has been established that both substantive and procedural rights are susceptible of protection by means of provisional measures,\(^6\) provided that the rights to be preserved must have a connection with the dispute.\(^7\)

24. Therefore, the Respondent seeks this tribunal to preserve the Respondent’s right to the procedural integrity of arbitration\(^8\) including the right of exclusivity of the tribunal’s jurisdiction under Art. 26 of the ICSID Convention\(^9\) and the self-standing rights which are the preservation of the status quo and the rights to the non-aggravation of the dispute\(^10\) pending the determination of the proceeding.

\(^4\) Occidental v Ecuador, ¶ 60.
\(^5\) Tokios Tokelés, ¶ 4.
\(^6\) Taalinn v Estonia, ¶ 91.
\(^7\) Quiborax v Bolivia, ¶ 118.
\(^8\) Nova v Romania, ¶ 235.
\(^9\) Teinver v Argentine, ¶ 175.
\(^10\) Quillborax v Bolivia, ¶ 117.
25. In the same vein, the *travaux préparatoires* of the ICSID Convention referred to the need “to preserve the status quo between the parties pending the final decision on the merits” and the commentary to the 1968 edition of the ICSID Arbitration Rules explained that Art. 47 of the Convention is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice to the execution of the award. This position has been applied by ICSID tribunal whereby the good and fair practical rule is where both parties should refrain from doing anything that could aggravate the dispute.

26. The Claimants’ actions of waging an aggressive media campaign against the Respondent to mischaracterize the measures taken by Respondent for blocking their social media websites will alter the status quo and aggravate the dispute. The continuous misuse and misrepresentation of argument by the Claimants through its media campaign will further inflame the volatile political and social situation in Tyrea. As a result, the Respondent’s reputation, economy and integrity will be jeopardized when the deliberate media campaign will create a trial by the media. This undermines the Respondent’s right to the exclusivity of proceeding as well.

27. ICSID tribunals have held that the existence of protection of a right to exclusivity of the arbitration proceeding susceptible of protection by way of provisional measures is guaranteed under Art. 26 of the ICSID Convention. This right has also been jeopardized when the Claimants engaged with the professional public relations experts to issue negative information to the press against the Respondent.

C. The requirements of provisional measures have been fulfilled

28. Provisional measures should be granted to the Respondent to preserve the self-standing rights and there exist the circumstances of necessity and urgency to avoid irreparable harm. Recent ICSID tribunal includes the requirement of proportionality, which

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11 Belgium v Bulgaria, ¶ 199; Germany v United States, ¶ 103.
12 Amco v Indonesia, ¶ 410.
13 Case File, Request for Provisional Measures, p.36, ¶ 2.
14 Case File, Request on Provisional Measures, p.38, ¶¶ 8-10.
15 Burlington v Ecuador, ¶ 57; Tokios Tokelés, ¶ 7.
16 Case File, Request for Provisional Measures, p.36, ¶ 2.
17 Occidental v Ecuador, ¶ 61.
requires “balancing the inconvenience in the imposition of the measures upon the parties.”

(a) The provisional measures are urgent

29. There is an urgent need for the tribunal to intervene with the actions of the Claimants as such action is prejudicial to the rights of the Respondent is likely to be taken before such final decision is given and such measures are intended to protect against the aggravation of the dispute during the proceedings.

30. The Claimants alleged that the statement by Mr. Woodlant, threatening to block the social media websites if they refuse to give access to the Respondent is a clear misrepresentation. The meeting which was attended by Mr. Frederick Woodlant and the Regional Vice President of Speakup named Saraid Parlante, merely discussed the role of social media to curb the issues in Tyrea through the algorithm. Such misrepresentation could greatly affect the Respondent in its normal course of dealing particularly to its reputation to the NGOs, stakeholders and to the people of Tyrea themselves as they will now see the Respondent as an oppressor of free speech.

31. Moreover, the Claimants have also extracted phrases from the Respondent’s arbitration documents without its whole context. Such publication of the Excerpts will obviously generate further media coverage and thereby run the risk of severe reputational damage, accusations of incompetence and non-transparency, and further waves of media speculations and criticisms.

32. The threat is imminent and requires urgent relief because the Respondent has already made the bid to the World Expo that is intended to attract millions of visitors with the intention to generate large revenues and boost its image worldwide. The acts of the

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18 Born.
19 Occidental v Ecuador, ¶ 59.
20 Burlington v Ecuador, ¶ 73; Finland v Denmark, ¶ 23; Congo v France, ¶ 22; Schruer (III).
21 Case File, Request for Provisional Measures, p.37, ¶ 4.
22 Case File, Affidavit of Ms. Saraid Parlante, p.12, ¶ 7.
23 Case File, Request for Provisional Measures, p.37 ¶ 5.
24 Tallinn v Estonia, ¶ 36.
Claimants greatly undermine the attempt of the Respondent in developing anew its economy and smoothly transition to a modern market economy as an emerging country.

33. ICSID tribunal satisfies that there exists a sufficient risk of harm or prejudice, as well as aggravation in this case to warrant some form of control from the tribunal due to the deliberate media campaign as the general media interest have already exists.\(^{26}\)

\(\text{(b) The requirement of necessity has been fulfilled}\)

34. ICSID tribunals have interpreted “irreparable harm” to mean “serious harm”, “serious prejudice”, or “significant harm”.\(^{27}\) In addition, ICSID tribunals have held that provisional measures may be necessary where the alleged harm is capable of being addressed by monetary compensation, but such compensation would not adequately remedy the damage suffered.\(^{28}\) There is necessity to grant provisional measures where actions of a party “are capable of causing or of threatening irreparable prejudice to the rights invoked”.\(^{29}\)

35. The Respondent submits that when the harm threatened relates to the integrity of the proceedings then the element of necessity will be met.\(^{30}\) The media publicity given by the Claimants exerts undue pressure on Respondents, their counsel, witnesses, experts and other participant in the process.

