24A

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

OLIVELY S.A. AND OTHERS	**V.**	**REPUBLIC OF MYTHLAND**
(Claimants)		(Respondent)

MEMORIAL FOR CLAIMANTS

2015

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

¶	Paragraph
AIR	All India Records
ARB	Arbitration
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
Art.	Article
ASEAN	Association of South-East Asian Nations
BAM	Banking and Mythland Plan
BIT	Bilateral Investment Treaty
BOD	Board of Directors
CCIA	COMESA Common Investment Area
CEO	Chief Executive Officer
Co.	Company
DIEA	Division on Investment and Enterprise
ECB	European Central Bank
ECR	European Court Reports
Ed.	Edition
EFSF	European Financial Stability Facility
ELA	Emergency Liquidity Assistance
ESM	European Stability Mechanism

EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
ICJ	International Court of Justice
Ibid	Ibidem
ICSID	International Centre for Settlement of Investment Disputes
IIC	International Investment Claims
ILC	International Law Commission
Inc.	Incorporation
Int'l	International
LCAI	London Court of International Arbitration
MFN	Most Favoured Nation Treatment
Mgmt	Management
NAFTA	The North American Free Trade Agreement
No.	Number
Ors.	Others
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice
PCA	Permanent Court of Arbitration
r/w	Read with
Rep.	Report

SADC	Southern African Development Community
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
TARGET2	Trans-European Automated Real-time Gross Settlement Express Transfer System
TDM	Trans National Dispute Management
U.N.T.S.	United Nations Treaty Series
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of treaties
Vol.	Volume

INDEX OF AUTHORITIES

Cases

Articles

Treaties

Books

Dictionary

STATEMENT OF JURISDICTION

Olively, S.A. and nine Olive Garden shareholders and depositors in Bhangi Bank, the Claimants in the instant case, have the honour to submit this Memorial before the Tribunal in pursuance of Article 11(2) of the Treaty *concerning the Encouragement and Reciprocal Protection of Investments* between Olive Garden and the Republic of Mythland, since the divergences between the Claimants and the Respondent could not be settled within six months from the date when the divergences had been raised by the Claimants.

Further the Tribunal has the jurisdiction to hear the dispute under Article 25 of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*.

STATEMENT OF FACTS

I

BACKGROUND- The Republic of Mythland (*hereinafter*, **Respondent**), a EU member State has a booming offshore banking sector. Nearly, 50% of the money deposited in the Respondent's banks belonged to private entities. The largest groups of depositors were from Big Bear and the second largest were from Little Bear. Whereas, citizens and private entities from Olive Garden (which is also a EU member State) owed almost half of the total debt owned by Respondents banks.
Following the Great Recession that began in 2007-08, foreign depositors began to withdraw their money from the Respondent State.

OLIVE GARDEN'S SITUATION- At the same time, Olive Garden became embroiled in deep problems of its own due to an economic crisis brought about by the inability of both their government and citizens of Olive Garden to pay their existing debts.

II

Chronology of events- 2004 to 2009

ACQUISITION OF SHARES – In 2006, a group of 10 Olive Garden nationals, through their investment vehicle Olively S.A, a company incorporated in Olive Garden (hereinafter, Claimants), acquired 20.2% of Bhangi Bank's shares (second largest Bank in the Respondent State), both individually and jointly. The Claimants acquired this strategic stake from a group of British financial institutions for €527 million.

III

MR. PANICOS APPOINTED AS CHAIRMAN AND CEO OF BHANGI BANK- Following the Claimants' acquisition in Bhangi Bank, Mr. Panicos was appointed Chairman and CEO of the same and under the new management Bhangi Bank, converted from a conservative bank with under 100 branches in 4 countries to a more dynamic bank with more than 500 branches, with international presence in 11 countries.
MR. CONFUSICOS APPOINTED AS GOVERNOR OF MCB- The Ministry of Finance of the Respondent's State appointed Mr. Confusicos as the Governor of Mythland Central Bank

(*hereinafter*, **MCB**) . Prior to this, Mr. Confusicos was the chief economist of Bhangi Bank for the last three years, which position he came to after having spent ten years at the helm of the MBF (premier banking industry association), interspersed with various positions at the BIS, IMF and ECB.

IV

Chronology of events- 2010

STRESS TEST- In this year, Bhangi Bank's regular filings were never selected for detailed scrutiny under the risk assessment methodology framework envisaged by Mr. Confusicos. A bank 'stress test' scheduled for June was postponed and eventually it didn't occur. No audits were conducted. But however tests under the risk methodology framework was conducted for Lucky Bank; also a 'stress test' was conducted for Lucky Bank in April and three audit visits also took place that year for Lucky Bank.

V

Chronology of events-2011

EU-OLIVE GARDEN NEGOTIATIONS- Throughout 2010-2011, the EU Troika had been negotiating with Olive Garden to rescue that country's economy. In July, the EU Troika agreed a program with Olive Garden to provide financing '*together with voluntary contributions from the private sector*' and this program provided Olive Garden with EFSF financing subject to the private sector holders of Olive Garden debt participating by taking a loss- proposed at 21% of the face value of the debt. This was strongly opposed by the MBF.

