**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 |

# INDEX OF AUTHORITIES

## LIST OF STATUTES

- The Arbitration and Conciliation Act, 1996
- The Customs Act, 1962

## LIST OF TREATIES

- ICSID Convention, 1966
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- M. Sornarajah, The International Law On Foreign Investment, 3rd Ed., 2010

## LIST OF WEBSITES

- www.economist.com
- pennstatelawreview.org

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- American Manufacturing and Trading Inc. v. The Republic of Zaire, ICSID Case No. ARB/93/1
- Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine, ICSID Case No ARB/08/11
- Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3
- Daimler Financial Services AG v Argentine Republic, ICSID Case No. ARB/05/1
- EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13
- Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19
- Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3
- Frontier Petroleum Services Ltd. v. The Czech Republic, UNCITRAL, Final award (Nov. 10, 2012) para.468
- Glamis Gold Ltd. v. United States of America, UNCITRAL, Final Award (June 8, 2009)
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- Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17
- International Thunderbird Gaming Corp. v. United Mexican States, NAFTA/UNCITRAL, Separate Opinion (Jan. 26, 2006).
- Klöckner Industrie-Anlagen GmbH, et al. v. United Republic of Cameroon, ICSID Case No. ARB/81/2
- Lanco International Inc. v. Argentine Republic, ICSID Case No. ARB/97/6

- Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1
- Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2
- S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Second Partial Award (Oct. 21, 2002)
- Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4
- Saluka Investment BV v. The Czech Republic, UNCITRAL, Partial Award, 17 March 2006 para. 52
- SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6,
- Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2
- Ulysseas, Inc. v. The Republic of Ecuador, UNCITRAL, Final Award (June12, 2012).
- White Industries Australia Limited v. The Republic of India, UNCITRAL, Final award (Nov. 30, 2011)

## STATEMENT OF JURISDICTION

The Respondent has approached the Hon'ble International Centre for Settlement of Investment Disputes in response to the jurisdiction raised by the Claimant under Article 25 of ICSID 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 2001, Government invited tenders to bid for blocks located in the offshore coasts of Province of Shahime, Gondwana Ocean. Gondwana Oil Corporation Ltd and Nixio Petroleum formed a consortium to participate in bidding. The consortium became the successful bidders.
- As on 13 November 2001, PSC was entered between Government of Gondwana and Contractor. The two companies entered into a JOA in conformity with Article 7 of the PSC on 15 December and Nixio was appointed as operator.
- In 2002, Nixio started exploration and by 2005 a significant discovery was made in the basin. The company started with the production in 2006. Crude oil production rapidly elevated from 32.03 MMT to 35.67 MMT between 2006 and 2010. There was a sudden decrement in production and it touched an all-time low of 25.09 MMT in 2011-12, to which Government sought clarifications.
- On 12 March 2012, Nixio in response stated that certain geological factors were impeding production. The DGH conducted an inquiry comprising of prominent NOC members and found that the reasons cited by Nixio were baseless. Moreover the report stated that Nixio was showing front-load expenditure thereby cutting down on the profit

oil share of the government and undermining the capacity utilization of the reserve and also concealing material facts.

- In May 2012, the Income Tax Department raided the office of Nixio at New Ankara and DGH's report bought forth that the essentiality certificate issued for the equipment had to be cancelled as many of the drilling equipment were no longer put to use, making Nixio liable for taxes on equipment.
- Acting upon the report of DGH and the IT department, the government terminated the PSC on 5 September 2013 as per Article 30.3 of the PSC through a show cause notice. 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.
- Immediately after termination of PSC, Nixio invoked arbitration under Article 33 of PSC contesting validating of termination. The tribunal held the validity of termination.
- On 21 August 2014, Nixio filed a request for registration of arbitration with ICSID against the Republic of Gondwana. As 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.
- Government of Gondwana contends that ICSID does not have jurisdiction in the matter as the contractual forum mentioned in the PSC is New Ankara and governing law is 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. THAT THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMS SUBMITTED BY THE CLAIMANT.

It is humbly submitted that the tribunal does not have jurisdiction as the written consent as per Art. 25 of ICSID Convention and Art. 26(4) of the ECT was not given by the claimants. Moreover the requirement of amicable settlement as per Art. 26 of ECT was not complied with. Contract claims are inadmissible because the parties to the PSC agreed to a different dispute resolution forum. ICSID do not have jurisdiction in the matter as the contractual forum mentioned in the production sharing contract is New Ankara as well as the governing law is Gondwana.

