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5th Paras Diwan International Moot Court Competition 2015

Before

THE HONOURABLE TRIBUNAL OF ICSID

APPLICATION NO. _____/2014

Nixio…….. Petitioner

v.

Govt. of ROG .....……..……..... Respondent

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INDEX OF ABBREVIATION

ARB-	Arbitration
Art.-	Article
BIT-	Bilateral Investment Treaty
Co.-	Company
E&P-	Energy and Petroleum
ECT-	Energy Charter Treaty
Ed.-	Edition
EPLR-	Energy Production License Regime
FET-	Fair and Equitable Treatment
GOND	Gondwana
Govt.	Government
ICSID	International Centre for Settlement of Investment Disputes
MPSC-	Model Production Sharing Contract
No.-	Number
NOC –	No Objection Certificate
Nov.-	November
OECD-	Organization for Economic Co-operation and Development
Para.-	Paragraph
Para. –	Paragraph
Pg.-	Page
PSC-	Production Sharing Contract
PSU-	Public Sector Undertaking
ROG –	Republic Of GONDWANA
S.para-	Sub – paragraph
Sept.	September
v.-	Verses

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STATEMENT OF JURISDICTION

The Petitioner humbly submits this memorandum for petitions filed before this Honourable tribunal in pursuit of legal justice. The application invokes its jurisdiction under the ICSID convention as well as under ECT. It sets forth the facts & the laws on which the claims are based

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STATEMENT OF FACTS

PART I

GOND is hottest offshore exploration frontier. Exploration has been taking place across the entire Shamime basin, a deep water block in the ROG Ocean. ROG's industrialization depends largely on how its energy resources. With the completion of the Khilo export-marketing condensate facility, as well as the commencement of the export of liquefied natural gas to Europe, there is no doubt that the energy sector will continue to be an important factor in the ROG economy for the foreseeable future. It introduced Exploration & Production License Regime (EPLR), a policy mechanism that opened doors to foreign oil companies to invest, explore & produce oil & gas in the sovereign territory ROG.ROG has executed their development & exploration model through Production Sharing Contract (PSC) Model. Under this policy, Govt. invited bids through an international competitive bidding system[1] .After the bidding rounds, the Govt. entered into PSC with the successful bidders after which they become the contractors.

In the year 2001, the Govt. invited tenders to bid for blocks located in the offshore coasts of Province of Shahime, ROG Ocean. In response to the invitation, ROG Oil Corporation Ltd. & Nixio Petroleum formed a consortium to participate in the bidding. The consortium of ROG Oil Corporation Ltd. & Nixio Petroleum became the successful bidders. A PSC in respect thereof was entered into between the Govt. ROG & the Contractor on 13 Nov. 2001. The contract area as recorded by the PSC was identified as CO DWN-98-3, a deep water block.

PART II

15 December 2001, the companies ROG Oil Corporation Ltd. & Nixio entered into a Joint Operating Agreement in conformity with Article 7 of the PSC to define the rights & liabilities of the parties under the contract. Nixio was appointed as the operator under the agreement. GOND

[1] (Annexure 1).

Oil Corporation Ltd. - a national oil Co. established in 1985 under the ROG Oil Corporation Act, 1985. It is a Co. incorporated & registered as per Co. laws prevalent in ROG. The Govt. holds majority shares of the Co. The Co. dominated ROG oil industry along with its smaller subsidiaries before liberalization & the EPLR regime.ROG Oil Corporation Ltd. continued to remain prominent even after EPLR, winning major bids in both the first & the second round of bidding.

Nixio Petroleum is a Co. incorporated according to the laws of Republic of Cedonda, established in 1955, It is a Co. operating in almost all areas of oil & gas industry including exploration & production, power generation, petrochemicals etc. Nixio has been ranked number one amongst private E&P companies in Asia & third amongst global private E&P companies. Due to their impeccable & advanced technologies they have emerged as a leading brand in E&P sector & are responsible for oil & natural gas exploration, development & production activities in many countries.

PART III

In 2002 – Nixio started exploration & by 2005 – significant discovery was made in the basin. The development plan submitted to the Govt. showed that the basin has largest reserves in nation.

Nixio started production in the year 2006 - decrement in production over the period of six fiscal years from 2006, the reason for which was geological factors as stated by Nixio. After an inquiry conducted by the DGH comprising of national oil Co. members, it was found the reasons stated by Nixio were baseless & Nixio was showing front-load expenditure thereby cutting down the profit oil share of Govt. & undermining the capacity utilization of the reserve. In May 2012, Income tax dept. raided the office of Nixio at New Alankara. DGH report also bought forth essentiality certificate issued for the equipment which had to be cancelled as many of the drilling equipments were not put to use, making Nixio liable for taxes on the equipments.

PART IV

Acting upon the reports of the DGH, the actions that were taken are:

1. Termination of the contract by the Govt. as per Article 30.3 of the PSC by issuance of a show-cause notice dated 05.09.2013.

2. Participating interest of Nixio was transferred to ROG Oil Corporation as per Article 30.3 of the PSC. After termination of the contract, Minister of Petroleum & Natural Gas at a press conference on 12 Sept., 2013 stated that;

a) They were forced to terminate the contract of Nixio as the Co. was involved in various malpractices causing loss to the exchequer of the nation;

b) The Co. has been concealing material facts from the Govt. because of which Govt.'s share of petroleum was substantially affected.

Nixio denies such allegation claiming them to be politically motivated. The chairman of Nixio, Geoffrey Martin on his statement to the press alleging that Govt. of ROG has been harassing their Co. & categorically denied all charges. It also raised its concern over losing investors due to such actions of the ROG Govt.

After termination of contract, Nixio invoked ARB under Article 33 of the PSC contesting the validity of the termination. The arbitral tribunal gave an award against Nixio & held the validity of the termination.

Immediately after the award, the ROG Economic Times on 15th July, 2014 in a newspaper report, "*The Nixio Oil Crisis"* analysed the ARB award:

"The National Oil Companies have dominated the ROG's Oil Sector. One of the major reasons for this is the Govt. support which the NOCs get. The presence of bureaucracies has further deterred the scenario & has prevented the formation of coherent policy. There exists a belief that the biddings remains biased towards NOCs."

