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5TH DR. PARAS DIWAN MEMORIAL INTERNATIONAL ENERGY LAW
MOOT COURT COMPETITION, 2015

BEFORE THE 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

MEMORANDUM FOR RESPONDENT

MOST RESPECTFULLY SUBMITTED
COUNSELS APPEARING ON BEHALF OF RESPONDENT

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STATEMENT OF JURISDICTION

Nixio on its own behalf, has approached the Centre for Settlement of Investment Disputes, for hearing issues relating to the violation of the rights conferred to it under the Energy Charter Treaty.

The Republic of Gondwana humbly contests the jurisdiction of this Tribunal.

STATEMENT OF FACTS

1. Gondwana is one of the fastest developing oil producing nations in Asia and is anticipated to be Asia's largest oil producer after explorations in CO-DWN 98 basin take place. The country is heavily dependent on oil. Oil revenue makes for almost 50 per cent of Gondwana's total oil earnings and 80 per cent of total government revenue. Its laws and constitutional principles are in complete consonance with that of the Republic of India. For rational and effective exploitation of these reserves, the Government of Gondwana embarked on an Exploration and Production Licensing Regime (EPLR) inviting foreign oil companies to invest, explore and produce oil & gas Gondwana under a Production Sharing Contract (herein after PSC) Model as per New Exploration Licensing Policy IX.

2. Nixio Petroleum (a company incorporated in Republic of Cedonda) and the State owned Gondwana Oil Corporation Ltd. formed a consortium to participate in the bidding rounds for CO DWN-98-3 block and became the successful bidders. A PSC in respect thereof was entered into between the Government of Gondwana and the Contractor on 13 November 2001. Nixio was appointed as the operator under the agreement to perform all the functions under the contract for all the constituents and carrying out petroleum operations..

3. In 2005, a significant discovery was made and production started in 2006. In the following years as production was exemplary however four years later the production started plummeting astonishingly and reached as low as 25.09MMT in 2011-12 from

35.67 in 2009-10. Not finding the reasons stated by the Contractor satisfactory for the decrease in production, the Director General of Hydrocarbons (herein after DGH) conducted an inquiry that concluded that the reasons cited by Nixio were baseless and 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. Further, in May 2012 the Income Tax Department raided the office of Nixio and submitted that the essentiality certificate issued for the equipment had to be cancelled as many of the drilling equipments were no longer put to use, making Nixio liable for taxes on the equipments.

4. Acting upon the report of DGH and Income Tax Department and in interest of the public, the Government was forced to terminate the contract for indulging in various malpractices and concealing material facts and transfer the participating interest of Nixio to Gondwana Oil Corporation as per Article 30.3 of the PSC. Nixio invoked arbitration under Article 33 of the PSC and the arbitral tribunal gave an award against Nixio and held the validity of the termination. Nixio did not challenge the decision of the arbitral tribunal in either the High Court or the Supreme Court of Republic of Gondwana.
5. Aggrieved by the decision of arbitral tribunal and citing the failure of the Gondwanan legal system, Nixio Petroleum has moved to International Centre for Settlement of Investment Disputes (herein after ICSID) claiming violation of the Energy Charter Treaty to which both countries are parties.

STATEMENT OF ISSUES

- I. WHETHER THE CLAIM MADE BY CLAIMANT FALL WITHIN THE JURISDICTION OF ICSID?**
- A. *Whether the Claimant has already exercised its right to dispute settlement?*
- B. *Whether as arguendo, the Centre can decide the dispute, even if the Respondent State's alleged violations of the Energy Charter Treaty are proved?*
- II. WHETHER THE ACTIONS OF THE GONDWANA (RESPONDED) AMOUNT TO VIOLATION OF ART. 2 AND ART. 26 OF THE ENERGY CHARTER TREATY?**
- III. WHETHER THE RESPONDENT CAN EVOKE ART. 17 PART III OF THE ENERGY CHARTER TREATY?**
- A. *Whether the right to invoke Article 17 comes without any prerequisites?*
- B. *Whether the Understanding 3 of the Energy Charter Treaty puts the burden of proof on the Investor?*
- IV. WHETHER THE TERMINATION OF THE PSC AMOUNTS TO VIOLATION OF ART. 10 AND 21 OF THE ENERGY CHARTER TREATY?**
- A. *Whether Respondents provided Fair and Equitable Treatment as enshrined under Article 10 to the claimants?*
- B. *Whether the Taxation Measures applied by the respondent were in accordance with the provisions of law and the PSC, and did amount to a violation of Article 21?*
- V. WHETHER TRANSFERRING OF PARTICIPATING INTEREST IN THE PSC AMOUNTS TO EXPROPRIATION BY THE GOVERNMENT UNDER ART. 10, 12 AND 13 OF THE ENERGY CHARTER TREATY?**

SUMMARY OF ARGUMENTS

I. ICSID DOES NOT HAVE JURISDICTION TO DECIDE OVER THE MATTER

Arbitration according to the terms of the Production Sharing Contract that has been signed by the Claimant has taken place. The issues argued by the Claimant at the Centre have an indistinguishable source with respect to whether they originated from the contract or the Energy Charter Treaty. In light whereof, the fork-in-the-road provision of the ECT applies and since the issues have already been decided, the Centre should deny jurisdiction over the matter. An arguendo, stating that the issues raised by the Claimant in the contractual arbitration and the treaty arbitration are different, nevertheless, the “cooling-off” period has not been met.

II. ACTIONS OF THE RESPONDENT DO NOT AMOUNT TO VIOLATION OF ARTICLE 2 AND ARTICLE 26 OF THE ECT

The actions of Gondwana were taken in public interest within the framework of State’s permanent sovereignty and sovereign rights over energy resources which is recognized by the ECT. The contract was terminated given the immense economic public interest involved and the nation’s dependence on oil and therefore, did not violate the principle of *pacta sunt servanda*. The activities of Gondwana were within the framework of the State’s sovereignty over its natural resources, were in interest of the nation, were transparent, were in regard to the principles laid down in international law and do not violate the Article 2 and Article 26 of the Energy Charter Treaty.

