TEAM CODE – SCA004

ARBITRATION UNDER

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF BINDA AND THE ESWATINIAN KINGDOM OF NULAND FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

&

BILATERAL INVESTMENT TREATY BETWEEN THE GOVERNMENT OF REPUBLIC OF BINDA AND THE KINGDOM EMIRATES OF PETROLLAR ON THE PROMOTION AND PROTECTION OF INVESTMENTS

BEFORE

AN AD HOC TRIBUNAL GOVERNED BY THE UNCITRAL RULES

BETWEEN

AIRFRESH (CLAIMANT) AND **GOVERNMENT OF REPUBLIC OF BINDA (RESPONDENT)**

&

OXFORD (CLAIMANT) AND **GOVERNMENT OF REPUBLIC OF BINDA (RESPONDENT)**

MEMORIAL FOR THE CLAIMANT

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LIST OF ABBREVIATION

%	Percentage
&	and
AAA	American Arbitration Association
AAA-IDR	American Arbitration Association International Dispute Resolution
AJIL	American Journal of International Law
Apr.	April
ARB.	Arbitration
art. / arts./Art	Article / Articles
BIT	Bilateral Investment Treaty
BNR	Binda Rupee
Chap	Chapter
Cl.	Claimant
Co.	Company
Corp.	Corporation
Dec/Dec.	December
Doc	Document
Dr.	Doctor
Eg.	Example
Feb	February

FET	Fair and Equitable treatment
FILJ	Foreign Investment Law Journal
FIN. ECON	Financial Economy
FPS	Full protection and security
GATT	General Agreement on Tariffs and Trade
Govt.	Government
I	First
i.e.	id est (that is)
IBA	The International Bar Association
ICGJ	International Court of General Jurisdiction
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
II	Second
III	Third
ILM	International Legal Materials
Inc./Inc	Incorporated
IV	Fourth
Jan	January
Jul	July
Jun	June
JWIT	Journal of World Investment and Trade
Kl	Kiloliter

L. Rev	Law Review
Ltd.	Limited
Mar	March
Mr.	Mister
NGT	National Green Tribunal
No./No	Number
Oct	October
p./pp./pg	Page
Para	Paragraph
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Journal
Petro	Petrollar
PIL	Public International Law
SEZ	Special Economic Zone
SIAC	Singapore International Arbitration Centre
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNICTRAL	United Nations Commission on International Trade Law
US	United States
USCTR	US Claim Tribunal

USD	United States Dollar
V	Fifth
v.	versus
VCLT	Vienna Convention on the Law of Treaties
VIII	Eighth
vs.	Versus

STATEMENT OF JURISDICTION

CLAIM 1:

The Claimants humbly submit to the jurisdiction of this Ad Hoc Arbitral Tribunal under Article 9 of the Binda – Nuland BIT, and submit to the UNCITRAL Arbitration Rules under Article 1 of the UNCITRAL Arbitration Rules.

CLAIM 2:

The Claimants humbly submit to the jurisdiction of this Ad Hoc Arbitral Tribunal under Article 16 of the Petrollar – Binda BIT, and submit to the UNCITRAL Arbitration Rules under Article 1 of the UNCITRAL Arbitration Rules.

STATEMENT OF FACTS

CLAIM 1

- The southern states of Smallnadu and Kukatuka in Binda agreed to resolve inter-state disputes.
- A foreign investor, Airfresh, from the kingdom of Nuland, entered into a contract for operating a regional environmental project. Investment treaty protections for foreign investments were offered under the Nuland-Binda BIT.
- Airfresh determined that it was in compliance of Binda's laws regarding hazardous substances and was operating its facilities after obtaining the necessary permits.
- In March 2018, residents of Smallnadu launched a public agitation against Airfresh on the grounds that it was contaminating the neighbouring water bore wells. This agitation led to sabotaging of the facilities of Airfresh by the angry citizens. The MLAs compelled the state pollution control board to agitate a claim before the jurisdictional NGT for closure of the Airfresh facilities. The NGT ruled against Airfresh, so they appealed to the Appellate NGT, but failed. Airfresh then appealled to the Supreme Court of Binda.
- In the meantime, before the claim could be heard, the affected public approached the Supreme Court through a PIL and obtained an interim stay order from the apex court, preventing Airfresh from operating the hazardous waste landfill and related operations.
- Subsequently, under the Nuland-Binda BIT, Airfresh initiated investor-state Arbitration against the Republic of Binda under the UNCITRAL Arbitration Rules.

Claim 2

- The northern state of Bingee, in Binda, contains the biggest & holiest river of Binda i.e. Junjee, which is the only river source of safe drinking water. Junjee is being highly polluted due to the toxic waste discharges and observance of holy rituals.
- The Prime Minister, vowed to save the national river along with the mantra "Save Junjee, Save Binda".
- Oxford, a company from Petrollar, invested its engineering and other services, in 2016, to clean Junjee & supply safe drinking water to the state of Bingee. An escalation clause was fixed to the contract signed between Oxford & Bingee. Oxford's investments were protected under the Petrollar-Binda BIT. Oxford was further instructed to incorporate the concept of waterfront development for recreation, & to provide a boost to the local economy.
- Due to recent economic pressures, the Govt. of Binda restricted the outward remittance of money by major investors in Binda, due to fiscal prudence. Only monitored minimal funds transfer out of Binda was permitted.
- Citing public policy reasons, Bingee, revised downward the escalation clause from 10% per year on the sale/purchase to 5% per year.
- Other domestic providers of similar services like those of Oxford weren't affected by these monetary restrictions, but were affected by the austerity measures.
- After failed attempts at conciliation & negotiation, Oxford initiated investor state arbitration against Binda, alleging expropriation, breach of treaty in relation to national treatment & denial of free transfer of funds, & sought compensation.

STATEMENT OF ISSUES

CLAIM 1

1. WHETHER BINDA EXPROPRIATED AIRFRESH'S INVESTMENT.
2. WHETHER BINDA MET AIRFRESH'S LEGITIMATE EXPECTATIONS IN RELATION TO PROTECTION OF ITS INVESTMENT.
3. WHETHER BINDA DENIED FAIR AND EQUITABLE TREATMENT TO AIRFRESH.
4. WHETHER BINDA FAILED TO PROVIDE FULL PROTECTION AND SECURITY TO AIRFRESH'S INVESTMENT.