This is not the first instance of arbitral award over validity of the termination of the PSC. The situation becomes worse by the fact the son of Mr. Ganesha Jhah, the minister of petroleum & natural gas is a shareholder in ROG Oil Corporation Ltd.

Therefore, Nixio seeks a "neutral forum" which would share its values in the form of international ARB outside the jurisdiction of the host state.

Nixio alleges that the ROG Govt., the national legislature, judicial authorities & other public authorities & agencies deliberately created numerous problems for them & refused or unreasonably delayed the adoption of adequate corrective measures.

These actions & omissions, according to Nixio, caused & are still causing material damage to the operations in CO DWN-98-3 block & have had, & still have, a direct negative impact on the reputations & market values of the respective Nixio group companies. ROG's actions & omissions violate the ECT (ECT) to which both countries are parties.

Nixio Oil seeks an award of damages for breaches of the treaty & compensation for expropriation.

Course of action after arbitral award:

a) By the letter dated 21 August 2014, Nixio, filed a request for registration of ARB with the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) against the ROG the request invoked the ICSID ARB provisions, along with the ECT (“ECT”) provisions;

b) the Govt. of ROG contented that the ICSID did 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 ROG. Moreover, ARB has already been concluded under the PSC;

c) However on 19 Sept. 2014, the Centre in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation & ARB Proceedings (the “ICSID Institution Rules”) acknowledged receipt of the request & on the same day transmitted a copy to the ROG.

THE ISSUES INVOLVED

1. Whether the claim made by claimant fall within the jurisdiction of ICSID.

2. Whether the actions of the ROG (Respondent) amount to violation of Art. 2 & Art. 26 of the ECT.

3. Whether the Respondent can evoke Art. 17 part III of the ECT.

4. Whether the termination of the PSC amounts to violation of Art. 10 & 21 of the ECT.

5. Whether transferring of participating interest in the PSC amounts to expropriation by the Govt. under Art. 10, 12 & 13 of the ECT.

SUMMARY OF ARGUMENTS

WHETHER THE CLAIM MADE BY CLAIMANT FALLS WITHIN THE JURISDICTION OF ICSID.

The jurisdiction nestles on the basis of rudimentary criteria given in article 25 of ICSID. Jurisdiction Ratione Materiae to rule on the application & interpretation of the established agreement as the dispute itself is arising out of an investment law dispute. Referral to the "charter of the investment" was rendered the only auxiliary in the wake of the apparent jingoism practiced. ICSID is an exclusive remedy for settlement of investment dispute. The wording of the BIT imposes an obligation, & not a mere option which is contended by the ECT. The absoluteness of the subjection is further bolstered by the existence of the legal dispute. The undercurrent of political perfidy also slackened the vitality of the award of the domestic tribunal. The disparate issues of the claimant ushers the jurisdiction of ICSID after the demise of the contact agreement which provided for domestic ARB.

WHETHER THE ACTIONS OF THE ROG AMOUNT TO VIOLATION OF ART. 2 & ART. 26 OF THE ECT.

The parties concerned in this dispute are signatory to ECT whose purpose is to establish long term relation in energy field. The actions of ROG clearly stand as a violation to Article 2 of the energy charter. Instead of striving for mutual benefit the state considered its own benefit.

Just because this article is not under the purview of Part III of the charter, it doesn't mean that ICSID's jurisdiction cannot be exercised in this area. In order to interpret Part III, Part I of the ECT becomes relevant. Part I opens with definition & purpose, without which the entire treaty's interpretation becomes quite difficult. Part III would have no relevance in absence of Part 1.

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

It is plain that "third State" in Article 17(1) refers to a non-Contracting Party under the ECT & this is confirmed by the Vienna Convention on the Law of Treaties, as well as the *travaux préparatoires* of the ECT. By contrast, when contracting States intend to exclude the benefits of an investment protection regime to entities controlled by nationals of the host State, they so provide expressly. This was not done by the ECT drafters. The ROG, which is bound by the ECT, cannot therefore claim to be a "third State" for the purposes of Article 17(1).

It results from the above that the cumulative conditions for the application of Article 17 of the ECT are not met & then Respondent's objection must fail.

WHETHER THE TERMINATION OF THE PSC AMOUNTS TO VIOLATION OF ART. 10 & 21 OF THE ECT.

The essence of the ECT is to avoid discrimination & provide FET, which is confirmed under Art. 10 of the ECT. The act of termination of the Production Sharing Contract is contrary to the objectives of the Treaty. The production of oil was reduced due to geological factor which cannot be controlled by human agencies & is not a valid ground for termination of the contract under the PSC. The inquiry report, basing upon which such termination is effectuated, has not been made fairly. The Minister of petroleum & natural gas, a major shareholder in ROG National oil Corporation Ltd., has adequate power to influence the enquiry committee.

The claimant holds an essentiality Certificate by virtue of which the taxes on the equipments are exempted. It is an advantage accorded by the Respondent. According to Article 21 of the ECT, taxes on the advantages accorded by the contracting parted cannot be imposed. Moreover, the tax liability has crossed the line & tantamount to expropriation.

WHETHER TRANSFERRING OF PARTICIPATING INTEREST IN THE PSC AMOUNTS TO EXPROPRIATION BY THE GOVT. UNDER ART. 10,12 & 13 OF THE ECT.

The expropriation needs to be in the public interest, non-discriminatory, carried out under due process of law & accompanied by payment of prompt, adequate & effective compensation. None of the conditions are fulfilled & the Respondent indirectly expropriated the property, participating interest, of the investor's in the Claimant Co. The Participating interest of the claimant is the asset of the Co. & the investments of the Investors residing in the Republic of Cedonda. This is a clear situation of indirect expropriation. The act of the state of transferring the participating interests of the Claimant Co. constitutes breaches of the ECT by the Respondent, including: expropriation without full or adequate compensation. Hence there is violation of Article 13 of the Treaty There is a legitimate expectation to be compensated by the Respondent & by not compensating the Co. it has breached & deviated from FET. Good faith is an application of the FET. The investment by the claimant has been done with a good faith on the Respondents that they will not cause huge loss to the investors. They should adhere to the given laws & the terms of the contract & by not doing so, they are in breach of the good faith. They produced a biased inquiry report & did not follow principle of FET. .