36. The mere likelihood of future exacerbation of the dispute which includes the serious damage to the reputation and the volatile political and social situation in Tyrea as a result of the allegations spread deliberately through the media campaign is sufficient for the tribunal’s intervention of the Claimants’ actions.\(^{31}\)

37. Ultimately, there is a necessity for the provisional measures to be granted and if the tribunal does not intervene, the Claimants would not stop causing irreparable harm to the Respondent’s state even after the disposal of these proceeding as the Claimants

\(^{26}\) Biwater Gauff v Tanzania, ¶ 146.
\(^{27}\) Abaclat v Argentine, ¶ 11.
\(^{28}\) Perenco v Ecuador, ¶ 43; Phoenix v Czech, ¶ 33.
\(^{29}\) Occidental v Ecuador, ¶ 59.
\(^{30}\) Quilborax v Bolivia, ¶ 156; Teinver v Argentine, ¶ 226.
\(^{31}\) Talinn v Estonia, ¶ 101.
insist that these media campaign will remain unless the Respondent withdraw its bid to the World Expo.\textsuperscript{32}

(c) The measure requested is proportionate

38. In order to give proper consideration to this “balance of inconvenience”, the Tribunal must take into account the “countervailing interest in favour of transparency” as well as the potentially substantial damage that Claimants would suffer should the Application be granted.\textsuperscript{33}

39. In this case, the Claimants do not have an unfettered general right to unilaterally publish the Arbitration Documents, whether their own or Estonia’s as 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.\textsuperscript{34}

40. The Claimants’ right to free speech is limited for respect to the rights and reputation of others pursuant to Article 19 of the ICCPR, which all the Claimants are party to.

II. THE TRIBUNAL LACKS JURISDICTION IN LIGHT OF THE RESPONDENT’S DENUNCIATION FROM ICSID CONVENTION.

41. The Respondent’s denunciation from ICSID Convention has been received by the depositary on 5\textsuperscript{th} January 2018. However, the Claimants have submitted their request to arbitrate on 29\textsuperscript{th} June 2018, which is after the receipt of the written notice, has been received by the depositary in order to arbitrate under ICSID Convention. Therefore, it is the Respondent’s position that the tribunal lacks jurisdiction to adjudicate the present dispute because [A] the denunciation of the Respondent from ICSID Convention is valid, [B] The claims are based on unperfected consent, [C] TN-BIT and TK-BIT is not applicable for lack of perfected consent and [D] there is an alternative forum for the Claimants to initiate arbitration proceedings.

\textsuperscript{32} Case File, Request for Provisional Measures, p.38, ¶ 7.
\textsuperscript{33} Talinn v Estonia, ¶ 67.
\textsuperscript{34} Amco v Indonesia, ¶¶ 410-412; World Duty Free v Kenya, ¶ 16; Churchill v Indonesia, ¶¶ 9,13,57.
A. The denunciation of the Respondent from ICSID is valid

42. The denouncement of the Respondent from ICSID Convention is in accordance with the law of treaties which allows the withdrawal of a party from a treaty to take place in conformity with the provisions of the treaty.\(^{35}\)

43. ICSID Convention has provided specific provision for a Contracting State to withdraw itself from ICSID. This is based on Art. 71 of the ICSID Convention, which facilitates a Contracting State orderly exit from ICSID in case of denunciation by written notice to the depositary.\(^{36}\)

44. Due to the long-lasting imbalance between the interests of investors and States, which has been demonstrated by the vast majority of the awards issued to the investors, it jeopardized the protection of the interests of the Respondent and its nationals.\(^{37}\) Hence, the Respondent decided to denounce itself from ICSID Convention on 5\(^{th}\) January 2018 by written notice to the depositary and such notification has been made public.\(^{38}\)

45. Therefore, to bind the Respondent to arbitrate under ICSID Convention would defeat the purpose of denunciation itself and the Respondent could potentially be a party to arbitrate under ICSID Convention in an unlimited and unforeseeable number of future ICSID arbitrations. This would also leave Art. 71 of the ICSID Convention without effect.\(^{39}\)

B. Consent to the jurisdiction has lapsed

46. In order for the investor or the investors to invoke the ICSID Arbitration proceeding, it must be done before the notice of denunciation has been received by the depositary in accordance with Art. 72 ICSID Convention. The provision reads as follows:

\begin{quote}
Notice by Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or
\end{quote}

\(^{35}\) Schruer (I); Art. 54(a) VCLT.
\(^{36}\) Fabrica v Venezuela, ¶ 190.
\(^{37}\) Case File, RE-1, p.27.
\(^{38}\) Case File, PO.2, p. 63, ¶ 7.
\(^{39}\) Fabrica v Venezuela, ¶ 289.
Following the natural and ordinary meaning\textsuperscript{40} of Art. 72 ICSID Convention, it will only preserves the rights and obligations of a state to arbitrate under ICSID Convention if the consent was given before the notice of denunciation was received by the depositary,\textsuperscript{41} and it does not extend to the rights or obligations arising after such notice.

The ordinary meaning of the term ‘consent to the jurisdiction of the Centre given by one of them’ under Art. 72 of the ICSID Convention and the terms ‘no party may withdraw its consent unilaterally’ under Art. 25(1) of the ICSID Convention must be read together. It was founded upon perfected consent which means when the Claimants submits their notice to arbitrate before it has been received by the depositary hence it cannot be undone by the conduct of one of the parties.\textsuperscript{42}

Professor Schreuer’s maintains that an offer by a host State in a treaty or legislation to engage in arbitration under the ICSID Convention becomes binding only when accepted by an investor.\textsuperscript{43}

However, that is not the case here as the Claimants only send their notice to arbitrate on 29\textsuperscript{th} June 2018,\textsuperscript{44} which is after the notice of denunciation has been received by the depositary. In this situation, the consent to the jurisdiction has lapsed thus, the Claimants consent to arbitrate under ICSID Convention cannot be preserved.\textsuperscript{45}

To allow a request to arbitrate to be invoked within the six months period as provided in Art. 71 of the ICSID Convention would defeat the purpose of Art. 72 of the ICSID which provides that “the consent to the jurisdiction of the centre given by one of them before such notice was received by the depositary.” Any request to arbitrate must be send before the notice of denunciation has been received by the depositary.

