THE 2019 FOREIGN DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT

ARBITRATION PURSUANT TO THE ICSID ARBITRATION RULES 2006

BETWEEN

FRIENDSLOOK PLC
WHISTLER INC.
SPEAKUP MEDIA INC.
(Claimants)

AND

THE REPUBLIC OF TYREA
(Respondent)

ICSID CASE NO. ARB/18/155

23 September 2019

COUNTER-MEMORIAL ON JURISDICTION, LIABILITY AND REMEDIES
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>TABLE OF CONTENTS</td>
<td>ii</td>
</tr>
<tr>
<td>LIST OF ABBREVIATIONS</td>
<td>xv</td>
</tr>
<tr>
<td>STATEMENT OF FACTS</td>
<td>1</td>
</tr>
<tr>
<td>SUMMARY OF ARGUMENTS</td>
<td>4</td>
</tr>
<tr>
<td>ARGUMENTS</td>
<td>5</td>
</tr>
<tr>
<td><strong>I. THE TRIBUNAL SHALL GRANT RESPONDENT’S REQUEST FOR PROVISIONAL MEASURES</strong></td>
<td>5</td>
</tr>
<tr>
<td>A. THE TRIBUNAL HAS PRIMA FACIE JURISDICTION TO GRANT PROVISIONAL MEASURES</td>
<td>5</td>
</tr>
<tr>
<td>B. THE CRITERIA FOR GRANTING PROVISIONAL MEASURES ARE MET</td>
<td>6</td>
</tr>
<tr>
<td>1. The rights to be protected exist and are threatened by Claimants’ actions</td>
<td>6</td>
</tr>
<tr>
<td>a. Respondent has the right to non-aggravation of the dispute</td>
<td>6</td>
</tr>
<tr>
<td>b. Claimants may not justify their conduct by reasons of transparency</td>
<td>7</td>
</tr>
<tr>
<td>2. The requested measures are urgent</td>
<td>7</td>
</tr>
<tr>
<td>3. Requested measures are necessary</td>
<td>8</td>
</tr>
<tr>
<td>4. Requested measures are specific</td>
<td>9</td>
</tr>
<tr>
<td>5. Requested measures are proportionate</td>
<td>9</td>
</tr>
<tr>
<td><strong>II. THE TRIBUNAL HAS NO JURISDICTION OVER THE DISPUTE AS RESPONDENT DENOUNCED THE ICSID CONVENTION</strong></td>
<td>10</td>
</tr>
<tr>
<td>A. RESPONDENT IS NOT BOUND BY ITS CONSENT TO THE ICSID ARBITRATION EXPRESSED IN THE BITS</td>
<td>10</td>
</tr>
<tr>
<td>B. CLAIMANTS FAILED TO SUBMIT THEIR CLAIMS BEFORE THE ICSID RECEIVED THE NOTICE OF DENUNCIATION</td>
<td>11</td>
</tr>
<tr>
<td>1. The present situation is governed by Art. 72 of the ICSID Convention</td>
<td>11</td>
</tr>
<tr>
<td>2. The preservation effect of Art. 72 of the ICSID Convention does not cover the present claim brought after the notice of denunciation</td>
<td>12</td>
</tr>
<tr>
<td>C. CLAIMANTS CANNOT SOLELY RELY ON THE BIT TO JUSTIFY THE TRIBUNAL’S JURISDICTION</td>
<td>13</td>
</tr>
<tr>
<td>D. INITIATION OF ARBITRAL PROCEEDINGS BY CLAIMANTS AFTER THE SUBMISSION OF THE NOTICE OF DENUNCIATION IS INCOMPATIBLE WITH THE PRINCIPLE OF GOOD FAITH</td>
<td>14</td>
</tr>
<tr>
<td><strong>III. THE TRIBUNAL SHALL NOT HEAR THIS DISPUTE ON A MULTI-PARTY BASIS</strong></td>
<td>14</td>
</tr>
<tr>
<td>A. THE APPLICABLE LAW DOES NOT ENVISAGE MULTI-PARTY PROCEEDINGS</td>
<td>15</td>
</tr>
<tr>
<td>1. ICSID framework does not envisage multi-party arbitration</td>
<td>15</td>
</tr>
<tr>
<td>2. Art. 9 of the BITs does not provide for multi-party arbitration</td>
<td>16</td>
</tr>
</tbody>
</table>
B. IN ANY EVENT, CRITERIA FOR MULTI-PARTY ARBITRATION TO BE ALLOWED IS NOT FULFILLED

1. Respondent did not consent to multi-party arbitration

2. Claimants’ claims are not homogeneous
   a. Claimants’ investments are different
   b. Alleged breaches of Tyrean national legislation committed by Claimants lack homogeneity
   c. Legal grounds of claims are not the same
   d. Damages incurred are not homogeneous

C. REASONS OF PROCEDURAL ECONOMY SHOULD NOT OVERWEIGHT RESPONDENT’S DUE PROCESS RIGHT OF THE DEFENCE

IV. NONE OF THE RESPONDENT’S MEASURES AMOUNTS TO EXPROPIATION OF CLAIMANTS’ INVESTMENTS

A. Claimants’ assets are not susceptible to expropriation
   1. Advertising contracts of Claimants are not susceptible to expropriation
   2. Tyrea-specific products are not susceptible to separate expropriation

B. Respondent’s actions do not amount to expropriation

C. The Respondent’s actions do not constitute unlawful expropriation
   1. Tyrea implemented its measures in pursuance of a legitimate public purpose
      a. Tyrea pursued genuine public purpose
      b. Measures towards Claimants were proportionate
   2. Tyrea’s actions were not discriminatory
   3. No compensation is due

V. RESPONDENT DID NOT VIOLATE ART. 3(1) of the BITs

A. Respondent did not frustrate Claimants’ legitimate expectations
   1. Respondent did provide any specific assurance to Claimants
   2. Claimants’ expectations were unreasonable
   3. The BITs do not contain a stabilization clause

B. Respondent acted within its regulatory powers
   1. Respondent’s measures were reasonable
   2. The blocking of Claimants was proportionate
   3. Respondent’s measures were non-discriminatory

VI. IF CLAIMANTS ARE ENTITLED TO COMPENSATION, EXPENDITURE-BASED CALCULATION SHOULD BE APPLIED TO DAMAGES CALCULATION
1. Claimants’ businesses are not going concerns and lack substantial historical record of financial performance to claim lost profits ........................................................................................................35

2. The financial performance data presented to the Tribunal by Claimants is insufficient and projections of future cash flow are unreliable .................................................................36
   a. The financial performance data presented to the Tribunal by Claimants is insufficient
      36
   b. The financial projections for Claimants’ lost profits are unreliable ......................36

3. WACC of 5% is unfounded and speculative .................................................................37

B. Proven expenditure method should be applied in the present case .........................38

C. Certain types of damages requested by Claimants should not be compensated at all ....38
   1. Claimants are not entitled to damages for the lost opportunity to proceed with market expansion ........................................................................................................................38
   2. Cost of the equipment is not part of the direct damages and should not be compensated .................................................................................................................................39

PRAYER FOR RELIEF ........................................................................................................41
## INDEX OF AUTHORITIES AND LEGAL SOURCES

### Books

<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dolzer, Schreuer</td>
<td>Rudolf Dolzer, Christoph Schreuer, Principles of International Investment Law, 2nd Ed. (2012)</td>
</tr>
<tr>
<td>Islam</td>
<td>Rumana Islam, Fair And Equitable Treatment (FET) Standard In International Investment Arbitration, Developing Countries In Context (2018)</td>
</tr>
<tr>
<td>Kinnear</td>
<td>Kinnear, Fischer , et al. (eds), Building International Investment Law: The First 50 Years of ICSID (2015)</td>
</tr>
<tr>
<td>Ostřanský</td>
<td>Josef Ostřanský, The burden of proof and the prima facie threshold at the jurisdictional stage in investment treaty arbitration (2012)</td>
</tr>
<tr>
<td>Ripinsky, Williams</td>
<td>Sergey Ripinsky, Kevin Williams, Damages in International Arbitration. (2008)</td>
</tr>
<tr>
<td>UNCTAD Expropriation</td>
<td>Expropriation UNCTAD Series on Issues in International Investment Agreements II, UN (2012)</td>
</tr>
<tr>
<td>Author</td>
<td>Title and Details</td>
</tr>
<tr>
<td>-------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>Author</td>
<td>Title</td>
</tr>
<tr>
<td>--------</td>
<td>-------</td>
</tr>
<tr>
<td>Author</td>
<td>Reference</td>
</tr>
<tr>
<td>--------</td>
<td>-----------</td>
</tr>
<tr>
<td>Stern</td>
<td>Brigitte Stern, Chapter 45: Interim/Provisional Measures, in Meg Kinnear, Building International Investment Law (2015)</td>
</tr>
</tbody>
</table>

