Team Code:PR-6

5th Paras Diwan International Moot Court Competition

2015

Before

THE HONOURABLE TRIBUNAL OF ICSID

APPLICATION NO. _____/2014

Nixio…………………………………………….……………Petitioner

v.

Government of ROG ....……………….............. Respondent

TABLE OF CONTENTS

INDEX OF ABBREVIATION..ii

INDEX OF AUTHORITIES...iii-vi

STATEMENT OF JURISDICTION...vii

STATEMENT OF FACTS..viii-xi

STATEMENT OF ISSUES..xii

SUMMARY OF ARGUMENTS...xiii-xv

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

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

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

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

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

ARGUMENTS ADVANCED...1-23

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

Whether the actions of the ROG (Respondent) amount to violation of Art. 2 & 26 of the ECT..8

Whether the Respondent can evoke Art. 17 part III of the ECT..13

Whether the termination of the PSC amounts to violation of Art. 10 & 21 of the ECT......15

Whether transferring of participating interest in the PSC amounts to expropriation by the Govt. under Art. 10,12 & 13 of the ECT. 17

PRAYER..24

Respondent

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
Pg.-	Page
PSC-	Production Sharing Contract
PSU-	Public Sector Undertaking
ROG –	Republic Of GONDWANA
S.para-	Sub – paragraph
Sept.	September
v.-	Verses

Respondent

INDEX OF AUTHORITIES

STATUTES

Model PSC,NELP IX, 2010 14

The ARB & Conciliation Act, 1996 4

The ECT, 1991 8

The ICSID Convention, Regulations & Rules, ... 3

ECT 1994 13

NAFTA 14

UNICITRAL RULES 7

Cases

Chevron v.Ecuador,1652 ....

Saluka Investments BV (The Netherl&s) v The Czech Republic,1976 18

Elettronica Sicula SpA (ELSI) (United States of America v. Italy), ICJ Reports 1989 19

Tradex Hellas S.A. v. Republic of Albania (ICSID Case No. ARB/94/2) 20

Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB(AF)/00/2) 21

Genin, Eastern Credit Ltd. Inc. & AS Baltoil v. Republic of Estonia, Award, 25 June 2001 22

Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/ 3, Award, ¶ 98 (Apr. 30, 2004), 43 I.L.M.967 16

Respondent

Amco v. Indonesia award 20th NOV. 1984......6

S.D .Myers v. Canada, Award on Liability, 13 NOV. 2000......22

Joy mining v. Egypt,(ICSID Case No. ARB/03/11) 5

Fraport v. The Republic of Philippines, (ICSID Case No. ARB/03/25)......5

Plama v. Bulgaria......14

The Rompetrol Group N.V. v Romania, ICSID Case No. ARB/06/3......6

GARANTI KOZA LLP & TURKMENISTAN (ICSID CASE NO. ARB/11/20)......3

HULLEY ENTERPRISES LIMITED (CYPRUS)- & - THE RUSSIAN FEDERATION PCA CASE NO. AA 226......9

YUKOS UNIVERSAL LIMITED (ISLE OF MAN) - & - THE RUSSIAN FEDERATION PCA CASE NO. AA 227......14

Articles

"DENIAL OF BENEFITS" UNDER THE ECT MENA CHAMBERS BOULEVARD SAINT-MICHEL 50 1040 BRUSSELS BELGIUM......13

CONSENT TO SUBMIT INVESTMENT DISPUTES TO ARB UNDER ART 26 OF THE ECT ADNAN AMKHAN* *ARBITRAL PROCEEDINGS; ARBITRAL TRIBUNALS; ARB AGREEMENTS; CONSENT; ENERGY; INTERNATIONAL INVESTMENT DISPUTES*......*9*

DENIAL OF BENEFITS & ART 17 OF THE ECT BY LOUKAS A. MISTELIS* & CRINA MIHAELA BALTAG**......13

ECT *COMING UP FOR 20 YEARS* BY DEBORAH RUFF, JULIA BELCHER & CHARLES GOLSONG *INTERNATIONAL ARB REPORT* 2014 – ISSUE 2......9

EXPROPRIATION REGIME UNDER THE ECT......16

IEEJ: APRIL 2013 ALL RIGHT RESERVED IN ECT: AN UNEXPLOITED BUT RICH WELL NORIKO YODOGAWA, LEGAL COUNSEL, ENERGY ECT SECRETARIAT......*10*

Respondent

INTRODUCTORY NOTE TO THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES: AES SUMMIT GENERATION LTD. V. REPUBLIC OF HUNGARY BY CHARLES OWEN VERRILL, JR. [SEPTEMBER 23, 2010] ....9.

INVESTMENT ARB & THE ECT EDITED BY CLARISSE RIBEIRO..3

INVESTOR-STATE DISPUTE SETTLEMENT UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II...8

INVESTOR-STATE DISPUTES ARISING FROM INVESTMENT TREATIES: A REVIEW UNCTAD SERIES ON INTERNATIONAL INVESTMENT POLICIES FOR DEVELOPMENT 8

NEW YORK LAW JOURNAL *ECT: INTERNATIONAL CENTRE FOR SETTLEMENT DECISION* BY EMMANUEL GAILLARD...7

Books

Investment treaty ARB & public law, By Gus van Harten 7

Rubins, the notion of investment...4.

The ICSID Convention: A Commentary, By Christoph H. Schreuer..4

R Dolzer., Principle of International Investment Law, second ed., 2012....................................21

The ECT: An East-west Gateway for Investment & Trade, edited by Thomas W Wälde 17

Douglas, The Hybrid Foundation of Investment Treaty ARB...19

International Investment Agreements a Guide to the key Issues Edited by Katia Yannaca-small......16

ECT- Reader's Guide..17

Ian Brownlie, Principles of Public International Law, 5th ed...22

NAFTA & ECT :Compliance & Implementation...14

Settlement of Investment Dispute under ECT...10

Report

Respondent

Report of the Executive Director of ICSID..5

The Boundaries of Regulatory Expropriation in International Law", ICSID Review.........................16

United Nations Conference on Trade & Development, Dispute settlement, Icsid: a Report................7

C. Yannaca-Small, 'Fair & Equitable Treatment Standard in International Investment Law', In.......21

International Investment Law: A Changing Landscape...7

S. Vasciannie, 'The Fair & Equitable Treatment Standard in International Investment Law & Practice...21

Respondent

STATEMENT OF JURISDICTION

The Respondent 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.