ARGUMENTS ADVANCED

1. WHETHER THE CLAIM MADE BY CLAIMANT FALL WITHIN THE JURISDICTION OF ICSID.

The regime for the international protection of foreign investment is sustained by two streams. On the one hand, foreign investors & their investments are granted international protection through International Investment Agreements (IIAs). On the other hand, the regime is informed by principles of customary international law & general principles of law that have evolved over time. ICSID Convention imposes certain objective jurisdictional criteria which may override the elaborate treaty definitions.

In the ICSID case Salini v. Morocco, the tribunal interpreted the reference to the requirement of the conformity with national laws & regulations as follows: "The Tribunal cannot follow the Kingdom of Morocco in its view that para. 1 of Article 1 refers to the law of the host State for the definition of 'investment'. In focusing on the 'categories of invested assets […] in accordance with the laws & regulations of the aforementioned party', this provision refers to the validity of the investment & not to its definition."[2]Drawing inspiration from the so-called "Salini test," a tribunal-created four-step objective assessment of what constitutes an investment, the tribunal in Phoenix v. The Czech Republic discerned six elements that distinguish a mere contribution of value from an investment under Article 25 of the ICSID Convention: "(i) a contribution in money or other assets; (ii) a certain duration; (iii) an element of risk; (iv) an operation made in order to develop an economic activity in the host State; (v) assets invested in accordance with the law of the host State; (vi) assets invested bona fide.

Here, there has been contribution on part of Nixio, in terms of skill as well as intellectual property. Since the agreement is a license regime, the contract has laid down time period for which the contract is to subsist. Development – generally understood as the general welfare of a people– is a key goal of states, & capital is but a means of financing it. As is relevant from interpretation of the facts of the case that a

[2] Salini Costruttori S.p.A.& Italstrade S.p.A., v. Kingdom of Morocco, (ICSID Case No. ARB00/4), Decision on Jurisdiction, 16 July 2001, (2003) 42 ILM 606

handsome part of ROG's GDP is based on this investment which helps in boosting its economy. According to C. Schreuer, it is possible to identify certain features of an investment under the Convention on the basis of ICSID case-law:

- the project should have certain duration;
- there should be a certain regularity of profit & return;
- there is typically an element of risk for both sides;
- the commitment involved would have to be substantial;
- the operation should be significant for the host state's development.

C. Schreuer has clarified that these features should not be necessarily understood as jurisdictional requirements but as typical characteristics of an investment. The expectation of a long-term relationship & return would exclude that a one-spot transaction or a one-time lump sum agreement can qualify as an investment.[3]

The Claimant mentions recent arbitral precedents which have held that contractual jurisdiction clauses do not preclude the jurisdiction of international tribunals under an international treaty on the grounds that they fail to recognize the pacta sunt servanda principle.[4]

In general terms, as it is also more generally the case in international law, & according to the definition recalled by the International Court of Justice in the Case concerning East Timor, a dispute in the legal sense is: "a disagreement on a point of law or fact, a conflict of legal views or interests between parties. Here similarly, the dispute is with respect to the law point in relation to nonpayment of compensation for expropriation as given in the Model PSC.

[3] C. Schreuer (n. 17) 139-141.

[4] Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic, (ICSID Case No. ARB/97/3)

The jurisdiction & waiver provisions of the Contract Documents are limited to normal breach of contract claims & do not require submission of a BIT claim to local courts.[5]

In order to gain access to dispute settlement under the ICSID Convention, an investor is required to be a "national of another Contracting State". Juridical persons will qualify as nationals of Contracting States through their place of incorporation or seat of business.

In the Eudoro Armando Olguin v. Republic of Paraguay, CSOB & Tradex cases the Tribunals have referred to the possibility of the consent being granted by the State in a BIT. That will not grant jurisdiction per se to ICSID, for the consent of the investor will be lacking. But once the investor files a claim with the Center, it is considered that the two parties have consented to submit the dispute to ARB before ICSID.[6]

The Tribunal consequently considers that the true test of jurisdiction consists in determining (a) whether, in its claim, the claimant raises some legal issues in relation with a concrete situation, & (b) if the Tribunal's determination of the answer to be given to these issues would have some practical & concrete consequences.

The situation as hereby defined stands thus: owing to the action, Cedonda is at the losing end, not only with regards to its investment but also is repute in the global market. In case the tribunal is able to determine the issues, Cedonda will be subject to grant of some relief.

As the BANRO case pointed out, Tribunals do not accept the view that their competence is limited by formalities, but rather base their decisions on a realistic assessment.

ARB is always based on a consent agreement between the parties. But the fact that ICSID ARB is, by necessity, between a host State & a foreign investor leads to some peculiarities in the giving of consent. The most conspicuous peculiarity is that consent agreements need not be based on a document that is

[5] ICSID CASE No. ARB/01/12 AZURIX CORP. Claimant v. THE ARGENTINE REPUBLIC Respondent

[6] (No ARB/98/5, award of August 8, 2000.),

signed by both parties. Rather, the host State may make a general offer to foreign investors or to certain categories of foreign investors to submit to ARB. This offer may be contained in legislation or in a treaty to which the host State is party.[7]

The fact that the extent of the jurisdiction of each tribunal is determined by the combination of the pertinent provisions of two "leges specialia": on the one hand, the ICSID Convention &, on the other hand, the ECT in force between the two concerned States.

Since the early 1990s, a number of multilateral treaties that provide for ICSID's jurisdiction have come into existence. The underlying mechanism is similar to that in the BITs discussed above. The treaties contain offers by the States parties to them to consent to ICSID's jurisdiction. These offers may be taken up by investors who are nationals of other States parties to the treaties.[8]

The ECT in its **Art** 26 also provides consent to ICSID's jurisdiction by the States parties in relation to investors of all other States parties. The Treaty contains an unconditional consent to ICSID & to the Additional Facility, whichever may be available. The Article specifically requires consent in writing also on the part of the investor. The Article only envisages the submission of a claim by the investor but not by the host State.[9]

Moreover, there is no mutuality between Nixio's current claims before the local tribunal & claim before the Tribunal under the Convention because both the claims are different. The two proceedings are different as in the domestic ARB, Nixio challenged the validity of the termination. Subsequently in this international forum it seeks an award of damages for breaches of treaty & compensation for expropriation.

