TEAM CODE: PR-26

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON D.C.

IN THE PROCEEDING BETWEEN

NIXIO PETROLEUM LIMITED

(CLAIMANT)

AND

REPUBLIC OF GONDWANA

(RESPONDENT)

(ICSID CASE NO. ARB/11/86)

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LIST OF ABBREVIATIONS

• ARB	Arbitration
• Art.	Article
• BIT	Bilateral Investment Treaty
• DGH	Director General of Hydrocarbon
• ECT	Energy charter treaty
• Ed.	Edition
• EPLR	Exploration and Production License Regime
• Hon'ble	Honourable
• Ibid	Ibidem
• ICSID	International centre for settlement of investment dispute
• ICSID Convention	Convention on the Settlement of Investment Dispute between State and Nationals of other States
• JOA	Joint operating agreement
• No.	Number
• NOC	National Oil Company
• p.	Page
• Para.	Paragraph
• PSC	Production sharing contract
• UNIDROIT	International Institute for the Unification of Private Law
• v.	Versus
• VCLT	Vienna Convention on Law of treaties
• Vol.	Volume

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STATEMENT OF JURISDICTION

The Claimant has approached the Hon'ble International Centre for Settlement of Investment Disputes under Article 25 of ICSID Convention read with Article 26 (4) of the Energy Charter Treaty.

STATEMENT OF FACTS

- Gondwana is an Asian country well known in the oil industry as 'Asia's hottest offshore exploration frontier'. The nation's energy sector is an important factor of its economy and the oil revenue forms a major section in the GDP and total government revenue of the country. For development of oil production and related revenues, the government introduced the EPLR regime aimed at liberating the investments in the oil sector and further executed a PSC Model for the same. Bids were invited and the Government entered into contracts with successful bidders.
- In the year 2001, Government invited tenders to bid for blocks located in the offshore coasts of Province of Shahime, Gondwana Ocean. The consortium of Gondwana Oil Corporation Ltd and Nixio Petroleum became the successful bidders.
- A PSC was entered into between Government of Gondwana and Contractor on 13 November 2001. The two companies entered into a JOA in conformity with Article 7 of the PSC on 15 December. Nixio was appointed as operator.
- In 2002, Nixio started exploration and by 2005 and a significant discovery was made in the basin. The company started with the production in 2006. Between 2002 and 2012 there was a fall in production and the government sought clarifications for the same.
- As on 12 March 2002, Operator in response stated that certain geological factors were impeding production. The DGH conducted an inquiry comprising of prominent NOC members and found the reasons cited by Nixio to be baseless.
- In May 2012, the Income Tax Department raided the office of Nixio at New Ankara and DGH's cancelled the essentiality certificate issued for the drilling equipment and held Nixio liable for taxes on drilling equipments.

- Acting on the DGH's report, the PSC was terminated through a show cause notice dated 5 September 2013. Also, the participating interest of Nixio was transferred to Gondwana Oil Corporation. As on 12 September, 2013 Minister of Petroleum and Natural Gas at a press conference declared the news regarding termination of PSC between the two parties.
- Nixio's chairman, Mr. Jeofrey gave a statement to press stating that the Government had been harassing the company since early days of contract and denied all charges. Immediately after termination of PSC, Nixio invoked arbitration under Article 33 of PSC contesting validating of termination. The tribunal held the validity of termination.
- Newspaper report dated 15 July 2014 in the Gondwana Economic Times arrived at the conclusion that bidding remained biased towards NOC's which dominated the Oil sector. Also, questions were raised regarding the fact that son of Mr. Ganesh Jhah, Minister of Petroleum and Natural Gas was a shareholder in Gondwana Oil Corporation Ltd.
- Nixio alleges that the Gondwana Government and related authorities are deliberately causing numerous problems for the company and the acts of the government are causing material damage to the reputation of the Company. Nixio Oil seeks award of damages for breach of the treaty and compensation for expropriation.
- As on 21 August 2014, Nixio filed a request for registration of arbitration with ICSID against the Republic of Gondwana. On 19 September 2014, the Centre in accordance with Rule 5 of ICSID Rules, acknowledged receipt of the request and transmitted a copy to Republic of Gondwana.

STATEMENT OF ISSUES

I. **WHETHER THE CLAIMS MADE BY THE CLAIMANT FALLS WITHIN THE JURISDICTION OF ICSID?**

II. **WHETHER THE ACTIONS OF RESPONDENT AMOUNT TO VIOLATION OF ART. 2 AND 26 OF THE ECT?**

III. **WHETHER THE RESPONDENT CAN EVOKE ART. 17 PART III OF THE ECT?**

IV. **WHETHER THE TERMINATION OF THE PSC AMOUNTS TO VIOLATION OF ART. 10 AND 21 OF THE ECT?**

V. **WHETHER TRANSFERRING OF PARTICIPATING INTEREST IN THE PSC AMOUNTS TO EXPROPRIATION BY THE GOVERNMENT UNDER ART. 10, 12 AND 13 OF THE ECT?**

SUMMARY OF ARGUMENTS

I. THE TRIBUNAL HAS JURISDICTION OVER THE CLAIMS SUBMITTED BY THE CLAIMANT.

The requirements as per the ICSID convention under article 25 are satisfied. The dispute is of legal nature and concerns investment and is directly related to it. Claimants are national of Cedonda which is a party to the ICSID convention. The consent for the instant case has been given in the Energy Charter Treaty. And on the part of the claimant it was given on filing the claims in the ICSID tribunal. Both the contract and the treaty based claims are admissible. Therefore the tribunal has jurisdiction *ratione materiae*, *ratione personae*, *ratione voluntatis*.