### II. THAT THE ACTIONS OF GONDWANA DO NOT AMOUNT TO VIOLATION OF ART. 2 AND ART. 26 OF ECT.

The Actions of the respondent do not amount to violation to Art. 2 and Art. 26 as the tribunal has no jurisdiction over the present matter because consent has not been given by the host state, also, local remedies have not been exhausted by the claimants and neither have they approached any municipal court to set aside the award given by the domestic tribunal. Further, fair and equitable treatment has been accorded to the claimant to foster a long term cooperation in accordance with the provisions of Art. 2 of the treaty.

### III. THAT THE RESPONDENT CAN EVOKE ART. 17 PART III OF THE ECT.

The Respondent can invoke Art. 17 Part III of the ECT as the claimant is a subsidiary of the Nixio group which exercises control over it, being a third party to the contract, it cannot take

benefit of the protection under ECT. Further, the respondent being a welfare state gives primary importance to the welfare of its people and defending the interests of the claimant, that is responsible for tax evasion and concealment of material facts which caused huge losses to exchequer of the nation, is not in the best interest of the nation.

## IV. THAT TERMINATION OF THE PSC DOES NOT AMOUNT TO VIOLATION OF ART. 10 AND 21 OF THE ECT.

There has been no violation of Art. 10 of the ECT by the respondent and such favorable conditions had been provided to the investments as laid down under international standards. The termination of the PSC was decided by the government only when sufficient material was collected to suggest the defective performance of claimant. Moreover the claimant was concealing material information from the government and also evading tax liability for unused equipment. The termination of PSC was conducted with a due process and thus, there lies no violation of ECT provisions.

## V. THAT THE TRANSFER OF PARTICIPATING INTEREST IN THE PSC DOESD NOT AMOUNT TO EXPROPRIATION BY THE GOVERNMENT.

The decisions of terminating the PSC and transferring of the participating interest of claimants to Gondwana Oil Corporation were taken to prevent further losses to the exchequer of the nation. The claimants were indulging in various malpractices and were concealing material facts from the government because of which government's share of petroleum was substantially affected. The government at no juncture breached any provisions of the ECT and has provided necessary conditions for effective use of the investments. There has thus been no expropriation of investments and the contract was terminated following the due process as under Art.30.3 of the PSC.

## ARGUMENTS ADVANCED

### CONTENTION I: THAT THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMS SUBMITTED BY THE CLAIMANT

It is humbly submitted before this tribunal that ICSID does not have jurisdiction in the present matter as the contractual forum mentioned in the PSC is New Ankara as well as the governing law is Gondwana. Moreover, arbitration has already been concluded under the PSC and thus arbitration in a different forum on the same issue cannot be evoked.[1]

Essentially, Consent is the cornerstone of the jurisdiction of the Center[2] which, in the present case, has not been accorded by the Respondent. In a contract-based arbitration, the consent is specific to the disputes that arise from that contract.[3] As a preliminary matter, the question of the existence of jurisdiction based on consent must be examined *proprio motu*, i.e., without objection being raised by the Party. A fortiori, since the Respondent has raised preliminary objections to the jurisdiction, the existence of consent to the jurisdiction must be closely examined.[4]

The mere ratification of the Convention is not in itself consent to arbitration by a State. As Preamble of the Convention clearly states, ratification does not oblige the State to submit a given dispute to arbitration.[5] Two states cannot, by virtue of Art. 25 of the convention compel

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[1] Factsheet, P. VIII Para. 3.

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

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

[4] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award (Mar 15, 2002) Para. 55.

[5] ICSID Convention Preamble Para. 7 (1966).

any of their nationals to appear before the Centre, this is a power that the convention has not granted to the states.[6] Therefore the claimant cannot rely on the consent of their nation.

### 1.1 Jurisdiction *Ratione Temporis* not present

For ICSID jurisdiction the claim has to be submitted after the date the other party consented provided the dispute arose after the date the parties consented to be the critical date. Disputes usually arise before a claim. If the date of the claim filing is previous to the date of the consent, the Tribunal did not have jurisdiction.[7] The claimant has not given their consent concerning settlement of dispute to the ICSID tribunal.

Under Art. 25 of ICSID convention, consent in writing is a precondition for ICSID jurisdiction. The term "*consent in writing*" is not defined in the ICSID Convention, but it is defined in the Report of the Executive Directors on the Convention. According to this Report, the Convention does not require that: "*… the consent of the both parties to be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investment to the jurisdiction of the Center, and the investor might give his consent by accepting the offer in writing"*[8]. The requirement reflects the general principle that the authority of an arbitral tribunal is derived from an arbitration agreement.[9] The requirement of written consent has not been fulfilled by the claimants and hence there is no consent on their part for dispute settlement.

[6] American Manufacturing and Trading, Inc. v. The Republic of Zaire, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997).

[7] Tradex Hellas, S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Award (Dec. 24, 1996).

[8] *Supra* n. 2

[9] Sweet & Maxwell, Law and Practice of International Commercial Arbitration, Para. 1-8 (4th ed. 2004); Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (Jul 31, 2001) Para. 27.