**Cases**

<p>| AAPL | Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, 27 June 1990 |</p>
<table>
<thead>
<tr>
<th>Case Title</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abaclat</td>
<td>Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011</td>
</tr>
<tr>
<td>Abaclat Dissenting Opinion</td>
<td>Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Dissenting Opinion to Decision on Jurisdiction and Admissibility of Prof. Georges Abi-Saab, 4 August 2011</td>
</tr>
<tr>
<td>ADC</td>
<td>ADC Affiliate Limited and ADC &amp; ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, 2 October 2006</td>
</tr>
<tr>
<td>ADM</td>
<td>Archer Daniels Midland Company and Tate &amp; Lyle Ingredients America, Inc v. The United Mexican States, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007</td>
</tr>
<tr>
<td>Alemanni</td>
<td>Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014</td>
</tr>
<tr>
<td>Ambiente</td>
<td>Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013</td>
</tr>
<tr>
<td>Amco</td>
<td>Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures, 9 December 1983</td>
</tr>
<tr>
<td>American International Group</td>
<td>American International Group, Inc. and American Life Insurance Company v. Islamic Republic of Iran and Central Insurance of Iran (Bimeh Markazi Iran) IUSCT Case No. 2 1983</td>
</tr>
<tr>
<td>Azurix v. Argentina</td>
<td>Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, Decision on Provisional Measures, 6 August 2003</td>
</tr>
<tr>
<td>Bayindir</td>
<td>Bayindir İnşaat Turizm Ticaret Ve Sanayi A.S, v Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009</td>
</tr>
<tr>
<td>Biloune</td>
<td>Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana, Award, 30 July 1990</td>
</tr>
<tr>
<td>Biwater Gauff v. Tanzania</td>
<td>Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID No. ARB/05/22, Procedural Order No. 1, 31 March 2006</td>
</tr>
<tr>
<td>Burlington</td>
<td>Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5 (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)), Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures, 29 June 2009</td>
</tr>
<tr>
<td>Case Title</td>
<td>Description</td>
</tr>
<tr>
<td>----------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Caratube</td>
<td>Caratube International Oil Company and Mr. Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Award, 27 September 2017</td>
</tr>
<tr>
<td>Casado v. Chile</td>
<td>Victor Pey Casado &amp; President Allende Foundation v. Chile, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001</td>
</tr>
<tr>
<td>City Orient</td>
<td>City Orient Ltd. v. The Republic of Ecuador, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007</td>
</tr>
<tr>
<td>CME</td>
<td>CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Final Award, 14 March 2003</td>
</tr>
<tr>
<td>CME</td>
<td>CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Separate opinion of Ian Brownlie, 14 March 2003</td>
</tr>
<tr>
<td>Continental Casualty</td>
<td>Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008</td>
</tr>
<tr>
<td>Copper Mesa Mining</td>
<td>Copper Mesa Mining Corporation v. Republic of Ecuador, PCA No. 2012-2, 15 March 2016</td>
</tr>
<tr>
<td>Crystallex</td>
<td>Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016</td>
</tr>
<tr>
<td>EDF v. Romania</td>
<td>EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13 Award, 8 October 2009</td>
</tr>
<tr>
<td>Electricity Company of Sofia</td>
<td>Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), 1939 P.C.I.J. (ser. A/B) No. 77 (Apr. 4)</td>
</tr>
<tr>
<td>Enron</td>
<td>Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007</td>
</tr>
<tr>
<td>Feldman</td>
<td>Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2009</td>
</tr>
<tr>
<td>Case Study</td>
<td>Description</td>
</tr>
<tr>
<td>------------</td>
<td>-------------</td>
</tr>
<tr>
<td><strong>Flughafen Zürich</strong></td>
<td>Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19, Award 18 November 2014</td>
</tr>
<tr>
<td><strong>Fraport</strong></td>
<td>Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, 23 December 2010</td>
</tr>
<tr>
<td><strong>Gabriel Resources</strong></td>
<td>Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania, ICSID Case No. ARB/15/31, Decision on Claimant’s Second Request for Provisional Measures of November, 22 November 2016</td>
</tr>
<tr>
<td><strong>Gemplus</strong></td>
<td>Gemplus, S.A., SLP, S.A., and Gemplus Industrial S.A. de C.V. v. United Mexican States, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010</td>
</tr>
<tr>
<td><strong>Generation Ukraine</strong></td>
<td>Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, 16 September 2003</td>
</tr>
<tr>
<td><strong>Glamis Gold</strong></td>
<td>Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award, 8 June 2009</td>
</tr>
<tr>
<td><strong>Global Trading Resource Corp</strong></td>
<td>Global Trading Resource Corp. and Globex International, Inc. v. Ukraine, ICSID Case No. ARB/09/11, Award, 1 December 2010</td>
</tr>
<tr>
<td><strong>Grand River Entreprises</strong></td>
<td>Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, 12 January 2012</td>
</tr>
<tr>
<td><strong>Kardassopoulos</strong></td>
<td>Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007</td>
</tr>
<tr>
<td><strong>LG&amp;E</strong></td>
<td>LG&amp;E Energy Corp., LG&amp;E Capital Corp., and LG&amp;E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Award, 25 July 2005</td>
</tr>
<tr>
<td><strong>Mavrommatis</strong></td>
<td>The Mavrommatis Palestine Concessions, Judgment No. 2, 1924, PCIJ Series A – No. 2</td>
</tr>
<tr>
<td><strong>Metalclad</strong></td>
<td>Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000</td>
</tr>
<tr>
<td><strong>Methanex</strong></td>
<td>Methanex Corporation v. USA, UNCITRAL, Final Award, 3 August 2005</td>
</tr>
<tr>
<td><strong>Micula</strong></td>
<td>Ioan Micula, Viorel Micula and others v. Romania (I), ICSID Case No. ARB/05/20, Award, 11 December 2013</td>
</tr>
<tr>
<td><strong>Middle East Cement</strong></td>
<td>Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award 12 April 2002</td>
</tr>
<tr>
<td><strong>Mobil and others</strong></td>
<td>Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award 9 October 2014</td>
</tr>
<tr>
<td>----------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Noble Energy</strong></td>
<td>Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008</td>
</tr>
<tr>
<td><strong>Nova Scotia</strong></td>
<td>Nova Scotia Power Incorporated v. Venezuela, Ad Hoc Tribunal (UNCITRAL), Decision on Jurisdiction, 22 April 2010</td>
</tr>
<tr>
<td><strong>Occidental</strong></td>
<td>Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award, 1 July 2004</td>
</tr>
<tr>
<td><strong>OIEG</strong></td>
<td>OI European Group B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25, Award, 10 March 2015</td>
</tr>
<tr>
<td><strong>Oil Platforms, Higgins</strong></td>
<td>Oil Platforms (Islamic Republic of Iran v United States of America), Separate Opinion Higgins, § 32 ICJ Reports, 12 December 1996</td>
</tr>
<tr>
<td><strong>Parkerings</strong></td>
<td>Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007</td>
</tr>
<tr>
<td><strong>Philip Morris</strong></td>
<td>Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2006</td>
</tr>
<tr>
<td><strong>Phoenix</strong></td>
<td>Phoenix Action, Ltd. v. The Czech Republic, ICSID, No. ARB/06/5, Decision on Provisional Measures, 6 April 2007</td>
</tr>
<tr>
<td><strong>PSEG</strong></td>
<td>PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007</td>
</tr>
<tr>
<td><strong>Quiborax</strong></td>
<td>Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplán v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010</td>
</tr>
<tr>
<td><strong>Rusoro Mining</strong></td>
<td>Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016</td>
</tr>
<tr>
<td><strong>Saluka</strong></td>
<td><strong>Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, 17 May 2006</strong></td>
</tr>
<tr>
<td>------------</td>
<td>----------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Schwarz</strong></td>
<td><strong>Hela Schwarz GmbH v. People's Republic of China, ICSID Case No. ARB/17/19, Decision on the Claimant’s Request for Provisional Measures, 10 August 2018</strong></td>
</tr>
<tr>
<td><strong>S. D. Myers</strong></td>
<td><strong>S. D. Myers Inc. v. Canada, Procedural Order No. 16, 13 May 2000</strong></td>
</tr>
<tr>
<td><strong>SGS v. Pakistan</strong></td>
<td><strong>SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Procedural Order No. 2, 16 October 2002</strong></td>
</tr>
<tr>
<td><strong>Siemens</strong></td>
<td><strong>Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, 6 February 2007</strong></td>
</tr>
<tr>
<td><strong>Tecmed</strong></td>
<td><strong>Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, Award, 29 May 2003</strong></td>
</tr>
<tr>
<td><strong>Teinver</strong></td>
<td><strong>Teinver S.A., Trasportes de Cercanias S.A. and Autobuses Urbanos del Sur S.A. v. Argentina, ICSID Case No. ARB/09/1, Award, 21 July 2017</strong></td>
</tr>
<tr>
<td><strong>Tidewater</strong></td>
<td><strong>Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Award, 13 March 2015</strong></td>
</tr>
<tr>
<td><strong>Tokios Tokelés</strong></td>
<td><strong>Tokios Tokelés v. Ukraine, ICSID Case No. ARB 02/18, Award, 26 July 2007</strong></td>
</tr>
<tr>
<td><strong>Toto</strong></td>
<td><strong>Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Award, 7 June 2012</strong></td>
</tr>
<tr>
<td><strong>Vivendi</strong></td>
<td><strong>Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux) v. Argentine Republic (I), ICSID Case No. ARB/97/3, Award, 20 August 2007</strong></td>
</tr>
<tr>
<td><strong>Waste Management</strong></td>
<td><strong>Waste Management, Inc. v. United Mexican States (&quot;Number 2&quot;), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004</strong></td>
</tr>
<tr>
<td><strong>Yukos</strong></td>
<td><strong>Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, Final Award, 18 July 2014</strong></td>
</tr>
</tbody>
</table>

**International Treaties UN Documents**

<table>
<thead>
<tr>
<th><strong>ICSID Convention</strong></th>
<th>Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965, 575 UNTS 159</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>VCLT</strong></td>
<td>Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331</td>
</tr>
</tbody>
</table>

**Miscellaneous**

<table>
<thead>
<tr>
<th><strong>All the New Features Coming to the Facebook</strong></th>
<th>All the New Features Coming to the Facebook, at <a href="https://www.digitaltrends.com/social-media/facebook-developer-conference-new-app-features/">https://www.digitaltrends.com/social-media/facebook-developer-conference-new-app-features/</a>.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Germany Votes for 50m Euro Social Media Fines</strong></td>
<td>Germany Votes for 50m Euro Social Media Fines, at <a href="https://www.bbc.com/news/technology-40444354">https://www.bbc.com/news/technology-40444354</a></td>
</tr>
<tr>
<td><strong>Top Instagram Updates You Need to Know in 2019</strong></td>
<td>Top Instagram Updates You Need to Know in 2019, at <a href="https://adespresso.com/blog/instagram-updates-you-need-to-make/">https://adespresso.com/blog/instagram-updates-you-need-to-make/</a></td>
</tr>
</tbody>
</table>
## LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>¶/¶/¶/¶/paras.</td>
<td>Paragraph(s)</td>
</tr>
<tr>
<td>ARSIWA</td>
<td>Articles on Responsibility of States for Internationally Wrongful Acts</td>
</tr>
<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
</tr>
<tr>
<td>BITs</td>
<td>BITs between Tyrea and Kitoa and Tyrea and Novanda</td>
</tr>
<tr>
<td>DCF</td>
<td>Discounted Cash Flow</td>
</tr>
<tr>
<td>DoRA</td>
<td>Decision on Respondent’s Application under ICSID Arbitration Rule 45(1)</td>
</tr>
<tr>
<td>FET</td>
<td>Fair and equitable treatment</td>
</tr>
<tr>
<td>FMV</td>
<td>Fair Market Value</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Center for Settlement of Investment Disputes</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
</tr>
<tr>
<td>p./pp.</td>
<td>Page(s)</td>
</tr>
<tr>
<td>PCA</td>
<td>Permanent Court of Arbitration</td>
</tr>
<tr>
<td>PO</td>
<td>Procedural Order</td>
</tr>
<tr>
<td>RfPM</td>
<td>Request for Provisional Measures</td>
</tr>
<tr>
<td>SCC</td>
<td>Stockholm Chamber of Commerce</td>
</tr>
<tr>
<td>SoUF</td>
<td>Statement of Uncontested Facts</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
</tr>
<tr>
<td>U.S./US</td>
<td>United States of America</td>
</tr>
<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
</tr>
<tr>
<td>WACC</td>
<td>Weighted Average Cost of Capital</td>
</tr>
</tbody>
</table>
STATEMENT OF FACTS

1. The Republic of Tyrea (“Tyrea” or “Respondent”) is a state that emerged in 2012 from a civil war between two main ethnicities inhabiting it, the Minyar and the Tatyar, between which tensions still remain. Tyrea concluded a bilateral investment treaty with the Federation of Novanda and the Union of Kitoa (the “BITs”) and was a party to ICSID Convention until it denounced the ICSID Convention by submitting its notice of denunciation on 5 January 2018.

2. In September 2013, Tyrea enacted a Law on Media and Information No. 1125-L (the “Media Law”) liberalizing the Internet and to the great extent deregulating the media and the press. The day Media Law was published, the spokesperson for the Tyrean Parliament gave an encouraging statement to the potential investors, including FriendsLook, SpeakUp and Whistler, concerning investments in the new Tyrean market.

3. FriendsLook is a major social network incorporated under the laws of Novanda, together with SpeakUp and Whistler, which are global social networks incorporated under the laws of Kitoa (“Claimants”). Seeing the introduction of the new media regulation, these three investors decided to seize the opportunity of what they saw as a promising undeveloped market and established businesses in Tyrea in January 2015 and early summer 2015, respectively. Soon after their establishment, Claimants attracted millions of new users. To maximize their commercial success, Claimants started working on new features and products for the Tyrean market since 2017.

4. In the end of 2016, posts started to be published on Claimants’ websites inciting ethnic hatred and violence between the Minyar and the Tatyar. Words, which Claimants failed to filter or otherwise hold off, led to action, i.e., fights and violent altercations between the Minyar and the Tatyar across the entire country, leading to massive casualties and spinning out of control even by police and military forces. With the situation threatening to slip into a full-blown civil war Tyrea had just emerged from, Respondent needed to act and adopted Law 0808-L Amending the Law on Media and Communication (the “Law 0808-L”) obliging all social networks to implement

---

1 SoUF, ¶1.
2 Ibid., ¶2.
3 Respondent’s Exhibit 1, lines 835-840.
4 SoUF, ¶7.
5 Ibid., ¶¶8-9.
6 Ibid., ¶6.
7 Ibid., ¶10.
8 Ibid., ¶11.
9 Ibid., ¶13.
10 Ibid., ¶14.
software capable of identifying users and filtering content within a 60 days’ deadline.\textsuperscript{11} Even Claimants perceived the Law 0808-L as a justified measure and started to work on elaborating algorithms and programs to comply with the new requirements.

5. Meantime, the situation in Tyrea rapidly deteriorated,\textsuperscript{12} which forced Tyrea to react immediately. Thirty days after the Law 0808-L was introduced, Respondent had to reduce the initial 60-day period to 45 days by virtue of Decree No. 0599/201-D dated February 2018.\textsuperscript{13}

6. In the meantime, Claimants’ algorithms proved to be inefficient. Additionally, SpeakUp openly refused to comply with user identification requirements. In face of a creeping civil war, Respondent made a hard choice and implemented the blocking of Claimants’ websites, which it was authorised to do by the Law 0808-L for Claimants’ non-compliance with the requirements to establish a working filtering algorithm and user identification.\textsuperscript{14} Domestic social networks, Wink and TruthSeeker, are currently also involved in criminal proceedings for failure to implement a successful algorithm, however, as their threat to security is incomparable to that of Claimants due to their lack of popularity and limited role in hate speech dissemination, they were not blocked. At the same time, Tyrea did everything in its power to curb spreading violence, heavily tightening the security, combating fake news on ethnic tensions and launching a national program to foster dialogue between the ethnic groups in Tyrea.\textsuperscript{15} Though the blocking of Claimants was a controversial decision for Tyrean officials to make, it bore fruit: immediately after the blocking first signs of de-escalation of violence in Tyrea came.\textsuperscript{16}

7. In the second half of April 2018, Claimants decided to wind down their businesses in Tyrea.\textsuperscript{17}

8. In the beginning of January 2018, Tyrea denounced the ICSID Convention,\textsuperscript{18} following more than one year of deliberation in the Tyrean Parliament on the possibility of denunciation.\textsuperscript{19} Despite being well aware of the fact that Tyrea had denounced the ICSID Convention, Claimants collectively submitted a claim against Tyrea in the end of June 2018.\textsuperscript{20}

\textsuperscript{11} Ibid., ¶15.
\textsuperscript{12} Ibid., ¶19.
\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid., ¶21.
\textsuperscript{15} PO2, ¶15; PO3, ¶12.
\textsuperscript{16} PO2, ¶5.
\textsuperscript{17} Ibid., ¶12.
\textsuperscript{18} Respondent’s Exhibit 1.
\textsuperscript{19} PO3, ¶3.
\textsuperscript{20} ICSID Notice of Registration, p. 21.
9. Claimants’ efforts at resolution of the dispute with Respondent did not end here. Simultaneously with bringing an investment arbitration claim, Claimants started a large-scale media and lobbying campaign, publishing strategically redacted excerpts of the case materials, funding articles painting Tyrea as a despotic oppressor of free speech, and lobbying government officials. As the result, Tyrea has already been condemned by several NGOs for its efforts at maintaining its national security and peace among its citizens.