III. THE EVOCATION OF ARTICLE 17 BY THE RESPONDENT STATE IS CONSISTENT WITH THE OBJECTS AND PRINCIPLES OF ECT

Application of Article 17 is a right that is granted without any pre-requisites, if the conditions laid down in them have been satisfied. The right to evoke Article 17 should be unconditional as the Contracting Parties become aware of the circumstances of evoking Article 17 only after the Investor files the claim. Moreover, a strict reading of the Article does not provide for any prerequisites. In addition, the invocation of the Article would rather lead to a strengthened cooperation, as it would promote Investors to be upfront about their identity. Nevertheless, Understanding 3 of the ECT indicates that burden of proof lies on the Investor to prove that they do not fall under the purview of the article In light whereof, the Gondwana's claim to invoke Article 17 is within the Objects and Principles of the Charter.

IV. THE TERMINATION OF THE PSC DOES NOT AMOUNT TO VIOLATION OF ARTICLES 10 AND 21 OF THE ECT

The termination of the PSC does not amount to the violation of Article 10 and 21 of the ECT. In accordance with Article 10, the respondent provided Fair and Equitable Treatment, created stable, equitable, transparent conditions for investors of other Contracting Parties, and accorded at all times fair and equitable treatment by following the due course of law, as prescribed in the PSC, in a just and reasonable manner. Also, the taxation measures applied by the respondent were in accordance with the provisions of law and the PSC, and did not amount to a violation of Article 21 of the ECT.

V. TRANSFERRING OF PARTICIPATING INTEREST IN PSC DOES NOT AMOUNT TO EXPROPRIATION UNDER ART. 10, 12 AND 13 OF THE E.C.T.

The argument put forward by the Claimants as to expropriation is misconstrued since it denies the Gondwana government its inherent and essential international law sovereignty over its natural resources and the right to manage its own economy. The confiscation of the participating interest of Nixio Petroleum was an exercise of regulatory authority and police powers as a penalty for crimes by the Government of Gondwana since the Claimant was indulged in various malpractice. concealing material information from the Government and substantially affecting the petroleum star of the Government. Also, the depriving measures taken by the Gondwana Government were lawful since they were taken in public interest, under due process of law and were non-discriminatory.

ARGUMENTS ADVANCED

I. ICSID DOES NOT HAVE JURISDICTION TO DECIDE OVER THE MATTER

1. Article 26 of the Energy Charter Treaty stipulates that an Investor can either choose to go to a domestic court of the Host State, go to a previously decided dispute resolution body or go to ICSID. In the present case, the Claimant has already exercised its right of dispute settlement by arbitrating domestically on the same issue [A]. In any event, that the two issues are different [B] even then the Centre has no jurisdiction.

A. The Claimant has already exercised its right to dispute settlement.

2. Treaties often confine the foreign investor to the remedy that he has chosen. Largely, this compromise forestalls recourse to a multiplicity of claims being brought in respect of the same dispute before different tribunals or courts.¹ A purely contractual claim will normally find it difficult in passing the jurisdictional test of treaty-based tribunals, which will of course require allegation of a specific violation of treaty rights as the foundation of their jurisdiction.² The Centre has denied jurisdiction of various claims arising out of the same dispute and justified, that if the ‘fundamental basis of a claim’ sought to be brought before the international forum is autonomous of claims to be heard elsewhere it does not have

¹ Sornarajah M., *The International Law on Foreign Investment*, Cambridge University Press 2010. pg. 320.

² *Enron Corporation and Ponderosa Assets, LP v Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction (Ancillary Claim) of 2 August 2004, <<http://www.worldbank.org/icsid/cases/enron-decision-en.pdf>>, where similar wording was used, para 49.

jurisdiction.³ The tribunal cautioned that individual cases should be regarded with discernment, but found that what is necessary is to determine whether the claims made have the same normative source and whether a claim truly does have an autonomous existence outside the contract.⁴

3. In part, the distinction between these different types of claims [contract versus treaty] has relied on the test of triple identity in justification to apply the defense of *lis pendens*.⁵ Therefore, to apply the principle that the issue raised at the treaty-based tribunal, the triple identity test has to be satisfied, that the parties are the same, the cause of action is the same and the identity of the cross-relief is similar to such an extent that the two issues are practically inseparable and to draw any jurisdictional conclusions from the distinction between them.
4. The claims made by Nixio, in this regard, emerge from the contract, be it expropriation or having been denied fair and equitable treatment. These are standards provided forth in the contract and which have been discussed in the domestic fora. Therefore the Respondent submits that since it is impossible to distinguish between the treaty claims and the contractual claims, the two being practically the same, the Centre deny jurisdiction over the matter and maintain the sovereignty of the Gondwanan Tribunal that decided the dispute.

B. *Arguendo, the Centre cannot decide the dispute, even if the Respondent State's alleged violations of the Energy Charter Treaty are proved.*

³ *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21

⁴ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A v. Argentine Republic* ICSID Case No. ARB/97/3, Annulment Award of 20 August 2007

⁵ *Joy Mining Machinery Limited v Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award of 6 August 2004, 19 ICSID Rev-FILJ 486 (2004), <<http://www.worldbank.org/icsid/cases/joy-mining-award.pdf>>, at para 75. *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, <http://www.worldbank.org/icsid/cases/CMS_Award.pdf>; *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of 6 August 2003, 18 ICSID Rev-FILJ 301 (2003), <<http://www.worldbank.org/icsid/cases/SGS-decision.pdf>>.