\textsuperscript{40} VCLT, Art. 31.
\textsuperscript{41} ICSID, Art. 71.
\textsuperscript{42} Fábrica v Venezuela, ¶ 277.
\textsuperscript{43} Schruer (I).
\textsuperscript{44} Case File, Request for Arbitration, p. 20.
\textsuperscript{45} Schruer (I).
Professor Schreuer explains that Art. 72 does not deprive the six-month period provided for in Art. 71 of *effet utile*, because that period applies to other obligations incumbent upon a Contracting State under the Convention, such as respect for the Centre’s immunities and privileges (Articles 18-24) and recognition and enforcement of awards (Article 54).  

C. **TN-BIT and TK-BIT is not applicable for the lack of perfected consent**

The offer to arbitrate provided in the BIT merely constitutes “an offer of consent” hence it may be withdrawn if there were no perfected consent in existence. Under international contractual principles, the offer not yet accepted can be irrevocable in some cases.

The Claimant has failed to satisfy the conditions for access to ICSID arbitration in both BIT and ICSID Convention as the consent to the jurisdiction to the centre has not been perfected. As such the claimant cannot initiate the arbitration proceeding under ICSID Arbitration.

D. **There is an alternative forum for the Claimants to initiate arbitration proceedings**

The ICSID Convention is not the sole forum for the claimant to bring a case to arbitration as Art. 9(2) of the BIT provides alternative forum in order to initiate arbitration proceedings under the ICSID Additional Facility Rules. That form of arbitration is entirely independent of actions taken by Contracting States under the ICSID Convention.

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46 Blue Bank v Venezuela, ¶ 80.
47 Schruer (I).
48 Mezgravis.
49 Fábrica v Venezuela, ¶ 261.
III. THIS TRIBUNAL LACKS JURISDICTION OVER THE MULTI-PARTY ARBITRATION

56. The rules governing the ICSID arbitration do not contemplate the possibility of multi-party arbitrations. It is true that there have been several cases where the Tribunal adjudicated multi-party cases. However, those disputes were arbitrated with common legal instrument that gave the parties their rights and obligations to institute arbitration proceedings. Furthermore, class action arbitration greatly increases risks to the defendants. Therefore, the Respondent submits that [A] multi-party proceedings from different nationals fall outside the framework of the ICSID Convention, [B] the dispute resolution clause provided in the BIT must be interpreted restrictively; [C] multi-party arbitration cannot be pursued against the Respondent simply from the implied consent to arbitrate and [D] secondary consent needs to be established.

A. Multi-party proceedings from different nationals fall outside the framework of the ICSID Convention

57. Nothing in the wording of the ICSID Convention and ICSID Arbitration Rules supports the conclusion that investors may bring multi-party arbitration against a state.51

58. The onus lies on the Claimants to establish that they are ‘nationals of a Contracting State’ for the purposes of Art.25(2) of the ICSID Convention in order to establish ICSID tribunal’s jurisdiction.

59. Art.25 of ICSID regulates the requirements for jurisdiction of an ICSID tribunal, namely rationae personae, rationae materiae and rationae temporis. Further, an arbitral tribunal has to ascertain the requirement of rationae voluntatis where the parties have consented to have their dispute decided by an ICSID tribunal.52

50 Cremades.
51 Szczudlik.
52 Schruer (II).
60. The requirement of *rationae personae* has not been met when Claimants who are from different nationals submitted their disputes to ICSID as Art.25 ICSID Convention, which established the jurisdiction of ICSID tribunals merely provides that a “dispute must arise between a Contracting State and a National of another Contracting State.” Such provision must be interpreted in its natural and ordinary meaning.53

61. To allow the singularity in Art. 25(1) of the ICSID Convention to include plural will undermine the intention of the parties to arbitrate under ICSID and it may be a ground for annulment of the award.54 This is based on the case of *Klockner v Cameroon*, where the Respondent initially argued the use of singular in Art.25(1) of ICSID Convention would bar the multipartite arbitration. But later it was objected by the decision of the tribunal itself. However, the award given by the tribunal was annulled by ICSID ad hoc committee for excess of power due to arbitral tribunal lack of jurisdiction under Art. 52(1)(b) of the ICSID Convention.55

62. To interpret the singularity of the term “*a national*” to include “*nationals*” would be contrary to the fundamental rule of ICSID itself. Therefore, the recourse to the *travaux préparatoires* must be made to avoid a result which is manifestly absurd and unreasonable.56

63. The *travaux préparatoires* of Art. 25 of the ICSID Convention in the 1963 draft defines the term “*national*” as association of persons to include the possibility of multi-party under ICSID.57 However, such definition was later deleted in the 1964 draft and this has never changed ever since. This shows that it was never the intention of the drafters to allow multi-party arbitration from different nationals to take place under ICSID.