10. At the end of December 2018 Tyrea had no choice but to file the request for provisional measures asking the Tribunal to enjoin Claimants from continuing their targeted media and lobbying attack.\textsuperscript{21}

\textsuperscript{21} Respondent’s RfPM, pp. 36-38.
SUMMARY OF ARGUMENTS

Jurisdiction

1. Respondent respectfully submits that the Tribunal shall grant Respondent’s request for provisional measures since the Tribunal has *prima facie* jurisdiction for doing so and the requested measures satisfy all necessary requirements.

2. Second, the present Tribunal does not have jurisdiction over the case at hand. First, Respondent is not bound by its consent to arbitration expressed in the BITs, because it had denounced the ICSID Convention before Claimants submitted their Request for Arbitration.

3. Furthermore, the Tribunal shall not hear the dispute on a multi-party basis due to the fact that this procedural mechanism is not available under applicable law, and the required criteria for resorting to this form of proceedings are not met. Moreover, multi-party arbitration should not be authorized on policy considerations.

Merits

4. First, Tyrea did not expropriate Claimants’ investments by introduction of TCA Ordinance blocking Claimants’ websites in Tyrea. Measures employed by Tyrea did not have severe irreversible economic impact on Claimants’ businesses. In any event, Tyrea complied with conditions of lawful expropriation laid down in Art. 6 of the BITs.

5. Second, Tyrea did not violate Fair and Equitable standard of treatment enshrined in Art. 3 of the BITs. Respondent did not frustrate legitimate expectations of Claimants and complied with principles of proportionality and non-discrimination.

6. Finally, there was no violation of the BITs, thus, no damages are due. Should the Tribunal decide otherwise, the DCF method should not be applied since Claimants are not going concerns, reliable projections of future cash flow are absent and discount rate of 5% is unfounded. The proper way to estimate Claimants’ losses id method based on the proven expenditure.
ARGUMENTS

PART ONE: JURISDICTION

1. The Tribunal shall grant Respondent’s Request for Provisional Measures (I).

2. The present Tribunal has no jurisdiction over the case at hand. First, Respondent denounced the ICSID Convention (II). Second, the Tribunal shall not hear this dispute on a multi-party basis (III).

I. THE TRIBUNAL SHALL GRANT RESPONDENT’S REQUEST FOR PROVISIONAL MEASURES

3. The Tribunal shall grant Respondent’s request for provisional measures. In this case, Claimants, dissatisfied with the blocking of their websites by Tyrea, chose not to wait for the issuance of the award by the Tribunal, but to punish the state for these actions in their own way. Such disregard of this Tribunal’s authority is intolerable, therefore, Respondent appeals for provisional measures to put an end to the aggravation of the dispute by Claimants. First, the Tribunal has prima facie jurisdiction to grant provisional measures (A). Second, the requested measures meet all essential requirements (B).

A. THE TRIBUNAL HAS PRIMA FACIE JURISDICTION TO GRANT PROVISIONAL MEASURES

4. This Tribunal has prima facie jurisdiction required\(^{22}\) to grant provisional measures.

5. Importantly, the test for prima facie jurisdiction is lower than for establishing jurisdiction over the entire case.\(^{23}\) To demonstrate prima facie jurisdiction, it is sufficient if there is no “clear lack of jurisdiction”.\(^{24}\) In the instant case, this was firmly established by the Tribunal itself when at the Respondent’s request it issued the decision recognising there is no manifest lack of jurisdiction,\(^{25}\) which means that prima facie jurisdiction exists.

6. Claimants may attempt to rely on the fact that Respondent contests jurisdiction to hear this case.\(^{26}\) This, however, does not affect Respondent’s firm standing. It is widely recognized that provisional measures are taken without prejudice to a subsequent determination of jurisdiction and

---

\(^{22}\) Le Bars, Shiroo, p. 26; Bento, p. 371; PNG, ¶118; Occidental, ¶55; Quiborax, ¶108-109.

\(^{23}\) Mavrommatis, 16; Oil Platforms, Higgins, at 856, § 32; Ostfanský, p. 5.

\(^{24}\) Casado, ¶11; Schwarz, ¶58.

\(^{25}\) DoRA, p. 46, ¶¶53-54.

\(^{26}\) Response to RfA, p.23, ¶4.
respondents preserve their right to contest it in later stages.\textsuperscript{27} Besides, the benefit of the doubt is usually exercised in support of the applicant for such measures.\textsuperscript{28}

7. Hence, this Tribunal has \textit{prima facie} jurisdiction to grant the requested interim measures.

B. \textbf{The Criteria for Granting Provisional Measures Are Met}

8. All the requirements for provisional measures to be granted are met in the present case, namely, the right to be protected exists (1); the measures are urgent (2), necessary (3), specific (4) and proportionate (5).\textsuperscript{29}

1. The rights to be protected exist and are threatened by Claimants’ actions

9. For provisional measures to be granted there should be an existing right, the preservation of which is threatened.\textsuperscript{30} Here, Claimants violate Respondent’s right for the preservation of \textit{status quo} (a) and excuse their actions by reasons of transparency (b).

\textit{a. Respondent has the right to non-aggravation of the dispute}

10. Respondent’s right for the preservation of \textit{status quo} is to be protected.

11. The array of rights for the protection of which provisional measures may be granted is wide. More importantly, it is not limited to procedural rights. The procedural rights to be preserved should closely relate to the substantive rights of the party.\textsuperscript{31} Granting measures that aim to preserve the right for \textit{status quo} on this ground is commonplace in international arbitration, as numerous tribunals found such rights for “self-standing”.\textsuperscript{32}

12. In the instant case, Claimants’ publicity stunt involving a massive targeted media and lobbyist campaign painting Respondent as a retrograde tyranny thumping freedom of expression\textsuperscript{33} is a thinly veiled attempt to force Respondent into succumbing to Claimants’ profit-driven demands. Publications funded and orchestrated by Claimants have already impaired Respondent’s international image (international organisations already condemned Respondent’s measures to protect peace and security of its own citizens).\textsuperscript{34} The same actions are also threatening Respondent’s financial position (in light of the upcoming decision on its World Expo 2030 bid\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{27} Schreuer, p. 263; \textit{Casado}, ¶¶ 8-14; SGS, p. 298; \textit{Biwater Gauff}, ¶¶ 47, 70; \textit{City Orient}, ¶43.
\item \textsuperscript{28} Coleman, Innes, p. 2.
\item \textsuperscript{29} Bento, p. 370-375; Le Bars, Shiroor, p. 26.
\item \textsuperscript{30} Malintoppi, p. 2; Schreuer, p.746.
\item \textsuperscript{31} Stern, p.629.
\item \textsuperscript{32} \textit{Quiborax}, ¶117; \textit{Burlington}, ¶60; \textit{Biwater Gauff}, ¶71.
\item \textsuperscript{33} RIPv, p. 36, ¶3.
\item \textsuperscript{34} \textit{Ibid.}, p. 37, ¶5.
\item \textsuperscript{35} \textit{Ibid.}, p. 38, ¶8.
\end{itemize}
and the sovereign bond issuance,\textsuperscript{36} which is bound to suffer from the blow to Respondent’s international reputation).

13. All of this is aimed to force Respondent to withdraw from these proceedings and abandon its chance at fair decision of the dispute by the Tribunal. Additionally, the materials published by Claimants twist the actual facts and circumstances.\textsuperscript{37} Considering that the materials are published in social networks and other widely available sources,\textsuperscript{38} this is also likely to affect perception of the case by the Tribunal itself. All in all, the provisional measures are aimed at safeguarding the vital rights in dispute belonging to Respondent.

\textit{b. Claimants may not justify their conduct by reasons of transparency}

14. The principle of transparency of the arbitration should not be applied in the case at hand.

15. Claimants may attempt to hide behind considerations of transparency. Leaving alone the fact that Claimants’ actions most obviously are not driven by transparency considerations, there is no duty of transparency as the ICSID Convention and the ICSID Arbitration Rules, do not require to disseminate case materials to public.\textsuperscript{39} Furthermore, the UNCITRAL Rules on Transparency do not apply to the present case, as Respondent never consented to their application.\textsuperscript{40} On the contrary, the parties are obliged not to aggravate or exacerbate the dispute,\textsuperscript{41} and the public discussion of the case should be restricted to the sufficient minimum.\textsuperscript{42} The publication of information should be neutral and accurate, otherwise, such disclosure may be forbidden,\textsuperscript{43} which is precisely what needs to be done in the present case.

16. Consequently, Respondent’s request for provisional measures aims to safeguard its crucial right to non-aggravation of the dispute by the other Party, which is threatened by Claimants’ media campaign.

\textbf{2. The requested measures are urgent}

17. Urgency means impossibility to wait until the award is rendered\textsuperscript{44} because of a risk of definitive loss of the right claimed occurring before that.\textsuperscript{45}

\begin{itemize}
  \item \textsuperscript{36}Ibid., p. 38, ¶10.
  \item \textsuperscript{37}Ibid., p. 37, ¶4.
  \item \textsuperscript{38}Ibid., p.36, ¶2.
  \item \textsuperscript{39}Carmody, p. 142.
  \item \textsuperscript{40}UNCITRAL Rules on Transparency, Art. 1; UNCITRAL Report, ¶91; Shirlow, p.5; Euler, Gering, p.14.
  \item \textsuperscript{41}Amco, ¶5; Malatesta, p. 107; Occidental, ¶96; Casado, ¶25; Electricity Company of Sofia, ¶24.
  \item \textsuperscript{42}Biwater Gauff, ¶149; Abaclat, ¶72; Knahr, p. 102.
  \item \textsuperscript{43}Born, p. 2826, 2831; Born, Schenken, p.36; Metalclad, ¶8.
  \item \textsuperscript{44}Burlington, ¶72; Phoenix, ¶33.
  \item \textsuperscript{45}Azurix, ¶33; Biwater Gauff, ¶76; City Orient, ¶67; Tokios Tokeles, ¶8; PNG, ¶116; Kinnear, p.630; Schreuer, p. 751 (¶17); Gabriel Resources, ¶45; Quiborax, ¶100;
\end{itemize}
18. In the case at hand, the urgency is based not only on the nature of the measures, but also on the circumstances necessitating prompt action. The dispute has already attracted significant public interest and led to action being taken by third parties against Respondent: some NGOs considered Tyrea violating human rights.\textsuperscript{46} Claimants continue to publish new materials additionally encouraging public discussion and attracting attention to the dispute.\textsuperscript{47} Without doubt, the arbitrators will pre-examine the circumstances of the dispute in favour of Claimants. However, Respondent needs to defend the public order in the country, which is fueled by Claimants’ publications. It is crucial to put an end to the escalation of the situation, especially in light of the upcoming hearings to avoid bias and presumptions and considering Respondent’s World Expo bid and upcoming sovereign bond issuance.

19. The abovementioned circumstances impress the present request with particular urgency.

3. Requested measures are necessary

20. Provisional measures are necessary if they are required to defend the rights of the requesting party and ensure that the award will grant effective protection,\textsuperscript{48} and if failure to take such measures will cause irreparable harm or lead to the substantial prejudice of the tribunal.\textsuperscript{49} The term “irreparable” is not understood literally and substantial harm is sufficient.\textsuperscript{50} Provisional measures may be granted regardless of whether the harm is reimbursable by a monetary award.\textsuperscript{51}

21. As stated in point B.1.a. above, Claimants’ media campaign and lobbying severely affect Respondent’s rights in the dispute, its political integrity and economic strategy. Reputation damage due to Claimants’ one-sided public allegations threatens Respondent’s chances to host the World Expo 2030, which is a chance to boost economic development,\textsuperscript{52} and the plan to issue sovereign bonds.\textsuperscript{53} Furthermore, Claimants distort the facts, inflaming political and social situation in Tyrea.\textsuperscript{54} On top of that, Claimants’ actions most certainly exacerbate the present dispute.

22. Therefore, requested interim measures are necessary.

\textsuperscript{46} RfPM, p. 37, line 1171; PO3, §2.
\textsuperscript{47} PO3, §9.
\textsuperscript{48} City Orient, §52; Burlington, §75.
\textsuperscript{49} Quiborax, §81; Occidental, §§87-91; Malintoppi, p. 4.
\textsuperscript{50} Burlington, §30; City Orient; §52;
\textsuperscript{51} Micula, §68.
\textsuperscript{52} RfPM, p.38, §8.
\textsuperscript{53} Ibid., p.38, §10.
\textsuperscript{54} Ibid., p.37, §4.
4. Requested measures are specific

23. The provisional measures requested are sufficiently specific, *i.e.*, sufficiently narrow so that the other party and the tribunal can clearly determine the requested measures and ensure compliance therewith.\(^{55}\)

24. It is common in investment arbitration practice to request relief framed in the similar way as Respondent does. For instance, in *Azurix* claimant requested that the respondent abstain from “incurring political subdivision in any action or omission” that could aggravate the dispute, and the tribunal recognised such request as “sufficiently specific”.