5. Even if said issues are different and the treaty claims and the contractual claims can be distinguished, even then the (i) Centre does not jurisdiction over the matter as, judicial fair and equitable treatment is not a standard as prescribed in the Energy Charter Treaty and, (ii) alternatively, the ‘cooling-off’ period has not been met.

(i) *Judicial Fair and Equitable treatment is not a standard as prescribed by the Energy Charter Treaty*

6. The Article 10 of the ECT provides for fair and equitable treatment, wherein no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. Nevertheless, it does not provide for judicial fair and equitable treatment wherein the arbitral tribunal in question, which is being accused of denying fair and equitable standard of treatment was constituted by one arbitrator appointed by the Claimant, one arbitrator appointed by the Respondent and the third one as decided by the two arbitrators. This has been done according to the Article 33 of the Production Sharing Contract (hereinafter referred to as “the Contract” or “PSC”) under the purview of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act” or “1996 Act”).,

7. Therefore, the claim made that the award given by the Arbitral Tribunal was biased and skewed towards the Respondent fails as the tribunal was constituted fairly, all rules and procedure were duly followed and executed in a just manner as stipulated by the PSC or the Act.

(ii) *Alternatively, the ‘cooling-off’ period has not been met*

8. There must be a good faith attempt to secure a settlement.⁶ The continuation of a harmonious relationship may be a more desirable objective than a termination in the context of hostility. This requirement thus ensures that negotiations are attempted.
9. Article 26 clause (1) and (2) of the Energy Charter Treaty state that a dispute having arisen between the Contracting State and an Investor relating to any matter under Part III of the Treaty shall be settled amicably. Moreover, only if the disputes cannot be settled amicably within three months can the Investor submit the dispute(s) for resolution under clause (2) (a) or (b) or (c) to the respective fora of their choice, which in this case is under clause (2) (c) to ICSID. However, in the present case, on July 15, 2014, a newspaper report, “The Nixio Oil Crisis” was published in the Gondwanan Economic Times, which analysed the arbitration award. Therefore, it is safe to presume that the newspaper report was published on or immediately after the arbitration proceedings. More importantly, Nixio filed a request for registration of the dispute to ICSID on August 21, 2014. The time gap between the domestic arbitration award and the registration of dispute to ICSID under Article 26 Clause 2(c) of the Treaty is just over one month and is therefore in clear violation of Article 26 Clause (1) and (2).
10. The tribunals in various cases have very strictly interpreted the ‘cooling-off’ period and stated that if the same has not been complied with, the jurisdiction over the matter will be relinquished.⁷ In the present case as well, the cooling off period, being a fundamental

⁶ *Occidental v. Ecuador*, London Court of International Arbitration (Award, 1 July 2004);

⁷ *Muphy Exploration and Production Company International v Republic of Ecuador* (ICSID Case No ARB/08/4); *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2 (Order, 16 March 2006); *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22 (Award, 24 July 2008).

requirements that needs to be complied has not been met and therefore the Centre cannot take jurisdiction over the matter.

II. ACTIONS OF THE RESPONDENT DO NOT AMOUNT TO VIOLATION OF ARTICLE 2 AND ARTICLE 26 OF THE ECT

11. The actions of Gondwana do not amount to the violation of Article 2 and Article 26 of the ECT. The ECT, is a multilateral convention whose purpose, as defined in the Article 2 of the Treaty, is to establish a legal framework in order to promote long-term investment cooperation in energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter. The Charter, as defined in Art. 1(1) of the Treaty is the Concluding Document of the Hague Conference on the European Energy Charter that lays down the objectives of the Energy Charter Treaty. These objectives are defined within the framework of "State's permanent sovereignty and sovereign rights over energy resources."⁸ Article 26 of the Treaty concerns disputes arising out of breach of Part III of the Treaty which deals with promotion and protection of investments.

12. The principle of permanent sovereign rights over natural resources is recognised principle in customary international law and gives states the right to possess, use and dispose freely of any surface and subsurface natural resources, connected with their territory, and for this purpose they may not only regulate their economy but also nationalise or expropriate

⁸ Objectives, Title I, Concluding Document of the Hague Conference on the European Energy Charter

property and terminate contracts both of nationals and foreigners.⁹

13. The actions of Gondwana were within the framework of its sovereign rights over energy resources established by the ECT and international law jurisprudence. The right of Godwana over its natural resources is a part of its sovereignty and Gondwana holds permanent sovereignty over its natural resources. The country is highly reliant on oil and the income from oil forms a major part of Gondwana's gross domestic product (GDP). The unethical actions of the Claimant were substantially affecting the income of the Government and in turn the nation. Hence, the Respondent, in interest of the public, had to exercise the powers under its sovereign rights over its natural resources within the framework of ECT, terminate the contract and transfer the participating interest of the Nixio Petroleum.

14. Nixio Petroleum Limited was indulged in various malpractices and concealed material facts from the Government because of which the Government's share of profits from petroleum were substantially affected. Therefore, the Respondent was forced to terminate the contract and such termination was made in accordance with the previously agreed terms of Article 30.3 of the Production Sharing Contract (PSC). An arbitral proceeding under Article 33 of the PSC was also held where the arbitral tribunal gave an award against Nixio and held the validity of the termination. A proper legal framework as per Article 2 of the ECT was provided for. The proceedings was held as per the terms of Article 33 in a way that both the

⁹ A. Cassese, *Self-determination of Peoples – A Legal Appraisal*, Cambridge 1995, pp. 55-56; N. Schrijver, *Sovereignty over Natural Resources – Balancing Rights and Duties*, pp. 22-24, 264, 285; G. Elian, *The Principle of Sovereignty over Natural Resources*, Alphen an den Rijn 1979, pp. 11-12, 15-16; N. Schrijver, "Permanent Sovereignty over Natural Resources versus Common Heritage of Mankind – Contradictory or Complementary Principles of International Economic Law" in *International Law and Development*, P. de Waart et al. eds., Dordrecht 1988, pp. 90-91; K. Hossain & S. R. Chowdhury, *Permanent Sovereignty over Natural Resources in International Law*, London 1984, p. 93; UNGA – Res. 626 (VII), Right to exploit freely natural wealth and resources, Dec. 21, 1952, 7 UN – GAOR, Supp. No. 20, p. 18, UN Doc. A/2361.

parties had previously consented to and were hence, fair, transparent and just.