Respondent

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 EPLR, a policy mechanism that opened doors to foreign oil companies to invest, explore & produce oil & gas in the sovereign territory of ROG.ROG has executed their development & exploration model through PSC Model. Under this policy, Govt. invited bids through an international competitive bidding system[1] .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. of 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 Art 7 of the PSC to define the rights & liabilities of the parties under the contract. Nixio was appointed as the operator under the agreement.

[1] (ANNEXURE I).

Respondent

GOND 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:

Respondent

1. Termination of the contract by the Govt. as per Art 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 Art 30.3 of the PSC. After termination of the contract, Minister of Petroleum & Natural Gas at a press conference on 12 September, 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 Art 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 have 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.

Respondent

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 PSC is New Ankara as well as the governing law is
ROG. Moreover, ARB has already been concluded under the PSC;

c) However on 19 September 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.

Respondent

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.

Respondent

SUMMARY OF ARGUMENTS

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

The dispute is "manifestly outside the jurisdiction of the Centre". Adherence of the States concerned to the Convention subordinate to ARB clause is in dereliction of the PSC. The reference by any tertiary provision to the requirement of the conformity to the applicable laws & regulations does not constitute a formal recognition but is rather disfigurement of mutual consent of the parties. The party's freedom, in principle st&s violated by approaching ICSID. Claimant ought to acquiesce the order already pronounced by the domestic ARB centre on account of its self initiated capitulation to be subjected to the same. Contracting Party impairs by unreasonable, discriminatory measures, the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Furthermore no clear & unequivocal intention to be subjected to the jurisdiction of ICSID in the contract settles the score in behalf of ROG. To be subjected to ICSID, a dispute constitute jurisdictional requirements & not mere procedural steps. the modal verb “shall” in Arts of the PSC clearly suggests the idea of an obligation to follow the ARB clause saliently. Moreover procedural requirements may not be ignored without giving rise to procedural consequences. If the procedural conditions to a State’s consent to arbitral jurisdiction are overlooked, there is no consent to ICSID jurisdiction.

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

In the Present case there is a dispute between the investor & state, hence the jurisdiction of ICSID was evoked by the claimants yet, they cannot contest that there is a violation of Art 2 as it is mentioned under part I of the ECT. Only if the dispute relates to Investment i.e. mentioned under part III the ECT , the Claimants can claim for its violation and not otherwise. As mentioned in para 1 of Art 26 there must be an attempt to settle the dispute in an amicable manner. But in this case the

Respondent

Claimants never tried to resort to amicable settlement. Instead they directly went to the Domestic arbitral tribunal. Further there was no breach of obligation on the respondents part. It was because of the actions on part of claimant that they had to take stringent measure. It must be noted here that the investor are allowed to adapt either of the three measure & not all. In the present case the claimant had already approached the domestic tribunal & hence they now cannot come before the international Arbitral Tribunal. In the present case the two exception has been fulfilled i.e. the investor has submitted the dispute to arbitrative tribunal & the dispute over here relates to breach of obligation. Hence there is no explicit consent here.

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

The scope of Art 17(1) is to give contracting states the right to exclude from the benefits conferred by Pt. III of the ECT alleged investors owned or controlled by citizens or nationals of third countries, which are not economically bound to the host state. Art 17(2), in turn, refers to the right of contracting states to deny such benefits to investments—as defined in Art 1(6) of the ECT—if the denying contracting Party establishes that the investment belongs to an investor of a third country with which the denying state (a) maintains no diplomatic protection, or (b) adopts or maintains certain detrimental economic measures. The "denial of benefits" clause under the ECT corresponds to the principle of reciprocity found in international law on foreign investment law.

Respondent maintains in this phase of the ARB that, even if it has any obligations towards Claimant under the ECT (which Respondent contests) it is entitled to deny the advantages of them to Claimant by reason of Art 17(1), & that it has done so. Respondent recalls that the terms of Art 17 derive from the "denial-of-benefits" clauses. In the present case Nixio has various investor from various countries & hence there is involvement of third state & hence Govt. of ROG is not under the obligation to extend to it the protection under the energy ECT.

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

Respondent

The PSC is terminated on the grounds of defeating the interest of the Nation, which is enumerated under Art 30.3 (g) of the PSC. The claimant is indulged in malpractices causing huge losses to the exchequer of the nation. The Art 8.3 (k) of the PSC puts an obligation on the Claimants to be 'mindful of the rights & obligations towards the nation.' ROG has followed the due process for termination. It is not arbitrary decision & follows the principle of natural justice. Hence, there is fair & equitable treatment & no violation of Art 10 of the ECT.

The Art 26 of the Energy Contract Treaty lays down certain preconditions which need to be fulfilled before a dispute can be admitted for ARB in ICSID. The point of argument raised by the claimant under Art 21 of the ECT cannot be admitted in this forum. The disputes related to Part III of the ECT can only be admitted for ARB. Also, under Art 26 of the ECT it is said that the issues should be first settled amicably. Both the preconditions are not fulfilled; hence the issue cannot be maintained in this forum.

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

Incoherence of details on part of Nixio resulted in an escalation of the miscarriage of investment relation. Indeterminacy of the standard of the investor, failure of the doctrinal efforts promise to prove that investor's right won't remain discreet on part of Nixio has obliterated any opportunity of compensation. standard for the threshold review of investment treaty claims at the jurisdictional stage, & confirms the fundamental importance of respecting limits placed by sovereign States on their consent to international ARB. The relevant PSC provided for exclusive jurisdiction of the ROG courts which has rendered its decision devoid of any compensation. some demonstrated diminution of investment value as a result of Govt. regulation is not a devastating impact equivalent to the effects of traditional direct expropriation or nationalization.

Respondent

ARGUMENTS ADVANCED

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

The opposition humbly states that they are now confronted with a second ARB predicated on virtually identical facts & allegations & seeking effectively the same relief. That the petitioners had previously invoked ARB proceeding under Art 33 of the PSU contesting the validity of termination. The tribunal had pronounced an award that went in favour of the State of ROG. The claimants, despite willingly submitting themselves to be subjected to the ARB & conciliation Act of the state of ROG, now refutes the award passed by the honourable domestic ARB forum.