25. Additionally, in the present case, Respondent clarifies requested provisional measures and specifically requests the Tribunal to order Claimants to refrain from promoting, stimulating, or instigating the publication of propaganda or other actions that could exacerbate the dispute.\(^{56}\)

26. Thus, the requested interim measures are sufficiently specific.

5. Requested measures are proportionate

27. Proportionality means that the harm that the applicant is likely to suffer if the measures are not granted should outweigh any harm that the other party may suffer.\(^{57}\)

28. In the case at hand, the Tribunal needs to establish the balance of harms inflicted on two parties.\(^{58}\) Claimants do not suffer any harm in result of granting interim measures - the withholding from publications will not influence their businesses. All possible negative consequences of granting such measures to Claimants amount to loss of their scandalous popularity, which Claimants do not even need as their social networks are world-wide well-known.\(^{59}\)

29. In contrast, for Respondent, the ignorance of the request would mean the rapid increase of the social and ethnic tension in the country,\(^{60}\) the drastic change of cost of sovereign bonds’ issuance\(^{61}\) and the ruin of a positive image of a democratic and investor-friendly state.

30. Therefore, it is evidential, that the requested measures should be granted in order to balance the interests of the Parties.

31. For all these reasons, Respondent’s request for provisional measures should be granted.

\(^{55}\) Bento, p.375.
\(^{56}\) RfPM, p. 36, line 1136.
\(^{57}\) *Occidental*, ¶84.
\(^{58}\) Bento, p. 373.
\(^{59}\) SoUF, p.49, ¶¶7-9.
\(^{60}\) RfPM, p. 38, ¶9.
II. THE TRIBUNAL HAS NO JURISDICTION OVER THE DISPUTE AS RESPONDENT DENOUNCED THE ICSID CONVENTION

32. Claimants’ plea should be dismissed on jurisdictional grounds due to denunciation of the ICSID Convention by Tyrea. First of all, Respondent is no longer bound by its consent to the ICSID jurisdiction expressed in the BITs. (A). Secondly, Claimants failed to submit their claims before the ICSID received the notice of denunciation. (B). Thirdly, Claimants cannot solely rely on the BIT to justify the Tribunal’s jurisdiction (C). Finally, the initiation of arbitral proceedings by Claimants in full knowledge that the Respondent had commenced denunciation procedure is incompatible with the principle of good faith. (D).

A. RESPONDENT IS NOT BOUND BY ITS CONSENT TO THE ICSID ARBITRATION EXPRESSED IN THE BITs.

33. In accordance with Art. 25(1) of the ICSID Convention, the main prerequisite for the jurisdiction of the ICSID is the consent in writing by both parties to the dispute.62 The irrevocability of consent provided for in the last sentence of Art. 25(1) of the ICSID Convention operates only after the consent has been perfected through its acceptance by the investor.63 Therefore, a unilateral act offering consent to the ICSID’s jurisdiction is insufficient to establish jurisdiction.64

34. A provision on consent in a BIT constitutes a mere offer to arbitrate which must be accepted by an investor.65 Consequently, a state may withdraw its offer at any moment, if by that time it was not accepted by the investor.66 Notably, as recognized by Prof. Schreuer, relying on an ICSID consent clause in the BIT without making a reciprocal declaration of consent investors run the risk that the state’s offer may be withdrawn before they decide to initiate arbitral proceedings.67

35. Generally, the investor’s acceptance is made by the institution of proceedings against the host state on the basis of the BIT.68 Thus, only rights and obligations arising out of a perfected consent persist after the receipt of a notice of denunciation.69

63 Schreuer, p. 358; Hirsch, p. 50.
64 Delaume, p. 172.
65 Schreuer commentary, p. 218, ¶302; Laviec, Chapter VIII, ¶29; Wychera, Mimnagh, p. 3
66 Schreuer, p. 363.
67 Ibid.
68 Schreuer commentary, p. 220; Toto, ¶94: Tokios Tokelés, ¶104; Kardassopoulos, ¶118;
69 Favianca, ¶282.
36. In the case at hand, the notice of denunciation was received by ICSID on 5 January 2018, whereas Claimants filed their Request for Arbitration only five months later, namely, on 29 June 2018. Accordingly, Tyrea’s offer to arbitrate expressed in Art. 9(3) of the BITs was not yet accepted by Claimants before the notice of denunciation was submitted by Respondent.

37. In light of the above, Tyrea is not bound by its unilateral consent to ICSID jurisdiction, since such consent was validly withdrawn before Claimants’ acceptance of the offer to arbitrate.

**B. CLAIMANTS FAILED TO SUBMIT THEIR CLAIMS BEFORE THE ICSID RECEIVED THE NOTICE OF DENUNCIATION**

38. The critical date for the submission of claims is regulated by Art. 72 of the ICSID Convention (1), the preservation effect of which does not cover the present claim brought after the receipt of the notice of denunciation by ICSID (2).

1. **The present situation is governed by Art. 72 of the ICSID Convention**

39. Claimants may insist on the applicability of Art. 71 of the ICSID Convention under which their claim would have been submitted in time within six months period following denunciation. However, this particular situation is regulated by Art. 72 of the ICSID Convention which does not allow initiation of arbitration after the denunciation notice is filed.

40. Pursuant to Art. 71 of the ICSID Convention, any Contracting State may denounce the Convention by written notice to the depositary. The denunciation takes effect six months after receipt of such notice. Under Art. 72 of the ICSID Convention, rights and obligations that arise out of the consent to the ICSID’s jurisdiction shall not be affected by the denunciation of the ICSID Convention.

41. In contrast to Art. 71 of the ICSID Convention, Art. 72 refers specifically to the consent to jurisdiction. The interplay between these two articles was compared to the “division of labour” by the arbitral tribunal in *Favianca* case. The tribunal stated that Art. 71 is addressed to the respondent as a Contracting State to the ICSID Convention, whereas Art. 72 is addressed to the respondent as a party (or potential party) in ICSID arbitrations. Therefore, the issues concerning the jurisdiction of the Tribunal and the expression of consent by the parties to the dispute are regulated by Art. 72 of the ICSID Convention.

---

70 DoRA, ¶52.
71 ICSID Notice of Registration, p. 21.
72 *Favianca*, ¶269.
42. Art. 72 establishes a different rule on the effective date of the denunciation with respect to deadline for submission of investors’ claims. In particular, if a state’s consent was perfected by investor before the notice of denunciation, such state’s rights or obligations arising therefrom shall remain unaffected even beyond the date the denunciation takes effect. However, the effect of Art. 72 regarding the preservation of state’s initial obligations occurs only if investor filed its claim before the notice of denunciation was received by the depositary.  

43. Hence, the six-month period in Art. 71 of the ICSID Convention has no relevance for the consent to arbitration. In other words, the end of this period would constitute the critical date for all other matters not relating to consent to jurisdiction of ICSID.

44. Here, Tyrea’s consent to the jurisdiction of ICSID took place before the notice of denunciation. Tyrea’s consent is expressed in Art. 9 of the Tyrea-Novanda BIT signed on 28 March 2000 and Art. 9 of the Tyrea-Kitoa BIT concluded on 20 January 2001. The notice of denunciation was received by ICSID on 5 January 2018.

45. Therefore, the date of denunciation and its legal consequences shall be governed by Art. 72 of the ICSID Convention.

2. The preservation effect of Art. 72 of the ICSID Convention does not cover the present claim brought after the notice of denunciation

47. The irrevocability of consent provided for in the Art. 25(1) of the ICSID Convention operates only after the consent has been perfected through its acceptance by the investor. However, in order to be preserved by Art. 72, consent must have been perfected before the notice of denunciation was received.

48. As affirmed by one of the founders of the ICSID Aron Broches, a general statement in favor of submission of claims to the ICSID would not be binding on the state which had made it until it had been accepted by an investor. Otherwise, no investor could bring a claim before the ICSID after the state had withdrawn its unilateral statement by denouncing the Convention.

---

73 Schreuer, p. 355; Favianca, ¶271.
74 Durney, p. 253.
75 SoUF, ¶2.
76 DoRA, ¶52.
77 Schreuer, p. 358.
78 Schreuer commentary, p. 1286.
79 History of ICSID Convention, Volume II-2, p. 1010, ¶62.
49. The tribunal in *Favianca* case confirmed that ICSID will not have jurisdiction over a dispute submitted by the investor after the notice of denunciation even within the period at the end of which denunciation becomes effective.\(^\text{80}\)

50. More precisely, a claim cannot be brought after the notice of denunciation, including the six-month period between delivery of the letter of denunciation and the denunciation becoming effective.\(^\text{81}\)

51. In the case at hand, the notice of denunciation was received by the depositary on 5 January 2018,\(^\text{82}\) whereas the Request for Arbitration was submitted by Claimants on 29 June 2018,\(^\text{83}\) *i.e.* 5 months and 24 days after the receipt of notice of denunciation.

52. Thus, Art. 72 of the ICSID Convention does not preserve the legal force of the Respondent’s non-perfected consent.

**C. CLAIMANTS CANNOT SOLELY RELY ON THE BIT TO JUSTIFY THE TRIBUNAL’S JURISDICTION**

53. If the conditions to resort to arbitration proceedings are set out in two separate and wholly independent international legal instruments, namely, ICSID Convention and the BIT, the conditions of both must be satisfied for the Tribunal to have jurisdiction over the case.\(^\text{84}\)

54. Furthermore, the existence of the valid arbitral clause in the BIT does not necessarily mean that the dispute would fall within the ICSID jurisdiction, since the Contracting Parties to the BIT cannot in that instrument alter the status or scope of their rights and obligations as Contracting States to the ICSID Convention as a multilateral instrument.\(^\text{85}\) In particular, an ICSID arbitration clause in a BIT *per se* does not constitute a mutual consent of the parties to the dispute in the meaning of the ICSID Convention.\(^\text{86}\) Moreover, the denunciation of the ICSID Convention nullifies any unaccepted offer in a BIT to submit disputes to ICSID jurisdiction.\(^\text{87}\)

55. *In casu*, Claimants refer to Art. 9 of the BITs to justify the ICSID jurisdiction.\(^\text{88}\) Even if the requirements of the dispute settlement provisions of the BITs are met, the dispute should also

\(^\text{80}\) *Favianca*, ¶295.
\(^\text{81}\) Fouret, p. 84; Tzanakopoulos, p. 14; Durney, p. 302.
\(^\text{82}\) Respondent’s Exhibit 1, p. 27.
\(^\text{83}\) ICSID Notice of Registration, p. 21.
\(^\text{84}\) *Favianca*, ¶262; Wychera, Minnagh, p. 417.
\(^\text{86}\) Tzanakopoulos, p. 12; Schreuer, p. 357.
\(^\text{87}\) Durney, p. 302; Figueiredo, p.18; Tzanakopoulos, p. 14.
\(^\text{88}\) RfA, ¶2.
satisfy the conditions of the ICSID Convention. Nonetheless, as described above the present dispute does not fall within the jurisdiction of the Tribunal under ICSID Convention.

56. To conclude, the dispute settlement clause in the BITs does not constitute a valid justification for the jurisdiction of the Tribunal, provided the ICSID Convention requirements are not met.

57. In the light of the above, the Tribunal has no jurisdiction over the present case due to the fact of denunciation of the ICSID Convention by Tyrea and the lack of perfected consent to arbitration required by the ICSID Convention.

D. INITIATION OF ARBITRAL PROCEEDINGS BY CLAIMANTS AFTER THE SUBMISSION OF THE NOTICE OF DENUNCIATION IS INCOMPATIBLE WITH THE PRINCIPLE OF GOOD FAITH

58. As established by Art. 72 of the ICSID Convention and its drafting history, once the arbitration has already been launched or consent perfected, the subsequent denunciation would not relieve a state from its obligation to go to arbitration if a dispute arose. An approach to the contrary would contradict the good faith principle. Similarly, it is inconsistent with the principle of good faith if an investor perfects the consent after the notification of withdrawal from the ICSID Convention, knowing that a state has denounced the ICSID Convention.

59. Here, Claimants submitted their Request for Arbitration on 29 June 2018, being fully aware of the denunciation of the ICSID Convention by Tyrea, since the deliberations in the Tyrean Parliament on the possibility of denunciation of the ICSID Convention started already in November 2017 and the decision to denounce the ICSID Convention was made public on 5 January 2018, on the same date the notice of denunciation was submitted.

60. Therefore, the initiation of arbitral proceedings by Claimants is contrary to the principle of good faith.

61. For all aforementioned reasons, the Tribunal has no jurisdiction over the case at hand as Respondent has denounced the ICSID Convention.

III. THE TRIBUNAL SHALL NOT HEAR THIS DISPUTE ON A MULTI-PARTY BASIS

62. The present dispute cannot be resolved on the multi-party basis since this procedural mechanism is not available for Claimants under applicable law (A). Further, even if it was
available in principle, multi-party arbitration may be conducted only in specific circumstances which do not exist in the case at hand (B). Furthermore, no policy considerations that might be relied on by Claimants can justify multi-party arbitration (C).