## 1.2 Arbitration without Privity is not applicable

A host State can be deemed to have given "consent" to arbitration, if a provision of its "legislation" declares such consent[10]; in this report ''there is no mention that consent to arbitration could be given by a treaty provision.[11] Therefore inferring consent from arbitration clauses of such dated treaties are to be considered as overriding the will of the host State.[12] Therefore the Center cannot rely upon the consent given in the ECT.

## 1.3 Forum Selection Clause in the Contract

It is submitted that ICSID does not have jurisdiction in the matter as the contractual forum mentioned in the PSC is new Ankara as well as the governing law is Gondwana, thus the contractual claims are inadmissible. The Tribunal does not have jurisdiction since the forum selection clause of the contract shall prevail as the *lex posterior*.

The tribunal in *Bosh International v. Ukraine* concluded that when a contractual claim is asserted under an umbrella clause, the claimant in question must comply with any dispute settlement provision included in that contract.[13] The opinion of such tribunal is similar with the *Vivendi* Annulment Committee when it envisaged: "*In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract*." [14] In the *Woodruff* case the tribunal

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[10] *Supra* n. 2.

[11] Liber Amicorum Karl Heinz Böckstiegel, Köln, Berlin, Bonn, München, *Law of International Business and Dispute Settlement in the 21st Century*, P. 156 (2001).

[12] Supra note 3, p. 132.

[13] Bosh International Inc. and B&P Ltd Foreign Investments Enterprise v. Ukraine, ICSID Case No ARB/08/11, Award (Oct. 25, 2012) Para. 176.

[14] Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Application for Annulment (July 3, 2002) Para. 98.

recognized the primacy of the specific jurisdiction agreed in the contract over the jurisdictional provision in the international agreement.

As rightly said, "*He who comes into equity must come with clean* hands". As the parties consent for this remedy, it will be hypocrisy by the Claimant trying to claim a breach of contract without first observing its provisions and complying with them.[15] As defined in *Saluka*, this clause should be interpreted in "mandatory terms"[16] . When the contract is provided with a specific dispute-resolution mechanism, the intent of the parties cannot be clearer and must prevail.[17]

The application of the BIT would be inconsistent with the BIT's purpose[18] and inappropriate[19] to do so if it construed to override an exclusive forum selection clause in the contract. The tribunal in *SGS v. Philippines* noted that the BIT was intended by the State parties to support and complement, rather than displace, the specific negotiated investment arrangements between the investor and the host State.[20] In order to apply the maxim of *lex posterior*, the forum selection clause of the agreement should be applied instead of BIT forum selection clause since the former applied more specifically to the dispute at hand.[21]

### 1.4 Amicable settlement as per Art. 26(1) of ECT not complied

For the dispute to be referred to the ICSID tribunal a precondition of amicable settlement of dispute shall be complied with under Art. 26(1) of ECT. The cooling off period is of three months. On its failure only, the dispute could be referred to the ICSID tribunal as per Art. 26(4).

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[15] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004) Para. 154.

[16] Saluka Investment BV v. The Czech Republic, UNCITRAL, Partial Award (March 17, 2006) Para. 52.

[17],Mihir C. Naniwadekar, "The Scope and Effect of Umbrella Clauses: The Need for a Theory of Deference?", In Trade, Law and Development (Vol. 2, No.1 2010) P. 188.

[18]*Supra* n. 5, Para. 141.

[19] *Supra* n. 5, Para. 155.

[20] *Supra* n. 5, Para. 141.

[21] *Ibid*.

The claimants have not undergone any amicable settlement process for solving the dispute and have directly initiated the claim before ICSID.

In *Enron Corporation and Ponderosa Assets, LLP* v. *The Argentine Republic*[22], the tribunal noted that the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.

It is thus submitted that the claim made by the claimant does not fall within the jurisdiction of ICSID and the same should not be admitted under the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

[22] ICSID Case No. ARB/01/3, Decision on Jurisdiction (Jan. 14, 2004) Para. 88.

## CONTENTION II: THAT THE ACTIONS OF GONDWANA DO NOT AMOUNT TO VIOLATION OF ART. 2 AND ART. 26 OF THE ECT.

It is humbly submitted before this tribunal that the actions of the Respondent do not amount to violation of Art. 2 and Art. 26 of the ECT. The Respondent has not arbitrarily caused hindrance in the existence of a long term relationship between the Claimant and itself and further submits that no acts of the Respondent amount to violation of ECT provisions.

### 2.1 Termination of Contract in Public Interest:

In 2012, the Respondent sought clarification for the sudden drop in production; on investigation by the DGH the reasons furnished by the Claimant were found to be baseless. Further, the Claimant is alleged to be cutting down on the profit oil share of the government and undermining the capacity of the reserve. Keeping these factors in mind it was considered necessary to terminate the contract of the Claimant in the interest of the public.