[7] United Nations Conference on Trade & Development, Dispute settlement, Icsid, 2.3 consent to ARB, United Nations, New York & Geneva 2003

[8] ibid

[9] ibid

ICSID tribunal decisions in Lanco & Salini, the award in Vivendi I, & the decisions of the ad hoc Committees in respect of Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic ("Vivendi II") & Wena Hotels Ltd v. Egypt support a finding of jurisdiction in this case.

CMS Gas Transmission Co. & The Republic of Argentina, the tribunal noted: Decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims, even if there had been recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to ARB.

According to international standards every BIT should follow a FET towards its foreign investors. However the PSC in question has no such provisions. So, Nixio seeks recourse to this forum.

In several cases the point of written consent has been broadened by the tribunal. Similarly in the case of Amco Asia v. Indonesia case,[10]

The Tribunal rejected the restrictive interpretation made by Indonesia stating, "... a convention to arbitrate is not to be construed restrictively, nor as a matter of fact, broadly or liberally.

AAPL v. Sri Lanka case was the first case where an ARB clause was incorporated in a bilateral investment treaty, United Kingdom-Sri Lanka investment treaty, This case is important because it recognizes that bilateral investment treaties may provide a basis for establishing the consent of a State - party to a dispute.[11]

The ECT (ECT) in its article 1(7)(a)(ii) defines "investor" with respect to a contracting Party to include a " Co. or other organisation organised in accordance with the law applicable in that Contracting Party".

Article 1(6) of the ECT defines investment as "every kind of asset" & refers to any investment associated with an economic activity in the energy sector.

[10] ICSID ARB/81/1 published at 23 ILM 351 (1984)

[11] AAPL v. Sri ümka case,4 ICSID Rep. 245.

In Jan de Nul N.V. Dredging International N.V. v. Arab Republic of Egypt the tribunal concurred in relying on the so-called Salini-test to qualify as an investment the activities carried out in connection with the dredging operation of the Suez Canal. It identified the following elements as indicative of an investment for purposes of the ICSID Convention: 1) a contribution; 2) a certain duration over which the project is implemented; 3) sharing of operational risks & 4) a contribution to the host state's development. The tribunal also emphasised that these elements may be closely interrelated, should be examined in their totality & will normally depend on the circumstances of each case. The tribunal found that the amount of work involved & the related compensation showed that the Claimants' contribution was substantial. The operation was deemed of such magnitude & complexity that there could be no question as to the involvement of a risk[12]

The question of justiciability & sovereign prerogative has not posed any major problem in the practise of the ICSID tribunals. In the Amco v *Indonesia case, it was stated that the jurisdiction of this tribunal cannot simply be avoided by applying different formal characterization to the operative facts of the dispute.*[13]

In the decision on jurisdiction issued by the ICSID Tribunal in the CMS case, in particular, tribunal further observed: "What is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments."[14] Here the commitments of a profit, the promise of FET lay down by treaty standards have been grossly violated.

In the case of siemens v Argentina, a dispute may arise directly out of an investment made directly or indirectly by an investor. The direct requirement under the ICSID convention is related to the investment dispute & not to whether the investor (investment) is direct or indirect.

[12] Jan de Nul N.V. Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006.

[13] Amco v indonesia, decision on annulment , 16th may 1986, para 68

[14] AES' Counter-Memorial on Jurisdiction, at 18, pg. 50-53

What is at stake in the present case, are not the measure of a general economic nature taken by ROG, but their specific negative impact on the investments made by Nixio. As a sovereign State, ROG had a right to adopt its economic policies; but this does not mean that the foreign investors under a system of guarantee & protection could be deprived of their respective rights under the instruments providing them with these guarantees & protection.

In the case of fedax v venezuala,[15] *the tribunal stated that, It is apparent that the term directly relates in this article to the dispute & not to investment. It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction."*

One should take each agreement on its term & avoid drawing out of other treaties which are not applicable to this case, any conclusion neglecting the substantial difference of terminology, scope & meaning existing between these instruments. Operation in relation to energy resources must follow the definitions provided in the energy charter in terms of investment since both countries are party to the same.[16]

In the case of continental casualty v Argentina, it was held that international practise indeed shows that many, if not most, disputes based on an alleged breach of international standards concerning the treatment of the property of aliens, settled either by means of diplomatic protection or of direct ARB, have risen from general measures taken by host states, that affected directly those investments, without necessarily being specifically aimed at them.

Were this not the case, nationalization measures, either aimed at the property of both foreign & nationals, or just foreign party, which have been the substantial portion of those disputes, would have escaped any international litigation.

In the CSOB case the Slovak Republic argued that the dispute did not arise directly out of an investment but of an agreement that guaranteed obligations of another entity named Slovak Collection Co. The

[15] decision jurisdiction, 11 july 1997, para 24

[16] Methanex case

Tribunal stated that investments are usually operations composed of various interrelated transactions. The transactions by themselves might not qualify as an investment. However when a dispute is brought before ICSID the Tribunal needs to look at the overall operation & not solely at the particular transaction. If the whole operation can be qualified as an investment, even if it is not a direct investment, & the dispute arises directly out of that operation through the particular transaction, ICSID will have jurisdiction.

Under Article 3.4, if due interpretation be made, the contract was already terminated. & one can subject them to ARB under the PSC as long as the contract is subsisting. Since, the contract was already terminated & this case is related to the claim of compensation, one can very well move to ICSID for enforcement of same.

The non-compliance with municipal law & regulations would not result in a jurisdictional bar since it "does not create an obstacle to treaty coverage per se & access to a neutral forum for the resolution of investment disputes, to the extent that the asset under consideration falls under the definition of an investment provided by the applicable treaty; rather, such alleged non-compliance may constitute a limitation with respect to the merits of the claim related to the covered investment".[17]

Here similarly by following the MPSC, they are trying to protect the investment made by the State ROG by creating a huge biasness on the side of Cedonda which is illegal & unfair treatment.