A. THE APPLICABLE LAW DOES NOT ENVISAGE MULTI-PARTY PROCEEDINGS

63. Multi-party proceedings in investment arbitration are a far from being a widespread phenomenon, which is demonstrated by scarcity of case law on the issue. This is not surprising considering that the applicable legal framework does not provide for such type of proceedings, namely, no such option exists in either ICSID documents (1) or any of the BITs (2).

1. ICSID framework does not envisage multi-party arbitration

64. Neither the ICSID Convention, nor ICSID Arbitration Rules contain any provisions on collective proceedings.94 Such silence of both of these legal instruments demonstrates that collective proceedings are not available within ICSID system.95 Treaty practice demonstrates that, if multi-party proceedings are indeed available, they are expressly allowed.96 Thus, if multi-party claims were permitted under ICSID framework, they would have been expressly included in the relevant documents. Furthermore, if the main ICSID documents were open for multi-party arbitration just never mentioned expressly, they needed to envisage procedural issues tailored for collective proceedings, however, this is not the case at hand.

65. Claimants may attempt to rely on this Tribunal’s wide procedural discretion granted by Art. 19 of the ICSID Arbitration Rules and Art. 44 of the ICSID Convention. However, procedural discretion has limits and cannot contradict the agreement of the parties on the procedural rules. The parties when agreeing to arbitration did not choose the particular set of arbitration rules only for the Tribunal to substantially modify it in contradiction with the parties’ initial consent.97 Such interpretation of the ICSID framework which in effect substantially modifies their provisions may be deemed as violation of the fundamental rule of procedure that can lead to the annulment of the award under Art. 52 (d) of the ICSID Convention.98

66. Therefore, Claimants’ collective claim should be dismissed since multi-party arbitration simply does not fit into the applicable legal framework.

---

94 Brozolo, Ponzano, p. 128.
95 Ambiente Dissenting Opinion, ¶76; Strong, p. 28.
96 Art. 44 of the American Convention on Human Rights.
97 Radović, p. 17.
98 Heiskanen, p. 322.
2. Art. 9 of the BITs does not provide for multi-party arbitration

67. No indication that would allow multi-party arbitration can be found in any of the BITs either. As widely accepted in arbitral practice, the literal reading of BITs needs to be taken into account.\textsuperscript{99}

68. The possible indirect reference to multi-party arbitration may be found in the dispute resolution clause, where the term “investors” may be used in plural, which has been considered as an indication of possible multiple claimants in the dispute.\textsuperscript{100}

69. However, in the case at hand, the wording of the dispute resolution clause provided in Art. 9 of the BIT refers to “disputes between one Contracting Party and a national of the other Contracting Party”. The use of the word “a national” in singular, as opposed to plural which may have been employed instead, makes clear that the contracting parties to both BITs did not wish to include the option collective proceedings based on these treaties. There is no mention of, or even indirect reference to, multi-party arbitration in any other articles of the BITs either.

70. Thus, there is nothing in the BIT that allows multi-party arbitration.

B. In any event, criteria for multi-party arbitration to be allowed is not fulfilled

71. Even if the Tribunal finds that in general multi-party proceedings may be conducted under the applicable law, collective arbitration is not possible in this particular case. Multi-party arbitration is allowed only if the state consented to it (1) and claims are homogeneous (2), and neither of these criteria is met in the case at hand.

1. Respondent did not consent to multi-party arbitration

72. Consent as the cornerstone of any arbitration is lacking in the present case.

73. Multi-party proceedings are not covered by a state’s general offer to arbitrate since this procedural instrument fundamentally changes the nature of the dispute and requires state’s special or secondary consent.\textsuperscript{101} Parties do not abstractly consent to arbitration, they consent to a concrete procedure and a multi-party aspect indeed represents a manifest deviation from the parties’ initial agreement to the ordinary course of arbitration.\textsuperscript{102}

\textsuperscript{99} AAPL, ¶¶19-20.
\textsuperscript{100} Alemanni, ¶287.
\textsuperscript{101} Abaclat Dissenting Opinion, ¶190; Radović, p. 15.
\textsuperscript{102} Radović, p. 18.
claimants is not a classical procedural mechanism that can be imposed on the host State by arbitrators’ discretion.\textsuperscript{103}

74. For instance, the tribunal in \textit{Erhas} case highlighted that consent to arbitrate given in a treaty does not imply the acceptance of joint examination of claims made by unrelated claimants over a variety of investments and, thus, denied its jurisdiction over the dispute.\textsuperscript{104}

75. Claimants may refer to \textit{Abaclat} and \textit{Ambiente} cases in which the majority of arbitrators decided that no specific consent of the state to multi-party arbitration is required. However, both awards have strong dissenting opinions which opened the floor for the further serious criticism of the relevant tribunals’ approach to consent,\textsuperscript{105} which strongly speaks against following such practice. Importantly, the \textit{Abaclat} tribunal itself highlighted that its award was not intended to act as a precedent\textsuperscript{106} so as not to lay ground for unjustified extension of states’ consent to multi-party arbitration they never agreed to.

76. In the case at hand, Respondent while entering into the BITs could not have envisaged that these treaties would extend to multi-party arbitration. Neither Art. 9 of either of the BITs, nor the ICSID framework contains any provisions on collective proceedings, which makes it inconceivable for Respondent that its consent to one-on-one arbitration would be stretched to cover multi-party proceedings. Any conclusion to the contrary would undermine the core consensual nature of investment-state arbitration.

77. Therefore, Respondent cannot be forced by the Tribunal to participate in a multi-party proceeding without its express consent.

\textbf{2. Claimants’ claims are not homogeneous}

78. Only sufficiently homogeneous claims may be heard in multi-party proceedings.\textsuperscript{107} The crucial differences in the factual background of Claimants’ cases and the measures challenged bar the Tribunal from their examination on the multi-party basis. Namely, Claimants’ investments (a), breaches of Respondent national legislation committed by them (b), legal grounds of their claim (c) and damages incurred (d) are substantially different.

\textsuperscript{103} Radović, p. 12.
\textsuperscript{104} Spalton on GAR.
\textsuperscript{105} \textit{Abaclat Dissenting Opinion}, ¶190; \textit{Ambiente Dissenting Opinion}, ¶76; Radović, p. 3.
\textsuperscript{106} \textit{Abaclat}, ¶¶523-527.
\textsuperscript{107} \textit{Abaclat}, ¶540; \textit{Noble Energy}, ¶192; Dimsey, p. 217.
a. Claimants’ investments are different

79. One of the important factors to consider while deciding on the homogeneity of claims is commonality of investments. For the purposes of collective arbitration an investment should be the same or made jointly by the claimants.108

80. For instance, in the landmark cases on multi-party proceedings such as *Abaclat, Ambiente* and *Alemanni* cases all claimants made the same investment in the form of sovereign bonds in the same company.109 In the same vein, the *Flughafen Zürich* tribunal while recognising homogeneity of claims stressed that claimants were co-owners of the same investment (airport concession).110 Following the similar approach, the Czech Republic successfully objected to a joint claim on the ground that the claimants did not invest in the same company.111

81. In the present case, Claimants independently made three different investments in different periods of time.112 The only thing in common between their investments is that they operate in the same industry, all being social networks. However, upon closer examination, even the mode of operation of Claimants is completely different: FriendsLook concentrates on users’ accounts used to share posts and meet new people through their profiles,113 Whistler’s main feature is a short text114 while SpeakUp, by contrast, functions in the blog format.115 Moreover, Claimants’ investments cannot be treated as similar since they have different sources of income and use different business models: while FriendsLook and Whistler operate on earnings mainly from advertising, SpeakUp has additional source of revenues such as promotional content and commercial blogs special features.116

82. Thus, Claimants’ investments are distinct and do not qualify as homogeneous.

b. Alleged breaches of Tyrean national legislation committed by Claimants lack homogeneity

83. The circumstances surrounding the blocking of each of the Claimants substantially vary. Although general facts of the cases overlap, Claimants in fact committed different violations Respondent’s national legislation, thus, the basis of Respondent’s measures was not the same. As the circumstances of each event of blocking will need to be thoroughly considered while

---

108 *Noble Energy*, ¶13; Schreuer, p. 162.
109 *Abaclat*, ¶238; *Ambiente*, ¶60; *Alemanni*, ¶31.
110 *Flughafen Zürich*, ¶393.
111 Peterson in IA Reporter.
112 *SoUF*, p. 49, lines 1500-1501.
113 *Ibid*, p. 49, line 1507.
examining, for instance, proportionality and non-discrimination on the merits stage, if this case proceeds, it is impossible to put all Claimants in the same barrel.

84. In particular, Claimants had opposite attitudes regarding the Respondent’s requirement to provide access to Tyrean users’ Personal ID card details: while FriendsLook and Whistler took action to respect Respondent’s demand, SpeakUp unequivocally refused to comply with it and launched negotiations with the Tyrean authorities in an attempt to avoid compliance with the new requirements.117

85. In the light of the above, the Claimants’ behavior that caused the blocking had different nature and circumstances, thus, their actions should be examined in separate arbitrations in more detail.

c. Legal grounds of claims are not the same

86. Claimants’ cases cannot be examined on the multi-party basis since they are not based on the same legal instrument.

87. In the cases where multi-party arbitration was allowed, claimants in Abaclat and Ambiente were of the same nationality and based their claims on the same BIT.118

88. In the case at hand, Claimants come from two different countries and rely on two distinct BITs between Tyrea and Novanda and Tyrea and Kitoa. Thus, different legal grounds of Claimants’ claims hinder the resolution of this dispute through multi-party arbitration.

d. Damages incurred are not homogeneous

89. Homogeneity of damages represents another important factor to consider while deciding on the possibility of multi-party proceedings.119

90. In the present case, Claimants’ damages are not even comparable: not only damages of FriendsLook ($69,134,875.00) are two times bigger than damages of Whistler ($26,760,460.00) and SpeakUp ($26,094,600.00),120 but, as demonstrated above, they had differences in sources of income. This considerable disproportion in Claimants’ damages points to the fact that they were affected by Respondent’s measures in a different manner and features of each case should be established with greater accuracy, what is reasonably more real in separate proceedings.

117 Ibid, line 1593.
118 Abaclat, ¶259; Ambiente, ¶161; Aggarwal, Maynard, p. 847.
119 Abaclat, ¶541.
120 Claimants’ Exhibit 7, line 570.
91. Thus, such significant difference in the damages suffered by Claimants create doubts as to the homogeneity of compared cases.

C. REASONS OF PROCEDURAL ECONOMY SHOULD NOT OVERWEIGHT RESPONDENT’S DUE PROCESS RIGHT OF THE DEFENCE

92. Respondent recognizes that to examine the three cases in a single proceeding might look more reasonable from the standpoint of procedural economy. However, on the other side of the scale lies the thoroughness of case examination that should not be neglected by the Tribunal.

93. Each party to the dispute has a right to efficiently represent its case.\(^{121}\) Dealing with only one claim, the tribunal has the opportunity to examine every aspect of it and, thus, ensure the respondent’s due process rights.\(^{122}\) As stressed by the *Corn Products* tribunal which upheld objections to consolidation of the claims, participation of numerous claimants in a single proceeding is likely to prevent the parties from adequately present their cases in violation of their due process rights.\(^{123}\) In the opinion of the *Corn Products* tribunal, even the risks of inconsistent awards resulting from separate proceedings cannot outweigh the potential harm to due process rights that would arise.\(^{124}\) Thus, multi-party claims contravene due process rights of a host State.\(^{125}\)

94. In the case at stake, the need for separate proceedings is even more evident taking into account the technical complexity of this dispute: in order to decide on the merits the Tribunal need to analyze numerous posts in all three social networks that Respondent regarded as grounds for the blocking of the Claimants. Figures speak for themselves: radicals created tens of thousands of fake profiles on Claimants’ social networks to spread their extremists beliefs.\(^{126}\) All this crucial evidence as well as above-mentioned differences in the facts of three cases, Claimants’ investments and damages incurred should be examined by the Tribunal in detail to ensure due process in these proceedings.

95. Furthermore, Claimants’ may refer once again to the procedural efficiency point raised by the *Abaclat* tribunal, however such comparison is not justified: one of the main reasons favouring multi-party proceedings in that case was practical impossibility for ICSID to deal separately with

\(^{121}\) *Fraport*, ¶200; Schreuer, p. 987.

\(^{122}\) *Abaclat Dissenting Opinion*, ¶¶134-135; Giroud, Moss, p. 500.

\(^{123}\) *Corn Products*, ¶9.


\(^{125}\) McCarl, p. 186.

\(^{126}\) SoUF, p. 50, line 1556.
60,000 individual claims while the case at stake, having only three Claimants, does not raise such concerns.\textsuperscript{127}

96. Therefore, the participation of all three Claimants in one arbitration creates problems to Respondent’s due process right of defence, the completeness of evidence investigation and, thus, should be avoided.