According to Art. 25 on the Draft Articles of International Law Commission on State responsibility:[23]

> "Necessity may not be invoked by the State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril;

[23] International Law Commission, Draft Art. On State Responsibility, Commentary (2) to Art. 25, (Feb. 27, 2015) http:/untreaty.un.org.ilc/texts/instruments/English/ commentaries/9_6_2001.pdf

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."

The fact that the country is heavily dependent on crude oil production and CO-DWN-98-3 has one of the largest reserves in the nations, misappropriation by an investor with respect to an investment in this field is against the interest of the nation.

## 2.2 The Centre has no Jurisdiction over the matter

The PSC between the Respondent and the Claimant provides that in case of a dispute between the parties they may submit the dispute to arbitration.[24] It further provides that each party shall appoint one arbitrator and the two arbitrators appointed by the parties shall appoint the third arbitrator.[25] Therefore, Tribunal does not have jurisdiction where the parties have agreed to submit disputes elsewhere. The jurisdiction of ICSID tribunals is limited to the adjudication of disputes that the parties have actually agreed to submit to the Centre and not to an alternative forum[26]. Conversely, if the parties agree to submit their disputes to a forum other than ICSID, Art. 26 of the ICSID Convention requires the ICSID tribunal to respect their agreement.[27]

A series of ICSID cases, beginning with the *Klöckner* case, are said to support this proposition.[28] Pakistan places particular reliance on the *Vivendi* Annulment Committee

[24] Model Production Sharing Contract Art. 33.3, NELP – IX (2010), Nov. 13, 2001, 72

[25] Production Sharing Contract Art. 33.4,NELP – IX (2010) Nov. 13, 2001, 72

[26] ICSID Convention Art. 25(1), Oct. 14 1966, P. 18. The Centre's jurisdiction shall only extend to legal disputes "which the parties to the dispute consent in writing to submit to the Centre."

[27] ICSID Convention Art. 26, Oct. 14 1966, page 19. "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this convention." see Christoph Schreuer, The ICSID Convention: A Commentary page 345 (2001).

[28] Klöckner Industrie-Anlagen GmbH, et al. v. United Republic of Cameroon, ICSID Case No. ARB/81/2, Decision on Annulment (3 May 1985); Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Decision on Jurisdiction (24 December 1996); 14 ICSID Review—F.I.L.J. 161 (1999); Salini Costrutorri SpA and

decision as affirming the principle of party autonomy; that Committee held that the parties' agreement to refer disputes arising under a concession contract to the courts of the province of Tucumán, Argentina, did not prevent the ICSID tribunal from dealing with BIT claims relating to the same facts. However, the Annulment Committee expressly stated that it was not holding that the ICSID tribunal had jurisdiction over claims for breach of the concession agreement. Rather, it made the statement earlier quoted, namely, that in a case where the "essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum in that contract."[29]

Further, a State's consent cannot be presumed, it must be supported with "affirmative evidence"[30]. In the present case no written consent has been provided by the Respondent to submit the dispute for arbitration to ICSID.[31]

## 2.3 Local Remedies have not been exhausted

The PSC provides that all disputes between the Claimant and the Respondent shall be settled by Arbitration which shall be held at New Ankara[32] and the Laws of Gondwana shall be followed with respect to such arbitration[33]. An Award given by the tribunal is challengeable in

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Italstrade SpA v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001); Lanco International Inc. v. Argentine Republic, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction (8 December 1998); Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002).

[29] Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002).

[30] Daimler Financial Services AG v Argentine Republic, ICSID Case No. ARB/05/1 Award on Jurisdiction (22 August 2012).

[31] *Supra* n. 26.

[32] Factsheet, page VIII para 4.

[33] *Ibid*.

a municipal court by an application as per the governing law i.e. the Arbitration and Conciliation Act, 1996.

The adherence to the requirement of exhaustion of local remedies is not just a matter of admissibility but instead is a pre-condition to the tribunal's jurisdiction.[34]

### 2.4 Arbitrary claim of unfair and inequitable treatment

It is submitted that the termination took place in a fair and equitable manner, without violating any rights of the Claimant. Moreover the allegations regarding failure in administering justice by the government and authorities of Gondwana are baseless as complete procedure of arbitration was conducted when the Claimant contested the validity of termination of PSC. They were given adequate opportunity to put forward their case.

FET is a wide standard and it includes a bundle of rights and standards of treatment that shall be accorded to investor and his investment. These are transparency, protection of legitimate expectations, non-discrimination, and good faith treatment obligation[35].