15. It is further submitted that the Respondent did not violate the principle of *pacta sunt servanda* as laid down under Part III of the ECT. International courts and tribunals have accepted that under general international law host states are entitled to interfere with investor-state contracts and even terminate them if this serves the host state's public interest.¹⁰ The contract was terminated given the immense economic public interest involved and the nation's dependence on oil and therefore, did not violate the Article 26 of the ECT.

16. The activities of Gondwana were within the framework of the State's sovereignty over its natural resources, were in interest of the nation, were transparent, were in regard to the principles laid down in international law and do not violate the Article 2 and Article 26 of the Energy Charter Treaty.

¹⁰ *Amoco International Finance Corp v. Government of the Islamic Republic of Iran Award*, 14 July 1987, 15 Iran-US CTR 189, 242-3, para 17; *Stran Greek Refineries and Stratis Andreadis v. Greece Judgment*, 9 December 1994, ECHR Series A, No 301-B; *Shufeldt Claim (Guatemala and US) Award*, 24 July 1930, 2 UNRIAA 1079, 1095.

III. THE EVOCATION OF ARTICLE 17 BY THE RESPONDENT STATE IS CONSISTENT WITH THE OBJECTS AND PRINCIPLES OF ECT

17. The tribunal in examining the ‘denial of benefits’ clause noted that Article 17 can be read together with the definition of ‘Investor’ in Article 1(7) as establishing two classes of Investors of a Contracting Party for the purposes of the ECT.¹¹ The first class with an indefeasible right...[and] second class that have a defeasible right to investment protection under the ECT, because the host State of the investment has the power to divest the Investor of this right.¹² Respondent submits that [A] it has the right to evoke Article 17 without any public notice or any prerequisites. In any event, [B] the burden of proof lies on the Claimant according to Understanding 3 of the Energy Charter Treaty.

A. The right to invoke Article 17 comes without any prerequisites.

18. The right to evoke Article 17 should be [A] unconditional as the Contracting Parties become aware of the circumstances of evoking Article 17 only after the Investor files the claim. [B] In any event, a strict reading of Article 17 does not call for a prerequisite in any form and [C] would rather lead to an increase in cooperation as per the Objects and Principles of the Treaty.

(i) *The right to evoke Article 17 should be unconditional as the Contracting Parties become aware of the circumstances of evoking Article 17 only after the Investor files the claim*

¹¹ *Amto v. Ukraine SCC Case No. 080/2005*

¹² *Id.*, para. 61

19. Investments nowadays are structured in a very complicated manner and the Contracting Parties usually becomes aware of the circumstances justifying the application of Article 17 of the ECT only after Investor files the claim. Moreover, the host State may not even be aware of the establishment of a new investment in its territory, let alone the nationality of that investor, the extent of its business activities in its home State, and the nationality of its underlying owners or controllers. It is neither under any obligation to do so, and if it were there, it would be an impossible task to monitor each and every investment coming into the Host State. The host State may only learn of the conditions that would justify invoking its right to deny at such time as an investor notifies it that a dispute under the ECT has arisen and possibly not even then.”¹³

(ii) *A strict reading of Article 17 does not call for a prerequisite in any form*

20. The conclusion of the tribunal regarding the notice to be given to Investors is not based on the ordinary meaning of the terms of Article 17.¹⁴ Article 17 of the ECT does not provide for any prerequisites that should be complied with by the Contracting Party in denying the benefits of Part III to an ECT Investor.¹⁵ Unlike Article 17 of the ECT, Article 1113 of the NAFTA expressly provides that the application of the denial of benefits clause is subject to

¹³ Stephen Jagusch & Anthony Sinclair, ‘*The Limits of Protection for Investments and Investors under the Energy Charter Treaty*’, in Ribeiro (ed.), 101.

¹⁴ *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24)

¹⁵ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24. Decision on Jurisdiction, para. 157

prior notification.¹⁶

21. Such an implied requirement conflicts with the provisions of Article 31 of the Vienna Convention. The ordinary meaning of the terms used by Article 17 does not validate an implied requirement for a prior notification of investors by the Contracting Parties before exercising the denial of benefits right.¹⁷ A natural and ordinary reading of the words in Article 17(1) yields no express or necessary condition that the denying State must first give prior notification for the denial of advantages to be effective.¹⁸
22. The plain wording of the introductory part of Article 17 of the ECT justifies the right of a Contracting Party to deny, at any time and without any formality, the advantages of Part III of the ECT.¹⁹ Therefore, it is on the sole discretion of the Respondent to invoke Article 17 and are therefore under not obligation to provide any public notice before evoking the said clause.

(iii) *It leads to an increase in cooperation as per the Objects and Principles of the Treaty*

23. Article 2 provides that the purpose of the ECT is to develop a legal framework for the promotion of ‘long-term cooperation in the energy field’, which should be based on ‘complementarities and mutual benefits’. As the tribunal suggested, the denial of benefits clause is intended to strengthen long-term cooperation based on mutual benefits.²⁰

¹⁶ Meg Kinnear, Andrea Bjorklund & John F.G. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA*, Chapter 11 (Alphen aan den Rijn: Kluwer Law International, 2006), para. 1113–6.

¹⁷ The Nationality Decrees Issued in Tunis and Morocco Case, Advisory Opinion No. 4 of 7 February 1923, 24 PCIJ. 199.