97. In the light of the above, the Tribunal should not hear this dispute on a multi-party basis.

\textsuperscript{127} \textit{Abaclat}, ¶545.
PART II

MERITS

IV. NONE OF THE RESPONDENT’S MEASURES AMOUNTS TO EXPROPIATION OF CLAIMANTS’ INVESTMENTS

99. Respondent complied with all obligations under the BITs and international law when it introduced the Law on Media and Information\(^\text{128}\) and subsequent Ordinances,\(^\text{129}\) which resulted in the blocking of FriendsLook, SpeakUp and Whistler.

100. Claimants’ assets that were allegedly expropriated by Tyrea are not susceptible to expropriation (A). Furthermore, Tyrea’s actions cannot be qualified as expropriation (B) and, alternatively, Respondent satisfied all the criteria for lawful expropriation under Art. 6 of the BITs (C).

A. CLAIMANTS’ ASSETS ARE NOT SUSCEPTIBLE TO EXPROPRIATION

101. It was impossible to expropriate Claimants’ assets since neither advertising contracts in question (1), nor specific features and products for the Tyrean market (2) may be considered assets capable of expropriation.

1. Advertising contracts of Claimants are not susceptible to expropriation

102. Claimants allege that, as they were not in a position to perform and receive profits from advertising contracts due to the blocking, contracts in question were expropriated. Claimants may allege that such contracts fall under Art. 1 (a) (i) of the BITs as rights in the respect of contracts.\(^\text{130}\)

103. It should be noted that according to the arbitral practice the notion of investment does not cover contracts of purely commercial nature.\(^\text{131}\) For instance, the tribunal in *Global Trading Resource Corp.* held\(^\text{132}\) that purely commercial transactions typical for an investor were never intended to fall under the notion of investment.

104. Similarly, in *Nova Scotia*, the tribunal, which dealt with contractual rights under a coal supply arrangement, noted that even if an ordinary supply agreement was complicated in genesis

\(^{128}\) Claimants’ Exhibit No. 2.
\(^{129}\) Claimants’ Exhibit No. 4.
\(^{130}\) Art. 1 (a) (i) of the BITs.
\(^{131}\) UNCTAD Expropriation, p. 131.
\(^{132}\) *Global Trading Resource Corp.*, ¶56.
and composition, it still could not be recognized as investment since it was a commercial contract concluded as part of the normal business activity of claimant.\textsuperscript{133}

105. In the case at bar, advertising contracts of Claimants to launch advertising on their websites\textsuperscript{134} are of purely commercial nature and, therefore, do not qualify as part of the investment within the meaning of Article 1 of the BITs.

106. \emph{Ergo}, advertising contracts concluded by Claimants do not amount to assets susceptible to separate expropriation.

2. \textbf{Tyrea-specific products are not susceptible to separate expropriation}

107. New features and products that are developed to boost the usage of social networks may theoretically be qualified as intellectual property rights within the meaning of Art. 1 (iv) of the BITs.\textsuperscript{135} However, it is impossible to deprive investors of such features and products without formal revocation of the respective right. Such kind of intangible assets, once remained unrevoked and unaltered, pertains solely to the investor, thus making it incapable of separate expropriation.

108. Know-how and other intellectual rights by their nature receive protection in any state where social networks operate. The implementation of new features by social networks is very common in global practice,\textsuperscript{136} as it contributes to the overall value of the investment.

109. However, if such intellectual rights remain unaltered and unrevoked, they cannot be considered as separate investment. One can draw an analogy with \textit{Methanex},\textsuperscript{137} where the tribunal considered goodwill, market share and customers as elements that contribute to the overall value of investment, but not as discrete assets capable of separate expropriation.

110. As Claimants indicated,\textsuperscript{138} new features and products for social media platforms would have been implemented in 2018, which did not occur since Claimants were blocked at the beginning of 2018.\textsuperscript{139} Admittedly, such products, once launched, may boost usage of social networks. But in the instant case, the rights to these products were not altered or revoked.

111. Consequently, the advertising contracts and revenue from Tyrean-specific features and products that Claimants were elaborating for their social networks are not susceptible to expropriation.

\textsuperscript{133} \textit{Nova Scotia}, ¶113.
\textsuperscript{134} RfA, ¶14.
\textsuperscript{135} BITs, Art. 1 (iv).
\textsuperscript{136} Top Instagram Updates You Need to Know in 2019; All the New Features Coming to the Facebook.
\textsuperscript{137} \textit{Methanex}, ¶Part IV, Chapter D, ¶17.
\textsuperscript{138} SoUF, ¶14.
\textsuperscript{139} \textit{Ibid}, ¶21.
B. RESPONDENT’S ACTIONS DO NOT AMOUNT TO EXPROPRIATION

112. Direct expropriation occurs when there is a legal transfer of the title to the property or its outright physical seizure,\(^{140}\) which is clearly absent in the present case. Neither was there any indirect expropriation, \textit{i.e.} economic deprivation of the investment’s value without a formal transfer of property or seizure.\(^{141}\)

113. A measure is considered substantial enough to qualify as indirect expropriation only if it creates substantial and irreversible obstacles to use, enjoy or dispose of the investment rights.\(^{142}\)

114. First, such measure must destroy all or almost all of the economic value of the investment to establish substantial deprivation. As held by tribunals in \textit{LG&E}\(^{143}\) and \textit{Tokios},\(^{144}\) the threshold of such deprivation is extremely high and difficult to be satisfied.

115. In \textit{Tokios}, the claimant failed to convince the tribunal that the claimants’ reputation of customer relationships was damaged, or that police raids and investigations presented obstacles for the claimant to use its investment. Indeed, these factors deprived the investment of its business value. In the opinion of the tribunal, this was not substantial enough to reach the required threshold.\(^{145}\)

116. In the present case, the blocking did not in any way impact Claimants’ business worldwide, nor did it influence the way these social networks operate. As follows from the facts of the case, it was possible to overcome the blocking by using VPN services,\(^{146}\) the use of which increased after the blocking.\(^{147}\) Therefore, Claimants’ social networks are still accessible in Tyrea, which means that certain amount of revenue is generated by Claimants on a regular basis.

117. Second, substantial deprivation occurs when an investor loses control of the ownership or management rights over the investment.\(^{148}\) For instance, the tribunal in \textit{Biwater Gauff}\(^{149}\) found that Tanzania expropriated claimant’s investment. The conclusion followed from the fact of the

\(^{140}\) UNCTAD Expropriation, p. 6.

\(^{141}\) Ibid., p. 7.

\(^{142}\) Generation Ukraine, ¶20.32; Azurix, ¶276.

\(^{143}\) LG&E, ¶177.

\(^{144}\) Tokios, ¶120.

\(^{145}\) Ibid., ¶122.

\(^{146}\) PO2, ¶14.

\(^{147}\) PO3, ¶8.

\(^{148}\) Generation Ukraine, ¶20.30.

\(^{149}\) Biwater Gauff, ¶¶464-465.
government’s takeover of the investor’s premises, and the deportation of the investor’s official representatives.150

118. In the case at bar, shareholders of three social networks are free to dispose their ownership rights. Furthermore, Claimants continue to operate worldwide, while the use of VPN services still allows Claimants to generate revenue through advertisement in Tyrea.

119. Third, to establish indirect expropriation, the deprivation of investor’s rights must be irreversible,151 i.e. the situation when it is impossible to restore the investment rights after regulatory measures have been introduced.

120. In the case at hand, the blocking did not create irreparable obstacles to enjoy investment rights tantamount to expropriation for the social networks to operate in Tyrea. Claimants were blocked “pending further notice”.152 It means that the measure is of temporary nature, with the possibility for Tyrea to alter its decision and for Claimants to re-open their businesses.

121. Consequently, there was no substantial deprivation of Claimants’ investments.

C. THE RESPONDENT’S ACTIONS DO NOT CONSTITUTE UNLAWFUL EXPROPRIATION

122. Even if the Tribunal qualifies Respondent’s measures as expropriation, no compensation is due to Claimants, as Tyrea’s measures were lawful and in full compliance with Art. 6 of the BITs.

123. Expropriation is deemed lawful if a state complies with certain criteria enumerated in a BIT.153 Art. 6 of the BITs sets out three cumulative154 requirements for expropriation to be lawful, all of which were satisfied by Respondent. Tyrea’s actions were made for public purpose (1), they were not discriminatory (2), and therefore, no compensation is due (3).

1. Tyrea implemented its measures in pursuance of a legitimate public purpose

124. A state is considered to comply with the public purpose requirement when the aim sought by the state is indeed public (a) and the implemented measures are proportional (b).155

150 Ibid., ¶519.
151 UNCTAD Expropriation, pp. 69-70; S.D. Myers, ¶¶287-288.
152 Claimants’ Exhibit 4.
153 UNCTAD Expropriation, p. 27.
154 VCLT, Art. 31.
155 LG&E ¶195; Occidental, ¶402.
a. Tyrea pursued genuine public purpose

125. Public purpose shall not be motivated by private gain or some other illicit objective such as purely political reasons.\(^{156}\)

126. In the case at bar, Tyrea pursued the goal of public safety by introducing measures to prevent hate speeches dissemination.\(^{157}\) In light of the fact that Tyrea just emerged from a civil war several seven years ago and already had a history of tough tensions between the Minyar and the Tatyar,\(^{158}\) the rapid worsening of the situation that resulted in massive civilian casualties,\(^{159}\) had to be addressed.

127. Ergo, Tyrea pursued a genuine public purpose of restoring public order.

b. Measures towards Claimants were proportionate

128. The measures introduced by Respondent’s government to tackle the crisis in Tyrea were proportionate, fully in compliance with international law.\(^{160}\)

129. Even though the right to choose means in pursuance of public purpose is not absolute,\(^{161}\) states do have wide discretion to employ measures they deem fit. Most importantly, the measure must be efficient. If less severe available measures cannot satisfy the required goal, they should not be given priority.\(^{162}\)

130. States commonly block social networks when they have to react to the spreading of violence. For instance, after the terrorist attacks in April 2019 in Sri Lanka,\(^{163}\) the government temporarily blocked several social networks as it failed to wipe out the posts inciting violence. Sri Lanka stated that Facebook, Instagram, Whatsapp and Viber became ideal platforms for spreading of misinformation and hate speech.

131. Respondent did its best to allow social network to continue operating in Tyrea during the outbreak of ethnic conflicts in the country. Tyrea first introduced a deadline for compliance with the new regulation, even though immediate blocking would have been much more effective.

\(^{156}\) ADC, ¶429.
\(^{157}\) SoUF, ¶21.
\(^{158}\) Ibid., ¶1.
\(^{159}\) Ibid., ¶14, 19.
\(^{160}\) Tecmed, ¶122.
\(^{161}\) ADC, ¶432; S. D. Myers, ¶285; Tecmed, ¶115-116.
\(^{162}\) Teinver, ¶985.
\(^{163}\) Sri Lanka Blocks Social Media, Fearing More Violence.
132. Moreover, Claimants cannot rely on the fact that other penalties prescribed by the Law No. 0808 L,\textsuperscript{164} such as temporary blocking and fine, were available to Respondent. As demonstrated above, Tyrea was free to choose the most efficient available measure to tackle the spreading of hate speeches through Claimants’ social networks.

133. Consequently, Respondent’s measures were adopted for public purpose with due regard to proportionality requirement in full compliance with Art. 6 (a) of the BITs.

\textbf{2. Tyrea’s actions were not discriminatory}

135. A host state’s conduct is considered discriminatory when an investor is treated differently from other investors in similar circumstances without a reasonable justification.\textsuperscript{165}

136. By way of example, in Parkerings, claimant received refusal from Vilnius Municipality to launch a project because it was too close to the site protected by UNESCO, while a Dutch company was authorized to do so. However, claimant’s project extended significantly more into the protected area. The tribunal justified different treatment for the sake of historical and archaeological conservation, thus confirming that there are situations that may justify differentiated treatment to similar cases.\textsuperscript{166}

137. In the case at hand, Claimants allege that only FriendsLook, SpeakUp and Whistler were blocked, but two domestic social networks – Wink and TruthSeeker – remained in operation.\textsuperscript{167} This, however, does not amount to discrimination.

138. Indeed, the Law on Media and Communications\textsuperscript{168} established a universal standard for all social networks operating in Tyrea. However, Wink, with algorithm incapable of implementing the requirements, and TruthSeeker, being five times fewer that in case of FriendsLook,\textsuperscript{169} remained in operation.