2. WHETHER THE ACTIONS OF THE ROG (RESPONDENT) AMOUNT TO VIOLATION OF ART. 2 & ART. 26 OF THE ECT.

Article 2 states Purpose of the treaty. This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities & mutual benefits, in accordance with the objectives & principles of the Charter.

[17] . E. Gaillard, "Investments & Investors Covered by the ECT", in C. Ribeiro (n. 169), 62.

‘‘This Treaty establishes a legal framework in order to promote long-term co-operation in the energy field based on complementarities & mutual benefits, in accordance with the objectives & principles of the Charter.’’

Both the parties in this dispute are signatory to ECT & the ECT's purpose is to establish long term relation in energy field. The actions ROG clearly stands as a violation to Article 2 of the energy charter , Instead of looking for mutual benefit the state considered its own benefit only.

Just because this article doesn't come under Part III of the charter, it doesn't mean that ICSID cannot enter in this area. In order to interpret Part III, Part I of the ECT becomes relevant. Part I opens as definition & purpose, without definition & purpose the entire treaty's interpretation becomes quite difficult. Without part I Part III would have no relevance.

Article 26 (3)(b)(i) contains the ECT’s “fork-in-the-road” provision. It must be read together with the preceding para.s of Article 26.

As we shall see below, Art.26 is a multi-tier dispute resolution clause. Compared with other investor-state ARB provisions, there is very little unusual about Art.26. Of course, there are some unique features, but the basic concept remains the same: a qualified investor has the direct right to initiate a legal claim against a contracting party for breaching its certain treaty obligations.

As indicated in its title, ECT Art.26 provides for the settlement of disputes between an investor (as defined in Art.1(6)) & a contracting party (as defined in Art.1(3) of the ECT).17 Article 26 deals mainly with the nature & scope of the disputes to be settled, the procedures available to settle investment disputes. An investor can bring claims against a contracting Party to the ECT (i.e. the host state) for breach of an obligation involving investment protection (article 26, ECT). Disputes should ‘if possible, be settled amicably’ & a three-month consultation period be observed (article 26(1)). The consequences of failing to observe this are unclear. While some cases have held that

non-observance is not a bar to ARB, there is no principle which stipulates that an investor may ignore amicable settlement with impunity.[18]

Article 26(1) deals with amicable settlement, the wording of the act goes as "If possible settle amicably". The Provision Nowhere mentions that it is mandatory to settle the dispute amicably. Further the second sub section gives three other ways for dispute settlement. The word "or" symbolizes the alternatives available to the investor. Just because one has gone before the domestic forum doesn't mean that one cannot go before international forum.

Under Article 26(1) of the ECT, this Tribunal has jurisdiction over "disputes between a Contracting Party & an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III [of the Treaty]." Disputes that are not settled amicably may, at the option of the Investor, be submitted to international ARB. "Investor" is defined in Article 1(7).[19]

The preconditions that must be present before Art.26 can be relied upon are as follows:

(a) A dispute must arise between a contracting Party[20] & an investor[21] of another contracting Party;

(b) such a dispute must *relate* to the investment[22] of the investor;

(c) such an investment must have taken place in the area[23] of the contracting Party, &;

(d) the dispute must concern alleged breaches by the contracting Party of its obligations under Pt III of the ECT.

Since all the above mentioned conditions are fulfilled the investor can approach the forum before which it stands now.

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[18] ECT Coming up for 20 years by Deborah Ruff, Julia Belcher & Charles Golsong, International ARB report 2014 – issue 2

[19] Hulley Interim Award

[20] Defined in Art.1(2).

[21] Defined in Art.1(7).

[22] Defined in Art.1(6).

[23] Defined in Art.1(10).

The third para. makes explicit that each of the ECT contracting parties has given its prior unconditional consent to submit to ARB or conciliation .The two exceptions mentioned in art 26 is not applicable in this case as those are only for certain states under annexure ID

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

Each Contracting Party reserves the rights to deny the advantages of this part to:

(1) a legal entity if citizens or nationals of a third state own or control such entity & if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; or

(2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:

(a) does not maintain a diplomatic relationship; or

(b) adopts or maintains measures that:

(i) prohibit transactions with Investors of that state;or

(ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.

As stated in the article that a contracting state can deny benefits under article 26 on certain grounds but those grounds are not fulfilled in the present case , As there is no question of third state here. Further the burden of proving lies on the state. The burden of proof to establish the factual basis of the 'third country control,' together with the other conditions, falls upon the State[24] On the burden of proof, the tribunal in *Generation Ukraine Inc. v. Ukraine* concluded that the burden of proof lies on the state relying on the "denial of benefits" clause. One commentator of the Decision in *Plama v. Bulgaria* considered that the clarification relating to control "cannot

[24] Denial of Benefits & Article 17 of the ECT by Loukas A. Mistelis* & Crina Mihaela Baltag

be generalized as containing a rule that for all questions concerning the control over an investment the burden of proof is borne by the investor."

Unlike Article 17(1), Article 17(2) makes it clear that the state has the burden of proof for establishing that an alleged investor falls under one of the situations mentioned under this "denial of benefits" provision: "the denying Contracting Party establishes." It seems that, in any case, there would be fewer controversies on the meaning of Article 17(2).

In *Tokios Tokelès v. Ukraine*, Ukraine argued that the claimant has no "genuine link" with Lithuania, the country of incorporation, as it is owned & controlled by Ukrainian nationals. Additionally, the claimant had no substantial business activities in Lithuania & had its administrative headquarters in Ukraine, rather than in Lithuania. Based on this fact, the tribunal should have found that the claimant was not entitled to the protection offered by the Ukraine under the ICSID Convention. The tribunal held that the Ukraine-Lithuania BIT contains no "denial of benefits" provision. The Tribunal saw the absence of this clause as a "deliberate choice of the Contracting Parties." Same also goes in the present case also, since there is no express provision relating to denial of benefit means there is no intention to denying of benefit.