64. Therefore, as the jurisdictional limitations are not complied with, it prevents an ICSID tribunal from carrying out multi-party arbitration in one single proceeding.58

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53 VCLT, Art. 31.  
54 ICSID Convention, Art. 52.  
55 Klockner v Cameroon, ¶ 9.  
56 VCLT, Art. 32.  
57 Ambiente v Argentine, ¶78; History.  
58 Szasz.
B. The Dispute Resolution Clause provided in the BIT must be interpreted restrictively

65. The consent provided in the BITs cannot be interpreted to cover the power of the tribunal to hear collective actions.\textsuperscript{59}

66. The existence and scope of consent to a given international arbitration cannot be said to have been established by invoking mere “silence” or “non-exclusion” provisions.\textsuperscript{60} The failure to provide explicitly for collective proceedings cannot be construed as permitting them by implication, since it constitutes powerful evidence of the absence of any intent by the parties to these instruments to permit such claims.\textsuperscript{61}

67. The crux of Art. 9 of both BITs which provides “disputes between one Contracting Party and a national of the other Contracting Party” does not extend to cover multi-party arbitration in its natural and ordinary meaning.\textsuperscript{62}

68. Art. 9 of the BITs only cover disputes between one host state and investor or investors from the same national. Accepting the interpretation of including multi-party arbitration from different national would vary the terms of Art. 9 of the BITs which does not fall within the jurisdiction of the tribunal as it is the duty of the Tribunal to discover and not to create meaning of the provisions.\textsuperscript{63}

69. In all cases in which investment tribunals have been prepared in principle to accept multiple claims that has either been on the basis of express consent by the Respondent \textit{in casu}, or at least tacit consent by the failure to raise express objection on that score.\textsuperscript{64}

70. Even if the state has not included the restriction to multiparty arbitration in the BIT as provided under Art. 25(4) of the ICSID Convention, the states at the time of drafting

\textsuperscript{59} Abaclat v Argentine (II), ¶¶ 177, 190.
\textsuperscript{60} Ambiente v Argentine, ¶ 82.
\textsuperscript{61} Giovvani v Argentine, ¶ 47.
\textsuperscript{62} VCLT, Art. 31.
\textsuperscript{63} Quasar de Valors, ¶ 93; Ambiente v Argentine, ¶ 13.
\textsuperscript{64} Giovvani v Argentine, ¶ 282.
and signing the BITs could not have envisaged that BITs would cover multi-party arbitration.

C. Multi-party arbitration cannot be pursued simply from implied consent to arbitrate

71. ICSID tribunals are not given legislative jurisdiction or power hence, the silence on class action in the ICSID Convention and in the BIT cannot be implied as consent to multi-party proceeding.\(^{65}\)

72. Instituting multi-party arbitration from different nationals in one single proceeding in the absence of specific consent to multi-party arbitration will seriously violate the rights of all relevant contracting states to the BIT's by imposing upon them an obligation they never assumed or intended to assume.\(^{66}\)

73. The class action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.\(^{67}\)

74. Moreover, to allow multi-party arbitration to take place simply from the implied consent to arbitrate is contrary to the cardinal principle of arbitration itself which is the party autonomy.

D. Secondary consent needs to be established

75. Under ICSID Arbitration proceeding, the primary consent which is the agreement to arbitrate a particular dispute must be differentiated to secondary consent which involves a particular type of procedure, and class action clearly falls under this heading. Traditional multi-party arbitrations are also required to establish secondary consent in cases where the arbitration agreement is silent or ambiguous as to multi-party treatment".\(^{68}\)

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\(^{65}\) Ambiente v Argentine, ¶ 61.

\(^{66}\) Szczudlik.

\(^{67}\) Stolt-Nielsen v AnimalFeeds, ¶ 1775.

\(^{68}\) Strong.
The ICSID Convention and Arbitral Rules are silent about all kinds of collective proceedings therefore, the Respondent cannot be deemed to have submitted itself to multi-party arbitration treatment unless it gave an additional consent to that particular type of procedure.69

Indeed, the few cases of multi-party arbitrations which took place within the ICSID framework were always either with the clear agreement of the parties or with no objection from the Respondent, which amounts to an implied consent. Thus, the rule of “secondary consent” was consistently upheld in multi-party arbitration.70

Legislative history of ICSID suggested that it was the Secretariat’s intention to develop rules and procedures to draft model “Special Consent Clauses” and to consider what “special Regulations and Rules” might be required for multi-party ICSID arbitrations.71 It was also debated during the latest revision of the Rules, but again was not expressly addressed in the revised Rules of 2006.72

This shows that ICSID allows multi-party arbitration, but it is subjected to specific consent to multi-party arbitration given by both parties, which is not the case here. The Claimants have never asked for secondary consent for multi-party arbitration from the Respondent and the Respondent have clearly objected to this kind proceeding73, hence, multi-party arbitration cannot be pursued.

69 Ambiente v Argentine, ¶ 3.
70 Abacalat v Argentine, ¶ 175; Ambiente v Argentine, ¶ 103.
71 Giovvani v Argentine, ¶ 3.
72 Abacalat v Argentine, ¶ 175; Ambiente v Argentine, ¶ 103.
ARGUMENTS ON MERITS

IV. THE RESPONDENT’S ACTIONS DID NOT AMOUNT TO A VIOLATION TO ARTICLES 3(1) AND 6 OF THE TYREA-NOVANDA BIT AND TYREA-KITOJA BIT

80. The Respondent respectfully submits the Tribunal to find that; (A) the Respondent accorded FET to the Claimants at all times; and (B) the Respondent did not expropriate Claimant’s investment as it was exercised under the expression of their police powers, or, in the alternative, the actions of the Respondent amounts to a lawful expropriation pursuant to Art. 6 of the BIT.

A. The Respondent accorded FET to the Claimants at all times

(a) The Respondent’s actions satisfy the current position of the FET standard

81. Contrary to the Claimants’ contention, the Respondent did not breach the FET standard set in Art. 3.1 of the BITs. The clause reads as follows:

Each Contracting Party shall ensure fair and equitable treatment to the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.

82. It is now established that as any other treaty provisions, the text of Art. 3.1 of the BITs must be interpreted according to the normal canons of treaty interpretation as contained in Arts. 31 and 32 of the VCLT. In the present case, Art. 31(3)(c) of the VCLT is of a relevance in which it requires that a treaty is to be interpreted in the light of “any relevant rules of international law applicable to the relations between the parties.”