II. THE ACTIONS OF THE GOVERNMENT OF GONDWANA AMOUNT TO VIOLATION OF ART. 2 AND ART. 26 OF THE ECT.

The Actions of the Government of Gondwana amount to violation of Art. 2 and Art. 26 of the ECT as the government has failed to provide fair and equitable treatment to the investment of the claimant, further, they have failed to provide a stable business environment. Also, the claimant was not provided with the opportunity to show cause for their actions which is against the principle of natural justice. They have also failed to follow the due process in terminating the contract, all these circumstances make it clear that the respondent had no intention to establish a long term cooperation with the claimant which is in violation of Art. 2 of the treaty.

III. THAT THE RESPONDENT CANNOT INVOKE ART. 17 PART III OF ECT.

The Respondent cannot invoke the as the claimant is a national of Republic of Cedonda which is a signatory to the ECT, it can be reasonably concluded from the factsheet that the claimant has substantial business activity in Republic of Cedonda and is not a ‘mailbox company’, thereby satisfying all the

requirements to claim protection. Further, the respondent cannot invoke Art. 17 part III of ECT retrospectively as it would breach investor's legitimate expectations which is against Art. 2 of the ECT.

IV. THAT THE TERMINATION OF PSC AMOUNTS TO VIOLATION OF ART. 10 AND ART. 21 OF ECT.

The termination has violated article 21 of the ECT which states that Article 10(2) and 10(7) shall apply to Taxation Measures of the Contracting Parties. The claimants were made liable for not paying taxes for not using the drilling equipment. However the courts in Gondwana have stated that the end use does not matter and it is enough that the equipment is required for the manufacturing purposes. Hence under similar circumstances claimants should be given most favoured treatment and the move of Gondwana was discriminatory in nature.

V. THAT THE TRANSFER OF PARTICIPATING INTEREST IN THE PSC AMOUNTS TO EXPROPRIATION BY THE GOVERNMENT.

There has been a forceful taking of the investments made by claimant in Gondwana after termination of PSC. The termination and transfer of the participating interest in the PSC has resulted in the Claimant to surrender all previously made investments in Gondwana, both capital and physical. Actions and omissions of the State have had and still have a direct negative impact on the reputations Nixio and have resulted in the breach of provisions of the ECT, thus making the respondents liable for compensation for expropriation and damages for breach of treaty.

ARGUMENTS ADVANCED

CONTENTION I: THE TRIBUNAL HAS JURISDICTION OVER THE CLAIMS SUBMITTED BY THE CLAIMANT.

It is humbly submitted that this Tribunal has jurisdiction to hear the claims submitted by the Claimant and these claims are admissible under the ECT. Gondwana legal system has failed to administer justice. Therefore Claimant seeks a 'neutral' forum which would share its values in the form of international arbitration outside the jurisdiction of the host state.[1]

1.1 The Tribunal has Jurisdiction under the ECT

The ECT under Art. 26 (4) constitutes the governing law for the present proceedings that have been instituted, for the alleged violation of various treaty provisions. Consent is the cornerstone of the jurisdiction of the Centre[2]. A treaty-based arbitration is a unique category of contract based arbitration where the Contracting States consent to claims by all the present and potential investors subject to the satisfaction of the nationality requirement along with the fulfilment of requirements for a valid investment[3]. The ICSID convention requires four preconditions for jurisdiction; a) the dispute needs to be of legal nature; b) the dispute needs to arise directly out of an investment; c) the non-State party to the dispute needs to be a national of another Contracting State; d) consent to submit the dispute to ICSID needs to be granted by both parties in writing[4].

[1] Factsheet, P. VIII para 1

[2] *Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention*, March 18, 1965

[3] Sornarajah Muthucumaraswamy, *The International Law on Foreign Investment* (3rd Ed. 2010). p. 306.

[4] ICSID Convention Art. 25(1), Oct. 14 1966, P. 18

A dispute concerning legal rights or reparations for breach of legal obligations is a 'legal dispute' for the purpose of the ICSID Convention.[5] This dispute involves the legal rights and obligations that the Respondent owes under the ECT. The Claimant is seeking reparations for the Respondent's breach of legal obligations under Articles 2, 10, 21, and 13 of ECT. As such, this dispute is of a legal nature for the purposes of Art. 25 (1) ICSID Convention.

The Tribunal has jurisdiction *Rationae Materiae*. A two-fold test must be applied in determining whether the Tribunal has competence: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in it.[6]

The nations of Cedonda and Gondwana are both party to the ECT and ICSID. The necessary requirements for an 'investment' as per Art. 1(6) of the ECT have been fulfilled and the Claimant comes within the definition of 'investor' under Art. 1(7) of the ECT. After entering into the PSC, the Claimant started exploration activities in 2002. The Claimant conducted production activities for six fiscal years till 2012.[7] Therefore Claimant has been making *bona fide* investments in Gondwana on a large scale since 2002.

It is further submitted that from the facts and circumstances of the case, it can be reasonably concluded that the Claimant's investment is the main subject matter of the dispute. In order to establish that the subject of the dispute is an investment, the 'double barrelled test'[8] is used. This test is satisfied if "the dispute arises out of an investment within the meaning of the

[5] *Supra* n. 2, at Para. 26.

[6] Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Award (Dec. 29, 2004) Para. 68.