In so far as the Province's acts are exclusively contractual, they cannot amount to a violation of the FET standard based on a theory of legitimate expectations. In *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*[36], the tribunal stated: "For the sake of completeness, the Tribunal adds that a breach of FET requires conduct in the exercise of sovereign powers."

The PSC provides that at the end of the Initial Exploration Period, the Contractor has the option of terminating the contract.[37] Therefore, it can be said that the Claimant's claims that the

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[34] *Supra* n. 30.

[35] Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment (2009)

[36] ICSID Case No. ARB/03/29, Award (Aug. 27, 2009).

[37] Model Production Sharing Contract Art. 3.4, NELP – IX (2010), Nov. 13, 2001, 13.

Respondent has been harassing them ever since the discovery was made in the basin[38] are baseless and arbitrary as there is no mention of any previous complaints by the Claimant and the Claimant never exercised their right to terminate the contract under Art. 3.4 of the PSC.

In the present case, the international principle of FET has not been violated by the Respondent and the Claimants have not been subject to bias or discrimination on any grounds. The termination of the PSC took place only after collection of sufficient material facts relating to defective performance by the Claimants and also after giving a show cause notice regarding the same.

FET is only denied when the investor is treated in such an unjust or arbitrary manner that the treatment is unacceptable from an international law point of view.[39] In *EDF v. Romania* it was held that, 'in the absence of specific promises or representations made by the State to the investor, the latter cannot have a legitimate expectation that there will be no changes in the host State's legal and economic framework.'[40] Plenty of arbitral tribunals have emphasized that to create legitimate expectations the governmental assurances and representations must "exhibit a level of specificity".[41]

Thus, it is submitted that at no time the actions of the Respondent amounted to violation of Art. 2 and Art. 26 of the ECT, *per contra* the claimants have violated the contractual obligations under the PSC which have resulted in heavy losses to the exchequer of the nation.

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[38] Factsheet, P. VII Para. 1.

[39] S.D. Myers Inc. v. Government of Canada, UNCITRAL, Second Partial Award (Nov. 21, 2002).

[40] Ulysseas, Inc. v. The Republic of Ecuador, UNCITRAL, Final Award (June12, 2012).

[41] Frontier Petroleum Services Ltd. v. The Czech Republic, UNCITRAL, Final award (Nov. 10, 2012) Para.468; White Industries Australia Limited v. The Republic of India, UNCITRAL, Final award (Nov. 30, 2011) Para.10.3.17; Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012) Para.9.10.

## CONTENTION III: THAT THE RESPONDENT CAN INVOKE ART. 17 PART III OF THE ECT

It is humbly submitted before this 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.[42] 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.[43]

In the instant case, the facts and circumstances make it clear that the Claimant is not entitled to the benefits under part III.

### 3.1 Ownership and Control over the Investor

In the case, the Claimant is Nixio Petroleum Ltd. which is a company under the Nixio group of companies.[44] Although, Nixio is incorporated in Republic of Cedonda which is a member of the ECT, however, it is one of the many companies of the Nixio group of companies whose nationality cannot be determined by the factsheet. Under the Final Act of the European ECT

[42] *See*, M. Sornarajah, *The International Law on Foreign Investment*, P. 218 (Cambridge Univ. Press 2004). The principle is commonly found in the preamble of a BIT.

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

[44] Factsheet, P. VIII Para. 3.

understanding number 3, it has been said that in case of any doubt regarding the control over a company *the burden of proof shall lie on the investor*.[45]

### 3.2 Retrospective Effect

As to the retrospective application of Article 17, the very purpose of the denial of benefits is to give the Respondent the possibility of withdrawing the benefits granted under the BIT to investors who invoke those benefits.[46] Therefore, "it is proper that the denial is "activated" when the benefits are being claimed".[47] The right to deny benefits can be claimed when the other party raises objections with respect to the jurisdiction and no prior notification is required.

If the treaty is silent about a time limit before which the denial of benefits clause may be invoked there is no obligation on the part of the host state to invoke the clause before request for arbitration is filed. Several international forums have stressed that in the absence of a contrary provision, the host states may deny the benefits under a treaty only when they are claimed by the investor.[48]

Further, if the provision has retrospective effect, it will encourage the investors to be upfront about ownership, nationality and citizenship from the very beginning[49] which would help foster

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[45] Final Act of the European Energy Charter Conference, Lisbon, Understandings no. 3 (Dec. 16-17, 1994) http://www.encharter.org/fileadmin/user_upload/document/EN.pdf at 26 (Feb. 28, 2015).

[46] Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Award (Jan. 31, 2014) para. 376.

[47] Ibid

[48] Carmen Núñez-Lagos and Hogan Lovells, The invocation of "denial of benefits clauses": when and how? (Feb. 17, 2015), http://kluwerarbitrationblog.com/blog/2014/02/17/the-invocation-of-denial-of-benefits-clauses-when-and-how-2/.