The Decision on Jurisdiction in *Plama v. Bulgaria* is the first decision under the ECT to address in detail the "denial of benefits" provision under Article 17 of the ECT. The tribunal in *Plama v. Bulgaria* ultimately rejected the application of Article 17(1), as the claimant was controlled by a national of a contracting state, & not by a national of a third state, as required by Article 17(1) of the ECT[25]

Before *Plama v. Bulgaria*, the tribunal in *Petrobart v. Kyrgyzstan* rejected respondent's allegation as to the applicability of Article 17(1) to Petrobart. The tribunal held that the information about

[25] *Plama Consortium Limited*, ICSID (W. Bank) Case No. ARB/03/24 (Award).
The Tribunal found that Plama Consortium Limited was ultimately owned & controlled
by Mr. Vautrin, a French national. As France is a Contracting Party to the ECT, Bulgaria could not rely on Article 17(1) of the ECT to deny to Claimant the benefits of Part III of
the ECT.

Petrobart "contradicts the view that Petrobart is a Co. owned or controlled by citizens or nationals of a state other than the United Kingdom & that Petrobart has no substantial business in the United Kingdom."

The Tribunal interpreted Article 17(1) of the ECT in the light of Article 31(1) of the Vienna Convention on the Law of the Treaties (VCLT):

The express terms of Article 17 refer to a denial of the advantages "of this Part," thereby referring to the substantive advantages conferred upon an investor by Part III of the ECT. The language is unambiguous; but it is confirmed by the title to Article 17: "Non application of Part III in Certain Circumstances" (emphasis added). . . . From these terms, interpreted in good faith in accordance with their ordinary contextual meaning, the denial applies only to advantages under Part III. Consequently, the tribunal held that the "denial of benefits" clause concerns only the benefits under Part III & does not, in any way, deny the applicability of Article 26 of the ECT:

Article 26 provides a procedural remedy for a covered investor's claims; & it is not physically or juridically part of the ECT's advantages enjoyed by that investor under Part III. As a matter of language, it would have been simple to exclude a class of investors completely from the scope of the ECT as a whole. . . . This limited exclusion from Part III for a covered investor . . . clearly requires Article 26 to be unaffected by the operation of Article 17(1).

In the tribunal's view, to exclude Article 26 of the ECT by way of the "denial of benefits" clause would mean that the Contracting State invoking the application of Article 17(1) is the judge in its own cause. That is a license for injustice; & it treats a covered investor as if it were not covered under the ECT at all. The reference to "this part" is a clear indication that the drafters of the ECT intended to refer to Part III of the ECT, to which Article 17 belongs.

At the jurisdictional stage, Bulgaria argued that the intention of the ECT's drafters was to confer on the contracting state "a direct & unconditional right of denial which may be exercised at any time & in any manner." The tribunal rejected this view considering that it is crucial for the

investor to have access to a forum that would be able to determine whether Article 17(1) of the ECT is applicable.

The tribunal relied on the provision of Article 1113 of the NAFTA concluding that this solution is supported by the wording of the "denial of benefits" clause under the NAFTA. Article 1113 of the NAFTA requires the denying contracting state to give prior notification to the contracting state of which the entity in question is asserting to be a national & to initiate the consultation proceedings. Article 17 of the ECT contains no such requirements.

One commentator of the *Plama* Decision suggested that states should enact "a law containing an abstract & general denial of benefits provision."The textual interpretation of the chapter of Article 17 above has been confirmed by both the *Plama* & the three *Yukos* tribunals. For example, the *Plama* tribunal in its Decision on Jurisdiction reasoned as follows:

In the Tribunal's view, the existence of a "right" is distinct from the exercise of that right. For example, a party may have a contractual right to refer a claim to ARB; but there can be no ARB unless & until that right is exercised. In the same way, a Contracting Party has a right under Article 17(1) ECT to deny a covered investor the advantages under Part III; but it is not required to exercise that right; & it may never do so.

What is clear from the above is that the Contracting Party intending to exercise its right under Article 17 must take a 'positive action' towards that end. The exercise of this right should be timely & exercised in a transparent manner.

To sum up, subject to a proper moment for exercising "*the right*", Article 17(1) permits a host Contracting Party to deny the advantages of Part III of the ECT to an Investor organised according. The term "*third state*" does not include nationals of a Contracting Party to the ECT. It is our opinion that the term "*third state*" in Article 17(1) refers only to states that are not parties to the ECT. We hold this opinion for the following reasons.

Applying the rule of interpretation set out in Article 31 of the VCLT,6 the two terms employed in Article 17, i.e. "*third state*" & "*Contracting Party*" must be construed in connection with the definition provided in Article 1(7) of the ECT.

Article 1(7) of the ECT recognises two kinds of Investors:

(a) **with respect to a Contracting Party**:

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable laws;

(ii) a Co. or other organization organized in accordance with the law applicable in that Contracting Party;

(b) **with respect to a "third state"**, a natural person, Co. or other organization which, fulfils, mutatis mutandis, the conditions specified in subpara. (a) for a Contracting Party.7

It is suggested here that the above interpretation of the term "*third state*" is in line with its ordinary meaning. This is supported by what is said in the 1966 commentary of the *International Law Commission on the Vienna Convention*: "this term [third state] is in common use to denote a State which is not a party to the treaty."

Therefore, any other interpretation amounts to assigning a "special meaning" to this term, & the party claiming such special meaning carries a burden of proving it, as required by Article 31(4) of the VCLT.

Based on the above brief textual interpretation of the term in the context of Article 17(1) & in the context of the investment provisions, & in light of the ECT's object & purpose, it is the opinion of the authors of this note that the intent of the ECT's parties was that the term "*third state*" means non-Contracting Parties to the ECT. We are also of the opinion that the textual interpretation summarised above is fully borne by the ECT's *travaux préparatoires*, which we briefly consider next to the laws of another Contracting Party, but owned or controlled by nationals of a "*third state*", **only** if that entity does not have substantial business activities in the area of the Contracting Party in which it is organised. The absence of any one condition renders the *denial-of-advantages* clause inapplicable.