¹⁸ Stephen Jagusch & Anthony Sinclair, *Part II – Denial of Advantages under Article 17(1)*.

¹⁹ Jagusch & Sinclair, *Part II – Denial of Advantages*, 38.

²⁰ *Supra* 15.

24. The purpose of the ECT is the long-term cooperation in the energy field, based on mutual benefits. This however, does not automatically exclude a retrospective refusal of benefits for Investors and Investments, which under normal circumstances would not be protected by the provisions of the ECT. The retrospective effect of Article 17(1) benefits ‘long-term cooperation’ by encouraging investors to be upfront about ownership, nationality and citizenship.²¹

25. Since in the present case, there is no knowledge of the ownership or control of the Claimant, the onus lies on the Claimant to be upfront about the ‘ownership, nationality and citizenship’ to benefit ‘long-term cooperation’. In light whereof, the Respondent is justified in evoking Article 17 to deny the Claimant advantages under Part III.

B. Understanding 3 of the Energy Charter Treaty puts the burden of proof on the Investor

26. Article 17(1) ECT provides little guidance on the allocation of the legal burden between the parties. Under normal circumstances, that host state officials will never know at the time they ought to take action whether a given company is covered by the treaty.²² The controlling company and the company seen by the host state officials may be separated by multiple layers of intermediate holding companies not heard of. It is further asserted that the strict interpretation of Article 17(1) would place an impossible task on states as they become aware of the circumstances justifying the denial of benefits only when faced with a

²¹ Chalker James, ‘*Making the Energy Charter Treaty Too Investor Friendly: Plama Consortium Limited v. the Republic of Bulgaria*’, *Transnational Dispute Management Journal* 3, no. 5 (2006): 7

²² Symposium Barton Legum, *Defining Investment and Investor: Who Is Entitled to Claim? Making the Most of International Investment Agreements: A Common Agenda* 5 (OECD, Dec. 12, 2005), at 4.

claim from a presumptive investor.²³

27. Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has to prove that such control exists.²⁴ It might be difficult for the respondent to determine who owns or controls an Investor when ownership or control might involve a number of entities in different jurisdictions. Similarly, the Claimant knows exactly what its business activities are in a particular area, and can easily present the evidence to establish those activities, while this information might not be accessible to the respondent. Nevertheless, the relative accessibility of evidence would not seem to justify any modification to the normal rules regarding the burden of proof. It would support a duty to disclose evidence so that a respondent could request the disclosure of specific documents from the Claimant where the documentation is not otherwise accessible.²⁵

28. More importantly, Article 17 of the ECT denies not only the benefits of Part III, but also the procedural remedies under Part V of the ECT. The tribunals have been unable to answer, however, that how can there be Article 26 of the ECT, which is limited to Part III, if a respondent properly invokes Article 17 (1), which denies to the investor any Part III protections.²⁶ In light whereof, the right conferred to the Respondent by Article 17 is unconditional and to prove the contrary lies on the Claimant having the required knowledge to prove the contrary.

²³ Loukas A. Mistelis & Crina Mihaela Baltag, '*Denial of Benefits and Article 17 of the Energy Charter Treaty*', 113 Penn St. L. Rev. 1315 (2009).

²⁴ *Supra* 11

²⁵ *ibid.* at para. 65.

²⁶ James Chalker, '*Making the Energy Charter Treaty Too Investor Friendly: Plama Consortium Limited v. the Republic of Bulgaria*', Transnational Dispute Management Journal 3, no. 5 (2006):

IV. THE TERMINATION OF THE PSC DOES NOT AMOUNT TO VIOLATION OF ARTICLES 10 AND 21 OF THE ECT

29. Respondent submits that the termination of the PSC does not amount to the violation of Article 10 or 21 of the ECT as the [A] Respondent provided Fair and Equitable Treatment as enshrined under Article 10 to the Claimant; and ensured that the [B] taxation measures applied by the respondent were in accordance with the provisions of law and the PSC, and did not amount to a violation of Article 21 of the ECT.

A. Respondent provided Fair and Equitable Treatment as enshrined under Article 10 to the Claimant

30. Article 10(1) of the ECT provides for the obligation of a Contracting Party to ensure stable, equitable, favourable and transparent conditions for investors of other contracting parties to make investments in its territory. Within the Article, the standard of Fair and Equitable Treatment (hereafter, referred to as FET) is embedded in a complex provision that also refers to constant protection and security, to prohibition of unreasonable or discriminatory measures to treatment required by international law, and an umbrella clause with regard to the observance of any obligations entered into between a Contracting Party and an Investor of another Contracting Party.²⁷ Moreover, it is widely accepted that the most important function of the FET standard is the protection of the investor's legitimate expectation through the creation of a transparent and stable legal framework.²⁸

31. Accordingly, tribunals have held that the FET standard requires a transparent, and consistent legal framework that protects the investors' legitimate expectations, freedom

²⁷ Schreuer, Christopher H., *Investment Protection and the Energy Charter Treaty-Chapter 2 Selected Standards of Treatment Available under the Energy Charter Treaty*, Juris Publishing Inc., Dec. 2008, pg 64-65

²⁸ *Tecnicas Medioambientales Tecmed S. A. v. The United Mexican States*, ICSID CASE No. ARB (AF)/00/2 (Award, 29 May 2003, ILM 43 (2004): 133.)

from coercion and harassment, procedural propriety and due process and generally action in good faith.²⁹ In *Petrobart v. The Kyrgyz Republic*³⁰ the tribunal held that Article 10(1) of the ECT in its entirety intended to ensure a fair and equitable treatment of investments. Thus, it regarded FET as an overarching principle that embraces all the other standards mentioned in the article.