CLAIM 2

1. WHETHER MR. WHITE'S APPOINTMENT AS ARBITRATOR IS JUSTIFIED AND FREE OF CONFLICT OF INTEREST.
2. WHETHER BINDA EXPROPRIATED OXFORD'S INVESTMENT.
3. WHETHER BINDA BREACHED THE TREATY IN RELATION TO NATIONAL TREATMENT.
4. WHETHER BINDA DENIED OXFORD FREE TRANSFER OF FUNDS.

SUMMARY OF ARGUMENTS

CLAIM 1

A. THAT THIS TRIBUNAL HAS JURISDICTION:

1. That Article 2 has been satisfied.
2. That this court has jurisdiction under Article 9.

B. THAT BINDA HAS FAILED TO PROVIDE FAIR AND EQUITABLE TREATMENT:

1. That Binda has not met Airfresh's legitimate expectations.
2. That Binda has not complied with contractual obligations.
3. That there was denial of justice

C. THAT BINDA HAS FAILED TO PROVIDE FULL PROTECTION AND SECURITY TO AIRFRESH:

D. THAT BINDA HAS EXPROPRIATED AIRFRESH'S INVESTMENT:

1. Airfresh is considered as an investor under Article 1.
2. That there was taking of the Airfresh's property by the Government of Binda.
3. That the taking of property was not justified.

CLAIM 2

A. CHALLENGE TO ARBITRATOR

1. That Article 19 of the BIT is not violated
2. That the corporate veil cannot be pierced
3. That the IBA Guidelines are not applicable

B. THAT THIS TRIBUNAL HAS JURISDICTION

1. That Article 15 has been satisfied
2. That the tribunal has Ratione Personae jurisdiction
3. That this tribunal has Rationae Temporis jurisdiction

C. THAT BIND HAS BEACHED THE TREATY IN RELATION TO NATIONAL TREATMENT

1. That like circumstances existed between the parties.
2. That there was differential treatment despite like circumstances
3. That the differentiation is not justified.

D. THAT BINDA HAS DENIED THE RIGHT TO FREE TRANSFER OF FUNDS OF OXFORD

1. That Binda has denied the right to free transfer of funds under Article 6.1
2. That there was discrimination in the denial of right to free transfer of funds

E. THAT BINDA HAS EXPROPRIATED OXFORD'S PROPERTY

1. That there was lack of proper regulation by Binda
2. That the doctrine of Police powers does not apply as there is abuse of power.
3. That there is substantial deprivation of property
4. That compensation has not been given

ARGUMENTS ADVANCED

CLAIM 1

A. <u>THAT THIS TRIBUNAL HAS JURISDICTION:</u>

1. THAT ARTICLE 2 HAS BEEN SATISFIED:

1.1 Article 2 of the BIT states that the Agreement shall apply to all "investments" in the "territory" of the other contracting party. These terms have been defined under Article 1 of the BIT. Importing the principles of VCLT, the meaning of 'immovable property', taken in its ordinary meaning, would include the hazardous waste facilities operated by Airfresh. The meaning of 'territory' also includes the SEZ in which the facility was built, as Binda has sovereignty and exclusive jurisdiction over this area. Thus, since the essentials of Article 2 have been satisfied, the agreement and the rights under it are applicable to Airfresh.

2. THAT THIS COURT HAS JURISDICTION UNDER ARTICLE 9:

2.1 *RATIONAE MATERIAE*:

2.1.1 The rationae materiae has been defined under Article 9 as disputes in relation to an investment under the Treaty. As argued above, Airfresh's immovable waste facilities fall within the meaning of "investment" and thus, the *ratione materiae* jurisdiction is satisfied.

2.2 *RATIONAE PERSONAE*:

2.2.1 Article 9 also limits disputing parties to investors of one Contracting Party and the other Contracting party as the *rationae personae* jurisdiction of this tribunal. Since the dispute is between the State of Binda – a contracting party, and Airfresh - investor of the other contracting party, the *Rationae Personae* jurisdiction is also satisfied.

2.3 THAT THE DISPUTE HAS NOT BEEN SUBMITTED BEFORE A COMPETENT DOMESTIC BODY:

2.3.1 Under Article 9, any dispute may be submitted to either resolution by domestic judicial bodies, or by negotiation. If no consensus is reached, then the parties may opt for arbitration.

2.3.2 It is submitted that the parties have not approached the domestic tribunals for resolution of the disputes. The claim before the NGT was merely for the closure of the Airfresh facilities, which has now reached the Supreme Court on appeal. This claim does not include the issues of expropriation, legitimate expectations, full protection and security and fair and equitable treatment as claimed before this tribunal. A 'fork in the road' provision cannot, by any reasonable interpretation of this type of clause, prevent an investor from bringing a treaty claim in respect of a grievance unrelated to a different grievance that was previously submitted to a domestic court, even if such complaints relate to the same investment.[1] Object of the claim must be looked into to distinguish 'domestic disputes'.[2] The fact that the Concession Contract referred contractual disputes to the contentious administrative courts of Tucumán did not affect the jurisdiction of the Tribunal with respect to a claim based on the provisions of the BIT.[3]

2.3.3 Applying the "fundamental basis of claim" test, the treaty lays down a different standard upon which the parties are to be judged. This was not the basis of the claim before the domestic court. The domestic court is dealing with the issue of closing down the factory and is based on the contract. However, this claim is based on the treaty, and thus, the court's jurisdiction is not barred.

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[1] Zachary Douglas, The International Law of Investment Claims, 155 pp.323 Cambridge University Press.

[2] Eudoro Armando Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5, Preliminary Objections (Decision on Jurisdiction) (Aug 8, 2000)

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

2.4 Thus, there is no agreement regarding the adjudication of the claims before this tribunal. The Arbitration clause under Article 9(3) may be invoked.

B. THAT BINDA HAS FAILED TO PROVIDE FAIR AND EQUITABLE TREATMENT

Binda's actions denied fair and equitable treatment to Airfresh. The Respondent failed to accord fair and equitable treatment as required under Article 3

1. THAT BINDA HAS NOT MET AIRFRESH'S LEGITIMATE EXPECTATIONS

1.1 The Respondent has violated the Claimant's legitimate expectations of predictability and stability, which formed the basis of its decision to invest in the investor's property.