139. In the case at hand, the circumstances surrounding three foreign social networks and two domestic ones are by no means similar. Multiple facts demonstrate that the popularity and, therefore, possibility to influence the ethnic relations in Tyrea, of FriendsLook, Whistler and SpeakUp was incomparable with those of domestic social networks.\textsuperscript{170} Although Tyrea did not

\textsuperscript{164} Claimant’s Exhibit 2, Art. 117.
\textsuperscript{165} \textit{Saluka}, ¶313; \textit{Parkerings}, ¶360.
\textsuperscript{166} \textit{Parkerings}, ¶368.
\textsuperscript{167} \textit{SoUF}, ¶22.
\textsuperscript{168} Claimants’ Exhibit 2.
\textsuperscript{169} \textit{SoUF}, ¶22.
\textsuperscript{170} \textit{Ibid.}
publicly announce the reasons why the TruthSeeker was blocked, they are evident from the practical standpoint – TruthSeeker was five times less popular than FriendsLook.171

140. Differential treatment based on huge gap in popularity of a social network has already been implemented in states’ practice. For instance, Germany has recently adopted a law, which obliges to take down posts containing hate speech only those social networks that have over 2 million users,172 but allowed social networks with less audience, although capable of dissemination of hate speech, to remain in operation.

141. Ergo, Tyrea’s measures were not discriminatory in compliance with Art. 6 (b) of the BITs.

3. No compensation is due

142. Under international law if a measure is introduced within the host state’s regulatory powers in compliance with the criteria of non-discrimination, proportionality and good faith, it is non-compensable.173

143. A non-discriminatory regulation introduced for a public purpose and in accordance with due process is neither expropriatory nor compensable.174

144. For example, in Saluka, the Czech Republic imposed a forced administration upon the investor’s banking enterprise by the State Bank. The tribunal found this measure complied with Article 5 of the BIT between the Netherlands and the Czech Republic with exactly the same terms as in our case and held that the State’s actions were within regulatory powers, therefore, compensation is not due.

145. Since in the present case Respondent complied with all the requirements of Art. 6 of the BITs, there are no legal grounds for paying compensation.

146. Ergo, none of the Respondent’s measures amounts to expropriation in violation of BITs.

V. RESPONDENT DID NOT VIOLATE ART. 3(1) of the BITs

147. Claimants allege that Tyrea’s legislative and administrative measures violated its rights under the BITs by breaching the fair and equitable treatment (the “FET”) standard enshrined in Art. 3(1) of the BITs.175

---

171 Ibid.
172 Germany Votes for 50m Euro Social Media Fines.
173 UNCTAD Expropriation, p. 88.
174 Methanex, ¶7.15; Saluka, ¶255.
175 RfA, p. 6, ¶18.2.
148. The origins of the FET standard may be found in the OECD Draft Convention on the Protection of Foreign Property of 1967. The notes and comments to the convention reveal that FET was historically understood as referring to the minimum standard of treatment under customary international law. The Tribunal should interpret FET provisions exclusively within the limits of this standard.

149. The minimum standard of treatment has its roots in the notorious case of Neer, which provides that an investor is only entitled to compensation if there is outrageous and bad faith conduct on behalf of the host state.

150. This standard has also been endorsed in the practice of arbitral tribunals. For example, in Siemens the tribunal decided to apply it as the BIT between Germany and Argentina in the FET clause did not provide for a different treatment from the customary international standard. Notably, this BIT also clarified FET by reference to "non-discriminatory and unreasonable" measures, exactly in the same way as the applicable BITs.

151. In the instant case, the measures introduced by Respondent did not violate customary international law threshold set by Neer commission. A violation of this standard occurs when a host state’s measures amount to outrageous and bad faith conduct, which is supported with convincing evidence. There is a much stricter threshold for establishing a violation of minimum standard of treatment rather than a violation of FET.

152. Even if the Tribunal decides that the minimum standard of treatment is inapplicable in the present case, Respondent submits that in any event the facts of the dispute do not allow to establish a violation of FET for the below reasons. Respondent did not frustrate Claimants’ legitimate expectations (A). Additionally, Respondent rightfully acted within its regulatory powers (B).

A. RESPONDENT DID NOT FRUSTRATE CLAIMANTS’ LEGITIMATE EXPECTATIONS

153. Under international law, in order to find that a foreign investor had certain legitimate expectations, the following requirements must be cumulatively satisfied: an investor must be given a specific assurance (1), an investor’s expectation must be reasonable and its decision to invest must be based on that expectation (2). None of these requirements has been satisfied in the case.

176 Dolzer, Schreuer, p. 125.
177 Siemens, ¶295; Neer, ¶5.
178 Neer, ¶5.
179 Micula, ¶668; Salaka, ¶304; Glamis Gold, ¶766.
at hand, and absent a stabilization clause (3), Claimant’s expectations that the Respondent’s legal framework would remain unchanged are illegitimate.

1. **Respondent did provide any specific assurance to Claimants**

154. The threshold for establishing a violation of legitimate expectations is quite demanding, since the investor must demonstrate that it received specific assurances from the host state. These assurances may take form of an individualized promise or representation that is directed to a specific investor, and not to the generality.

155. Statements that simply encourage foreign investments cannot give rise to legitimate expectations. Such assurances may only have such an effect if they are “definitive and unambiguous”. The *PSEG* tribunal stated that the general investment encouragement policy did not demonstrate specific promise made directly to the claimant about the success of their proposed project.

156. In the case at hand, Claimants rely on the statements of the spokesperson for the Tyrean Parliament, Mr. Anderson, which stated that in the future Tyrea aimed to provide the basis for the advent and effective cooperation with Claimants under the Media Law.

157. Besides, a government representative has indicated that the government will do their best to assist the people of Tyrea to explore and use new web opportunities. This statement was very wide-ranging and did not refer to a specific investor.

158. The above statements are manifestly of encouraging and welcome nature with no required specificity. Therefore, they could not have given rise to legitimate expectations of Claimants.

159. Furthermore, the statements given by Tyrean official were of purely political character, which is why they could not be regarded as a specific assurance. The same approach was followed in *Continental Casualty*, where the tribunal refused to accept certain public statements

---

180 *Grand River Enterprises*, ¶141; *Glamis Gold*, ¶799; Potesta, p. 107.
181 *Continental Casualty*, ¶261; *EDF v. Romania*, ¶217.
183 *Feldman*, ¶148.
184 *PSEG*, ¶243.
185 *SoUF*, ¶3.
188 *Continental Casualty*, ¶261.
of Minister Cavallo, undertaking not to abandon the convertibility of regime,\textsuperscript{189} since “political statements have the least legal value”.\textsuperscript{190}

160. In the case at hand, the political character of the two statements in question follows from the fact that they were made to the press and at an international conference by the spokesperson for the Parliament and the government representative. Such statements represent a common situation where politicians give unofficial comments on relevant issues. Such statements by their nature cannot give rise to any legitimate expectations on behalf of Claimants.

2. Claimants’ expectations were unreasonable

161. Claimants’ expectations that the legal framework in Tyrea would remain unchanged were unreasonable in light of ethnic tensions between the two major ethnicities inhabiting Tyrea: the Minyar and the Tatyar. The reasonableness of legitimate expectations should be assessed in sociocultural contexts prevailing in the host state,\textsuperscript{191} such as post-conflict situations.\textsuperscript{192}

162. In the present case, Claimants made their investments in 2015, after Tyrea has transitioned from a military dictatorship to a democracy as a result of a civil war in 2013, where the tension between tribes still remained.\textsuperscript{193} It is reasonable to assume that Claimants should have anticipated that Respondent might take necessary measures if ethnic clashes between the tribes were to intensify. It would be unreasonable to suggest that Respondent would not take any action when hate speech propagators resorted to the use of social media platforms to wage hate campaigns, augment their message and reach new audiences\textsuperscript{194} as the situation worsened.

163. Thus, Claimants should have reasonably foreseen that Respondent would exercise its legitimate right to regulate to restore peace and stability within its territory.

3. The BITs do not contain a stabilization clause

164. Investor’s protection is higher when a stabilization clause is present in a BIT because in this case the investor is specifically guaranteed that certain changes of legislation would not affect its investment. This is usually done when the contracting parties to a BIT want to grant additional protection to foreign investors. However, if the BIT does not contain such a clause, no investor can anticipate that a host-state regulatory framework will always remain frozen and unchanging.\textsuperscript{195}

\textsuperscript{189} Ibid., ¶252.
\textsuperscript{190} Ibid., ¶ 261.
\textsuperscript{191} Duke Energy, ¶340.
\textsuperscript{192} Bayindir, ¶193; Toto, ¶245; Islam, pp.101-103.
\textsuperscript{193} SoUF, ¶1.
\textsuperscript{194} Respondent’s Exhibit 2, p. 28.
\textsuperscript{195} Saluka, ¶ 305; Enron, ¶ 261.
165. As stressed by the Parkerings tribunal “[a] State has the right to enact, modify or cancel a law at its own discretion.”196 The absence of a stabilization clause in the BITs further strengthens this position. In fact, in lack of a stabilization clause, a state has an even greater flexibility to regulate pursuant to its essential interests.

166. As stabilization clause is absent in the applicable BITs, Claimants could not have reasonably expected that the changes in Tyrean legislation would not affect their investment.

**B. RESPONDENT ACTED WITHIN ITS REGULATORY POWERS**

167. In any event, under international law states are allowed to introduce reasonable regulatory changes. This inherent power to regulate is often referred to as the “police powers doctrine” by scholars and arbitrators.

168. In *Philip Morris* the dispute concerned the introduction of anti-smoking legislation by Uruguay, which allegedly damaged Claimant’s investment. Claimant, inter alia, referred to the violation of the FET. The tribunal affirmed the host state’s power to introduce regulatory changes in pursuance of a public interest. It mentioned that such measures were not made “outside of the acceptable margin of change” and therefore were lawful within the state’s police powers.197

169. The measures are considered to be within the regulatory powers of the state if they are reasonable (1), proportionate (2) and non-discriminatory (3).

**1. Respondent’s measures were reasonable**

170. The standard of reasonableness is met when there is a “logical connection” between the measure and the policy objective.198 The tribunal in *El Paso* upheld the validity of the host state’s measures as it appreciated that the measures were “based on a reasoned scheme to answer a major crisis”.199

171. Applied to the present case, at the beginning of 2017, street fights and violent altercations between the major tribes were reported for the first time since summer 2012. A year later, ethnic tensions occurred again with hundreds of casualties and subsequent incidents being reported increasingly frequently.200

196 Parkerings, ¶332; *El Paso*, ¶368.
197 *Philip Morris*, ¶423.
199 *El Paso*, ¶325.
200 SoUF, ¶14.
172. Consequently, the Respondent had no other option than to pass Law 0808-L that provided that Claimants had to implement a filtering algorithm preventing the spread of hate speech, request Personal ID card details from both new and existing Tyrean users, and correspondence between the users to the competent authorities. However, the situation across the country worsened rapidly, which is why Respondent had to pass yet another decree reducing the deadline to comply with the above mechanisms to 45 days. The latter was necessary under the circumstances of the constantly progressing destabilization of social climate in Tyrea.

173. As the algorithms flagged an overflow of posts and reviews for human analysts, the support teams of Claimants struggled to handle them quickly. Moreover, it took longer for fake accounts to be flagged than it was necessary for users to create them. The Algorithms of Claimants were clearly not suited to counter the spread of hate and misleading information.

174. In light of such evident negligence to comply with the requirements of Art. 51 of Law 0808-L and dread of slipping once again into civil war, Respondent had to introduce measures that resulted in the blocking of Claimants’ networks.

175. Therefore, Respondent’s measures were reasonable and taken within its regulatory powers in pursuance of a public purpose objective with an ultimate goal of restoring social, ethical and political stability in Tyrea.

2. The blocking of Claimants was proportionate

176. The standard of proportionality is met when there is a reasonable balance between “the charge or weight imposed to the foreign investor and the aim sought to be realized.” The tribunal in LG&E justified the validity of the host State’s measures, in spite of the host state’s actions which have not been best as “an across-the-board response was necessary” to achieve the State’s objectives. More detailed analyses of proportionality is contained in expropriation section above.

201 Ibid., ¶15.
202 Ibid., ¶19.
203 Ibid., ¶19.
204 Ibid., ¶21.
205 Tecmed, ¶122.
206 LG&E, ¶162.
207 Ibid., ¶257.
208 Memorial, IV (C) (1) (ii).
3. Respondent’s measures were non-discriminatory

177. Discrimination against foreign investors has been regarded as an important indicator of failure to grant FET.\textsuperscript{209} A State’s conduct is considered discriminatory when a state’s treatment intentionally favors a certain national or foreign investor against another foreign investor.\textsuperscript{210}

178. It is Respondent’s firm stance that it did not discriminate against Claimants when it introduced its regulatory legislation. More detailed analysis of this can be found in the expropriation section above.\textsuperscript{211}

179. \textit{Ergo}, Respondent did not violate the FET standard contained in Art. 3(1) of the BITs.

VI. IF CLAIMANTS ARE ENTITLED TO COMPENSATION, EXPENDITURE-BASED CALCULATION SHOULD BE APPLIED TO DAMAGES CALCULATION

180. It is Respondent’s firm stance that there was no violation of the BITs, therefore, no damages are due. But if this Tribunal decides otherwise, it should not calculate damages as suggested by Claimants.

181. Claimants contend that the Tribunal should apply the income-based approach which relies on the discounted cash flow (the “DCF”) method. However, the DCF method should not be utilized in the present case since it is too speculative (A). Thus, the only way to accurately estimate damages is on the basis of proven expenditure (B). Finally, certain types of damages sought by Claimants should not be compensated (C).