[7] Factsheet, P. V Para. 2

[8]Malaysian Historical Salvors Sdn, Bhd v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007), Para. 55.

convention", and "as defined in the parties consent to ICSID arbitration, in their reference to the Treaty."[9] The Claimant submits that large scale investments have been undertaken in the State with regard to exploration of oil in the basins and the termination of the PSC has violated provisions of the ECT and has led to expropriation of the investments and violation of the protections guaranteed under the treaty. Therefore the dispute has arisen directly out of the investment.[10]

The Tribunal Has Jurisdiction *Ratione Personae* as the place of incorporation or the 'nationality' of an entity is the sole requirement for it to qualify as an 'investor' under the ECT[11]. A company's nationality is determined primarily by its place of incorporation.[12] Nixio Petroleum Company is a company incorporated according to the laws of the republic of Cedonda established in 1955. The Claimants are the non-state party and is a national of Cedonda which is a party to the ICSID convention. It is incorporated according to the laws of Republic of Cedonda. The essential requirement of parties for ICSID jurisdiction is thus fulfilled. Therefore tribunal has jurisdiction *ratione personae*.

The Tribunal has jurisdiction *Ratione Voluntatis*. The instant dispute concerns the violation of the provisions of the ECT. The Contracting States have consented to resolve the disputes concerning investments through International arbitration at the option of the investor[13] and Investor party to the dispute may choose to submit it for resolution to The ICSID[14]. The Tribunals have referred to the possibility of the consent being granted by the State in a BIT.

[9]Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 31, 2001) Para. 44; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award (Dec. 29, 2004) Para. 68.

[10] *Ibid.*

[11]Energy Charter Treaty Art. 1(7), April 1998.

[12] TDM Infrastructure Pvt. Ltd v. Sue Development India Pvt. Ltd. (2008) 14 SCC 271.

[13] Energy Charter Treaty Art. 26(4), April 1998.

[14] Ibid

That will not grant jurisdiction per se to ICSID, for the consent of the investor will be lacking. But once the investor files a claim with the Center, it is considered that the two parties have consented to submit the dispute to arbitration before ICSID[15]. On its part, consent was granted by Claimant through the institution of these proceedings.[16]

1.2 Tribunal has jurisdiction over Contract based and Treaty based claims

The Tribunal has jurisdiction over Claimant's contract based claims arising under PSC by virtue of Art. 10 of the ECT. Claimant seeks arbitration before the ICSID on the basis of Art. 26 (4) of the ECT. In the present case Art. 10 the ECT clearly states that each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting party. Art. 10 of the ECT should be considered as an '*umbrella*' Clause. They are often referred to as 'umbrella clauses' because they put contractual commitments under the BIT's protective umbrella.[17] In *SGS v Philippines*[18] it was decided that the umbrella clause applies to all breaches of the relevant Investor-State contract.

The Tribunal, therefore, has jurisdiction over contractual disputes arising under the PSC, including any purely contractual claims that were not also premised on the Treaty's substantive provisions.

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[15] Eudoro Armando Olguin V. Republic of Paraguay, ICSID Case No. ARB/98/5, Award (July 26, 2001); Tradex Hellas, S.A. v. Republic of Albania, No. ARB/94/2, Award (Dec. 24, 1996).

[16] See, Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award (June 27, 1990) Para. 4; American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997) Para. 1-3; SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction (Jan. 29, 2004) Para. 30-31; Generation Ukraine Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003) Para. 12; Tokios Tokelės v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (April 29, 2004) Para. 94-100; Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction (April 22, 2005) Para. 108.

[17] Christoph Schreuer, *Travelling the BIT Route: of Waiting Periods, Umbrella clauses and Forks in The Road* (Vol. 5 No. 2 April 2004).

[18] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction (Jan. 29, 2004)

Jurisdiction of the Tribunal is determined by the combination of the BIT and the ICSID Convention[19]. The Umbrella Clause ensures observance of the commitment undertaken by both the contracting parties. Art. 38(1) of ICJ states that '*treaties are source of International Law*'. If a breach of contract at the same time violates a treaty applicable between an investor and the host State, it will give rise to the international responsibility of the host State.[20] For this tribunal to assume jurisdiction, there has to be a breach of a substantive treaty provision,[21] which in the present case is the breach of Articles 2, 10, 12, 13 and 21 of ECT.

1.3 Previous Contract Not To Exclude Jurisdiction of ICSID

The Investor is not bound by earlier contractual commitments when making its choice. It may opt for arbitration even though the contract with the state included forum selection clause in favor of the host state's court or different type of arbitration[22]. The selection of forum in agreement does not affect the exclusive jurisdiction of ICSID even if there had been a precondition for settlement of dispute in the local courts of the host state.[23]

The contractual forum mentioned in the PSC of the Claimants and Republic of Gondwana is New Ankara and the governing law is Gondwana. This does not affect the exclusive jurisdiction

[19] *Ibid*, Para. 154.

[20] Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005) Para. 53.

[21] Supra n. 18, at Para. 162.

[22] Jan Paulsson, *Arbitration Without Privity, ICSID Review Foreign Investment Law Journal* (Vol. 10 1995), P. 232; Walde, *Investment Arbitration Under The ECT- From Dispute Settlement To Treaty Implementation*, 12 Arb Int 429 (1996) P. 445

[23] Lanco International Inc. v. The Argentine Republic, ICSID Case No.ARB/97/6, Award (Dec. 8, 1998); SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay, ICSID Case No. ARB/07/29, Award (Feb. 10 2012); Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award (Nov. 20, 2000)

of ICSID to submit claims. A contractual forum selection clause should not be permitted to override the jurisdiction to hear the Treaty claims of a tribunal constituted under that Treaty.[24]

1.4 Amicable Settlement Provisions Do Not Bar Jurisdiction

Several ICSID Tribunals have decided that amicable settlement provisions do not bar jurisdiction.[25] A number of tribunals have confirmed that where negotiations are bound to be futile, there is no need for the waiting period to have fully lapsed[26]. It is submitted that after the arbitration proceedings in Gondwana there was no scope of any negotiation and therefore, the Claimant initiated proceedings under ICSID.