That the PSU signed by the state of ROG & the republic of Cedona in its Art 33.9 states that: *The ARB agreement contained in this Art 33 shall be governed by the ARB & Conciliation Act, 1996 (ARB Act). ARB proceedings shall be conducted in accordance with the rules for ARB provided in ARB Act.*

This proliferation of a subsequent proceedings not only is oppressive & vexatious; it also creates a fundamental bar to the Tribunal's jurisdiction over the claims in this ARB.

Art 25 of the ICSID lays down the presence of consent "in writing" as a precondition to the submission of claims to ARB & the Tribunal's assertion of jurisdiction on the same.

Article 25(1) of ICSID:

The jurisdiction of the Centre shall extend to any legal dispute ***arising directly out of an investment,*** *between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) & a national of another Contracting State, which the parties to the dispute* ***consent in writing to submit to the Centre****. When the parties have given their consent, no party may withdraw its consent unilaterally.*

With reference to the statement of facts it can be strongly emphasized upon that there is no such consent in writing to be subjected under the jurisdiction of ICSID. Moreover further inference can be drawn by relying upon the same which mention that:

Respondent

the contractual forum mentioned in the PSC is New Ankara as well as the governing law is ROG.

Although they purport in the MPSC to subject themselves to be governed by the ARB & Conciliation Act, 1996 (ARB Act), they continue to pursue another ARB premised on precisely the same measures that they claim in this case are in breach of the Treaty.

It is expressly mentioned in the ICSID rules that it can exercise jurisdiction in those cases which have an investment dispute as its basis. In this case, attention must be paid to the fact that the dispute so concerned is not arising out of investment in nature but a contractual one whose essence is technical inefficiency as can be derived from the statement made by the Minister of Petroleum & Natural Gas at a press conference on 12 September, 2013 stated:

We were forced to terminate the contract of Nixio as they were ***indulged in various malpractices*** *causing huge losses to the exchequer of the nation. The Co. has been* ***concealing material facts*** *from the Govt. because of which the Govt.****'s share of petroleum was substantially affected.***

It becomes clear from the above stated facts that there is no legal fallacy in regards to the concerned dispute. The apple of discord is the non-deliverance of the so promised work programme & non disclosure of some relevant facts which resulted in Govt.'s loss in the share of petroleum. It was the ground of technical incompetence & malafide intentions that had resulted in the termination of the contract. If referral be made to the annexure 1 which states the parameters for bid evaluation, technical capability was rendered to be of utmost importance. The basis on which the Co. had been awarded the very bid now stands falsified. The PSU signed by the two countries also mention in Art 35.2 that the *contract shall not be amended, modified,* ***varied or supplemented in any respect except by an instrument in writing signed by all the Parties.***

Here as it can be seen, it is the express intent of the claimants to move to the jurisdiction of ICSID without any instrument in writing that can supersede the ARB clause mentioned in Art 33.

In the proceeding between Garanti koza llp (claimant) & Turkmenistan (respondent) it was stated that

Respondent

"consent cannot be imported from a different bilateral treaty when Turkmenistan manifestly did not give such consent in the basic bilateral treaty."[2]

Similarly while forming the MPSC agreement, the Republic of Cedonda had consented to the terms of being governed under the ARB & conciliation act 1996 while being fully aware that any dispute would be subjected accordingly. Any deflection from the same thereof would now be unfair & a subsequent breach of the agreement.

Furthermore, it is submitted that it is not a dispute relating to investment law. A Co. that was granted the joint operating agreement to explore the CO DWN-98-3, a deep water block of the ROG peninsula had carried out malpractices in discharging of its contractual duties. As a result the Govt. had terminated the contract. Art 33.1 of the PSU clearly states:

The Parties shall use their best efforts to settle amicably all disputes, differences or claims arising out of or in connection with any of the terms & conditions of this Contract or concerning the interpretation or ***performance thereof.***

This dispute is the product of the non-performance of the Nixio Co. along the lines of the contractual agreement & hence subjected to domestic ARB.

In another decision this tribunal(ICSID) had pointed out that although it had jurisdiction over a dispute that arose directly out of an investment through a specific transaction, the jurisdiction extended only to the disputes as per the terms of consent of the parties. Therefore the tribunal did not acquire jurisdiction with regard to each agreement concluded to implement the wider investment operation.

The definition of investor & investment are among the key elements determining the scope of application of rights & obligations under international investment agreements. An investment agreement applies only to investors & investments made by those investors who qualify for coverage under the relevant provisions. Only such investments & investors may benefit from the protection & be eligible to take a claim to dispute settlement. This Co. in question must adhere to the definition of investment as mentioned in appendix D of the MPSC:

[2] (ICSID Case No. ARB/11/20)

Respondent

The "Investment" made by the Contractor in the Contract Area in any particular Year is the aggregate value for the Year of:

(i) the Contractor's Exploration Costs incurred on or in the Contract Area pursuant to Art15 plus

(ii) the Contractor's Development Costs incurred on or in the Contract Area pursuant to Art 15.

As this is not a dispute with regards to the exploration or development costs, it is not a dispute arising out of investments. Therefore, it is clear that the parties have much freedom in describing a transaction as investment, they cannot designate an activity as an investment that is squarely outside the objective meaning of that concept.[3]

In examining whether the requirements for an investment have been met, most tribunals apply a dual test: whether the activity in question is covered by parties' consent & whether it meets the requirements of the convention.[4]

Here the Nixio Oil co. fails at the first instance as the malafide act carried out obviously not with the consent of the parties.

So, most summarily, the state of ROGs objection to be subjected to the jurisdiction is as follows:

i. has not consented or agreed, in the PSU or otherwise, to participate with this Claimant in an ICSID ARB.

ii. the PSU contains Turkmenistan's consent only to participate in a domestic ARB to be guided under the provisions of the ARB & conciliation act of the state.

iii. GOND's consent to submit this dispute to ICSID ARB may not be created by operation of the ECT to which it is a party.