1.2 There is a liability for breach of the fair and equitable standard in circumstances where the assurances made to the foreign investor both in the contract as well as in non-contractual documents have been breached.[4] In **Saluka v. Czech Republic**,[5] the tribunal weighed the investor's legitimate and reasonable expectations against the host state's regulatory interests. The host state's lack of consistency and lack of transparency played decisive roles. This general line of reasoning based on consistency, stability and transparency has been followed in a number of additional decisions.[6]

1.3 The Tecmed tribunal declared that "the foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor and act consistently, i.e. without arbitrarily revoking any preexisting decisions or

[4] LG&E Energy Corporation v. Argentina (2007) Decision on Liability (Oct 3, 2006) 46 ILM 36, para. 130.
[5] Saluka v. Czech Republic, UNCITRAL Partial Award, (Mar 17, 2006).
[6] PSEG v. Turkey, Award, (Jan 19 2007), at paras 240-256; Enron v. Argentina, Award, (May 22, 2007), paras 260-262.

permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities."[7]

1.4 In the case of Oxford and Binda, the investor's legitimate expectations are based on a legal framework and on any undertakings and representations made explicitly or implicitly by the host state.[8]

1.5 The legal framework on which the investor is entitled to rely consists of legislation and treaties, of assurances contained in decrees, licences and similar executive assurances as well as in contractual undertakings. A reversal of assurances by the host state that have led to legitimate expectations will violate the principle of fair and equitable treatment.[9]

2. THAT BINDA HAS NOT COMPLIED WITH CONTRACTUAL OBLIGATIONS

2.1 Airfresh had invested in the state of Kukatuka, a southern state in the Republic of Binda, by securing a contract for the planning, constructing, owning and operating a regional environmental project. The investment treaty protections for foreign investments were offered under the Nuland-Binda BIT. Article 3 of Nuland-Binda BIT provides for fair and equitable treatment in the territory of the other Contracting Party**.**

2.2 Contractual agreements create legal stability and predictability. Therefore, *pacta sunt servanda* (Treaties shall be complied with) would be applicable here as an obvious application of the stability requirement that is so prominent in the FET standard. Tribunals agree that a failure to perform a contract may amount to a violation of the FET standard. In various cases that deal with the protection of the legitimate expectations of the investors, the expectations were actually

[7] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003)
[8] R.Dolzer 'New Foundations of the Law of Expropriation of Alien Property' (1981) 75 AJIL 553-589.
[9] WM Reisman and MH Arsanjani, 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes' (2004) 19 ICSID Review-FILJ 328.

based on contractual arrangements with the host state.[10] A tribunal also admitted that a violation of obligations under a contract may give rise to a claim for violation of the FET standard.[11] Another held that the FET standard covers the obligation to abide by contracts. .[12]

2.3 In the case of Airfresh and Binda, Binda has breached its contractual obligation of allowing Airfresh to allow it to operate its facilities and thus breaches Article 3.

3. DENIAL OF JUSTICE:

3.1 Judicial function- Denial of Justice Irrespective of an express provision of this kind, 'the fair and equitable treatment standard encompasses the notion of denial of justice.[13] The concept of denial of justice been defined under Article 8 of the Universal Declaration of Human Rights 1948: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.[14] Fair procedure is an elementary requirement of the rule of law and a vital element of FET. It is antithetical to the international delinquency of denial of justice.[15] This duty may be violated not only by the courts but also through legislative or executive action.

3.2 Justice may be denied through unreasonable delay in the judicial process.[16] That delay constitutes a separate basis on which the standard may be breached and is underlined in customary international law by the fact that undue delay in the remedial process attributable to

[10] Dolzer Rudolf and Schreuer Christoph, Principles of Imternational Investment Law, Oxford Publications.
[11] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Order of the tribunal on further proceedings (Dec 17, 2007)
[12] Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award (Oct 12, 2005)
[13] Jan de Nul NV v Egypt, Award (Nov 6, 2008) ICSID Case No ARB/04/13, 15 ICSID Rep 437, IIC 356 (2008, Kaufmann-Kohler P, Mayer & Stern) para 188.
[14] Universal Declaration of Human Rights (Dec 10, 1948) GA Res UN Doc A/811.
[15] Azinian v. Mexico, Award, (Nov 1, 1999), 39 ILM (2000) 537, paras 102,103.
[16] Fabiani (France v Venezuela) (1905) X RIAA 83; El Oro Mining (Great Britain) v Mexico (1931) V RIAA 191; Freeman chap X; Harvard Draft on the Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners, art 9; Paparinskis 211–22.

the responsible State provides an exception to the requirement to exhaust local remedies.[17] The same point has been made in the context of treaty claims. Where the gravamen of the claimant's claim is delay, an insistence on exhaustion of local remedies might constitute a denial of justice in and of itself.[18] In the present case the Airfresh appealed to the Supreme Court of Binda but it was expected that the case would not be heard for at least six months as there was heavy backlog of cases in the court of about 70,000 cases pending.

3.3 That delay constitutes a separate basis on which the standard may be breached and is underlined in customary international law by the fact that undue delay in the remedial process attributable to the responsible State provides an exception to the requirement to exhaust local remedies.[19]

C. THAT BINDA HAS FAILED TO PROVIDE FULL PROTECTION AND SECURITY TO AIRFRESH

1. Full Protection and Security (FPS) is a standard that protects the foreign investor against third party interference in an investment. Under FPS, the investor must be protected from interference from both state powers and from third parties. Thus, the state must guard the investor against employee uprisings or civil disturbances as well as refraining from threatening the investor itself.[20] In the present case also the govt. of Binda did not protected the full protection and security of the investor.

2. The treatment provision also includes the provision of 'full protection and security' to the foreign investment. It has been held in arbitral awards that this again adverts to customary law standards which require either that the state's forces should not be utilized to harm the foreign

[17] ILC 'Draft Articles on Diplomatic Protection' [2006] 2(2) YB ILC 22, art 15(b).
[18] Jan de Nul NV v Egypt, Award (Nov 6, 2008) para 256.
[19] ILC 'Draft Articles on Diplomatic Protection' [2006] 2(2) YB ILC 22, art 15(b).
[20] Schefer Krista, International Imvestment Law,2nd Edition, Edward Elgar Publications.

investor's property or that the state should give protection from violence against the interests of the foreign investor if such violence could be reasonably anticipated.[21]

3. Physical Security was not adequately offered to the investments of Airfresh as the members of the local community who had threatened to turn violent, eventually did manage to sabotage the investor's facilities.

4. In the case of Wena Hotel, private actors forcefully took over the claimant's hotels. While the government was not involved in the seizure, its police did not pursue such actors legally, subsequent to the seizure; the arbitral tribunal found therefore that Egypt had clearly failed to act according to the standard required in the BIT.[22]

5. Similar circumstances can be seen here. The investments were not adequately protected by the Police; moreover the offenders who sabotaged the facility were not pursued legally.