Thus, it is humbly submitted that the legal system of Gondwana failed to administer justice, as a result of which the Claimant has approached the ICSID in hope of effective administration of justice.

[24] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award (Feb. 10 2012).

[25] Ronald S. Lauder v. The Czech Republic, UNCITRAL Para. 187-191; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Feb. 5, 2002) Para.891; CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision (Sept. 1, 2006) Para. 122.

[26] Ronald S. Lauder v. The Czech Republic, UNCITRAL, Award (Sept. 3, 2001) Para. 187-191; Consorzio Groupement L.E.S.I. – Dipenta v. People's Democratic Republic of Algeria, ICSID Case No. ARB/03/08, Award (10 January, 2005) Para 32(iv); SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/10/13, Decision on Jurisdiction (Aug. 6, 2003) Para. 184; Ethyl Corporation v. The Government of Canada, UNICTRAL, Award on Jurisdiction (June 24, 1998) Para. 84.

CONTENTION II: THE ACTIONS OF THE GOVERNMENT OF GONDWANA AMOUNT TO VIOLATION OF ART. 2 AND ART. 26 OF THE ECT.

It is humbly submitted before this tribunal that the actions of the Government of Gondwana amount to violation of Art. 2 and Art. 26 of the ECT as they have failed to provide favorable conditions for the sustenance of a long term relationship with the Claimant. We further contend that their treatment violates the most basic notions of proper governmental conduct and respect for the rule of law.

The essence of ECT lies in promoting a long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.[27] However, after the initial objections raised by the government regarding the decrement in production, the government without providing an opportunity to the investor to show cause proceeded directly to terminate the contract. From these actions of the government it can reasonably be concluded that Gondwana is not an investor friendly nation.

The Claimant is among the global leaders in the sector of Oil and Gas. On the contrary, the reputation of the Government of Gondwana with respect to their treatment of private investors is questionable and allegations of bias towards NOCs and obstruction of formation of coherent policy, are being raised.

2.1 The Respondent has violated the Principles of Natural Justice (*Audi Alteram Partem*)

Audi Alteram Partem is a fundamental fair procedure that both the sides should be heard. This is the most far reaching of the principles of natural justice. *Coke*'s report quotes from Seneca: "*That where justice is violated it is no justification that the decision was correct*[28] implying

[27] Energy Charter Treaty Art. 2, April 1998.

[28] *See,* Earl v. Slater & Wheeler (Airlyne) Ltd. [1973] 1 WLR 51, Seneca's sentiment is, "*Quicunque aliquid statuerit parte inaudita altera, aequum licet statuerit, haud aequus fuerit*".

that a dismissal held without a hearing was held intrinsically unfair, even though fully justified."

The main pillars of the ECT are (a) protection of investment of the investor and (b) providing non-discriminatory conditions for energy trade.

The Respondent has violated both these principles by, firstly, expropriating the interest of the Claimant without providing any compensation and secondly, the Government has resorted to discriminatory measures by not providing an opportunity to the Claimant of being heard.

In the present case the Claimant was served a notice on September 5th, 2013 by the Respondent, however, on 12th September, 2013 it was made public, by the Minister for Petroleum and Natural Gas at a press conference, that the contract between the Claimant and the Respondent had been terminated and the participating interest of the Claimant had been transferred to the Respondent.

This was in contravention to the provisions of PSC which provide that a notice of 90 days shall be given to the contractor[29] and it further provides that if the circumstances that give rise to right of termination under Art. 30.3(f) are remedied within the period of 90 days granted by the government following the notice of the government's intention to terminate the contract as aforesaid such termination shall not become effective[30]. The Supreme Court has held, "Any order passed without giving notice is against the principle of natural justice and is void *ab initio.*"[31] In *Delhi Transport Corporation* v. *DTC Mazdoor Union*[32], Supreme Court of India held that "the *audi alteram partem* rule, in essence, enforce the equality clause in Art 14 and it

[29] Model Production Sharing Contract Art. 30.3, NELP – IX (2010), Nov. 13, 2001, P. 68

[30] Model Production Sharing Contract Art. 30.5, NELP – IX (2010), Nov. 13, 2001, P. 69

[31] *Municipal Board Pushkar v. State Transport Authority*, AIR 1965 SC 458

[32] AIR 1991 SC 101,*See Cantonment Board, Dinapore v. Taramani*, AIR 1995 SC 61

is applicable not only to quasi-judicial bodies but also to administrative order adversely affecting the party in question unless the rule has been excluded by the Act in question."

Further, the apex court has held that the notice must give reasonable opportunity to satisfy the requirements of the notice or to show cause.[33] The stipulated time as per the contract governing the relationship between the two parties was 90 days[34] whereas the time between the issuing of show cause notice and termination of contract was only 7 days and therefore unreasonable. Therefore as the Claimant was not provided with a reasonable opportunity, there has been a serious prejudice which is in violation of the non-discriminatory principle enshrined in the treaty.

The order of the Government is liable to be set aside as the Claimant was called upon to show-cause; however, the opportunity to do so was not accorded to them.

2.2 Factors responsible for fall in production were beyond the control of the Claimant (Force Majeure)

As defined under the PSC '*force majeure*' means, 'any cause or event, lying beyond the reasonable control of, and unanticipated or unforeseeable by, and not brought about at the instance of, the Party claiming to be affected by such event, or which, if anticipated or foreseeable, could not be avoided or provided for, and which has caused the non-performance or delay in performance.'[35]

[33] State of J&K v. Haji Wali Mohd., AIR 1972 SC 2538

[34] *Supra* n. 29.