74 TN-BIT, TK-BIT, Art.3.1.
75 VCLT, Art.31 & 32; LG&E v Argentine, ¶ 122; Teinver v Argentina, ¶¶ 664-666.
76 VCLT, Art.31(3)(c).
83. In this understanding, the scope and content of FET under Art. 3.1 must therefore be
determined by reference to the rules of international law with customary international
law being part of such rules. This directs the Tribunal to refer to the rules of customary
international law, not as frozen in time, but in its evolution.\(^77\) In relation to this, the
standard of FET has evolved from time to time and among of the broader contents that
are covered under such standard would include (b) the protection of the investor’s
legitimate expectations\(^78\) and (c) a non-discriminatory treatment,\(^79\) none of which is
compromised by the Respondent’s actions.

(b) *The Claimants’ legitimate expectations were not defeated*

84. The Claimants’ contend that as a State, the Respondent should have ensured a stable
legal framework as it is a part of their legitimate expectation. However, it is common

85. With this in mind, it is now an acknowledged fact that laws are inherently liable to
change, even when the original legislative intent was to create a permanent regime or a

86. In light of the foregoing, legitimate expectations would depend on specific
representations made by the host State to the investors.\(^83\) The present case concerns the

\(^77\) Tecmed v Mexico, ¶ 116; ADF v USA, ¶ 179; Mondev v USA, ¶ 125; Philip Morris v Uruguay, ¶ 290.
\(^78\) Philip Morris v Uruguay, ¶ 320; EDF v Romania, ¶ 216; Teinver v Argentina, ¶ 667.
\(^79\) Muchlinski; OECD.
\(^80\) Parkerings v Lithuania, ¶ 327-28; BG Group v. Argentina, ¶¶ 292-310; Continental Casualty v. Argentina,
\(^81\) AES v. Hungary, ¶¶ 9.3.27-9.3.35; Paushok v. Mongolia, ¶ 302; Impregilo v. Argentina, ¶¶ 290-291;
\(^82\) Continental Casualty v Argentina, ¶ 258; El Paso v Argentina, ¶ 350; Teinver v Argentina, ¶ 668.
\(^83\) AES v Hungary, ¶¶ 9.3.34 & 10.3.23.
\(^84\) Dolzer/Schreuer; Philip Morris v Uruguay, ¶ 376; Methanex v USA, ¶ 7; El Paso v Argentina, ¶ 165;
EDF v Romania, ¶ 217.
formulation of general regulations pertaining to the usage of Internet in Tyrea.\textsuperscript{84} There is no question of any specific commitment of the State or of any legitimate expectation of the Claimants vis-à-vis Tyrean’s Law on Media and Information No. 1125-L on Media and Information (hereinafter referred to as the “Media Law”).

87. Under any circumstances, the Media Law do not exist as a form of assurance that there will be no change in the law. This is due to the fact that provisions of general legislation applicable to a category of persons do not create legitimate expectations.\textsuperscript{85}

88. Not only that, the official statement made by Mr Anderson, the spokesperson for the Tyrean parliament on the day of the publication of the Media Law is inadequate to surmount as a specific representation. This is because they were directed to the public at large and not personally addressed to them.\textsuperscript{86} Even during the international conference that was conducted back in December 2014, it was a public event and not an exclusive meeting between the Claimants and the Respondent.\textsuperscript{87}

89. All in all, the Respondent made no specific commitments to the Claimants capable of giving rise to legitimate expectations and thus, they can have no expectation that new and more onerous regulations will not be imposed. Besides, the sources of expectations that the Claimants cite are unavailing because they arise from general municipal legislation and general statements from the government’s representatives.

(c) The Respondent’s measures are non-discriminatory

90. The Claimants have failed to demonstrate that the measure taken by the Respondent had any connection with their participation in the market as foreign investors.\textsuperscript{88}

91. In this regard, there is a need to emphasize that the object of the Law No.0808-L Amending the Law on Media and Information (hereinafter referred to as the “Decree”) was mainly to eliminate the threat to public order and has nothing to do with the

\textsuperscript{84} Case File, UF, ¶ 3.
\textsuperscript{85} Philip Morris v Uruguay, ¶ 426.
\textsuperscript{86} Case File, UF, ¶ 3.
\textsuperscript{87} Case File, UF, ¶ 5.
\textsuperscript{88} Rubins/Kinsella; GAMI Investments v Mexico, ¶¶ 114-115.
Claimants’ nationality. The adopted regulation is of a general application and will also affect other social media platforms as well and this is explicitly mentioned in the Decree. The reference of the phrase “Every Social Network” is a clear indication that the Claimants’ contention is unfounded right from the start. 89

92. Additionally, for a state’s conduct to be deemed discriminatory, the state should have been treating persons who are similarly situated differently. 90 Such a distinction is evident in the Decree itself whereby it demands that an algorithm is needed to be developed based on its scale of operations. In doing so, factors such as the audience size and the amount of content published by the relevant social network are being emphasized. 91 Here, the Claimants’ positions are materially different from local social networks as their influential powers are stronger than those of the local platforms. 92 As the situation was urgent, it was important to block major services first to pacify the situation.

93. Furthermore, Tyrea’s distinction of platforms based on its popularity is justified as demonstrated by the European Court of Human Right whereby it is explained that the necessity of hate speech restriction rises in accordance with the popularity of individual Internet Sites. 93 Besides, the blocking of the Claimants’ platforms was based on a fair case by case assessment of the relevant circumstances by competent and qualified public officials. 94

B. The Respondent did not unlawfully expropriate the Claimants’ Investments

94. The blocking of the Claimants’ social media platforms does not amount to expropriation as (a) the Respondent’s legitimate police powers exempt such a measure. In the alternative, (b) the blocking is a lawful expropriation pursuant to Article 6 of the BITs.