32. Respondent submits that the provisions under paragraph (3) of the article, intend to assure an absolute minimum standard of treatment.³¹ It provides that the treatment accorded to the investments of investors of other Contracting Parties shall not be less than that required by international law. In *PSEG v. Turkey* it was held that the concept of FET has acquired a standing of its own, which is separate and distinct from that of other standards.³² Also, in *Azurix v. Argentina*, the Tribunal interpreted the Argentina-United States BIT which provided for treatment no less than that required by international law, by affirming that FET as a standard is separate and higher than the one under international law.³³ Furthermore, in *Genin v. Estonia*,³⁴ the Tribunal referred to FET as an “international minimum standard” that merely pointed out that the treaty provision containing the obligation to offer FET constituted a minimum standard below which the domestic law shall not fall.³⁵

²⁹ Supra 29; C. Yannaca-Small, ‘Fair and Equitable Treatment Standard in International Investment Law’, In *International Investment Law: A Changing Landscape*, OECD ed. (2005) p. 73; C. Schreuer, ‘Fair and Equitable Treatment in Arbitral Practice’, *The Journal of World Investment & Trade* 6 (2005): 357; R. Dolzer, ‘Fair and Equitable Treatment: A Key Standard in Investment Treaties,’ *The International Lawyer*, 39 (2005): 87.

³⁰ *Petrobart v. The Kyrgyz Republic*, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration No. 126/2003 (Award, 29 March 2005, *loc. cit.* 91)

³¹ Craig Bamberger, Jan Linehan & Thomas Waelde, *The Energy Charter Treaty in 2000: In a New Phase*, Oxford University Press, Dec 2000

³² *PSEG v. Turkey*, ICSID Case No. ARB/02/5 (Award, 19 January 2007) para 239

³³ *Azurix Corp. v. The Argentine Republic*, PCA CASE NO. 2010-18 / BCB-BZ (Award, 14 July 2006, available at <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>.)

³⁴ *Genin, Eastern Credit Ltd. Inc. and AS Baltoil v. Republic of Estonia*, ICSID Reports 241 (Award, 25 June 2001, 6.)

³⁵ *Ibid.*, para. 367.

33. Accordingly, it is submitted that the government of Gondwana upheld the obligations enshrined in Article 10 of the ECT, and did not violate the autonomous international standard of FET by ensuring fair and equitable treatment of the Claimant's investments, providing a transparent and consistent legal framework that protects the investors' legitimate expectations, and duly following the due process of law in an impartial and non-discriminatory manner. The termination of the PSC does not amount to a violation of the provisions under Article 10 as the termination was according to the provisions of the contract, in the event of the violation of the provisions of the contract.
34. Respondent submits that the Director General of Hydrocarbon (hereafter, referred to as DGH) is the Gondwanan governmental regulatory body under the Ministry of Petroleum and Natural Gas. Its Objectives include the promotion of sound management of the oil and natural gas resources, and having a balanced regard for environment, safety, technological and economic aspects of the petroleum activity.³⁶ Hence, it is a competent legal body authorized to conduct inquiries. In one such enquiry of prominent national oil company members, it found that the reasons cited by Nixio, such as the low fluidity in the CO DWN-98-3 basin were baseless. This enquiry was not specifically targeted at the Claimant but was a part of the DGH's ordinary course of work.
35. Furthermore, the production estimates provided in the report submitted by the DGH far exceeded the actual production. Thus, the Claimant was seen as undermining the capacity utilization of the reserve. Also, Nixio had been showing frontload expenditure, and thereby cutting down on the profit oil share of the government. This caused significant loss to the respondent since oil production accounted for 30% of the GDP and about 80% of the total

³⁶ Directorate General of Hydrocarbons (DGH), *About DGH*, available at <http://www.dghindia.org/> (last seen 16/3/2015)

government revenue. In *GAMI v. Mexico*³⁷, the Claimant alleged that the domestic regulations had not been carried out in accordance with their terms. It was held that the failures were not attributable to the government since the necessary cooperation of the Claimant had been lacking.³⁸

36. Furthermore, the Government of Gondwana complied with the principle of *pacta sunt servanda*, as enshrined under Article 10(1) of the ECT, which states that each Contracting Party shall observe any obligations it has entered into with an investor of another Contracting Party. Since the actions of the Claimant amounted to a violation of the PSC, the government was forced to terminate the contract on the grounds of concealment of material facts as well as failure to make monetary payments, under Article 30.3(a) and (f) of the PSC.

37. Article 10(3) of the ECT, defines “treatment” as one which is accorded by a Contracting Party to its own investors or to investors of any other Contracting Party, whichever is most favourable. Furthermore, Article 30.3 provides that in the situation where the Contractor comprises of two or more parties, the government shall not exercise its rights of termination in the case where the Contractor involves two or more parties, if the other non-defaulting party satisfies the government that it would carry out the obligations of the Contractor and has, with the permission of the government, acquired the participating interest of the defaulting party. Thus, the claim made by the Claimant that the government of Gondwana failed to provide the “treatment” as described in Article 10(3) of the ECT, is redundant as the transfer of the participating interest from Nixio Petroleum Ltd to Gondwana Oil

³⁷ *GAMI v. Mexico*, In proceedings pursuant to NAFTA Chapter 11 and the UNCITRAL Arbitration Rules (Final Award, 15 November 2004, *ILM* 44 (2005): 545.)

³⁸ *Id.*, paras. 104, 108, 110

Corporation Ltd, was done under the terms of the PSC. Also, the respondent adhered to the provisions under Article 10(5), by limiting to the minimum the exceptions to the treatment as defined under Article 10(3). Hence, the respondent treated both the Claimant and Gondwana Oil Corporation (a national of Gondwana) at par, i.e. both were subjected to the same laws of the PSC.