[35] Model Production Sharing Contract Art. 31.2, NELP – IX (2010), Nov. 13, 2001, P. 70, 'Force Majeure shall include natural phenomena or calamities, earthquakes, typhoons, fires, wars declared or undeclared, hostilities, invasions, blockades, riots, strikes, insurrection and civil disturbances but shall not include the unavailability of funds.'

UNIDROIT Principles state that, 'Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.'[36] In *Lebeaupin v Crispin*, *force majeure* was held to mean all circumstances beyond the will of man, and which it is not in his power to control.[37] The essential elements for force majeure to exist are, its occurrence with or without human intervention and it being completely beyond the parties' control and power to have prevented its consequences.

In the present case, there also lies a violation of Art. 31.7 of the PSC[38] whereby in such a situation, the parties must meet and discuss course of action to be taken to mitigate the effects. Claimant in reply to the clarification sent a letter dated 12th March, 2012 stating that certain geological factors like the flow of liquids within the reservoir were responsible for the drop in production and the same was beyond the control of the Claimants, after which no actions were taken by the Respondent to mitigate the geological factors impeding the production.

2.3 Due Process and procedures for amicable settlement have not been followed by the Respondent

There is authority to support the proposition that the cooling-off period, that is, the period of time (three months in the ECT) within which the Investor and the Contracting party shall attempt to settle their dispute amicably is in fact a procedural issue. It could be argued, however, that as far as the ECT is concerned, the attempt to settle the dispute amicably within

[36] UNIDROIT Principles Art. 7.1.7, 2010.

[37] [1920] 2 KB 714, P. 719

[38] Model Production Sharing Contract Art. 31.7, NELP – IX (2010), Nov. 13, 2001, P. 70, 'Notwithstanding anything contained herein above, if an event of Force Majeure occurs and is likely to continue for a period in excess of thirty (30) days, the Parties shall meet to discuss the consequences of the Force Majeure and the course of action to be taken to mitigate the effects thereof or to be adopted in the circumstances.'

a period of three months is a precondition for a valid arbitration agreement. This emerges clearly from the language of Art. 26 (1), (2) and (3).

Firstly, it is evident from the context of Art. 26 that the intent of the drafters of the ECT was that the disputing parties shall attempt to settle their dispute amicably. *Secondly*, Art. 26 (3) further provides that the offer of consent is given in accordance with the provisions of Art. 26. This implies that a contracting party's consent to arbitrate is dependent on the exhaustion of the amicable settlement requirement within the prescribed period. It follows therefore that an arbitration agreement will not be concluded unless such an attempt has taken place. In the present case, however, no attempt was made by the Government to resolve the dispute by means of negotiations or conciliation proceedings regarding violations of the provisions of ECT and also hints at the Government's intention to not foster a long-term relation with the contracting party.

In March 2012, in a letter to the Government, the Claimant made it clear that the factors responsible for impeding production were beyond their control (*Force Majeure*)[39] as under Art. 31. 1[40] of the PSC. However, notwithstanding this, the government terminated the contract of the Claimant without adequate notice[41] as the time period between the issuing of notice and the public statement announcing the termination of the contract of the Claimant was that of just one week, much less than the stipulated 90 day period. There has thus been a procedural abuse and a blatant violation of the principle of Natural Justice. Furthermore, if the government had

[39] *Supra* n. 35.

[40] *Supra* n. 35 'Any non-performance or delay in performance by any Party hereto of any of its obligations under this Contract, or in fulfilling any condition of any License or Lease granted to such Party, or in meeting any requirement of the Act, the Rules or any License or Lease, shall, except for the payment of monies due under this Contract or under the Act and the Rules or any law, be excused if, and to the extent that, such non-performance or delay in performance under this Contract is caused by Force Majeure as defined in this Art..'

[41] Model Production Sharing Contract Art. 30.3, NELP – IX (2010), Nov. 13, 2001, P. 68.

followed procedure, it would have given time for geological factors to stabilize causing the production levels to rise.

2.4 Respondent is bound by the principle of Promissory Estoppel

Promissory estoppel may be defined as, "Where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him"[42] This doctrine applies when among other things there is clear and unequivocal promise relying on which the other side acts to his prejudice.[43]

The PSC was entered into by both the parties after careful evaluation of each other. The Claimant has a strong standing on the international front and is a leading brand in E&P sector. The Government through an improper conduct terminated the contract, without providing reasonable time to the Claimants to put forward their case. There has been a *prima facie* denial of principles of Natural Justice. No due process was followed before termination and process of amicable settlement has been vehemently ignored and the Claimant denies all allegations put forward by the government against it. *Per contra* it is the government which has acted wrongfully, breaching the terms of contract and expropriating the investments made by the Claimants. There has been a procedural abuse of power and the Claimant seeks damages and compensation for the same.

[42] Union of India v. Indo-afghan Agencies, AIR 1968 SC 718; Robertson v. Minister of Pensions, (1959) 1 KB 227.

[43] Anchar Ali v. State of Assam, AIR 1989 Gauhati 12.

CONTENTION III: THAT THE RESPONDENT CANNOT EVOKE ART. 17 PART III OF ECT.

It is humbly submitted before this Hon'ble tribunal that the "denial of benefits" clause under the ECT corresponds to the principle of reciprocity found in international law on foreign investments and public international law.[44]

Article 17 part III of the ECT provides the circumstances under which a State may deny the benefits mentioned in part III. The denial of benefits provision is inserted in treaties as a safeguard against 'free riders' i.e. nationals of third party nations who would gain rights despite the fact that the contracting states did not wish to accord those rights to them.[45]

There are two main essentials required for denying to a contracting party the benefits under part III of ECT which have been dealt with in detail in the following sub-contentions.