In the Tribunal's view, the existence of a "right" is distinct from the exercise of that right. A Contracting Party has a right under Article 17(1) ECT to deny a covered investor the advantages

of Part III; but it is not required to exercise that right; & it may never do so. The language of Article 17(1) is unambiguous; & that meaning is consistent with the different state practices of the ECT's Contracting States under different bilateral investment treaties: certain of them applying a generous approach to legal entities incorporated in a state with no significant business presence there (such as the Netherlands) & certain others applying a more restrictive approach (such as the USA). The ECT is a multilateral treaty with Article 17(1) drafted in permissive terms, not surprisingly, in order to accommodate these different state practices.

Moreover: A putative covered investor has legitimate expectations of such advantages until that right's exercise. A putative investor therefore requires reasonable notice before making any investment in the host state whether or not that host state has exercised its right under Article 17(1).

Claimant contends that the reserved right to deny under Article 17(1) must be exercised. Article 17(1) could have been otherwise drafted, as is Article VI of the ASEAN Framework Agreement on Services, to state that the advantages of Part III "shall be denied" to "a juridical person owned or controlled by persons of a non-Member State constituted under the laws of a Member State, but not engaged in substantive business operations in the territory of Member States." But the drafters of the ECT, submits Claimant, deliberately chose to provide for a reserved, optional right in Article 17(1), a right that must be exercised to take effect, & only prospectively.

Article 17(1) does not deny *simpliciter* the advantages of Part III of the ECT—as it easily could have been worded to do—to a legal entity if the citizens or nationals of a third State own or control such entity & if that entity has no substantial business in the Contracting Party in which it is organized. It rather "reserves the right" of each Contracting Party to deny the advantages of that Part to such an entity. This imports that, to effect denial, the Contracting Party must exercise the right.

It is apparent from the wording of Article 17(1) that two additional cumulative substantive conditions must be met before the "denial-of-benefits" clause can be exercised in respect of any

particular legal entity. First, such legal entity must be owned or controlled by citizens or nationals of a third State; second, the legal entity must have no substantial business activities in the place in which it is organized.

In view of the Tribunal's conclusion, explained in the previous section, that Respondent cannot invoke Article 17(1) due to its failure to give notice to Claimant that it was doing so, there is no need, in principle, to address Respondent's submissions that these substantive conditions for the application of Article 17(1) have been satisfied.

Article 17 is a reservation of right which must be exercised: Article 17 provides that each Contracting Party "reserves the right" to deny the benefits of Part III. It follows from the plain meaning of these words that each Contracting Party has a right under Article 17(1) of the ECT to deny a covered investor the benefits of Part III; but as long as that right has not been exercised the investor benefits from the protection of Part III of the ECT. That the right to deny the benefits of Part III is an option that needs to be exercised by a Contracting Party is confirmed by the *travaux préparatoires* of the Treaty. Further, if a Contracting Party is to exercise its reserved right under Article 17(1) of the ECT, it must do so by a clear & unambiguous act. Contrary to the Respondent's contention, Article 17(1) of the ECT does not therefore operate automatically. As the ROG did not exercise its reserved right to effectively deny the benefits of Part III of the ECT to each of the Claimants, Article 17(1) does not apply in these ARBs.

The Claimants are not owned or controlled by citizens or nationals of a third State: In any event, even assuming that the ROG has effectively exercised its reserved right to deny the benefits of Part III of the ECT to each of the Claimants, which the Claimants deny, Article 17(1) of the ECT still cannot apply because the cumulative conditions for the ROG to exercise its right under Article 17 are not met, *i.e.* the Claimants are not owned or controlled by citizens or nationals of a third State.

It is plain that "third State" in Article 17(1) refers to a non-Contracting Party under the ECT & this is confirmed by the Vienna Convention on the Law of Treaties, as well as the *travaux préparatoires* of the ECT. By contrast, when contracting States intend to exclude the benefits of an investment protection regime to entities controlled by nationals of the host State, they so provide expressly. This was not done by the ECT drafters. The ROG, which is bound by the ECT, cannot therefore claim to be a "third State" for the purposes of Article 17(1).

It results from the above that the cumulative conditions for the application of Article 17 of the ECT are not met & then Respondent's objection must fail.

4. WHETHER THE TERMINATION OF THE PSC AMOUNTS TO VIOLATION OF ART. 10 & 21 OF THE ECT.

1. That the ECT under Article 10 renders obligation on the contracting parties to create stable, equitable, favorable & transparent conditions for the investors. FET is a part of the protection provided by the host country, to the investors & is the minimum standard of treatment. It is a commitment to provide FET to the investors. The ordinary meaning of "fair" &/or "equitable" as defined in the Concise oxford dictionary of current English, is 'just', 'even-handed', 'unbiased', 'legitimate'. The preamble of the ECT identifies/ gives regards to the Principle of avoidance of discrimination in international trade. If the meaning of 'fair & equitable' & the preamble of ECT are put together, then it reflects the purpose of ECT, viz., to protect the investors from discrimination, by treating the contracting party & the investors equally. Hence, FET is the key element to eliminate biasness which will in return eliminate the factor of discrimination.
2. That the abrupt termination of the contract by ROG is a biased decision as there is no substantive ground for such termination in the Production Sharing Contract. This very act differs from the underlying principle of the ECT as it is an act which is discriminatory in nature. Equitable treatment between the ROG National Oil Corporation Ltd. & Nixio has not been implemented. The production of oil reduced due to geological factor which cannot be controlled by human agencies & is not a ground for termination of the contract under the Production Sharing Contract.

There is no concealment of facts as alleged by the ROG, the reason due to which there are losses are very well explained to the ROG through a letter dated 12th March 2012. There must be a derogatory error in the inquiry report made by the Director General Hydrocarbon. Since ROG National Oil Corporation Ltd. is a public Co. preference is given to it & Govt. acted in such a way that our Co. is smoothly scooped out of the contract. The plant & machinery established by our Co. & money invested by our investors, all will be utilized by the public Co.. This is not just or is contradictory with the principle of Fair Equitable Treaty which is the essence of the ECT. In such a situation only Nixio & its investors are at a loss. Adequate compensation should be provided & the compensation should be made according to the incurred losses by the ROG in order to fulfillment of its commitment.