38. Furthermore, the obligations enshrined under Article 10(12), which provide for the obligation of a contracting party to ensure that its domestic laws provide effective means of assertion of claims with respect to investments, are fulfilled by the respondent. Chapter 7, Section 34 of the Arbitration and Conciliation Act of 1996 provides for recourse against arbitral awards if the award is in direct contravention of the laws in India or if it was carried out in an unjust manner. Therefore, it is submitted that the Claimant has ample opportunity to seek justice in the domain of the domestic law of Gondwana.

39. Respondent submits that justice was delivered in an impartial and non-discriminatory manner. Arbitration was invoked by the Claimant in accordance with Article 33.3 of the PSC and the matter was submitted to an arbitration tribunal for a final decision. The arbitration was conducted in accordance with the Arbitration and Conciliation Act, 1996. The arbitration tribunal consisted of three arbitrators. Each party to the dispute appointed one arbitrator, and the two arbitrators appointed by the two parties appointed the third arbitrator. Hence, the arbitration was done in a just, fair and equitable manner, and with due regard to the interests of the Claimant as each party appointed equal number of arbitrators. Also, Article 33.8 of the PSC states that the decision of the majority of the arbitrators would be final and binding on the parties.

40. Therefore, it is submitted that the termination of the PSC did not violate international law or the provisions of Article 10 of the ECT as the Respondent provided the necessary treatment to the Claimant under the provisions of the article, created stable, equitable, transparent conditions for investors of other Contracting Parties, and accorded at all times fair and equitable treatment by following the due course of law, as prescribed in the PSC, in a just and reasonable manner.

B. Taxation Measures applied by the respondent were in accordance with the provisions of law and the PSC, and did not amount to a violation of Article 21

41. Respondent submits that the tax imposed in the Claimant does not amount to a violation of the principles enshrined under Article 21 of the ECT. Provisions under Article 21(3)(b) prevent the use of taxation measures which are discriminatory in nature. Moreover, it states that Article 10(2) and (7) shall apply to taxation measures, other than those on income and capital, in the event where any taxation measure arbitrarily discriminates against an investor of another Contracting Party, or arbitrarily restricts the benefits accorded under the investment provisions of the Treaty. Also, Article 21(5) provides that the provisions of Article 13 apply where the alleged tax constitutes expropriation and is discriminatory.

42. Respondent submits that in the present case, the Taxation Measures applied by the Respondent were in accordance with the provisions of law and the PSC. The DGH's report stated that Nixio was showing front-load expenditure, and was thereby cutting down the profit oil share of the government and undermining the capacity utilization of the reserve. Also, it stated that the equipment imported for petroleum operations were no longer put to use.

43. Accordingly, Articles 17.5 and 17.6 of the PSC state that the machinery, plant, equipment etc. imported by the Contractor solely and exclusively for use in the petroleum operations under this contract shall be exempt from custom duties or other charges; and the government would have the right to inspect the items to determine that the items have solely and exclusively been imported for reason the exemption was given. In the case where the items are being used for other purposes, the contractor shall immediately become liable for the payment of the applicable custom duties. Thus the government of Gondwana cancelled the essentiality certificate issued for the equipment as they were no longer put to use, making Nixio liable for taxes on the equipment.
44. Respondent further submits that since the taxation measures were not discriminatory, and were imposed due to the violations of the essentiality contract and the exorbitant frontload expenditure shown by Nixio, it does not amount to expropriation under Article 13 and Article 21(5) and is merely in accordance with the provisions of the contract.
45. Therefore, it is submitted that the actions of the Claimant clearly violated the provisions of the PSC and the taxation measures imposed by the respondent as non-discriminatory and do not violate any provision under Article 21 if the ECT.

V. TRANSFERRING OF PARTICIPATING INTEREST IN PSC DOES NOT AMOUNT TO EXPROPRIATION UNDER ART. 10, 12 AND 13 OF THE E.C.T.

46. The transferring of participating interest in the PSC does not amount to expropriation by the Government of Gondwana under Article 10, 12 and 13 of the Energy Charter Treaty and the measures taken by the Respondent were lawful as they met all the four conditions specified in Article 13 of the ECT.

47. The argument put forward by the Claimant as to expropriation is misconstrued as it denies the Respondent its inherent and essential international law sovereignty over its natural resources and the right to manage its own economy. The ECT too, as is highlighted in the Preamble of the treaty, functions within the framework of sovereign rights over natural resources. Every nation has the right to regulate its natural resources and non-discriminatory regulatory measures aimed at the general welfare do not amount to an expropriation or nationalisation, and therefore do not lead to compensation claims.³⁹ In *Too v. Modesto*⁴⁰ too, the Tribunal confirmed the established principle in §712 of the Third Restatement that a state is not responsible for loss of property or any other economic disadvantage resulting from bona fide, non-discriminatory general taxation, regulation, forfeiture from crime, or other action of the kind that is commonly considered as within the police powers of states.⁴¹ It is argued that the confiscation of the participating interest of Nixio Petroleum was an exercise of regulatory authority and police powers as a penalty for crimes by the Government of Gondwana. The Claimant indulged in various malpractice, concealing material information from the Government and substantially affecting the petroleum star of the Government. Therefore, the confiscation of the participating interest of the Claimant as a penalty for crimes was a valid use of police powers.

48. The Respondent further argues that the depriving measures taken by the Gondwanan Government were lawful since they were taken in public interest, under due process of law and were non-discriminatory.

³⁹ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, para. 255 (Partial Award, March 17, 2006)

⁴⁰ (1989) 23 Iran-U.S. C.T.R. 378

⁴¹ Third Restatement §712(g).