Joy Mining v. Egypt, case made it clear that: *"The parties to a dispute cannot by contract or treaty define as investment, for the purposes of ICSID jurisdiction, something which does not satisfy the*

[3] The ICSID Convention: A Commentary By Christoph H. Schreuer, pg 117

[4] Rubins, the notion of investment, pg 289-290

Respondent

objective requirements of Art 25 of the Convention. Otherwise Art 25 & its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.[5]

In Fraport v. The Republic of the Philippines, the tribunal held by majority that an investment intentionally structured in violation of Philippine Law in order for the investor to gain the prohibited management & control of a project did not qualify as an investment & fell outside the ICSID jurisdiction & the competence of the tribunal. As a consequence, since the tribunal held by majority that there was no "investment in accordance with law", it also found that it lacked jurisdiction ratione materiae. According to the majority of the tribunal economic transactions undertaken by a national of one of the parties to the BIT have to meet certain legal requirements of the host state in order to qualify as an "investment".[6]

Similarly in this case, the Nixio oil co. had shown front-load expenditure thereby cutting down on the profit oil share of the Govt. & undermining the capacity utilization of the reserve. It was a move on their part to restructure the investment to be beneficial on their behalf. They tried to derive sole benefit out of a commercial agreement entered by ROG to boost their economy.So any measure initiated by the state of ROG is legitimate & does not call for the jurisdiction of ICSID. Executive Director's Report states that, " the dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for the breach of a legal obligation". ICSID does not have jurisdiction over "disputes of a purely commercial or political nature.[7]

The requirement of directness is one of the objective criteria for jurisdiction & is therefore independent of the parties consent. This means no matter what the parties have agreed, the dispute must not only be connected to an investment but it must also be reasonably & closely connected.[8]

---

[5] Joy Mining Machinery Ltd. v. The Arab republic of Egypt, Award, 6 August 2004.

[6] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award, 16 August 2007.

[7] Report of the Executive Director of ICSID

[8] The ICSID Convention: A Commentary By Christoph H. Schreuer, pg 106

Respondent

Disputes arising from ancillary or peripheral aspects of the investment are not covered by the consent agreement.

In Amco v Indonesia, it was contended that tax dispute was most indirectly related to the investment. As it was not specifically contracted for in the agreement & does not directly arise out of the investment. [9]

These are measures of general bearing which are aimed at restoring the economy. There is no specific target towards the claimant's investment.

A thorough scrutiny of the preamble of ICSID shows that mention of the requirement of consent has been made twice & states that no contracting state by the mere fact of its ratification, acceptance or approval of the convention be deemed to be under any obligation to submit any particular dispute to ARB.

In a case under this tribunal, it was held that there is a *Need for link between state conduct towards individuals & treaty breach.*

The tribunal noted that, unusually, the measures primarily complained of were not directed at the claimant ..... but rather at individuals who directed the affairs of those companies. The tribunal held that the rights of such individuals were personal & distinct from those of TRG & stated that, even where an act directed at an individual had been established as being in breach of his personal rights, a claimant would still have to show a connection between such conduct & conduct directed at the investor or its investment in order to establish a BIT breach.[10]

With reference to the energy ECT art 26, the tribunal has held that:-*Not all references to the ICSID Convention in BITs constitute binding offers of consent by the host State. Some clauses contain promises of future consent or hold out a general prospect of sympathetic consideration. An even weaker reference to ICSID is contained in some BITs that provide for the host State's sympathetic consideration to a request for*

[9] Resubmitted case: jurisdiction decided on 10 may 1988, ICSID reports, 543

[10] *The Rompetrol Group N.V. v Romania,* ICSID Case No. ARB/06/3

Respondent

ICSID dispute settlement. It is obvious that a clause of this kind does not amount to consent by the host State.[11]

When the Govt. contracts with the Co. to tend the lawn in front of parliament, the Govt.'s conclusion o0f the contract is a commercial act of the state, one that any private party could carry out & its resolution by ARB can credibly be positioned within the private domain.[12] Similarly the letting out of ROG of its territory for exploration & its subjection to dispute resolution can be brought under the private domain & thereby exclude the jurisdiction of ICSID.

Even a dispute that gives rise to legal questions is sometimes inappropriate for ARB if it affects the sovereign powers or questions of political significance. As a matter of fact, during the course of drafting of the convention also, most of the discussions about the type of disputes that should be made subject to centre's jurisdiction did not turn on their legal or non-legal nature but whether it was acceptable to expose a state to ARB in respect to activities which are within its sovereign prerogative.[13]

Similar line of arguments were carried out in the case of CMS Gas Transmission Co. v. Republic Argentina case that:

A Co. that is involved in the rendering of public services cannot impose a limitation on the sovereign right of the Govt. to change its economic policy or the tariff. The kind of agreement entered into by ROG with the Republic of Cedonda is not in the form of any treaty but a PSC. Art 30.3 of the PSC also lays down some grounds based on which the Govt. can terminate the contract:

(a) has knowingly submitted any false statement to the Govt. in any manner which was a material consideration in the execution of this Contract

(g) has failed to comply with or has contravened the provisions of this Contract in a material particular;

Respondent

---

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

[12] Investment treaty ARB & public law, by gus van harten, pg 46

[13] The ICSID Convention: A Commentary By Christoph H. Schreuer, pg 101

So, the state has rightly exercised its jurisdiction in terminating the contract & there is no such pending dispute that can be brought under the jurisdiction of ICSID.

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

Article 2 states Purpose of the treaty. It goes as follows-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 ECT.

In the Present case there is a dispute between the investor & state, hence the jurisdiction of ICSID was evoked by the claimants but the claimant cannot contest that there is a violation of Art 2 as it is mentioned under Pt. I of the ECT. Only if the dispute relates to Investment i.e. mentioned under Pt. III the ECT , the Claimants can claim for its violation or else not.

Article 26(3)(b)(i) contains the ECT's "fork-in-the-road" provision. It must be read together with the preceding paras of Art 26:

(1) 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 Pt. III shall, if possible be settled amicably.

(2) If such disputes cannot be settled according to the provisions of para (1) within a period of three months from the date on which either Party to the dispute requested amicable settlement, the Investor Party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paras of this Art.

(3) (a) Subject only to s. paras (b) & (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international ARB or conciliation in accordance with the provisions of this Art.

(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under s.para (2)(a) or (b).