[49] Cf. Laurence Shore, The jurisdiction problem in Energy Charter Treaty claims, 10 INT'L ARB. L. REV. (June 2007) at 63; James Chalker, Making the Energy Charter Treaty Too Investor Friendly: Plama Consortium Limited v. the Republic of Bulgaria, 3 TRANSNAT'L DISP.MGMT. (Dec. 2006) P. 17.

a long term cooperation between the parties as envisaged under Art. 2 of the Energy Charter Treaty.

### 3.3 According to the Claimant Benefits under Part III are not in Public Interest

The Respondent is a welfare state and welfare of its citizens is thus the primary goal and given utmost importance when formulating any policy or taking any administrative action. Further, it is a developing country and its economy is majorly dependent on Oil and Natural Gas production, the Claimant has been carrying out E&P activities in the largest basin of the nation and the records show that they have been responsible for loss of government revenue by falsely reporting details of production and evading tax.

Also, the primary motive behind the introduction of the EPLR regime was to become independent as far as the Oil & Natural Gas needs of the nation are concerned which cannot be fulfilled if investors resort to such malpractices, against the very purpose that they were contracted to fulfil. It is also submitted that being a developing country, the respondent cannot afford the monetary losses that this arrangement is causing them. Therefore, it is in the interest of the public that these benefits not be accorded to the Claimant in the present case.

## CONTENTION IV: THAT THE TERMINATION OF THE PSC DOES NOT AMOUNT TO VIOLATION OF ART. 10 AND ART. 21 OF ECT.

It is humbly submitted before the Hon'ble tribunal that there has been no violation of the principle of FET during its interaction with the Claimant.

### 4.1 No violation of the Art. 10 of ECT has taken place

Termination of the PSC was done after sufficient material evidence was collected against the Claimants, namely, concealment of material facts from the Government and showing front load expenditure thereby cutting down on the profit oil share of the government and undermining the capacity utilization of the reserve. The essentiality certificate of the Claimant was cancelled as they were no longer using the drilling equipment thereby making them liable for taxes. The government thus decided on termination under Art. 30.3 of the PSC after giving a show-cause notice as on 5th September 2013.

The FET standard requires the balancing of both the investor's legitimate and reasonable expectations and the host country's legitimate regulatory interests.[50] As stated by *Stephen Schill*, 'FET standard can be understood as embodying the rule of law as a standard that the legal systems of host states have to embrace in their treatment of foreign investors'.[51] In *EDF v. Romania* it was held that, 'in the absence of specific promises or representations made by the State to the investor, the latter cannot have a legitimate expectation that there will be no changes in the host State's legal and economic framework.'[52] To create legitimate expectations

[50] Jeswald W. Salacuse, *The Law of Investment Treaties*, Oxford University Press (2010).

[51] Stephan W. Schill (ed), *International Investment Law and Comparative Public Law*, Oxford University Press (2010).

[52] Ulysseas, Inc. v. The Republic of Ecuador, UNCITRAL, Final Award (June12, 2012).

the governmental assurances and representations must "exhibit a level of specificity".[53] Without specific promises,

"An investor may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework."[54]

FET is only denied when the investor is treated in such an unjust or arbitrary manner that the treatment is unacceptable from an international law point of view.[55] In the instant case no such act or omission has been done by the Respondent to show that they violated the principle of FET. Termination was done under Art.30.3 of the PSC after complying with due process.

### 4.2 Stable and Transparent conditions for investors

The Respondents further submit that they have provided the Claimants with the required level of stability and favorable conditions for their investments and have also furnished necessary security for maintenance and use of investments.

Production started in 2006 after exploration began in 2002. Between 2002 and 2011, the government didn't interfere with the matters of the operator in any manner. After 2011, there was a sudden fall witnessed in production which worried the government and they sought clarification regarding the same. The 'geographical factors' cited by the Claimant were found to be baseless in the report of DGH and the Claimant was also found concealing material facts from the government and evading tax liability on certain unused drilling equipment. As under Art.17.5 of the PSC the government has the right to check that the imported item is being used

[53] Frontier Petroleum Services Ltd. v. The Czech Republic, UNCITRAL, Final Award (Nov. 12 2010) Para. 468; White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award (Nov. 30, 2011) Para. 10.3.17; Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction Applicable Law and Liability (Nov. 30 2012) Para. 9.10.

[54] EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award (Oct. 8, 2009).