3.1 Nationality of the other contracting party

In the present case Nixio is a national of Republic of Cedonda as a company's nationality is determined primarily by its place of incorporation.[46] Republic of Cedonda is a party to ECT and therefore the application of Article 17 part III of the treaty cannot be evoked.

In *Petrobart v. Kyrgyztan* it was held that the information provided about Petrobart clearly shows that it is a national of the United Kingdom and therefore the Respondent cannot deny the benefits by virtue of Article 17 part II of the ECT[47].

[44] The principle is commonly found in the preamble of a BIT. In international law on foreign investments, *See* M. Sornarajah, *The International Law on Foreign Investment,* p. 218 (Cambridge Univ. Press 2004).

[45] Herman Walker Jr., *Provisions on Companies in United States Commercial Treaties*, 50 AM.J. INT'L L. 373, 388 (1956).

[46] TDM Infrastructure Private Limited v UE Development India Private Limited (2008) 14 SCC 271.

[47] Petrobart Limited v. The Kyrgyz Republic, SCC Case No. 126/2003, Award (May 29, 2005)

Further, the provisions of article 17 part III of the ECT are against the spirit of the treaty as it denies certain protections which are necessary to guarantee a fair and equitable environment for the investor and their investment. Therefore, it must be exercised in circumstances where it is clear beyond doubt that the investor belongs to a third party to whom, the parties did not intend to extend the protections under this treaty.

3.2 Substantial Business

The term has not been defined in the ECT, however, it can be reasonably assumed, from the "mailbox company" analogy[48] that it refers to shell companies that exist only on papers without engaging in any activity. A corporation without active business operations or significant assets.

Nixio petroleum limited, however, is a super oil major, ranked one among E&P companies in Asia and third globally. Further, the claimant is responsible for oil related development and production activities in more than 80 nations. The claimant features among the Fortune 500 company companies in 2007 and was awarded the 'Superbrand' status in 2011.

Shell companies exist only on paper, with no real employees or offices.[49] However, in the present case the claimant is a company with Mr. Jeofrey Martin as its chairman[50] and it can be reasonably deduced that the claimant, whose business interests extend to over 80 countries, provides employment to a large number of other people. It is beyond clear from the facts of the case and the background of the claimant that it is has substantial business activity in Republic of Cedonda and therefore cannot be denied the benefits of Part III.

[48] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No.ARB/03/24, Award (Aug. 27, 2008)

[49] Michael Findley, Daniel Nielson and Jason Sharman, *Global Shell Games: Testing Money Launderers' and Terrorist Financiers' Access to Shell Companies*, (March 8, 2015) http://www.griffith.edu.au/__data/assets/pdf_file/0008/454625/Oct2012-Global-Shell-Games.Media-Summary.10Oct12.pdf.

[50] Factsheet, P. VI Para. 4

3.3 Burden of Proof to establish 'third party control' lies on the host state

The burden of proof to establish the factual basis of the 'third country control,' together with the other conditions, falls upon the State as the party invoking the 'right to deny' under the treaty.[51]

Interpreting Article 17(2) of the ECT, which reads 'the denying state establishes', as per the Vienna Convention it is clear that the state has the burden of proof that an alleged investor falls under one of the situations mentioned under this "denial of benefits" provision.[52]

In the present case the claimant does not fall under any of the situations provided under Article 17(2). Further, the exercise of the denial of benefits clause needs to be associated with some form of notice or publicity in the form of declaration in the host state's official gazette or a statutory provision in the investment laws, so as to make it reasonably available to the investors. Without prior declaration, Provisions of Article 17 serve, at best, as a half notice.

Also, the denial of benefits clause can be applied prospectively only and not retrospectively. In its decision on jurisdiction, the *Plama* tribunal held that a state cannot invoke the denial of benefits clause in article 17 retrospectively to defeat an existing treaty claim. The tribunal went even further when it suggested that any application of article 17 was permissible only before the investment itself had been made, because any contrary conclusion would defeat the legitimate expectations of an investor.[53]

[51] Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003)

[52] Loukas A. Mistelis and Crina Mihaela Baltag, *Denial of Benefits and Article 17 of the Energy Charter Treaty*, (Feb 25, 2015) http://pennstatelawreview.org/articles/113%20Penn%20St.%20L.%20Rev.%201301.pdf

[53] Supra n. 48

CONTENTION IV: THAT THE TERMINATION OF PSC AMOUNTS TO VIOLATION OF ART. 10 AND ART. 21 OF ECT.

It is humbly submitted before this Hon'ble tribunal that the termination of the PSC amounts to violation of Art. 10 and Art. 21 of the ECT. There has been a breach of legitimate expectations of the Claimant and due process has not been adhered to while terminating the PSC.

4.1 Fair and Equitable Treatment Not Provided

The ECT puts obligation on the host state to accord at all times to Investments of Investors of other Contracting Parties FET obligations[54]. The content of the FET standard must be adapted to the circumstances of each case.[55] FET obligation allows the Investor to expect that the State will act "in a consistent, free from ambiguity and totally transparent manner".[56] FET protects the Investor's legitimate expectations that the legal framework would be stable[57] and reasonable (i.e. related to rational policy) and non-discriminatory treatment[58]

4.2 Legitimate Expectations

The notion of legitimate expectations, also called basic expectations or reasonable and justifiable expectations,[59] is a key element of the FET standard.[60] The Investor's legitimate

[54] Energy Charter Treaty Art. 10(1), April 1998.

[55] Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, Award (June 2, 2000) Para. 138

[56]Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003) Para. 154

[57]Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, P.145 (2nd ed. 2012).

[58] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Award (March 17, 2006) Para. 309; Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, Award (June 2, 2000) Para. 98.

[59] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007) Para. 262.