Respondent

As mentioned in para 1 of Art 26 there must be an attempt to settle the dispute in an amicable manner."In the event of an investment dispute, the disputing Parties shall, as far as possible, settle the dispute amicably through consultations & negotiations which may include the use of non-binding & third-Party procedures." (Art 26, emphasis added).

But in this case the Claimants never tried to take the option of amicable settlement instead they directly went to the Domestic arbitral tribunal. Further there was no breach of obligation on the respondents Party, it was because of the actions of claimant they had to take stringent measure.

Even though the provisions of para.(1) were frequently redrafted during its negotiation, its main features remained relatively unchanged. The issue which received Particular attention from the negotiators was the type of obligations that could be subject to investor–contracting Party dispute settlement procedures. The core obligation under this para is therefore that disputes22 which fulfill the conditions listed therein shall, if possible, first be settled amicably. Amicable settlement, which is generally referred to in the context of investment treaties as the ''cooling-off period'',[14] means the settlement of disputes through negotiations & consultation. It is essential to note that such negotiation should be specific as to the nature of the dispute in question & conducted in good faith.[15]

Para (1) has two central components. First, it lists the preconditions necessary for the invocation of Art.26. Secondly, it explicitly provides for the initial step which must be pursued once these preconditions are met.

It is important to note here that Para (1) serves the important function of outlining the various facets of an arbitral tribunal's or conciliation commission's jurisdiction[16] that has been seized in a dispute pursuant to Art.26(2)(c). Therefore, the majority of disputes concerning jurisdictional issues of an

[14] CONSENT TO SUBMIT INVESTMENT DISPUTES TO ARB UNDER Art 26 OF THE ECT by ADNAN AMKHAN

[15] That negotiations should be undertaken in good faith is a well-recognised principle of international law. This same should be adhered to in the context of attempting to settle investment disputes between investors & the ECT contracting Party.

[16] The facets of an arbitral tribunal's jurisdiction are: *ratione personae*, *ratione temporis* & *ratione materiae*

Respondent

arbitral tribunal will most likely centre on the interpretation & application of the provisions of this Particular para.

Again, the disputing Parties are encouraged to settle their dispute amicably (Article 26(1) of the ECT), but if settlement is not reached within three months, the investor may submit the dispute to one of the following three forum (Article 26(2)(a) through (c) of the ECT):

(i) the courts or administrative tribunals of the respondent state;

(ii) a previously agreed dispute settlement procedure; or

(iii) international ARB.[17]

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 (art 26, ECT). Disputes should 'if possible, be settled amicably' & a three-month consultation period be observed (art 26(1)). The consequences of failing to observe this are unclear.

The 2nd para identifies the available third-Party dispute settlement procedures in the event that attempts to settle the dispute amicably prove unsuccessful. It is clear from this para that either Party to the dispute may request an amicable settlement, which the other Party must conduct in good faith. However, if the dispute has not been resolved through negotiations & consultations within the period of three months from the date the amicable settlement has been requested ,the investor is at liberty to submit the dispute to one of the three dispute settlement procedures made available under this para.

It is important to note that the pronoun ''it'' in the expression ''submit it'' which appears in the chapter of this para refers to the same dispute mentioned in para.(1), that is to say, the dispute concerning the alleged breach by a contracting Party of its obligation under Pt III of the ECT. Therefore, it is with regard to that dispute alone that the investor is given the choice of electing to ''submit it'' either to

(1) domestic courts or domestic tribunals of the respondent contracting Party,[18]

[17] IEEJ: April 2013 All Right Reserved 1 ECT: An Unexploited but Rich Well Noriko Yodogawa, Legal Counsel, Energy ECT Secretariat

Respondent

(2) a previously agreed dispute settlement procedure, or

(3) ARB or conciliation.

It must be noted here that the investor are allowed to adapt either of the three measure & not all. In the present case the claimant had already approached the domestic tribunal & hence they now cannot come before the international ARB.

This para makes explicit that each of the ECT contracting Parties has given its prior unconditional consent to submit to ARB or conciliation a dispute which falls within the remits of para.(1). However, sub-paras (b) & (c) of para.(3) list the two permissible exceptions to ‘‘unconditional consent’’. The first exception is where the investor has submitted the dispute to domestic courts or administrative tribunals, or previously agreed dispute settlement mechanisms.

The second exception to ‘‘unconditional consent’’ to submit the dispute to ARB or conciliation is where a dispute arises regarding an alleged breach of the obligation, as set out in the last sentence of Art.10(1) of the ECT.38 This sentence reads as follows:

‘‘Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.’’

It is important to note in the context of this para that ‘‘unconditional consent’’ to submit a dispute to ARB or conciliation is given within the procedural & substantive confines of the applicable provisions of the ECT.

In the present case the both the two exception has been fulfilled i.e. the investor has submitted the dispute to arbitrative tribunal & the dispute over here relates to breach of obligation. Hence there is no explicit consent here.

Respondent

---

[18] In response to the American delegation’s concern that ‘‘. . .the alternative of a domestic tribunal versus ARB is a genuine one’’, Art.10(12) was (after some debate as to where to place it in the text of the treaty) included in ECT Pt III, which reads as follows:

‘‘Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims & the enforcement of rights with respect to Investments, investment agreements, & investment authorizations.’’ The exact wording of this Art was submitted jointly by the United States & Japan.

Once the cooling-off period has come to an end, an investor can choose between a domestic court of the contracting Party, ICSID or international ARB under the UNCITRAL or Stockholm Chamber of Commerce Rules. The contracting Party must 'give its unconditional consent to the submission of a dispute to international ARB or conciliation' (art 26(3)(a)).Since in the present case there is no unconditional consent there is no violation of Art 26.

The ECT also includes a 'fork in the road' provision, requiring an investor to choose, from the outset, whether to pursue domestic legal proceedings or international ARB – but not both. Contracting Parties listed in Annex ID of the ECT may refuse to consent to the submission of a dispute to international ARB where the investor has previously submitted the dispute to another dispute resolution forum (art 26(3)).

Respondent submits that the term "dispute," which is not a defined term under the Treaty, "should be interpreted as a dispute between essentially the same Parties relating to the same material facts or injuries that constitute the basis of the dispute before the Arbitral Tribunal."Respondent submits that a more restrictive interpretation of "dispute" would defeat the object & purpose of this "fork-in-the-road" clause.