6. Some tribunals and commentators also extend the FPS obligation to cover legal security. Such protection would require the host to ensure[23] a stable legal regime and the availability of timely access to court proceedings to the investor. Timely access to court proceedings will not be provided to the investor i.e. Airfresh due to the heavy backlog of cases in the Supreme Court of Binda and a minimum of six months would be there before the case would be heard. This would further amount to denial of justice and breach of legal protection and security.

7. Likewise, an existing award under a contractual arbitration provision also does not preclude subsequent treaty-based investment arbitration, as the causes of action may be different. The reasoning here is that the tribunal in the contract-based arbitration is confined to disputes resulting from breaches of the contractual provisions whereas a treaty-based tribunal is

[21] American American Machine Tools (AMT) v Republic of Zaire, ICSID Case No. ARB/93, Award, (Feb 21, 1997), 36 ILM (1997) 1531

[22] Wena Hotels v. Arab Republic of Egypt, ICSID Case No.ARB/98/4, Award, paras. 84-95 (Dec.8, 2000), 42 ILM 896 (2002).

[23] Schefer Krista, International Investment Law, 2 nd Edition, Edward Elgar Publications.

concerned with violations of the treatment standards of the treaty, expropriation or other rights under the treaty such as the repatriation of profits. The distinction between contractual claims and treaty claims made in the Vivendi annulment award has generally been accepted by other tribunals. But, there could be circumstances where the two types of claims had into each other.[24]

8. In *Azurix v. Argentina*, the tribunal confirmed that 'full protection and security may be breached even if no physical violence or damage occurs'. The tribunal said that "it is not only a matter of physical security; rather, the stability afforded by a stable investment environment is as important from an investor's point of view. The tribunal is aware that in recent free trade agreements by the US with Uruguay, full protection and security is understood to be limited to the level of police protection required under customary international law. However, when the terms of 'protection and security' are qualified by 'full' and no other adjective or explanation needed they extend in their ordinary meaning, the consent of this standard beyond physical security."[25]

9. Thus, just the act of the state to employ police authorities for protection of investor's property will not suffice if it's not adequate enough as the meaning is extended to 'full' protection and security. Moreover, in the Pantechniki case (para 78), referring to the Cutler claim of 1927, it was held that 'a claim could only be made if the authorities had knowledge or should have had knowledge, of the impending attack, and failed to take precautions to thwart it.'[26]

10. In the given circumstances, the citizens of Smallnadu and Kukatuka had threatened to turn violent and the public opposition to the operations of Airfresh's facilities did not abate. This

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[24] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award (Aug 20, 2007)

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

[26] Pantaechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award (July 30, 2009)

clearly means that authorities despite having knowledge of an impending attack, required measures were not taken which led to the loss of the investors, as there was closure of the Airfresh facilities.

D. THAT BINDA HAS EXPROPRIATED AIRFRESH'S INVESTMENT:

1. AIRFRESH IS CONSIDERED AS AN INVESTOR UNDER ARTICLE 1

1.1 Airfresh is an Investor in Binda as it falls within the definition given under Article 1[27] of Binda-Nuland BIT.

1.2 In summary, Airfresh says that it is an "investor" and has made an "investment" pursuant to the BIT as there was proper signing of the contract between Airfresh and the state of Kukutuka.

1.3 It submits that the correct approach to be adopted by the Tribunal in assessing whether an "investment" has been made is to consider the plain and ordinary meaning of the words[28] used in the BIT. If this approach is adopted, the only conclusion that can follow is that Airfresh has made an "investment" under the BIT.[29]

2. THAT THERE WAS TAKING OF AIRFRESH'S PROPERTY BY THE GOVERNMENT OF BINDA:

2.1 *The Respondent expropriated the Claimant's investment-* Article 5 says that Investment of the investor of either Contracting Party shall not be expropriated or subjected to measure having effect equivalent to expropriation except for on a non-discriminatory basis and against fair and equitable compensation.

2.2 Airfresh constructed facilities across the state of Kukatuka and met all of the environmental discharge parameters in 2017. The public of Smallnadu launched a public agitation. The local MLAs compelled the state administration and the state pollution control to

[27] Bilateral Investment Treaty Between The Government of Republic of Binda And The Eswatinian Kingdom of Nuland for The Promotion And Protection Of Investments – Binda-Nuland, Article 1.
[28] United Nations, Vienna Convention on the Law of Treaties.
[29] White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award (Nov 30, 2011)

agitate a claim before the Jurisdictional NGT for the closure of the Airfresh facilities. Meantime, the people of the Kukatuka obtained an interim stay order from the Supreme Court via a PIL, preventing Airfresh from operating the hazardous waste landfill and related operation. Despite of the alleged pollution of the public drinking water wells by Airfresh being unproved Binda took away the property via the PIL.

3. THAT THE TAKING OF PROPERTY WAS NOT JUSTIFIED:

3.1 The taking of the Investment was not for a public purpose.[30] That assurance is not sufficient to satisfy the requirement of Article 5 of the BIT that the expropriation is "for a public purpose".

3.2 As according to the facts given a test was done by giving a series of samples of the bore well water over a six month period were jointly tested by the pollution control authorities and the alleged pollution of the public drinking wells by Airfresh were unproved and therefore the taking of property was not justified.

3.3 In the case of Fireman's Fund v. Mexico[31] the tribunal held that the elements of expropriation are (a) taking (which may include destruction) by a government-type authority. (b)The covered investment may include intangible as well as tangible property. (c) The taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment). (d) The taking must be permanent, and not ephemeral or temporary. (e) The taking usually involves a transfer of ownership to another person (frequently the government authority concerned), but that need not necessarily be so in certain cases (e.g., total destruction of an investment due to

[30] Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award (Jun 1, 2009)

[31] Fireman's Fund Insurance Company v. The United Mexican States, ICSID Case No. ARB(AF)/02/1, Award (Jul 17, 2006)

measures by a government authority without transfer of rights). (f) The effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation. (g) The taking may be de jure or de facto. (h) The taking may be "direct" or "indirect."

3.4 Where the acts of the respondent lacked due process of law, it was held to be expropriation.[32] The same happened in the present case where the government lacked in regulation of its power. Due to lack of regulation and lack of due process, the claimant had to suffer and thus the respondent did not regulate but substantially deprived claimant of his investment.[33]

3.5 The claimant had to bear an 'individual and excessive burden'[34] of taking of the property, as Airfresh was the only investor who invested in the Govt. of Binda and securing a contract for Planning, constructing, owning and operating an environmental project for hazardous waste and, and air pollution control, and later on there was closure on the Airfresh facilities.