[60] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Award (March 17, 2006) Para. 302.

expectations of how the State would treat the Investment are recognized as a considerable factor in defining a violation of FET. [61] Such expectations should be based on the host State's legal framework or on the host State's explicit or implicit representations, [62] which may arise, *inter alia*, from contracts.[63] Foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently."[64]

The Claimant's legitimate exceptions of stable business environment have been violated. They never expected that the contract will be terminated in such disproportionate manner. Moreover the investigation was not transparent as NOC members were involved[65] and was biased. They were treated discriminately as most favored treatment as per Art. 10(2) and Art. 10(7) was not given. The object of long term cooperation[66] was also affected by the termination. Providing a stable legal and business environment has been identified as an essential element of FET.[67]

[61] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, P.145 (2nd ed. 2012); Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000) Para. 89; International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award (Jan. 26, 2006) Para. 147.

[62] Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006) Para. 318.

[63] Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002) Para. 134; SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay, ICSID Case No. ARB/07/29, Award (Feb. 10 2012) Para. 146

[64] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003) Para. 154.

[65] Factsheet, P. V Para. 4.

[66] Energy Charter Treaty Art. 2, April 1998.

[67] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007) Para. 260; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No.ARB/06/11, Decision on Jurisdiction (Sept. 9, 2008) Para. 183; CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award (May 12, 2005) Para. 274-276; LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) Para. 124-125; PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award (Jan. 19, 2007) Para. 253; Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Award (March 17, 2006) Para. 303.

4.3 Due process not followed

The FET standard requires that the host State must never disregard the principles of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities.[68] The government of Gondwana has been harassing the Claimants ever since they made the discovery.[69] The Gondwana government, its national legislature, judicial authorities and the public authorities and agencies deliberately created numerous problems for them and refused or unreasonably delayed the adoption of corrective measures.[70]

Lack of due process may occur when there is a lack of procedural propriety such as when there was no notice, or when no opportunity to appear was given.[71] Any procedural irregularity that may have been present would have to amount to bad faith, a willful disregard of due process of law or an extreme insufficiency of action.[72]

In the present case, the termination was executed within 7 days of giving a show-cause notice in a press conference by the Minister of Petroleum and Natural Gas, not complying with the 90 day time period as mentioned under Art. 30.3 of PSC.

[68] *Supra* n. 60, Para. 308.

[69] Factsheet P. VII Para. 1.

[70] Factsheet, P. VIII Para. 2.

[71] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000) Para. 63.

[72] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award (June 25, 2001).

4.4 The termination was disproportionate

The principle of proportionality is present in a variety of international law settings, such as FET obligations.[73] To this end, the tribunal in *Occidental vs. Republic of Ecuador* noted:

> ". . . the overriding principle of proportionality requires that any administrative goal must be balanced against [the investor's] own interests and against the true nature and effect of the conduct being censured."[74]

The Tribunal in *Teemed* laid down a proportionality test which weighs the reasonableness of a measure to its goal, the deprivation of the Claimant's economic rights and the legitimate expectations of the investor. *There must be a reasonable relationship between the measures of the State and the burden on the investor, taking into account the investor's legitimate expectation.*[75]

Both the Treaty[76] and Gondwana law[77] guaranteed Claimants and their investments fair, non-arbitrary, and non-discriminatory treatment and principle of proportionality is its standard. By termination, Gondwana blatantly disregarded these standards. Having openly premeditated the

[73] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012) Para. 404; See, MTD Equity MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (May 25, 2004); LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003); Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006).

[74] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012) Para. 450.

[75] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003).

[76] Energy Charter Treaty Art. 10(1), April 1998.

[77] Hind Construction Co. v. Workman AIR 1965 SC 917; Ranjit Thakur v. Union of India (1987) SC 611, P. 620; Union of India v. G. Ganahyutham AIR 1997 SC 3387; Sardar Singh v. Union of India (1991) 3 SCC 213.

termination, Gondwana imposed manifestly disproportionate punishment on Claimants on grounds that it never substantiated in the face of Claimant's vigorous defenses. There is an element of arbitrariness in awarding these severe punishments.[78]

4.5 Violation of Art. 21.3 of ECT

The contract of the Claimants was terminated on the basis of the Art. 17.6 of the PSC. The reason given was that many drilling equipment were no longer put to use. They were held liable under Art. 17.6 of PSC. This treatment is discriminatory as per Art. 10(2) and Art. 10(7) of the ECT as Gondwana laws provide exemption in taxes under similar circumstances. They have failed to provide most favored treatment to the Claimants.

In the case of *Clough Engineering Ltd.* v. *Commissioner of Customs*[79], it was observed that the main intention of importing products to be used in the manufacturing process is to be seen and then they will be entitled for exemption. The apex court of Gondwana has also given similar opinion and held that end use is not necessary and the product should be required for manufacturing purpose as per notification.[80]

As per Art. 10(2) and 10(7) of the ECT the host state shall provide treatment which is no less favorable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favorable. The termination has violated Art. 21 of the ECT which states that Art. 10(2) and (7) shall apply to Taxation Measures of the

[78] Sardar Singh v. Union of India (1991) 3 SCC 213.

[79] Clough Engineering Ltd. v. Commissioner of Customs 2007 (117) ECC 278

[80] State Of Haryana v. Dalmia Dadri Cement Ltd. 2004 (178) E.L.T. 13 (S.C.); Mocil v. Commissioner Of Customs(Import), Mumbai 2000 (126) E.L.T. 1072; Commissioner of C. Ex., Chennai-I v. Q Max Test Equipment Pvt. Ltd. 2003(3) Tmi 513.

Contracting Parties. And hence under similar circumstances Claimants should be given most favored treatment and the move of Gondwana was discriminatory in nature.