3. That the fact that the Minister of Petroleum & Natural Gas, Mr. Ganesha Jhah, is a shareholder in the ROG National Oil Corporation Ltd. indicates that there is a political influence in the present case. The inquiry was conducted by the Director General Hydrocarbon comprising prominent National Oil Co. members, meaning that the members are part of the ROG Govt. If these two facts are connected then it can be concluded that the minister is in a position to influence the members of the inquiry committee to give a report against Nixio, which will benefit the ROG National Oil Co. Ltd. & indirectly the minister. This is how the inquiry report has been politically influenced against Nixio & on the basis of this report the Production Sharing Contract has been terminated leading to huge losses to the investors. In the case of Inmaris Perestroika Sailing Maritime Services GmbH & others v. Ukraine[26], the ICSID tribunal stated that a Govt. act could be unfair or inequitable if it is in breach of specific commitments, if they are undertaken for political reasons or other improper motives, if the investor is not treated in an objective, even-handed, unbiased & transparent way, or for any other reason. In the present case it has become clear that the treatment is unfair & inequitable, which is a breach of its commitment, arising out of political intervention. This breach of commitment violates the Article

[26] ICSID Case no. ARB/08/8; award dated March 1, 2012

10 (1). It also leads to a question on transparency of the procedure of making the report. The termination of Production Sharing Contract, hence, violates the Article 10 of the ECT.

4. That the alternate remedies are exhausted & after which the application has being made to the ICSID Forum. The claimant subjected the claims to the Domestic ARB in the host state & fulfilled the requirements under article 21, before coming to the ICSID Forum. It is required to first submit the matter to the domestic authorities for a decision & if the relief is not satisfactory or adequate than the matter can be referred to a higher authority. Hence the question of maintainability of the issue under article 21 does not arise.
5. That the article 21 of the ECT says that the taxation measure shall not apply to an advantage accorded by a contracting party pursuant to the tax provision of any convention, agreement, or arrangement. The Respondent issued an essentiality certificate by virtue of which the payment of taxes on the equipments was exempted. It is a privilege or advantage given to the claimant. The abrupt withdrawal or cancellation of such advantages is against the principle of FET & also, against the article 21. Taxes cannot be imposed on the advantages accorded by a contracting party. The tax liability imposed has crossed the line & has become tantamount to expropriation by violating or repudiating an explicit commitment given to the investor by the host state (Essentiality Certificate). It is in contravention to the Principle of Fair & Equitable Justice & leads to discriminatory & arbitrary taxes[27]. Here, Article 21 of the ECT is violated.

5. WHETHER TRANSFERRING OF PARTICIPATING INTEREST IN THE PSC AMOUNTS TO EXPROPRIATION BY THE GOVT. UNDER ART. 10,12 & 13 OF THE ECT.

1. That according to Article 13, investments may only be expropriated if certain conditions are fulfilled. The expropriation needs to be in the public interest, non-discriminatory, carried out under due process of law & accompanied by payment of prompt, adequate & effective compensation. The ECT expressly refers to both direct & indirect forms of expropriation. Article

[27] http://www.kslaw.com/Library/publication/International%20tax.pdf accessed on 25th February'2015 on 20:00 Hrs.

13(1) ECT provides investments of investors with protection from both direct & indirect expropriation, with the "effect" of the latter defined as "equivalent to nationalisation or expropriation". This is aimed at covering situations of *de facto* or indirect expropriation.[28] Even if there is no overt taking of the property by the Govt., the measures can be expropriatory if they effectively neutralize the benefit of the property of the foreign owner. Thus, if the state authorities interfere to a significant degree with the enjoyment of its use or its benefit, an indirect expropriation may be found. The Metalclad award (para. 103) to argue that indirect expropriation under international law includes: "incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."

2. That the Respondent indirectly expropriated the property, participating interest, of the investor's in the Claimant Co. The Participating interest of the claimant is the asset of the Co. & the investments of the Investors residing in the Republic of Cedonda. This is a clear situation of indirect expropriation. The tribunal in Petrobart v. Kyrgyz Republic noted that Article 13 of the ECT gave protection not only in respect of expropriation, but also in regard to measures that had an effect equivalent to expropriation. This act of the Respondents results to grievous loss of the Investors. The participating interest had the share of the investors, in which they have invested. The act of the state of transferring the participating interests of the Claimant Co. constitute breaches of the ECT by the Respondent, including: expropriation without full or adequate compensation; failure to afford FET to its investments; & failure to create stable, equitable, favourable & transparent conditions for the Claimant as an investor (as defined in the ECT). The respondent discriminated between the National oil Corporation Ltd. & Nixio by transferring the profits & interests of the Nixio to the National oil Corporation Ltd. it deprived the claimant of its right to his property & indirectly the property of its investors.

[28] Expropriation Regime under ECT, Pg. 10

3. That there is a legitimate expectation to be compensated by the Respondent & by not compensating the Co. it has breached & deviated from FET. Good faith is an application of the FET. It can be explained by an example: for violation of good faith in the investment context would be a deliberate conspiracy to defeat the investment or termination of the investment for reasons other than the one put forth by the Govt. The Respondent, in the present case, has terminated the contract due to political reasons as established earlier.[29] The Respondent has shown that on the basis of the inquiry report it has terminated the contract but the inquiry report was made wrongfully. The Minister of Petroleum & Natural Gas, Mr. Manish Jhah, being in a ministerial position & major shareholder of the Co. has used the power to influence the inquiry committee for its benefit. It is arbitrary & discriminatory in its incidence because it is not based on any rational decision making or a reasoned judgment that would involve balancing Nixio's.

Hence, there is a hidden reason for such termination which leads to the breach of good faith & violation of Article 10, which enunciates the Fair & Equitable principle.

[29] FET by Christopher schreuer, Pg. 128

PRAYER

In light of the questions presented, arguments advanced and authorities cited, the agent for the Petitioner Company most humbly and respectfully pray before this hon'ble Tribunal, that it may be pleased to adjudge and declare that the:-

1. *The arbitral award be set aside.*
2. *The Respondent be held guilty of termination of Agreement.*
3. *The Respondent be held guilty of violation of ECT.*

The Petitioner Company additionally prays that the Tribunal may make any such order as it may deem fit in terms of equity, justice and due conscience. And for this act of kindness the Respondent State shall as duty bound ever humbly pray.