3.6 As noted by the ICSID Tribunal in *AMT v Zaire*[35] the host country is bound to observe an obligation of vigilance in protecting the property of the investor. This requires the host country to take measures to ensure the protection and security of the investments in question. An omission to do so can amount to a case of *res ipsa loquitur*. The Govt. of Binda in this case omitted to take measure for the protection of the Airfresh's right over its property.

[32]Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award (Jun 1, 2009)
[33]Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award (Jul 1, 2004)
[34] Azurix v. Argentina, Award, ICSID CASE No. ARB/01/12, ¶311, Final Award, (Jul 14, 2006).
[35] American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award (Feb 21, 1997).

4. As has been proved above, Airfresh was an investor; that there was taking of property by the Government of Binda and that the taking of property was not justified. Therefore, the Expropriation has occurred.

ISSUE 2

A. CHALLENGE TO ARBITRATOR

1. THAT ARTICLE 19 OF THE BIT[36] IS NOT VIOLATED:

1.1 The Claimant, Oxford has appointed Mr. White as its arbitrator[37]. This has been challenged by the Respondent State, Binda on the grounds that Mr. White's niece is the Senior Investment Manager in one of the investors of Oxford[38].

1.2 Article 19.2 of the Binda - Petrollar BIT, which governs the Conflict of Interest of Arbitrators and Challenges states that the arbitrator must disclose in writing any circumstances that may raise doubts regarding his/her impartiality, in the eyes of the parties, including instances listed under Article 19.10. Direct relationship has been explained under the IBA Guidelines[39].

1.3 It is submitted that it is impossible to determine whether Mr. White's niece has an interest in the outcome of the arbitration. The fact that she was a manager in a company which has invested in Oxford[40] does not suggest that she had any interest, financial or otherwise, in the arbitration.

2. THAT THE CORPORATE VEIL CANNOT BE PIERCED:

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[36] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 19.
[37] Factual Matrix, Representation by the parties
[38] Factual Matrix, Representation by the parties
[39] Explanation to Article 2.2.2, IBA Guidelines on Conflict of Interest
[40] Factual Matrix, Representation by the parties

2.1 In the case of corporate companies, a company's profits and liabilities are not attributed to its investors or directors, unless the corporate veil is pierced. Piercing the corporate veil essentially means disregarding the separation between entities organized in corporate form with limited liability of shareholders[41]. The company is treated as a separate legal entity. [42]

2.2 In the case at hand, there are two sets of corporate veil which would need to be breached to attribute any profit/loss to Mr. White's niece – That of Oxford and that of the niece's company, Young & Coopers.

2.2.1 That the Corporate Veil of Oxford cannot be breached:

2.2.1.1 It is submitted that Oxford's liabilities and profits cannot be attributed to its investors, unless the corporate veil is pierced, as a legal decision. Young & Coopers, being merely an investor in this company, is also protected by the corporate veil. Thus, unless Oxford's veil is pierced, interest cannot be attributed.

2.2.2 That the Corporate Veil of Young & Coopers cannot be breached:

2.2.2.1 It is submitted that this tribunal does not have jurisdiction over Young & Cooper as it is not a company established under this BIT. Therefore, Article 2 [43] precludes this tribunal jurisdiction over it.

2.2.3 Since Mr. White's niece is the director of Young & Cooper, her interests are protected under the corporate veil of Young & Cooper. Thus, even if the profits could be attributed to Young & Cooper, it cannot be attributed to her.

3. THAT THE IBA GUIDELINES[44] ARE NOT APPLICABLE:

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[41] Pier Yaraslau Kryvoi, Piercing the Corporate Veil in International Arbitration, 1 Global Bus. L. Rev. 169 (2010-2011)

[42] Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure, 3 J. FIN. ECON. 305, 311 (1976).

[43] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 2.

[44] IBA Guidelines

3.1 Part II of the IBA Guidelines for Conflict of Interest[45] also list out disqualifications of arbitrators. Non-disclosure cannot by itself make an arbitrator partial or lacking independence[46]. Further, they may be consulted only if the parties have agreed upon their application[47].

3.2 The IBA Guidelines provide examples for the threshold of impartiality or independence.[48] However, they remain abstract and cannot replace a case-by-case analysis[49]

3.3 Claimant respectfully reminds the Arbitral Tribunal that it is not bound to apply the IBA Guidelines because the parties did not agree on their application. Even if the Arbitral Tribunal decided to apply the IBA Guidelines, the outcome would be the same: Respondent's challenge lacks any merit. Therefore, the Claimants respectfully request the tribunal to dismiss the Respondent's challenge as it is without merit.

B. <u>THAT THIS TRIBUNAL HAS JURISDICTION:</u>

1. THAT ARTICLE 15[50] HAS BEEN SATISFIED:

Article 15.1 states that the disputing investor must first submit its claim before the relevant domestic courts, provided that this is not applicable, if they can show that there is no domestic legal remedy available. Article 15.4 further states that the parties must first try amicable resolution. If this fails, and if the conditions under Article 15.5 are satisfied, then the investor may initiate arbitration.

1.1 That Article 15.1[51] is not applicable:

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[45] Part II, IBA Guidelines

[46] ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30 Decison On The Proposal To Disqualify L. Yves Fortier, Q.C., Arbitrator pg.7 (Feb 27, 2012); IBA Guidelines Part II, p. 18, No. 5

[47] Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB 12/20 (Apr 26, 2017); a ; Hodges, p. 207, 7; IBA Guidelines, Introduction, p. 3, No. 5

[48] IBA Guidelines Introduction, p. 3, No. 7

[49] von Goeler, p. 274

[50] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 15.

1.1.1 With a delay of 27 million cases in the Binda court system[52], it is reasonably foreseeable that justice to Oxford would also be delayed and hence denied. The facts under Claim 1 clearly show that Airfresh attempted to approach the domestic legal remedy. However, they have been unable to obtain a date for atleast 6 months and thus, and are now claiming expropriation against the same state. Further, the fact that there are two cases, with the same allegation, against the same party, is also persuasive as to the condition of the courts in Binda.

1.1.2 Even if this argument is not accepted, waiver of right to initiate proceedings in a court of law has been claimed under Article 15.1 (iii).

1.2 That Article 15.4 has been satisfied

1.2.1 Oxford attempted to settle the claims amicably and then through negotiation with the municipalities. Since the municipality was acting under the austerity legislations enacted by the state, the municipality is under the control of the state. This is proved by the "effective control" test as laid down by the ICSID[53] and further reiterated[54]. Thus, negotiation with the municipality is paramount to negotiation with the state, as required under Article 15.4[55], as a pre-requisite to initiating arbitral proceedings.