89 Case File, CE-2, p. 8.
90 Saluka v Czech Republic, ¶ 313.
91 Case File, CE-2, p. 8.
92 Case File, UF, p. 49, ¶7-10; Case File, UF, p. 53, ¶ 22.
93 Savva Terentyev v. Russia, ¶ 79.
(a) The legitimate police powers exempt Respondent’s Measures

95. The exercise of the Respondent's police powers is an inherent sovereign right in that it precludes not only the obligation to pay compensation but disqualifies the measure concerned as an expropriation.95

96. Expropriation and regulation are different in nature. The former focuses on the taking of an investment; it is a targeted act. The latter is part of the common and normal functioning of the State where impairment to an investment can be a side effect. 96

97. The action of the Respondent is purely one of a regulatory nature as it was taken in pursuance of a genuine (i) public purpose, in a (ii) non-discriminatory manner and in accordance with the (iii) due process of law.97

(i) Public purpose

98. As highlighted in Philip Morris tribunal,98 it is said that in a situation where a state is compelled to preserve public order and security, it is allowed for them to make such laws and this would be under the expression of police power.

99. In the dispute, the Decree and the blocking cannot be considered expropriatory since they were the legitimate exercise of the State to uphold the interest of the public. Particularly, Tyrea’s measures fall within the ambit of police powers as it was intended to preserve public order, national peace and security by supressing hate speech.99

100. In interfering with the Claimants’ investment, the Respondent’s action was indeed proportionate to the legitimate objective that is pursued.100 Essentially, they only asked the existing platforms in the country to comply with the Decree in order to resolve the issue at hand and that they did not resort to blocking them absolutely without prior notice.

95 Chemtura v Canada, ¶266; Philip Morris v Uruguay, ¶ 188 and 217; Methanex v USA, ¶ 7; Feldman v Mexico, ¶ 103-105.
96 UNCTAD, p. 139.
97 UNCTAD, p. 105; Newcombe/Paradell.
98 Philip Morris v Uruguay, ¶ 219.
99 Case File, CE-2, p. 8; Case File, CE-3, p. 10.
100 Tecmed v Mexico, ¶ 122.
101. Therefore, it is fair to come to the conclusion that the public interest to save Tyrean citizen clearly outweighs the financial gain of the Claimants to their investment. Additionally, the decision was necessary for such a situation as drastic times call for drastic measures. This is supported with the fact that hundreds of casualties had occurred out of the morbid event. 101

(ii) Non-discriminatory manner

102. According to UNCTAD, 102 an expropriation that targets a foreign investor is discriminatory when it is taken for reasons of the investor’s nationality. As elaborated earlier, this particular requirement is satisfied as there is no evidence to support the argument that the Claimants were blocked mainly because they were foreigners. On top of that, they are not even situated in the same circumstances with the local networks at the first place and thus, their comparison of non-compliance with Wink and TruthSeeker is unfounded.

(iii) Due process of law

103. The Claimants further allege that the Respondent had violated the requirement of due process of law when no prior notice was presented when the Respondent had slashed the original 60-day period by way of Decree No. 0599/201-D dated 11 February 2018. 103

104. As put forward by several Arbitral Tribunals, the due-process requirement should be deemed fulfilled as long as the regulation is carried out in accordance with the domestic law, in a non-arbitrary manner and with an opportunity for the investor to have the measure reviewed. 104

105. With no doubt, the Decree is enacted in accordance with the State’s law. This is explicitly stated in the Decree itself that such enactment is granted by virtue of Article

102 UNCTAD, p. 34.
103 Case File, Request for Arbitration, p. 4, ¶ 11; Case File, CE-3, p. 10.
104 ADC v Hungary, ¶ 376.
17 of the President Act. Under this provision, it provides extraordinary powers to the President to amend any operative decrees.\textsuperscript{105}

106. With regards to the availability of a fair hearing, it is agreed that a denial of justice would only exist where there are serious inadequacies in the state’s judicial system with respect to the judicial protection of foreigners and their rights.\textsuperscript{106} In this respect, it is nowhere mentioned in any of the facts in the case file that the Claimants are restrained by law to seek an appeal of the decision in the Respondent’s state.

107. In fact, the Claimants have not exercised such a right following the blocking when they have failed to approach the Tyrean authorities by relying on the excuse that any assurances would be in vain.\textsuperscript{107} The Respondent is only obliged to set up a mechanism for the Claimants to have the measure reviewed and not a guarantee that an appeal from such a decision is in favour of the Claimants.

108. Moreover, the Generation Ukraine tribunal have suggested that pursuit of local remedies may be a substantive requirement for an international claim of expropriation to succeed. This is to say that if there is no effort by the Claimants to obtain correction, then it is very doubtful that the measure taken by the Respondent would tantamount to expropriation.\textsuperscript{108}

109. Not to mention, the Respondent’s measures did not violate due process as it is the best response to the unfolding crisis.\textsuperscript{109} The Respondent needed to take immediate action in light of the ethnic tension in Tyrea. Hence, the time cut is accorded under due process.

110. Even when the dateline is reduced, it can still be considered as fair as the Claimants already had in place certain generic filters used worldwide to handle a situation as in the present one and this is their position even before the Decree was introduced.\textsuperscript{110} Taking into account the manpower that they would have as an international network, this would not be a huge burden for them to shoulder.

\textsuperscript{105} Case File, CE-3, p. 10.
\textsuperscript{106} Paulsson; Brownlie.
\textsuperscript{107} Case File, PO.2, ¶ 4.
\textsuperscript{108} Generation Ukraine v Ukraine, ¶¶ 20.30.
\textsuperscript{109} Sempra v Argentina, ¶ 318.
\textsuperscript{110} Case File, UF, p. 51, ¶ 16.
111. Under any circumstances, the Claimants cannot rely on the meeting between the Regional Vice President of SpeakUp and Tyrea’s Minister of Telecommunications that there was an extension of time on the dateline. The Minister only expressed that he is well aware that the time given is not adequate, but he did not in anyway, gave him an absolute assurance that there would be an extension of time. Even if the Claimants feel that there is an actual promise, the Minister had also added afterwards that “what is written cannot be changed”.

112. On the other hand, even if the dateline was not reduced, the Claimants would still refuse to comply one of the conditions and thus, this will make no difference as to what they are claiming.