49. The measures taken by the Respondent are in the interest of the public. Public interest covers, besides the universal interest of the public to be recognised and protected, “something in which the public as a whole has a stake, especially an interest that justifies governmental regulation.”⁴²

50. The measures taken by the Respondent were in interest of the public of Gondwana. Nixio's concealment of material facts and involvement in various malpractices not only caused huge losses to the exchequer of the nation but also substantially affected the government's share petroleum. The public and government of Gondwana are highly dependent on oil and this immense reliance on oil is apparent from the fact that crude oil production accounts for 30% of the GDP and 80% of the total government earnings. Also, oil revenue contributed 40.5% to the nation's total export earnings in 1999. The CO DWN-98-3 basin where Nixio was operating holds one of the Gondwana's largest reserves of crude oil and this oil can make Gondwana move towards the essential self-sufficiency in energy sector given the fact that Godwana is expected to be world's third largest energy consumer. Nevertheless, it is added that it is the state concerned that determines whether or not an activity falls with the public purpose, only very seldom is this decision questioned.⁴³ The substantial dependence of the public and the consequent interest of the public in oil cannot be overemphasized and thus, the measures taken by the Respondent are justified, lawful and in public interest.

51. With respect to due process of law, it is submitted that the measures taken by the

⁴² Brayan A. Garner (ed.), Black's law Dictionary, 9th ed. West Publishing Co., 2004,P.1266

⁴³ United Nations Conference on Trade and Development: “Taking of Property”, UNCTAD Series on issues in international investment agreements, New York & Geneva 2000, p. 12, UN Doc. UNCTAD/ITE/IIT/15; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, International Centre for Settlement of Investment Disputes, Case No. ARB/03/16, para. 432 (Award, Oct. 2, 2006); B. H. Weston: “The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth”, p. 440.

Respondent were not arbitrary, but were in accordance with the process established under the Production Sharing Contract (PSC) to which the Claimant is a party. As per Article 30.3 and Article 11.5 of the PSC, the Government reserves the right to terminate the contract and the lease for mining if the Defaulting Party comprising the Contractor knowingly submits any false statement to the Government in any manner which was a material consideration in the execution of this Contract. Nixio Petroleum concealed material facts regarding the production of petroleum and undermined the capacity utilization of the reserve. Therefore, the Government was compelled to terminate the contract and transfer the participating interest of Nixio to Gondwana Oil Corp. in accordance with the process established under the PSC.

52. Secondly, it is contended that contrary to the Claimant's allegation that no procedure at all was provided for resolution of the dispute, Article 33 of the PSC clearly provides for various methods of dispute resolution comprising of sole expert, conciliation and arbitration. Furthermore, the Claimant already went for Arbitration under Article 33 and the panel gave an award in favour of Respondent. This panel consisted of 3 arbitrators. As per Article 33 of the PSC, both the parties appointed one arbitrator each and the 2 arbitrators with the consent of both the parties, appointed the third arbitrator. The Claimant never, before and during the arbitral proceedings, objected to the arbitral proceedings or questioned the legitimacy of the proceedings. Even if the Claimant was not satisfied by the award given by the arbitral tribunal, the Gondwanan law provides the Claimant the right to move the Courts under the Arbitration and Conciliation Act, 1996 (Arbitration Act). Therefore, prima facie the due process as agreed under the PSC by both the parties was followed and there is no reason to believe otherwise.

53. In conclusion, the Respondent claims that the actions taken by the Gondwana Government were in respect to due process of law and were fair, reasonable and justifiable.
54. The Respondent submits that the measure taken by the Gondwanan Government were non-discriminatory in nature because no other foreign party was involved in the PSC and the treatment that was given to the domestic investor (Gondwana Oil Corp.) was in accordance with the provisions of the PSC.
55. As per the PSC, Nixio Petroleum was appointed as the Operator and was responsible for performing all the functions on the part of the Contractor and conducting major operations for exploration and mining of petroleum. Nixio was involved in various malpractices, concealing material facts from the Government and showing front load expenditure thereby reducing the share of the Government. There was no way possible that the Gondwana Oil Corporation could have known about the involvement of Nixio in such malpractices and hence can't be held as defaulting party. The termination of the Contracting and the transferring of the Participating Interest of Nixio were done pursuant to the provisions of Article 30.3 of the PSC wherein when Contractor comprises two or more Parties, the Government doesn't exercise its rights of termination pursuant to the non- Defaulting Party. Therefore, the measures taken by the Government were non-discriminatory in nature and do not violate Article 13 of the PSC.
56. It is a recognized principle of international law that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation

whatsoever.⁴⁴ Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected seeks compensation.⁴⁵ The Respondent humbly submits that the confiscation of the participating interest was a regulatory action of the state against the crimes committed by the Claimant and the Claimant is hence not entitled to any form of compensation.

57. Therefore, there was no expropriation under the ECT as is alleged by the Claimant and the Respondent took bona-fide, non-discriminatory measures in accordance with the due process of law and within the framework of sovereign regulatory powers of the state over its natural resources.

⁴⁴ *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican State*, International Centre for Settlement of Investment Disputes, Case No. ARB (AF)/00/02, para. 119 (Award, May 29, 2003)

⁴⁵ *Marvin Feldman v. Mexico*, International Centre for Settlement of Investment Disputes, Case No. ARB (AF)/99/1, para. 103 (Award, Dec. 16, 2002)

PRAYER

In light of the issues raised, arguments advanced and authorities cited, respondents most humbly request this Tribunal to adjudge and declare that:

I. The Centre does not have jurisdiction over the matter.

In the event it does have jurisdiction, the Respondents humbly plead that:

II. The actions of the Respondent do not violate Article 2 and 26 of the Energy Charter Treaty

III. The Respondent can evoke A. 17 and deny the benefits of Part III of the Treaty

IV. The termination of the PSC does not amount to violation of Art. 10 and 21 of the Energy Charter Treaty

V. The transfer of participating interest in the PSC does not amount to expropriation under Art. 10, 12 and 13 of the Energy Charter Treaty and is rather in terms with the PSC.

All of which is humbly prayed,

Agents for Respondents