1.3 That Article 15.5[56] has been satisfied:

1.3.1 It is submitted that both, the claim and the measure were taken in 2018. Thus, satisfying condition 15.5.(i)

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[51] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 15.1
[52] Factual Matrix, Background Facts, Para 10
[53] Jan de Nul NV and Dredging International NV v Egypt (ICSID Case No ARB/04/13, Award (Nov 6 2008), para. 173 (emphasis added)
[54] Gustav F Hamester GmbH and Co KG v Ghana (ICSID Case No ARB/07/24, Award (Jun 18 2010), para. 179 (emphasis added).
[55] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 15.4
[56] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 15.5

1.3.2 Since the parties have not launched any domestic proceedings, Condition 15.5.(ii) does not apply.

1.3.3 The disputing investors have waived their right to initiate proceedings before a court of law, as argued above, thus satisfying condition 15.5.(iii)

1.3.4 The facts are silent regarding the notice. However, Annexure III, IV, V and V allow the presumption that the notice has been given.

2. **THAT THIS TRIBUNAL HAS RATIONE PERSONAE JURISDICTION.**

Oxford, a company incorporated in the nation state of Petrollar, is an *investor*, with its *investment* in the nation state of Binda. This investment is via a contract under the Binda - Petrollar BIT. This claim has been initiated by Oxford, against the host state, Binda.

Under Article 2.1 of the Binda Petrolla BIT, the treaty is applicable only to measures adopted by a Party relating to investments of the investors of the other party. Further, Article 13.2 limits Chapter IV to only disputes between a Party and an investor of the other party with respect to its investments.

1.1 OXFORD FALLS WITHIN THE AMBIT OF THE TERM INVESTOR:

1.1.1 Investment has been defined under Article 1.4[57], and 'Investor' under Article 1.5. Oxford entered into a contract with Binda, in 2016, to supply safe drinking water and develop a waterfront along the Junjee River[58], with an escalation clause of 10% per year. Thus, Oxford had rights under a contract on a long-term basis – the requisite 2 years[59] - to cultivate a natural resource, i.e. water. This satisfies Article 1.4 (e) of the BIT and is thus an investment, and

[57] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 1.4
[58] Factual Matrix, Facts pertaining to claim 2, Para c
[59] Jan de Nul N V Dredgind international N V v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, 93-96, (Nov.6, 2008)

therefore makes Oxford an investor, under Article 1.5. It is also generally well established that rights arising from contracts may amount to investments for the purposes of many BITs.[60]

1.1.2 The *Salini*[61] Test as laid down by an ICSID tribunal is not applicable here as the test applies only to claims made under the ICSID rules[62]. However, the tests under it have been recognized under Article 1.4, under which, Oxford is still an arbitrator.

1.1.2.1 The first limb, that a substantial commitment needs to be made, is satisfied by the fact that Oxford entered into a treaty to develop a river which and provide water to approximately 500 million people, under a Build-Own-Operate scheme. Thus, Oxford's commitment of working capital is evident.

1.1.2.2 The Second limb, the duration element, is also satisfied by the bygone 2 years of operation in the state. As argued above, this is substantial time.

1.1.2.3 The third limb, the risk factor, is satisfied by the fact that it fixed its fee at 10%, despite the market fluctuations which may occur, the risk associated with the prerogatives of the Owner permitting him to prematurely put an end to the contract, to impose variations within certain limits without changing the manner of fixing prices;, therefore, would not give rise to a right to compensation, the biological risk of cleaning up a river laden with human cadaver, among other things.

1.1.2.4 The profit/return element is satisfied by Oxford having the rights to repatriate its earnings with tax savings, and thereby increasing profits.

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[60] Christoph H. Schroeuer et aI, the ICSID Convention: A Commentary (Cambridge, 2nd Ed, 2009) at 126.
[61] Salini Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/15/39 (Jun 21, 2011).
[62] White Industries Australia Limited v. The Republic of India, UNCITRAL Arbitration, IIC 529 (2011), Final Award (Nov 30, 2011).

1.1.2.5 The final element of contributing to the development of the host nation is evidently satisfied as the water was being cleaned for the benefit of the people of Binda and the waterfront was supposed to provide a tremendous boost to the local economy.

1.2 THE CLAIM SATISFIES ARTICLE 13.2[63]:

1.2.1 The claim has been brought by an investor against a Party in respect of the investment. This satisfies Article 13.2 which defines the *ratione personae* jurisdiction of the tribunals established under the BIT.

2. THAT THIS TRIBUNAL HAS *RATIONE TEMPORIS* JURISDICTION:

2.1 The rule of *Ratione Temporis* imports the general principle of non-retroactivity, as defined under Article 28 of the VCLT[64]. This has been discussed in the cases of Mobil v Venezuela[65], Lao Holdings[66], and Pac Rim[67]. This principle has been included in the BIT under Article 2.1[68] and 2.3, which only precludes disputes which arose before its enforcement.

2.2 The BIT was entered into in the year 2014[69], and is valid atleast until 2024. It is safe to assume that the investment began latest by 2016[70], when the operations began, if not earlier. Thus, any dispute which arose is well within the *Ratione temporis* jurisdiction of the court.

2.3 The dispute arose in the case at hand in 2018, when Bingee passed austerity legislations, thus unjustly forcing Oxford to cap its escalation rates at 5%. This legislation qualifies as a

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[63] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 13.2
[64] Article 28, Vienna Convention on Law of Treaties.
[65] Mobil Corporation, and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27 (Jun 10, 2010) Decision on Jurisdiction.
[66] Lao Holdings N.V. v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/12/6. Decision on Jurisdiction, (Feb 21, 2014).
[67] Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections. (Jun 1, 2012)
[68] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 2.
[69] Factual Matrix, Page 39
[70] Factual Matrix, Facts pertaining to claim 2, Para c

"measure", as required under Article 2.1, by a simple bare text reading of the definition under Article 1.8[71], read with Article 31(4) of the VCLT[72].

2.4 Since this measure was taken after the enforcement of the treaty, it qualifies under Article 2.3 as well. Thus, this tribunal has *Rationae Temporis* jurisdiction.

C. THAT BINDA HAS BREACHED THE TREATY IN RELATION TO NATIONAL TREATMENT:

Article 4 of the BIT[73] provides for National Treatment. The test for National Treatment has been provided in the case of Pope & Talbot[74] - contains three basic elements: (1) identification of the relevant subjects for comparison; (2) consideration of the relative treatment each comparator receives; and (3) consideration of whether any factors exist that justify any deviation in the treatment.