[55] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Second Partial Award (Oct. 21, 2002).

exclusively for the purpose for which exemption has been granted. And hence the Claimants were liable for taxes for no longer using the drilling equipments. These reasons led to the termination of the PSC. It is submitted that the Respondent has followed a fair, transparent procedure with regard to the termination after providing a show cause notice for the same. Also Claimants had invoked arbitration under Art. 33 of the PSC contesting the validity of the termination and the arbitral tribunal had given an award against Claimants and held the validity of the termination.[56]

The Respondents submit that a fair procedure has been followed before termination of the contract. Also prior to the raid which was conducted in the office of Claimants at New Ankara as on May 2012, the Claimants had not provided any information with regard to idle equipment under their possession, which shows their intention to evade the tax liability in future. After collecting evidence to show that the Claimant was indulged in various malpractices resulting in huge losses to the exchequer of the nation, the step was taken to conduct a raid in the main office of the Claimant. The conduct of the Claimants has been malicious leading to losses to government and has substantially affected the government's share of petroleum.

### 4.3 <u>Claimant acted in bad faith</u>

The above acts amounted to violation of the PSC and the government was forced to terminate the PSC between the two contracting parties after giving a show cause notice on 5$^{th}$ September 2013. Between May 2012 and September 2013, the Claimants did not put forward any evidence to suggest that the allegations levied against them were false. Also the tax liability has not been fulfilled by the Claimants between the span of one year and four months after the cancellation of the essentiality certificate issued for equipment.

[56] Factsheet, P. VII Para. 2.

The tribunal must look into the initial intention of the Claimants which comes into picture with regard to the DGH's report. The report stated that Nixio was showing front-load expenditure thereby cutting down on the profit oil share of the government and undermining the capacity utilization of the reserve.

### 4.4 Tax liability on equipment does not violate Art. 21 of ECT

It is submitted that the termination of PSC does not amount to violation of the ECT. It was well established in the PSC that the governing law is of Gondwana. As per the PSC[57] imported equipment no longer in use for petroleum operations are liable to be taxed with custom duties which have not been paid by the Claimants.

It is humbly submitted that the Respondent had issued an unambiguous notice to the Claimant listing reasons for termination of the PSC also sufficient time was provided to for corrective measures and adequate opportunity of being heard was provided during the arbitration held at the instance of the Claimants after giving show cause notice on 5 September 2013. Thus the termination of PSC has not violated any provisions of the ECT and a fair procedure has been followed by the Respondent.

[57] Model Production Sharing Contract Art. 17.6, NELP – IX (2010), Nov. 13, 2001, 45. 'The Government shall have the right to inspect the records and documents of the physical item or items for which an exemption has been provided pursuant to Art. 17.5 to determine that such item or items are being or have been imported solely and exclusively for the purpose for which the exemption was granted. The Government shall also be entitled to inspect such physical items wherever located to ensure that such items are being used for the purpose herein specified and any item not being so used shall immediately become liable to payment of the applicable customs duties.'

## CONTENTION V - THAT THE TRANSFERRING OF PARTICIPATING INTEREST IN THE PSC DOES NOT AMOUNT TO EXPROPRIATION BY THE GOVERNMENT UNDER ART. 10, 12 AND 13 OF THE ECT.

It is humbly submitted that the decisions of terminating the PSC and transferring of the participating interest of Claimants to Gondwana Oil Corporation were taken to prevent further losses to the exchequer of the nation. The Claimants were indulging in various malpractices and were concealing material facts from the government because of which government's share of petroleum was substantially affected.

### 5.1 Respondent did not violate the FET Provisions in the ECT

In the present case, the International principle of FET has not been violated by the Respondent and the Claimants have not been subject to bias or discrimination on any grounds. The termination of the PSC took place only after collection of sufficient material facts relating to defective performance by the Claimants and also after giving a show cause notice regarding the same.

The tribunal has remarked in *Feldman*[58], "Not every business problem experienced by a foreign investor is an expropriation, or a denial of due process or fair and equitable treatment". *International Thunderbird Gaming*, which held that at a minimum, fair and equitable treatment required that based on the totality of the circumstances, the actions "amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards."[59]

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[58] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002).

[59] Glamis Gold Ltd. v. United States of America, UNCITRAL, Final Award (June 8, 2009) Para. 240. See International Thunderbird Gaming Corp. v. United Mexican States, NAFTA/UNCITRAL, Separate Opinion (Jan. 26, 2006) Para. 194.

It is argued before this tribunal that the Respondents have at no time denied FET to the Claimant. In 2001, after entering into the PSC, Nixio and Gondwana Oil Corporation Ltd. signed a Joint Operating Agreement and Nixio was appointed as the operator[60]. Moreover between 2002 and 2011, the government did not make any inquiries regarding production activities. It was only when there was a sudden fall in production, did the government sought clarifications. This indicates that the Respondent had put substantial faith in the Claimant with regard to appropriation of resources of the country to fulfill their side of the contract effectively. The government had provided necessary conditions to the investor for effective use and management of resources.