Respondent counters that, while substantial authority does exist for the triple identity test, the "fork-in-the-road" objection should nevertheless be sustained in the context of this Particular dispute.

Respondent emphasizes that its consent to submit a dispute to international ARB is expressly conditioned on Claimants not having already submitted the dispute to a "previously agreed dispute resolution procedure," pursuant to Art 26(3)(b)(i) read in conjunction with Art 26(2)(a) & Annex ID of the ECT.

Respondent draws the Tribunal's attention to the 2012 decision in *Chevron v.Ecuador*,1652 which, according to Respondent, confirms "a narrow interpretation of 'fork-in-the road' provisions that focuses strictly on the legal bases of the claims would deprive such a clause of effective scope." Hence stricter interpretation will result in choosing either domestic forum or international forum, choosing one would exhaust other automatically.

Respondent

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

Article 17 of the ECT deals with "Denial of benefit clause" .It states that :- "each Contracting Party reserves the rights to deny the advantages of this Pt. 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 Pt. were accorded to Investors of that state or to their Investments."

The scope of Art 17(1) is to give contracting states the right to exclude from the benefits conferred by Pt. III of the ECT alleged investors owned or controlled by citizens or nationals of third countries, which are not economically bound to the host state. Art 17(2), in turn, refers to the right of contracting states to deny such benefits to investments—as defined in Art 1(6) of the ECT—if the denying contracting Party establishes that the investment belongs to an investor of a third country with which the denying state (a) maintains no diplomatic protection, or (b) adopts or maintains certain detrimental economic measures. The “denial of benefits” clause under the ECT corresponds to the principle of reciprocity found in international law on foreign investment law.

In the present case we find that Nixio is a Co. functioning in the entire world that simply indicates the fact that it has investors-linkage all over the world . It means that Nixio receives investment from other countries as well & hence here comes the relevance of third state.

It is pertinent at this point to make a few brief comments on Art 17; these will be further elaborated in the next subsection. Art 17 of the ECT repeatedly refers to investors “controlled” by citizens or nationals of a third country. What does “control” under Art 17 mean? While it is true that Art 1(6) is

Respondent

in itself an explanation of "investment" under the ECT, one could wonder whether the notion of "control"—as well as "ownership"—has different meanings throughout the Treaty, or whether it has only one meaning.

Should we import the explanation of "control" under Art 17? The answer to this question is crucial,: place the burden of proof on the investor, should there be doubts as to control. The Award in *Plama v. Bulgaria* clearly stated that "the burden of proof to establish ownership & control [of the claimant] is on claimant." The notion of "direct or indirect control" is explained in Understandings number 3 of the ECT as being "control in fact, determined after an examination of the actual circumstances in each situation." The Understandings number 3 further refers to the burden of proof in cases where there is doubt as to such control: in these cases, the investor claiming the control has the burden of proof that such control exists.

There is no doubt that the "denial of benefits" right must be exercised by the denying state. The silent issue of Art 17 is how & when to exercise this right. Respondent maintains in this phase of the ARB that, even if it has any obligations towards Claimant under the ECT (which Respondent contests) it is entitled to deny the advantages of them to Claimant by reason of Art 17(1), & that it has done so. Respondent recalls that the terms of Art 17 derive from the "denial-of-benefits" clauses of bilateral investment treaties of the United States of America. While some but not all of these clauses require prior consultation & notification before invocation, as does NAFTA, Respondent notes that: No such notification & consultation requirement or other formal requirements are included in Art 17 of the Treaty. Thus, a Co. that is owned or controlled by nationals of a third State, a nationals of the host State, does not enjoy any benefits under Part III of the Treaty if it lacks substantial business activities in the Contracting Party in which it is organized.

In order to benefit from Treaty protections, Respondent contends, a Co. that comes within the scope of Art 17 must obtain a commitment from the host State that it will be treated as a protected investor. No such commitments have been obtained.

Respondent also maintains that the *Plama* case is "weak authority with respect to its treatment of denial of benefits clauses" & "is suspect in its reasoning." It argues that: The *Plama Standard*, if

Respondent

accepted, would also impose an impossible Standard for States, particularly for States in transition to a free market economy. The *Plama Standard* converts something that the investor knows with certainty, whether it has substantial business in the State of incorporation & whether it is owned or controlled by third or host State nationals, into a burden to make such a determination with respect to a potential investor that a host State cannot know or determine.

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

1. That the preamble of the ECT provides for principle of avoidance of discrimination. Through the Art 10 of the ECT this objective has been reflected & implemented by giving fair & equitable treatment to the contracting parties. Whenever there will be unfair & inequitable treatment, principles of avoidance of discrimination will be defeated. Hence the act will be contrary & in violation of the Art. 10 of the ECT. The claimant has alleged that there is a breach of commitment to provide Fair Equitable Treatment, but such allegation does not hold valid as no discrimination has been done. The PSC is terminated on the grounds of defeating the interest of the Nation. It is clearly stated under Art 30.3 (g) of the PSC that the contract will be terminated if the contractor (Defaulting Party):

'Has failed to comply with or has contravened the provisions of this Contract in a material particular'

Also under Art 8.3 (k) of the PSC, it has been said that the Contractor shall having due regard to modern oilfield & petroleum industry practices:

'*Be always mindful of the rights & interests of India in the conduct of Petroleum Operations'*

The claimant has a contractual obligation to take due care of the interest of the nation, which it has failed to do. The claimant is indulged in malpractices causing huge losses to the exchequer of the nation. Based upon the data, it is clear that since Nixio has started exploration the production went down from 32.03 MMT to 25.09 MMT. The inquiry report which says that the geological reasons stated by the claimants are baseless, establishes the fault of the claimant. All the above stated facts &

Respondent

findings clearly indicates that the claimant is in breach of Art. 30.3 & 8.3 of the PSC, which gives a valid ground for termination of the PSC.

2. That the claimant was given a chance to give clarification for the sudden decrement in production. The claimant concealed the facts & gave reasons which later appeared to be baseless. The opportunity for clarification provided to claimant, is a clear act of fair & equitable treatment. No discrimination has been done to them. There is a valid ground for such termination of the contract. It is not arbitrary, unjust or grossly unfair. It is said by the tribunal in Waste Mgmt., Inc. v. United Mexican States[19] :

the fair & equitable treatment standard is violated by conduct that is: arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory & exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency & candour in an administrative process.