1. RELEVANT SUBJECTS FOR COMPARISON:

1.1 Article 4.1 requires the existence of 'like circumstances' while applying the rule of National Treatment. The GATT US - Petroleum Panel recognized that national treatment provisions protect expectations of equal competitive opportunity[75]. In *Feldman*, the NAFTA Tribunal also concluded that the foreign and domestic investors were in "like circumstances" because they operated in the same business sector. [76] S.D. Myers Tribunal looked into whether the non-national investor and the national investor operated in the same 'sector' – which

[71] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 1.
[72] Article 31(4), Vienna Convention on Law of Treaties
[73] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 4.
[74] Pope & Talbot v Canada, Award on the Merits of Phase 2, (Apr 10, 2001), IIC 192 (2000), Ad Hoc Tribunal (UNCITRAL), at 9–37.
[75] United States - Taxes on Petroleum and Certain Imported Substances, 17 June 1987 at para. 5.2.2. (Book of Authorities at Tab 109).
[76] Feldman Award at para. 171 (Book of Authorities at Tab 8)

included economic sectors and business sectors[77]. Further, in the Occidental case, by looking into the intent of the provision, it was held that any investor is comparable[78].

1.2 In the case at hand, there were domestic providers of services similar to that provided by Oxford, who were allowed to operate environmental facilities, but were granted exemptions. They thus operated in the same sector as the claimant.

1.3 Under the explanation to Article 4.1, clauses (a) and (b) qualify the domestic and international investor similarly, as both sets of investors operated environmental facilities.

1.4 It is thus submitted that the 'like circumstances' requirement is satisfied.

2. CONSIDERATION OF TREATMENT:

2.1 For a measure to be discriminatory, it does not need to violate domestic law, since domestic law can contain a provision that is discriminatory towards foreign investment. It is only in the sectors or matters for which it has reserved the right to make or maintain an exception in the Annex to the Treaty that the State may treat foreign investment less favorably than domestic investment.[79] In the case of Feldman[80], claimant established a prima facie case of discrimination by showing that a foreigner was not receiving as favourable treatment as that which was being received by local competitors. This principle has been imported in Article 4.1 of the BIT which only requires a treatment less favorable than that which the host state accords to its own investors.

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[77] S.D. Myers Inc. v. Government of Canada, UNCITRAL, Separate Opinion on The Partial Award by Dr. Bryan Schwartz, (Nov 12, 2000) at para. 250 (Book of Authorities at Tab 4).
[78] Occidental Exploration and Production Company v, The Republic of Ecuador, LCIA Case No. UN 3467, Final Award, (Jul 1 2004).
[79] Ronald S. Lauder v. Czech Republic, Award, (Sept 3 2001), 9 ICSID Reports 44, Para 220.
[80] Marvin Feldman v United Mexican States, Final Award, (Dec 16 2002) (ICSID Case No. ARB(AF)/99/1)18 ICSID Rev-FILJ 488 (2003) at para 70.

2.2 Bingee's monetary action of restricting the outward remittance of money has caused loss only to Oxford and no other investor[81]. The domestic investors, operating under an exception, were not affected by the monetary measures[82]. Further, the intention of the legislation[83] does not seem to be to affect the domestic investors, but only affect the foreign investors as it limits foreign remittance of money. Foreign remittance of money is an important part of Oxford's investment, as they expected to repatriate their earnings with tax savings back to Petrollar.

2.3 This action not only disallowed Oxford from being able to send back its earnings from the water treatment facility, but also made it impossible to exercise its vested right[84] of constructing the waterfront[85]. However, the domestic investors would not be affected as their investments do not need repatriation to different countries. Thus, Oxford being a foreign investor was accorded less favorable treatment than Binda's own investors.

3. DIFFERENTIATION IS NOT JUSTIFIED:

3.1 In the case of *SD Myers v. Canada* it was held that circumstances that would justify governmental regulations that treat them differently must also be taken into account.[86] in its award the *Pope* tribunal suggested that it would look for a 'reasonable nexus' between the measure and a 'rational, non-discriminatory' policy goal, in order to determine whether a prima facie breach may turn out to be justified.[87]

3.2 It is submitted that the State's action of legislating monetary measures was not justified. There is no rational nexus between the change in supply of petroleum to Binda and stopping Oxford from exercising its vested rights of supplying water and developing the waterfront.

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[81] Factual Matrix, Facts pertaining to claim 2, Para f.
[82] Factual Matrix, Facts pertaining to claim 2, Para f.
[83] Genin v. Estonia, Award, (Jun 25 2001), 17 ICSID Review – FILJ (2002) 395, at para 369.
[84] Oscan Chinn, United Kingdom v. Belgium, PCIJ Series A/B No 63, ICGJ 313 (PCIJ 1932), (Dec 12 1934)
[85] Factual Matrix, Facts pertaining to claim 2, Para c
[86] SD Myers v. Canada, First partial Award, (Nov 13 2000), 40 ILM (2001) 1408, para 250.
[87] Pope & Talbot v. Canada, Award on the Merits of Phase 2, (Apr 10 2001), 78-79.

4. Having thus satisfied the test for breach National Treatment, it is submitted that the actions of Binda amount to breach of Treaty under Article 4.

D. <u>THAT BINDA HAS DENIED THE RIGHT TO FREE TRANSFER OF FUNDS TO OXFORD</u>

1.1 Oxford entered into a contract with Binda to supply safe drinking water to the residents of Binda at a rate of 50 BNR per 1kl, with an escalation rate of 10% per year for 5 years. Oxford was then tasked with developing a waterfront along the Junjee River. The investment was protected under the BIT, and thus, Binda had a duty to ensure free transfer of funds to Oxford. The Government of Binda, in 2016, restricted the outward remittance of money. Later, in 2018, it restricted the escalation rates to 5%, from the contractual 10%.[88]

1.2 According to Article 6.1.(iv)[89], payments made under a contract are freely transferrable on a non-discriminatory basis. In the case of Domtar v. United States[90], US were held liable for breach of free transfer of funds as they did not allow the timely transfer of funds. The exceptions to this rule are provided under Articles 6.3 and 6.4.

1.3 It is submitted that Binda, in passing the monetary regulation, has disallowed Oxford from transferring the payment it was due under the contract. Not only was Oxford's profit reduced substantially, but was also disallowed from being repatriated.