CONTENTION V: THAT TRANSFERRING OF PARTICIPATING INTEREST IN THE PSC AMOUNTS TO EXPROPRIATION BY THE GOVERNMENT UNDER ART. 10, ART. 12 AND ART. 13 OF THE ECT.

It is humbly submitted that in the instant case the transferring of participating interest in the PSC amounted to expropriation by the government under provisions of the ECT, making the Respondent liable for damages and compensation.

5.1 Violation of the provisions of the ECT

In the present case, the Respondents have failed to provide the Claimants and their investments the requisite treatment, protection and stability.[81] In *Técnicas Medioambientales Tecmed, S.A.* v. *The United Mexican States,*[82] the tribunal concluded, "The Tribunal considers that this [fair and equitable] provision of the Agreement, in the light of the demands of good faith required by international law, requires the Contracting Parties to the Agreement to accord a treatment to foreign investment that does not go against the basic expectations on the basis of which the foreign investor decided to make the investment." The Claimant doesn't have to show that the Respondent acted in a bad faith since the government might act in good faith but still doesn't fulfil its duty to treat foreign investors fairly and equitably.[83]

Failure to ensure transparency in the functioning of public authorities[84] and lack of a predictable framework for investment contrary to legitimate expectations of the investor and

[81] Energy Charter Treaty Art. 10, April 1998

[82] ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003).

[83] PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award (Jan. 19, 2007), Diaz Cabrera Fernando & Peterson Eric Luke, Investment Treaty News, http://www.iisd.org/pdf/2007/itn_febl_2007.pdf (10 March 2015).

[84] Emilio Agustín Maffezini v. The Kingdom of Spain, *ICSID Case No. ARB/97/7, Award (Nov. 13, 2000).*

commitments made by the host state, are breaches of FET standards. Tribunals have called for host states to provide investors with reasonable advance notice, a fair hearing, and an impartial adjudicator.[85]

It is submitted that essential requirements to be made by the contracting party under ECT have not been fulfilled by the Respondents and there lies a breach of ECT provisions.

5.2 Transferring of participating interest in the PSC amounts to Expropriation

'Expropriation' is defined as "including situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares."[86]

Judicial practice indicates that the severity of the economic impact is the decisive criterion when it comes to deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place. An expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment. The deprivation would have to be permanent or for a substantial period of time.[87]

The measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are irreversible and permanent and if the assets/rights subject to such measure have been affects in such a way that 'any form of exploitation thereof' has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed.

[85] ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006); Señor Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, Award (July 7, 2011).

[86] Energy Charter Treaty Art. 13(3), April 1998.

[87] *See*, K. Hober, *Investment Arbitration in Eastern Europe: Recent cases on Expropriation*, 14 The American Review of International Arbitration 399 (2003).

Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is interfered with to a similar extent, even where legal ownership over the assets in question is not affected, so long as the deprivation is not temporary.[88]

It is submitted that the transferring of the participating interest in the PSC has resulted in the Claimant to surrender all previously made investments in Gondwana, both capital and physical. Furthermore, the actions and omissions of the State have had and still have a direct negative impact on the reputations and market values of Nixio[89], also insufficient time was provided to the Claimant to show-cause for fall in production. This indirectly suggests the premeditated intention of the Government with regard to termination of PSC, thus making the Respondents liable for payment of compensation and damages.

5.3 Damages for breach of ECT provisions

Art. 12 of the ECT deals with 'compensation for losses in cases where there has been requisitioning of contracting parties investment or part thereof by the latter's forces or any destruction of investments by the latter's forces or authorities, which was not required by the necessity of the situation.'

It is humbly submitted that the tribunal should consider the *mala fide* investigation and bias towards NOCs and further the damages caused to the reputation of the Claimant owing to false charges levied against them by the Respondents. The tribunal must not overlook the Respondents neglect of the reality of the measures and the impact on the Investor (Claimant), namely its great economic losses followed by termination of PSC and expropriation of investments. As previously stated, the Respondent has failed to create stable, equitable, favorable and transparent conditions for the investments [90] and had adopted discriminatory

[88] *See*, Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA, 6 IRAN-U.S. C.T.R., P. 219 et seq.

[89] Factsheet P. VIII Para. 3.

[90] Energy Charter Treaty Art. 10, April 1998.

measures to terminate the PSC. Thus, the Respondent is liable to pay damages for breach of ECT provisions.

5.4 Compensation for expropriation (Art. 13 ECT)

Art.13 of the ECT deals with payment of compensation in matters of expropriation. In the present case, there has been expropriation of investments of the Claimant following a disproportionate termination of the PSC. It is submitted that the Claimant has made heavy investments in the State of Gondwana since 2002 and after the termination of PSC, the Respondents are liable to make good of the capital invested in their country. Compensation shall amount to fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment.[91]

[91] Energy Charter Treaty Art. 13(1), April 1998.

PRAYER

In the light of the issues raised, arguments advanced and authorities cited, the Counsels for the Claimant humbly prays before this Hon'ble Tribunal to kindly adjudge and declare:

- That the claim made by claimant fall within the jurisdiction of ICSID.
- That the actions of the respondent amount to violation of Art. 2 and 26 of ECT.
- That the respondent cannot evoke Art. 17 of the ECT.
- That the termination of the PSC amounts to violation of Art. 10 and 21 of the ECT.
- That transferring of participating interest in the PSC amounts to expropriation by the government under Art. 10, 12 and 13 of the ECT.

And pass any other appropriate order as the tribunal may deem fit.

And for this act of Kindness, the Claimant as in duty bound, shall forever pray.

Respectfully Submitted

Sd/-

Counsel for Claimant