(b) Alternatively, the blocking is a lawful expropriation pursuant to Art. 6 of the BITs

113. Assuming, arguendo, that the Respondent’s actions were expropriatory, the Respondent would still be in compliance with the BIT as it would be the case of a lawful expropriation. The Decree was implemented for a public purpose, in accordance with due process of law and in a non-discriminatory manner as mentioned under Article 6 of the BITs, whereas the required payment of due compensation is not incumbent upon the Respondent.

114. As explained earlier, the first three requirements are satisfied. For the fourth requirement, mere non-payment of compensation does not render an expropriation to be unlawful. In our dispute, it is justified by a reasonable disagreement over the existence of an expropriation and the amount of compensation.

115. Tribunals have agreed that where legitimate takings only lacking compensation were at stake, such an occasion would never be referred to as an unlawful expropriation. Therefore, while failure by the Respondent to pay any compensation would render an

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111 Case File, CE-6, ¶ 7.
112 Case File, CE-6, ¶ 7.
113 Case File, UF, p. 52, ¶ 20.
114 TN-BIT, TK-BIT, Art.6.
115 Venezuela Holdings v Venezuela, ¶ 301.
116 Santa Elena v Costa Rica, ¶ 71; Venezuela Holdings v Venezuela, ¶ 301.
act as unlawful but this should not be the case when a measure at stake allegedly constitutes an indirect expropriation.\textsuperscript{117}

116. It is the Respondent’s position that it remains open to the issue of providing just compensation provided that the computation of such is decided through a proper accounting of Claimants’ investments and not mere speculations. Additionally, the Tribunal must first determine the existence of an indirect expropriation and whether it is a lawful one or otherwise.

117. Determining as to whether an expropriation is lawful or otherwise would significantly impact the Respondent as to the quantum of damages. In relation to this, it is now settled law that the first is a legitimate act not sanctioned under international law, whereas the second is an international wrongdoing: the first requires compensation, the second, reparation.\textsuperscript{118}

V. THE COMPENSATION REQUESTED BY THE CLAIMANTS IS HIGHLY SPECULATIVE AND UNSUBTANTIATED

118. The Respondent’s primary position is that; (A) it is not appropriate to value the Claimants’ investment with their choice of quantification which is the DCF Method as it is impractical to be used in the present case.

119. In addition, (B) the Respondent respectfully submits that on the demand of lost profits in Tyrea and in the neighbouring countries, such claims should be disregarded by the Tribunal as allowing such an amount would be too speculative.

120. However, to the extent that it is necessary to value the businesses, (C) the Respondent’s experts suggested that a cost-based valuation (proven expenditure) alone is appropriate.\textsuperscript{119} This is when the tribunal decided to arrive to the conclusion that the case is a lawful expropriation.

\textsuperscript{117} UNCTAD, p. 44.
\textsuperscript{118} ILC, Art.31; Chorzow Factory, p.47; ADC v. Hungary, ¶¶ 484-494; Siemens v. Argentina, ¶ 352; Tidewater v Venezuela, ¶¶ 130-146, ¶¶ 159-163.
\textsuperscript{119} Case File, Respondent’s Expert Witness Report, p. 34.
A. The DCF Method is not a preferable approach in the present dispute

121. Generally, the DCF method is a valuation where it tries to calculate the value of a company today, based on forecasts of how much money the company is going to make in the future. In other words, it uses the forecasted free cash flows of a company and discount them back so as to arrive at the present value estimate.\(^{120}\)

122. As a matter of fact, the Respondent acknowledges the fact that the DCF Method is widely acceptable in investment tribunals.\(^{121}\) However, in applying one, Arbitral Tribunals have exercised great caution in using the method due to its inherently speculative nature. Not to mention, experience shows that investors tend to greatly exaggerate their claims of compensation for lost future profits.\(^{122}\)

123. In light of this point, there are three elements that led to the differences in the Respondent’s expert valuation.\(^{123}\) As for the Respondent’s expert, it will only be considered as appropriate to apply DCF if the following are satisfied.

124. Most importantly, the Claimants must have (a) an established historical record of financial performance. Secondly, there is a need for them to adopt (b) a detailed business plan and finally, they need to ensure that it is possible (c) to calculate a valid Weighted Average Cost of Capital (WACC) whereby in its application altogether, it would also include a sensible country risk premium.\(^{124}\) Unfortunately, none of the requirements are satisfied by the Claimants and as a result, the method cannot work properly.

\(^{120}\) Brunner; Wright; World Bank, Article IV-6; Rusoro v Venezuela, ¶ 760, Tidewater v Venezuela, ¶ 158.
\(^{121}\) Enron v Argentine, ¶ 385; Tidewater v Venezuela, ¶ 156.
\(^{122}\) ADC v Hungary, ¶ 502; World Bank.
\(^{124}\) Ibid; Rusoro v Venezuela, ¶ 759; Ol European v Venezuela, ¶¶ 658-660.
(a) An established historical record of financial performance

125. The DCF method relies on a sufficient amount of data for the estimation of unrealized profits. Without corroboration and caution, the DCF method can easily produce inaccurate, inflated results.\(^{125}\)

126. In *Tecmed v Mexico*, the Claimants’ landfill in that case had only operated for two years and a half and due to that fact, the tribunal concluded that there is no established historical record of financial performance.\(^{126}\)

127. Looking into the Claimants’ position, it can clearly be seen that their platforms had only operated as an on-going business for a short period in Tyrea and thus, there was no sufficient historical data to prepare reliable estimates as well.\(^{127}\) With this reason, the Claimants’ approximation of their profitability should be rejected as it is based on highly optimistic scenarios corroborated by inadequate past data.