GOND has followed the due process for termination. It is not arbitrary decision & follows the principle of natural justice. Equal opportunity was given to the claimant to give clarification, before terminating the PSC. Hence, the termination of the Contract does not lead to violation of Art. 10 of the Energy Contract Treaty.

1. That Art 26 of the Energy Contract Treaty lays down certain preconditions which need to be fulfilled before a dispute can be admitted for ARB. Under Art. 26 of the ECT it has been mentioned that :

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 shall****, if possible, be* ***settled amicably****.*

This Art makes it clear that a dispute has to concern an alleged breach of an obligation under Part III only, or else it cannot be admitted for ARB. By specifying that a dispute must concern a breach of an investment protection in Part III, Art 26 is potentially narrower than some other ARB agreements.[20]

[19] Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/ 3, Award, ¶ 98 (Apr. 30, 2004), 43 I.L.M. 967

[20] ARB under International Investment Agreements a Guide to the key Issues Edited by Katia Yannaca-small

Respondent

In the present claim the jurisdictional requirement is not fulfilled. The allegation that Art 21 is violated, cannot st& in the present forum as it belongs to part IV of the ECT.

2.That under the PSC Art. 33.1 it is said that all the disputes arising out of the contract shall be first settled amicably. The claimant did not exhaust the option of amicable settlement & directly applied for the ARB. This is in violation of the terms of the contract & hence the issues cannot be admitted & addressed in this forum. The Art 26, also, states that any issue related to investment shall be first settled amicably. However, the investor is not allowed to submit the case immediately to ARB, but has first to contact the competent tax authorities. The tax authorities of the two countries concerned shall strive to resolve the issue within six months. If the issue cannot be settled within this period, the foreign investor &/or his home country may invoke the dispute settlement mechanisms under Arts 26, 27. The tribunal may take into account any conclusions arrived at by the tax authorities regarding whether or not the tax amounts to an expropriation[21]. The issue regarding Art. 21 cannot be maintained in the forum due to the non fulfilment of the preconditions.

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

That the alleged violation of the section 10 as forwarded by the claimant also includes a phrase commonly known as the sanctity of Contract.[22] It obliges the contracting party to "observe any obligations entered with the investor". A merely textual reading of this provision makes it clear that it includes all types of obligations made by the agencies during initial contracts, preliminary agreements, & even commitments in general legislation in which the prospective investor places his trust. There are a numerous State measures that can potentially substantially deprive an investor of the value of its investment. For example, a State may choose to ban all forms of gambling. Such a ban may not be discriminatory, as it affects foreign & domestic investors alike.

[21] ECT- Reader's Guide, Pg. 39.

[22] The ECT: An East-west Gateway for Investment & Trade, edited by Thomas W. Wälde

Respondent

"Expropriate" has a number of potentially relevant definitions. The Shorter English Oxford Dictionary includes the following: "a. to dispossess of ownership; to deprive of property. (now chiefly to deprive of property for the public use, generally with compensation); b. the action of depriving of property , c. the action of taking (property) out of the owner's hands, esp. by public authority ".

It has been contended by Andrew Newcombe that it is appropriate, when determining whether an expropriation has occurred, to consider whether there has been an acquisition by the State. He contends that a State act which does not involve an acquisition should not be regarded as an expropriation.[23]

Foreign investors, like domestic investors, take the risk of changes in economic situations which may adversely affect their investments. It is a principle of customary international law that certain takings or deprivations by a State are non-compensable.[24] If the severity of the impact is to be considered, the facts need to be estimated against one another: *"Over-dependence on oil is evident from the fact that oil revenue, as a percentage of the nation's total export earnings, soared from 10.5 per cent in 1981 to 40.5 per cent in 1999. Since then crude oil production has accounted for 30 per cent of GDP & about 80 per cent of total Govt. revenue."*

So consecutive years of loss in the oil production has a potential to impact the GDP of the country & in fact bears the capacity to cripple its entire economy. The tribunal in Saluka Investments BV (The Netherlands) v The Czech Republic: *"The context within which an impugned measure is adopted & applied is critical to the determination of its validity."*

The tribunal further said "there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor & the aim sought to be realized by any expropriatory measure".

[23] "The Boundaries of Regulatory Expropriation in International Law", ICSID Review - Foreign Investment Law Journal, 1.

[24] Saluka Investments BV (The Netherl&s) v The Czech Republic (Partial Award, 17 March 2006) at [255];

Respondent

The FET standard consists mainly of an obligation on the host State's part to desist from a certain course of action. By contrast, by promising full protection & security the host State assumes an obligation to actively create a framework that grants security.[25]

The state can have no liabilities with respect to the other Co. when the change is in the public interest & the measure is otherwise proportional to that interest. Where these criteria are met, the State is not obliged to compensate the investor, notwithstanding the investor has been deprived of most of the value of its investment. The fact that "expropriation" is only permitted when it is for a public purpose, suggests that "public purpose" was not intended to be a filter on the concept of expropriation, as is required by the police powers doctrine.[26]

Any investment is subject to the domestic regulatory framework. International law has regard to domestic law to determine the scope of the rights which constitute the investment.[27]

No issue of expropriation can arise unless & until the new regulation falls outside the area of reasonable contemplation. This is so because until that occurs nothing has been lost. There is no deprivation or taking associated with the investment. No evidence was provided that ROG either directly or indirectly expropriated the investment or played any role in commercial difficulties.

Article 30.2 of the PSC states:

This Contract may, subject to the provisions herein below & Art 31, be terminated by the Govt. upon giving ninety (90) days written notice with reasons to the other Parties of its intention to do so in the following circumstances, namely, that the Contractor or a Party comprising the Contractor ("the Defaulting Party")

(a) has knowingly submitted any false statement to the Govt. in any manner which was a material consideration in the execution of this Contract;

As there was fault on grounds by the oil Co., the Govt. retained back the said areas & no prejudice has been meted out to the oil Co. The measure adopted was of a regulatory nature & not to cause

---

[25] Elettronica Sicula SpA (ELSI) (United States of America v. Italy), ICJ Reports 1989, p.15 at paras. 105-108;

[26] The ECT: An East-west Gateway for Investment & Trade, edited by Thomas W. Wälde

[27] Douglas, The Hybrid Foundation of Investment Treaty ARB 74BYIL 151 in particular the discussion from page 197.