## 5.2 Non-Performance or Defective Performance of Contract by the Claimants

Article 7.1.1 of the UNIDROIT Principles defines non-performance as the "failure by a party to perform any of its obligations under the contract, including defective performance or late performance."[61] The Principles also state that violation of an *accessory obligation* such as the duty of good faith and fair dealing,[62] or violation of the duty to act in good faith and maintain fair dealing[63] may also constitute non-performance.

Whether in a case of non-performance by one party the other party should have the right to terminate the contract depends upon the weighing of a number of considerations. On one hand, performance may be so late or so defective that the aggrieved party cannot use it for its intended purpose, or the behaviour of the non-performing party may in other respects be such that the aggrieved party should be permitted to terminate the contract. On the other hand, termination

[60] Factsheet, P. III Para. 3.

[61] UNIDROIT Principles of International Commercial Contracts Art. 7.1.1, 2010.

[62] UNIDROIT Principles of International Commercial Contracts Art. 7.2.1 Comment 2, 2010.

[63] Ibid.

will often cause serious detriment to the non-performing party whose expenses in preparing and tendering performance may not be recovered.[64]

"In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether:

(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;

(b) strict compliance with the obligation which has not been performed is of essence under the contract;

(c) the non-performance is intentional or reckless;

(d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;

(e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated."[65]

Conduct which gives the aggrieved party reason to believe that it *cannot rely on the other party's future performance* must be considered when determining whether non-performance is fundamental. An intentional breach may sometimes show that a party cannot be trusted.[66]

Under the present circumstances, the Claimant was indulging in various malpractices and was liable for taxes on equipment. Moreover the Claimant was also concealing material facts. The Claimant has therefore failed to perform the contract effectively and has caused heavy losses to the government.

[64] UNIDROIT Principles of International Commercial Contracts Art. 7.3.1 Comment 2, 2010

[65] UNIDROIT Principles of International Commercial Contracts Art. 7.3.1(2), 2010

[66] *Supra* n. 64.

### 5.3 Transferring of participating interest in PSC does not amount to expropriation

Claimant's expropriation claim must fail as no measure enacted by the Respondent leads to an expropriation of Claimant's investments. Moreover, the Respondent has acted via general regulatory measures that are in accordance with due process, not discriminatory and pursue public purpose objectives and economic welfare.

In *Tecmed* case, it was held that an expropriation formally means a *forcible taking* by the Government of the property owned by private persons through administrative or legislative action to that effect.[67]

In the present case, Government has not expropriated Claimant's investments or rights registered in its territory since there is no taking of any of its property titles. It is thus humbly submitted that a fair procedure has been followed by the government during the termination of the PSC and in the process no treaty provisions stand breached. Thus, the Respondents are not liable to make any payments with respect to compensation or damages under Article 12 and 13 of ECT respectively.

Article 30.3 of the PSC states that, 'This Contract may, subject to the provisions herein below and Article 31, be terminated by the Government upon giving ninety (90) days written notice with reasons to the other Parties of its intention to do so'. In cases where the contracting party has knowingly submitted any false statement to the Government in any manner which was a material consideration in the execution of this Contract[68] or has failed to make any monetary payment required by law or under this Contract by the due date or within such further period after the due date as may thereafter be specified by the Government.[69]

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

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

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

It is submitted that no expropriation has taken place and the PSC had been terminated following the due process. Firstly, the Claimant was falsely showing front-load expenditure thereby cutting down on the profit share of the government and secondly, the Claimant had failed to make monetary payment with regard to taxes on the equipment which were no longer put to use.

### 5.4 The Respondent did not deny the Claimant justice or violate due process

In the present case, on 5th September 2013 the government had issued a show cause notice to the Claimant informing about the termination of contract as per Article 30.3 of the PSC. The notice also stated that 'the contract will stand terminated on expiry of 90 days of show cause notice i.e., 5th November 2013.[70] Arbitration proceedings also took place at the instance of the Claimant and the tribunal had upheld the validity of the termination. Thus, justice has not been denied to the Claimant and sufficient opportunity was given to them to put forward their case. It is thus humbly stated before this Hon'ble tribunal that the transfer of participating interest in the PSC does not amount to expropriation by the government and thus the government is not liable to pay damages for breach of the ECT or compensation for expropriation.

[70] Factsheet, P. XIII, ANNEXURE II.

## PRAYER

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

- That the claims made by claimant do not fall within the jurisdiction of ICSID.
- That the actions of Respondent does not violate Art. 2 and Art. 26 of ECT.
- That the respondent can evoke Art. 17 of the ECT.
- That the termination of the PSC does not violate Art. 10 and 21 of the ECT.
- That transferring of participating interest in the PSC does not amount 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 Respondent as in duty bound, shall forever pray.*

Respectfully Submitted

Sd/-

Counsel for Respondent