1.4 Due to this restriction, it was not feasible for Oxford to construct the waterfront either. As has been argued above, this also qualifies as an investment and thus, any profit Oxford would have earned is also protected under Article 6. Since the restriction placed upon this investment

[88] Factual Matrix, Facts pertaining to claim 2, Para e
[89] Bilateral Investment Treaty Between The Government of Republic of Binda And The Kingdom Emirates Of Petrollar On The Promotion And Protection Of Investments – Binda-Petro, Article 6.
[90] Domtar Inc. v. United States of America, UNCITRAL, final award (Apr 16 2007).

limits the transfer of profits under the contract, it is in violation of the duty of Free Transfer of Funds.

E. THAT BINDA HAS EXPROPRIATED OXFORD'S PROPERTY

As stated the state of Bingee on behalf of its municipalities, cited public policy reasons and directed Oxford to revise downward, the escalation clause of 10% per year on the sale/purchase of water to 5% per year. Municipalities in turn enacted regulation under the general legislation in respect of austerity measures, to cap the escalation increase in drinking water purchased from Oxford to 5% per year. Because of the escalation clause the Oxford who was also permitted to operate environmental facilities were badly affected by the measure adopted by Bingee.

1. LACK OF REGULATION:

1.1 Expropriation can be direct, indirect, regulatory, creeping, de facto, or a government act may be "tantamount to," "equivalent to," or "have similar effect as" expropriation.[91]

1.2 The principal of abuse of rights or "abuse of discretion" is well established in international law. It effectively places the risks arising from bona fide regulation on economic factors. The Govt. of Binda lacked regulation in taking any measure for the purpose of welfare and security of the investor in this claim.

1.3 The concept of vested rights was discussed in the case of Oscar Chinn.[92] The vested right of Oxford was clearly infringed as the denial of the construction of the waterfront was issued after an agreement had been reached regarding its construction.

2. THAT THE DOCTRINE OF POLICE POWERS DOES NOT APPLY AS THERE IS ABUSE OF POWER:

[91]Sedco, Inc v National Iranian Oil Company and The Islamic Republic of Iran, Iran–United States Claims Tribunal, 10 Iran-U.S. Cl. Rep. 180 (1986).

[92]Oscar Chinn, United Kingdom v. Belgium, PCIJ Series A/B No.63, ICGJ 313 (PCIJ 1932), (Dec 12, 1934) above n 29 at 88.

2.1 A customary international law formulation of the same freedom, conferred as a right in the treaty context, is the prohibition against abuse of authority (or *abus de droit*). The arbitrary or unreasonable exercise of rights or powers within the exclusive jurisdiction of States amounts to abuse of power.

2.2 While in this case also The Government Binda also exercised unreasonable rights over Oxford by directly directing Oxford to revise downward, the escalation clause from 10% per year on the sale/purchase of water to 5% per year. And the concept of 'fair and equitable treatment', in international law prohibits state officials from exercising their authority in an abusive, arbitrary, or discriminatory manner.

2.3 Evidence of arbitrariness often becomes proof of a breach of the international minimum standard itself, rather than proof of the kind of improper state conduct which actually underlies the breach. [93]

2.4 As noted by the ICSID Tribunal in *AMT v Zaire*[94] the host country is bound to observe an obligation of vigilance in protecting the property of the investor.[95]This requires the host country to take measures to ensure the protection and security of the investments in question.

3. THAT THERE IS SUBSTANTIAL DEPRIVATION OF PROPERTY

3.1 Substantial deprivation amounts to expropriation and indirect expropriation must be held where government action substantially deprives the investor of economic use and enjoyment of its investment.[96] The term 'deprivation' is preferred to the term 'taking'. A deprivation or taking of property may occur under international law through interference by a state in the use of that

[93] Occidental Petroleum Corporation and Occidental Exploration and Production Company v.The Republic of Ecuador, ICSID Case No. ARB/06/11, Final Award (July 1, 2004)
[94]Notes and Comments to Art 3 OECD Draft Convention on the Protection of Foreign Property, above n 76 at 126.
[95]See eg Art 5 Hong Kong Model BIT, cited in Dolzer and Stevens, above n 18 at 204; Art 5 UK Model BIT, ibid232.
[96]Pope & Talbot Inc. v.The Government of Canada, UNICTRAL, Decision and order by the Arbitral Tribunal (Mar 11, 2002)

property or with the enjoyment of its benefits, even where legal title to the property is not affected.[97]

3.2 In the *ITT* case, the Iran–US Claims Tribunal found that a governmental interference may amount to an expropriation if it denies property owners 'fundamental rights of ownership, use, enjoyment or management of the business'.[98] In the present case it clearly interferes in the fundamental rights of ownership, use, enjoyment and management of the investment made by the investor by directing them to revise downward the escalation clause from 10% to 5% per year.

3.3 The S.D. Meyers tribunal found that an expropriation could occur even when the state action deprived the investor of only part of its investment.[99] The respondent's conduct was prejudicial towards claimant and preferential towards the domestic operators.[100] In the present case also, the domestic investor of similar service that was provided to Oxford were not affected, but Oxford was affected by the austerity measures adopted by Bingee

4. As argued above, Binda has taken Oxford's property without any justification or compensation, and is thus committed expropriation.

[97]Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran, 6 Iran–USCTR 219, 225 (June 29, 1984).
[98]ITT Industries Inc v Government of the Islamic Republic of Iran, 2 Iran– US CTR 348 (1983).
[99] S.D. Myers v. Govt. of Canada, UNCITRAL, Final Award (Dec 30, 2002)
[100] Occidental v. Ecuador, Award, ICSID Case No.ARB/06/11, Award (Oct 5, 2012)

PRAYER

In light of the submissions made, the Claimant hereby respectfully requests the Tribunal to find and order that:

CLAIM 1:

1. The tribunal has jurisdiction over the claims.
2. The Respondent has wrongfully expropriated the Claimant's investments.
3. The Respondent has failed, to accord fair and equitable treatment to the claimant, and to meet its legitimate expectations regarding the claims.
4. The Respondent has failed to provide full protection and Security to the Claimant's investments.

And accordingly order the Respondent to pay damages to the Claimant valued at BNR 200 Cr as well as legal costs and interests, or such amount as it finds reasonable and just.

CLAIM 2:

1. The tribunal has jurisdiction over the claims.
2. The Respondent has wrongfully expropriated the Claimant's investments.
3. The Respondent breached the treaty in relation to National treatment.
4. The Respondent has denied the free transfer of funds to the claimant.

And accordingly order the Respondent to pay damages to the Claimant valued at BNR 1000 Cr as well as legal costs and interests, or such amount as it finds reasonable and just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sd/-

(Counsel on Behalf of the Claimant)