Respondent

damage but rather to protect the state's economy. The measures were at the same time proportional. With reference to fair & equitable treatment it can be stated that it is based on principle of good faith which is why the PSC registers an absence of the faith as the contract was entered into keeping in mind the fact that ROG will be meted out with same good faith by Republic of Cedonda.

The energy resource belongs to the Govt. of Cedonda. One of the most validating point of moot is that the country has a sovereign control over its energy resource. Permanent sovereignty can very well be claimed as a valid reason to abrogate an agreement.

International business lives by commercial freedom of negotiating & contracting. International investor tend to be savvier than most Govt.s & be able to well appreciate the risks & rewards struck from the particular balance struck in a specific deal. On the other h& the treaty rules are just not expression of individual interest but reflect the policies of contracting state & the community of states under this treaty, in the rule of law for international investment. Companies waiving this system of law would, while pursuing their individual interest undermine this rule of law envisaged by this treaty.

Treaty standards should not be effectively invoked by an investor to subsequently obtain benefits which he did not obtain through the quid pro quo of negotiations. GOND further claims that there is no jurisdiction of this Tribunal, because the submission to ICSID ARB requires a dispute arising out of or relating to "expropriation", & that the conduct of ROG alleged by Nixio in this case cannot be considered as expropriation.

In a similar case Albania points out that a full examination of the alleged expropriation can only take place in the procedure on the merits of this case, but that in this jurisdictional phase of the procedure Tradex has to provide at least prima facie evidence to show that an expropriation occurred, as required by Art. 8 (2), & that Tradex has failed to do so.[28]

[28] Tradex Hellas S.A. v. Republic of Albania (ICSID Case No. ARB/94/2)

Respondent

It would be considered an expropriation if a state permits the deprivation of l& use from a joint venture based on foreign investment or fails to grant protection against interference if a legal duty for protection can be found to exist.

The Tribunal explained that FET standard was based on the principle of good faith, & therefore that provision implied that the conduct of the State needed to be coherent, without ambiguities & transparent in relation to the investor.[29] Fairness is also based on the principle of reciprocity . Tribunals have held that the FET standard requires a transparent & consistent legal framework that protects the investors' legitimate expectations, freedom from coercion & harassment, procedural propriety & due process & generally action in good faith.[30]

A classic example might be drawn from the Ghana-China BIT "Either contracting state may, for the national security & public interest, expropriate, nationalize or take similar measure against investment of investors of the other contracting state in its territory, but subject to the following conditions:

A) under domestic legal procedure B) without discrimination

Trust between investors & state is the motor of all investments & investors here are in a flagrant violation of the trust. This is here an exceptional circumstance that justify the act of expropriation.

If the Govt. was acting as a sovereign rather than a commercial participant, the act is far less likely to be characterized as expropriation.[31] As said before, the essence of this case is a breach of contract claim. The concept of regulatory takings refers to measures enacted by the state for the regulation of the economy & which, as a side effect, affect the investment. Such measures are not as a rule considered to constitute an expropriation. The distinction between expropriation & regulation screens

---

[29] Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB(AF)/00/2)

[30] C. Yannaca-Small, 'Fair & Equitable Treatment Standard in International Investment Law', In International Investment Law: A Changing Landscape, OECD ed. (2005) p. 73

[9]R Dolzer., Principle of International Investment Law, second ed., 2012, pg. 90

Respondent

out most potential cases of complaints concerning economic intervention by a state & reduces the risk that Govt.s will be subject to claims as they go about their business of managing public affairs.[32]

This opinion is shared by writers such as Prof. Brownlie, who states: "State measures, prima facie a lawful exercise of powers of Govt.s, may affect foreign interests considerably without amounting to expropriation.[33]

The decisions dealing with arbitrary conduct indicate that measures are arbitrary if they inflict damage on the investor without serving any apparent legitimate purpose.[34] The commitment hereby had formed of an unilateral character. Protection to investments are available only when the commitment is bilateral in nature.[35] The exercise of fraud by Nixio hereby terminated all the scope of protection that could be guaranteed to them under the contract entered into. The state here was forced to rely on its regulatory powers & under this made the foreign Co. its subject. This power articulates inherent social duties & the state of ROG upheld the same.

Every act must be seen in its context in order to decide whether it is a consequence of the contractual agreement or a consequence of the public policy of the state. In cases dealing with discriminatory treatment, tribunals have dealt with the issue of the basis for comparison & with the question of whether discriminatory intent is required for a violation of the standard.[36]

Since the collaboration was formed by the state which itself formed the EPLR regime to boost its GDP, there can be no plausible reason to terminate such a profitable contract other than the fact that such a contract was misused by the Republic of Cedonda to hamper ROG's economy. Much will depend on the wording of depend on the wording of the specific treaty to be applied in the particular

Respondent

[32] Opinion of Prof. Ove Bring & Dr. Richard Happ

[33] Ian Brownlie, Principles of Public International Law, 5th ed., p. 535.

[34] Genin, Eastern Credit Ltd. Inc. & AS Baltoil v. Republic of Estonia, Award, 25 June 2001, 6 ICSID Reports 241, para. 371

[35] Art 10(2) of the ECT

[36] S.D .Myers v. Canada, Award on Liability, 13 NOV. 2000, paras. 252-254, 8 ICSID Reports 18

case.[37] Here in this case, it is a contract. Thus there was a contract resolution which was violated by Nixio. So the termination of the same was executed with public powers.

Respondent

[37] S. Vasciannie, 'The Fair & Equitable TreatmentStandard in International Investment Law & Practice', The British Year Book of International Law 70 (1999): 122, 127 (pointing out that the use of the term fair & equitable treatment does not necessarily convey the same legal result in each case.)

PRAYER

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

1. *The petitioner's claim for compensation shall be set aside*
2. *The petitioner be held guilty of violation of Agreement.*
3. *The Petitioner's claim for violation of ECT be set aside.*

The Respondent State 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.

Respondent