(b) Adoption of a detailed business plan

128. It is crystal clear that the Claimants did not provide adequate data to justify the projection of their future cash flows and thus, it cannot be determined with reasonable certainty that their business would actually have reached the alleged level of sales.\(^{128}\)

129. For instance, FriendsLook freely put that their revenues would increase from 26,530,000 in 2017 to 52,020,000 in 2018, an 11% increase without any factual or legal explanation in their report to support this assumption.\(^{129}\)

130. Moreover, the profitability of the Claimants’ platform is based on click-through rates.\(^{130}\) Thus, without any specific figures to aid their computation, it is not entirely convincing that it is possible that the number of people clicking a particular

\(^{125}\) *Rusoro v Venezuela*, ¶ 759; *Siemens v Argentina*, ¶ 355; *Wena Hotels Ltd v Egypt*, ¶¶ 123 – 125.

\(^{126}\) *Tecmed v Mexico*, ¶ 185.

\(^{127}\) Case File, Request for Arbitration, p. 4, ¶ 4-6.


\(^{129}\) Case File, Claimants’ Expert Witness Report, p. 16.

advertisement would precisely resulted to the revenue that they have calculated. This is pertinent to our case as even a slight error in the underlying assumption of an analysis can drastically alter the valuation results.

131. The Claimants’ situation is to be distinguished with the Claimants in *Venezuela Holdings v. Venezuela*. The Claimants in that case have developed detailed legal arguments and a comprehensive documentation to back up their forecasts which have been most helpful to the Tribunal. This was clearly not done by our Claimants.

132. In conclusion to this point, the Claimants’ application of the DCF method is flawed, as it employs arbitrary parameters and unrealistic scenarios to inflate the extent of damages.

(c) *The inclusion of a sensible country risk premium*

133. The discounting rate plays an important role in estimating the value of assets by the DCF valuation. This rate reflects the time value of money, expected inflation and any risk attached to the cash flows. The Claimants need to know how that higher risk is different from that of their home state or other mature economies to evaluate the extent of the additional return and protections demanded.

134. Besides, the political situation of Tyrea is by no means stable. Logically, when a country is in the state of ethnic tension with people killing one another, it will not be possible to escape the serious impact on its economy altogether. Consequently, the value of the assets existing in Tyrea will fall sharply and a 5% discount is too optimistic for the above risks. Hence, a higher discount rate than 5% would more accurately depict the constant unrest in Tyrea.

135. At any rate, as Tyrea is experiencing a constant change politically & socially, it would be complicated to come out with a country risk premium. When this happen, the Claimants are unable to make use the DCF method correctly as the country risk is an

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131 *Venezuela Holdings v. Venezuela*, ¶ 309.
132 Domíngue.
essential element to the functioning of this method. Thus, agreeing to the application of DCF in this case would be too speculative. 133

136. In conclusion, adopting the unrealistically low country risk rate of 5%, the Claimants fail to consider the Respondent’s market volatility and political instability, which are essential factors to a reliable DCF projection and would have produced a more moderate compensation estimate.

B. The claims on loss of profits in Tyrea and in the neighbouring markets should be disregarded.

137. Under international law, lost future profits are allowed in general. However, the Claimants’ demand for lost profits should be rejected as they were unlikely to ever have materialized. 134

138. Additionally, the claims to lost future opportunities cannot be awarded since the Claimants had no firm contractual rights to those possible projects in Alcadia and Larnacia. 135

139. Furthermore, the Claimants’ loss of opportunities must be a direct consequence of the Respondent’s measures. Presently, there is no causal link between the Respondent’s measures and the Claimants’ failed negotiations in other countries. 136 Absent the Respondent’s blocking, the Claimants’ negotiations could still fail due to other risks. 137

C. The appropriate method for the quantification of damages in this case should be based on a proven expenditure

140. The Claimants have demanded for three items which are (a) direct damages, (b) the loss of profits in Tyrea and the expansion profits. As such request is unsupported and

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133 Case File, Respondent’s Expert Witness Report, p. 34.
134 Siemens v. Argentina, ¶ 379; Whiteman.
135 ADC v Hungary, ¶ 515.
136 S.D. Myers v Canada ¶ 173.
137 Case File, Request for Arbitration, p. 5, ¶ 15.
speculative, the tribunal should only consider the Claimants’ proven expenditure up until the blocking in the year of 2018.\textsuperscript{138}

\textit{(a) Direct damages}

141. The Claimants’ physical assets in Tyrea remain intact. The fact that it was closed, it was made under their own business decision and had nothing to do with the Respondent.\textsuperscript{139} Moreover, their assets – i.e. local offices, can generate profit by being sold or utilized for other business ventures.

142. The Respondent’s position is that a state is only liable for damages caused by its wrongful acts and not due to a voluntary decision made by the Claimants themselves.\textsuperscript{140}

\textit{(b) Loss of profits in Tyrea and in the neighbouring markets}

143. As pointed out earlier under, profits under this sub-heading should fail as the Claimants did not fulfil certain requirements that are compulsory for the functioning of the DCF method.\textsuperscript{141} If it is being used, the damages offered would be very speculative. Meanwhile, as for the market expansion profits, such profits must be reasonably anticipated, probable and not merely possible.\textsuperscript{142}

\textsuperscript{138} Case File, Claimants’ Expert Witness, p. 19; Wena Hotels Ltd v. Egypt, ¶ 125; Bear Creek v Peru, ¶ 604; Metalclad v Mexico, ¶ 122.
\textsuperscript{139} Case File, Response to The Request for Arbitration, p. 24, ¶ 7.
\textsuperscript{140} ILC, Art.31.
\textsuperscript{141} Rusoro v Venezuela, ¶ 759.
\textsuperscript{142} Whiteman.
TEAM LACHS

PRAYERS FOR RELIEF

The Respondent respectfully requests the Tribunal to find that:

1. The provisional measures should be granted to the Respondent;
2. The Tribunal has no jurisdiction over the dispute due to the Respondent’s denunciation of the ICSID Convention;
3. The Tribunal does not have the jurisdiction over the multi-party arbitration claim brought against the Respondent;
4. The blocking of the Claimants’ platforms is not 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. The compensation requested by the Claimants is speculative and the DCF method is inappropriate to be used for the quantification of damages in the present dispute.

TEAM LACHS
On behalf of the Respondent