A. THE TRIBUNAL SHOULD NOT APPLY THE DCF METHOD TO A DEVELOPMENT-STAGE PROJECT DUE TO ITS SPECULATIVE NATURE

182. Art. 6 of the BITs requires to determine the fair market value (the “FMV”) of the investment that was allegedly expropriated.\textsuperscript{212} The FMV is a price that a potential buyer, being a reasonably informed businessman, would pay for the investment.\textsuperscript{213} To determine the FMV, three basic approaches are usually applied in the arbitral practice: the income-based approach, on which the DCF method is based; the market-based approach; and the asset-based approach.\textsuperscript{214}

\textsuperscript{209} \textit{Waste Management}, ¶98.
\textsuperscript{210} \textit{LG&E}, ¶146.
\textsuperscript{211} \textit{Memorial, IV (C) (2)}.
\textsuperscript{212} BITs, Article 6.
\textsuperscript{213} World Bank Guidelines on the Treatment of Foreign Direct Investment, ¶IV.5.
\textsuperscript{214} Kantor, p. 9.; Ripinsky, Williams, p. 183.
184. In the instant case, the DCF method as a reflection of income-based approach cannot be applied since Claimants’ businesses are not going concerns and lack substantial record of financial performance (1), the data presented to the Tribunal is insufficient and projections of future cash flow are unreliable (2), the weighted average cost of capital (the “WACC”) of 5% is groundless (3).

1. Claimants’ businesses are not going concerns and lack substantial historical record of financial performance to claim lost profits

185. The DCF method may be applied if an enterprise is a going concern and has established a historical record of financial performance.\(^{215}\) Otherwise, the valuation is deemed to be too speculative and inherently subjective.\(^{216}\)

186. A going concern is an enterprise that has been in operation for a sufficient period of time to generate data required for the calculation of future income which could have been expected with reasonable certainty if the breach of BITs had not occurred.\(^{217}\) Two or three years is not considered a sufficient time to establish a performance record. For example, the Tecmed tribunal refused to apply the DCF method as investor’s enterprise had operated as an ongoing business for two and a half years, thus, there was no sufficient historical data to prepare reliable estimates.\(^{218}\)

187. For the same reason, the tribunal in American International Group chose not to apply the DCF method as the enterprise in this case had been in operation for four and a half years.\(^{219}\)

188. In the case at hand, Claimants’ businesses cannot be regarded as going concerns. FriendsLook had been in operation in Tyrea for three years, Whistler and SpeakUp for two and a half year.\(^{220}\) Such a short period is insufficient to establish a reliable performance record and precludes the use of the DCF method.

189. Hence, the DCF method cannot be applied since Claimants are neither going concerns, nor have sufficient historical record of financial performance.

\(^{215}\) OIEG, ¶660; Rusoro Mining, ¶759; Enron, ¶385; Metalclad, ¶120; World Bank Guidelines on the Treatment of Foreign Direct Investment, ¶IV.6.

\(^{216}\) Enron, ¶385; Siemens, ¶357.


\(^{218}\) Tecmed, ¶186.

\(^{219}\) American International Group, ¶108.

\(^{220}\) SoUF, ¶6.
2. The financial performance data presented to the Tribunal by Claimants is insufficient and projections of future cash flow are unreliable

190. According to the criteria set forth in *Micula*, a claimant bears the burden of proof to establish that its investment constituted a profit-making activity and would have been profitable, were it not for host state wrongdoing. Claimants’ DCF valuation is speculative since the data presented to the Tribunal is insufficient (a) and the financial projections for future cash flow are unreliable (b).

   a. The financial performance data presented to the Tribunal by Claimants is insufficient

191. Adequate evidentiary support is one of the key criteria for applying the DCF method. As stated by the tribunal in *Micula*, the calculation may be supported by business plans, invoices, internal documents, such as budgets and memos. Business plans of investors are regarded as the most reliable evidence to estimate possible future cash flows. Nonetheless, assessment should be based not only on a business plan, additional reliable data should be provided.

192. In the instant case, the only evidence that Claimants presented to this Tribunal is the report of Claimants’ expert. Claimants failed to submit to the Tribunal any business plans with financial projections, sales strategies and market analyses. It is therefore impossible to assess the accuracy of the projections based solely on the data provided by Claimants.

193. Thus, the data presented to the Tribunal is insufficient to apply the DCF method, which makes any assessment results based thereon speculative and unfounded.

   b. The financial projections for Claimants’ lost profits are unreliable

194. It is required that the financial projections used for the application of the DCF method be reliable. This means that that compensation may be awarded only if future profitability could be established with some level of certainty. As highlighted in *ADM*, lost profits are allowable insofar claimants prove that the anticipated profits a a shall be not merely possible but need to

221 *Micula*, ¶1009.
222 *Micula*, ¶1073.
223 *ADC*, ¶507; *Rusoro Mining*, ¶759
224 *Eastern Sugar*, ¶355.
225 Claimants’ Exhibit 7, pp. 14-19, lines 480-580.
226 PO No.2, ¶2; Separate Opinion of Ian Brownlie, *CME*, ¶59.
227 *Rusoro Mining*, ¶759.
228 *Vivendi*, ¶8.3.8.
probable or reasonably anticipated, meaning that projections of future cash flow should be credible.\textsuperscript{229}

195. In the present case, the report presented by Claimants’ expert shows that the projection of revenues for 2018 more than doubles the revenues for 2017.\textsuperscript{230} Even though Claimants were going to implement Tyrean-specific products to the functioning of their social networks,\textsuperscript{231} such a huge difference in numbers is unexpected, and with no explanation provided for such calculation is too speculative and uncertain.

196. Consequently, the financial projections made by Claimants are unreliable and not underpinned by sufficient evidence, which precludes the use of the DCF method.

3. WACC of 5\% is unfounded and speculative

197. Should the Tribunal decide to apply the DCF method, it should also use a correct discount rate. Discount rate is required to obtain the present value of future cash flows,\textsuperscript{232} which, \textit{inter alia}, includes country risk.\textsuperscript{233} Country risk means the exposure to a change in value of an investment or cash position resultant upon government action.\textsuperscript{234} As the tribunal in \textit{Tidewater} noted, it should consider the value that a willing buyer would have placed on the investment.\textsuperscript{235}

198. The Claimants’ report suggests an extremely low discount rate of 5\%,\textsuperscript{236} which is totally unfounded.\textsuperscript{237} By way of example, following nationalization of foreign oil fields by Venezuelan authorities, tribunal in \textit{Mobil and others},\textsuperscript{238} estimated discount risk premium at 18\%.

199. Among other things, the level of tensions in a state,\textsuperscript{239} the level of permitted free speech\textsuperscript{240} are considered to be essential for country risk determination.

200. Tyrea’s democracy is young is a state with a very short history of seven years,\textsuperscript{241} that emerged from a civil war.\textsuperscript{242} While all three social networks were in operation, at the beginning of 2017, brutal violence spread across Tytea, causing massive casualties.\textsuperscript{243} Even if Claimants were not blocked in the beginning of 2018, the value of their investment would have certainly decrease

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{229} ADM, ¶285.
\item \textsuperscript{230} Claimants’ Exhibit No. 7, pp. 17-18, line 545.
\item \textsuperscript{231} RfA, p. 5, ¶14, line 165.
\item \textsuperscript{232} Kantor, p. 44; Trenor, p. 110.
\item \textsuperscript{233} \textit{OI\textsc{E}G}, ¶708; \textit{Mobil and others}, ¶365.
\item \textsuperscript{234} Buckley, p. 312.
\item \textsuperscript{235} \textit{Tidewater}, ¶186.
\item \textsuperscript{236} Claimants’ Exhibit 7, p. 18.
\item \textsuperscript{237} Respondent’s Exhibit 4, p. 34.
\item \textsuperscript{238} \textit{Mobil and others}, ¶368.
\item \textsuperscript{239} Howell.
\item \textsuperscript{240} Garcia Dominguez, p. 98.
\item \textsuperscript{241} SoUF, ¶1.
\item \textsuperscript{242} Ibid.
\item \textsuperscript{243} Ibid., ¶14.
\end{itemize}
\end{footnotesize}
due to the internal crisis in Tyrea. All these factors should have been taken and should be taken now into consideration while calculating country risk premium in Tyrea.

201. Thus, the discount rate suggested by Claimants is too low under the circumstances of the present case.

**B. PROVEN EXPENDITURE METHOD SHOULD BE APPLIED IN THE PRESENT CASE**

202. In the case at hand, the Tribunal should apply the proven expenditure method.244

203. Awarding only the amount invested in the asset is appropriate in speculative situations.245 This approach finds support in the arbitral practice.246 For instance, the *Biloune* tribunal did not award lost profits since claimants could not provide any reliable and realistic estimate of them. This tribunal stated that FMV is best arrived at by reference to proven expenditure method.

204. As was demonstrated above, the alleged damages suffered by Claimants are too speculative. Therefore, it is only reasonably to apply the proven expenditure method.

205. For the aforementioned reasons, if any compensation is due to Claimants, it should be awarded based on Claimants’ proven expenditure instead of DCF method used by Claimants.

**C. CERTAIN TYPES OF DAMAGES REQUESTED BY CLAIMANTS SHOULD NOT BE COMPENSATED AT ALL**

206. Regardless of what method of calculation applies, Claimants are not entitled to compensation of certain types of damages they request. Namely, damages for lost opportunity to proceed with the market expansion to the neighbouring countries (1) and cost of the equipment as part of the direct damages (2) should not be compensated in principle.

1. **Claimants are not entitled to damages for the lost opportunity to proceed with market expansion**

207. Claimants demand damages for the loss of opportunity to expand their business to the neighboring states – Alcadia and Larnacia.247 After the Claimants’ blocking, these two states decided to stop the negotiations with Claimants for establishment of Claimants’ businesses in their territory.

---

245 *PSEG*, ¶304; *Copper Mesa Mining*, ¶7.24, 7.27, 11.4; *Siemens*, ¶362-389.
246 *Biloune*, ¶228-29;
247 RfA, ¶15.
208. Any damages must be sufficiently certain in order to be compensated. In Yukos, the tribunal rejected compensation for the claimant’s alleged loss of a 70% chance to obtain a listing on the NYSE, which would have potentially increased the value of the investment, regarding the listing itself and the benefits claimant might have derived from it as too uncertain.

209. In the instant case, Claimants had no guarantees that their expansion to Alcadia and Larnacia would have been profitable. This project did not even begin operation, which means any meaningful estimation of Claimants’ potential profits impossible. Furthermore, the Minyar and the Tatyar, two ethnicities that have tensions in Tyrea, also form part of population in Alcadia and Larnacia, thus, the very same problem and further potential clashes could occur in the territory of these states.

210. Therefore, the claim for damages for lost opportunities of the expansion of Claimants’ business in the neighboring countries is unfounded and speculative in its entirety.

211. Ergo, the DCF method cannot be applied in the present case due to its speculative nature.

2. Cost of the equipment is not part of the direct damages and should not be compensated

212. Contrary to Claimants’ assertion, Claimants were not deprived of the equipment acquired for operations in Tyrea or its value and, thus, it should not be compensated as part of direct damages.

213. Awarding compensation for the cost of assets which are still owned and used by an investor cannot be justified from a legal or economic point of view, even if the claimant subsequently becomes unable to obtain the level of return it was hoping for at the time of making such expenditures.

214. In the present case, the equipment is still owned by Claimants. For this reason, the claim for the costs of this asset is groundless.

215. Moreover, Claimants have an obligation to mitigate damages and should not receive compensation for losses that they could have avoided.

216. Duty to mitigate requires an injured party to take reasonable steps to limit the extent of the injury. In the case at hand, Claimants can still use the equipment in their offices in other

---

248 Caratube, ¶1149; ADC, ¶515.
249 Yukos, ¶1702.
250 Ibid, ¶1779.
251 SoUF, ¶1.
252 Wöss, p. 215; Middle East Cement, ¶167.
countries. As an alternative, they can take reasonable steps to mitigate damages by re-selling the equipment and thereby returning its costs.

217. Hence, Claimants are not entitled to receive damages for equipment costs since these losses could have been avoided by means of mitigation.

218. For the aforementioned reasons, damages for the loss of a chance to proceed with the expansion to the neighbouring countries and cost of the equipment should not be compensated at all.
PRAYER FOR RELIEF

219. For all the reasons stated above, Respondent respectfully requests this Tribunal to find that:

I. Respondent’s request for provisional measures shall be granted;

II. The Tribunal has no jurisdiction over the present case due to the denunciation of the ICSID Convention by the Respondent;

III. The Tribunal has no jurisdiction to examine the dispute on a multi-party basis;

IV. Respondent did not expropriate Claimants’ investments;

V. Respondent did not violate fair and equitable standard of treatment; and

VI. No damages are due or, in any event, the appropriate method for calculation of damages is proven expenditure method.

Respectfully submitted on 23 September 2019

by

Team Vicuna

On behalf of Republic of Tyrea