VI

DECREE 59/2011 PASSED- The Ministry of Finance of the Respondent's State issued Decree No. 59/2011 requiring private Mythlandic financial institutions to adhere to EU-negotiated rescue plans and giving the relevant directives of the plan, the force of Mythlandic law. Also, as an additional 'supervisory measure' and not required by any EU directive or plan, this Decree converted the Olive Garden operations of Mythlandic Banks into branch office operations of Mythlandic entities. Due to this Decree, the knock-on effect on Mythlandic banks was immediate. And thus, in this regard efforts were made by the Board of Bhangi Bank on (as Bhangi Bank was hit the most by this Decree and incurred direct losses of €1.7 billion) to acquire additional financing for recapitalization. Mr. Confusicos obliged by

directing the MCB to provide Bhangi Bank with ELA. Following this, the Minister of Finance removed Mr. Confusicos from his post by passing a Decree and in his place appointed Mrs. Fixitforus as the Governor.

JOINT MEETING WITH MRS. FIXITFORUS- Mr. Panicos and the Chairman of Lucky Bank held a joint meeting with Mrs. Fixitforus and the Permanent Undersecretary of the Ministry of Finance. They requested for EFSF funds as they were in dire need of it. However, the Governor was hostile in her demeanour and gave the private bankers a dressing down and further suggested that if Mr. Panicos pressed hard for the EFSF funds, it would put Bhangi Bank's ELA at risk as she would terminate it. Also, on the same afternoon, the EFSF administrators telephoned Mrs. Fixitforus offering help to abate the situation, but the same was not accepted by Mrs. Fixitforus.

VII

MCB MEETING- On the 4th of November, with a 30 minute notice the MCB convened a meeting and unveiled the Banking and Mythland Plan (*hereinafter*, **BAM**) under which 'ELA-on-demand' and bridging loans by the Ministry of Finance was worked out. And this BAM plan also accommodated a 'resubsidirisation' scheme wherein, a part of Decree 59/2011 would be repealed. But, however all these measures were not enough to resurrect Bhangi Bank and people in the room were aware of the same. Mrs. Fixitforus however demanded a unanimous agreement to this plan for its execution; but the same didn't happen as Bhangi Bank opposed it. Following this, on the very next day, Mr. Panicos was removed from his post of MBF Chairman by the passing of an extraordinary resolution by the MBF. And also an Administrative Regulation No.17/2011 was passed which reformulated the ELA criteria and brought in an assessment procedure. Mr. Panicos was also removed as the CEO of Bhangi Bank at an extraordinary meeting jointly called by the Mythlandic State owned company shareholders and some financial institution shareholders after the whispering campaign by the MCB officials. In his place, Mr. Onehitwonderous was appointed as the CEO and Chairman of the Board.

VIII

ONEHITWONDEROUS APPOINTED- Following his appointment, Mr. Onehitwonderous paid a visit to the Governor of MCB and following a fifteen-minute closed door meeting the Governor ordered the exemption of Bhangi Bank from the assessment procedure and emphasized that its ELA would remain uninterrupted. On 28 November 2011, Mr.

Onehitwonderous resigned citing health reasons and Mr. Sorryas, was appointed in his place, and, on the same date, the Recovery Plan submitted by Bhangi Bank was approved.

IX

AGREEMENT WITH BIG BEAR- The Respondent was facing many problems due to its liabilities and it entered into an agreement with Big Bear for an emergency loan of €2.5 billion to be paid back over 4.5 years, with an interest rate of 4.5%. A condition included in this loan committed the Mythland authorities '*to take no financial restructuring actions that would prejudice the present position and financial well being of Big Bear depositors and creditors*'.

X

Chronology of events-2012

CABINET COMMITTEE CONSTITUTED- As the bank problems worsened, in May 2012, a Cabinet Committee was constituted which was chaired by the Prime Minister of the Respondent State. Further, on 12 June 2012, the Olive Garden banking regulators replied to Bhangi Bank's request for resubsidirisation (made in December 2011) by not granting an approval for the same stating that resubsidirisation is not recognized in Olive Garden law. On 13 June 2012, Bhangi Bank commenced court proceedings in Olive Garden against Olive Garden regulator's decision of 12 June 2012. It applied for a temporary injunction requesting a stay of the decision pending outcome of the case. Also on the very next day, Bhangi Bank requested the MCB to continue to treat the debt as 'pending transfer' and not modify its previous decision. This request was accepted by the MCB.

XI

RESPONDENT ACQUIRES SHARES IN BHANGI BANK- On 14 June 2012, Bhangi Bank's Board asked the Ministry of Finance to take an ownership stake in the bank. By a Prime Ministerial Decree the Ministry of Finance was authorized to buy new issues of Class A shares of Bhangi Bank up to €1.8 billion. Thus, due to this the Claimants combined shareholding was reduced to 0.3% and the Ministry of Finance became the owner of 84% of the shares of the Bank.

KERBOODLE'S DISCOVERY- The reconstituted Board of Bhangi Bank appointed Kerboodle and Kerboodle, an accounting firm to help Bhangi Bank in its liabilities. Kerboodle reported that in addition to the adverse position in Bhangi Bank's accounting books and the €1.9 billion ELA liability; Bhangi Bank owed €9 billion to the MCB as this amount had been

cleared by the ECB on the MCB's account and not Bhangi Bank's account through TARGET2 payment clearance system. And this had not been included in the accounts of Bhangi Bank. In this regard Kerboodle recommended accessing EFSF funds and imposing losses on creditors.

XII

ELA INCREASED- As conditions worsened, the ECB allowed the MCB a one-time-country threshold of €13 billion on Respondent's total ELA utilization.

REQUEST FOR A NEW LOAN FROM BIG BEAR- The Respondents' further requested Big Bear for a new loan but the same was not provided to them.

EFSF FUNDS- On 25 June 2012, the Respondents submitted its official request for EFSF/ESM assistance to the EU, requesting €17 billion to be disbursed in two branches, under Article 15 and 16 of the ESM Treaty. Before Article 15 MoU could be signed, independent diagnostic checks of Respondent's banks had to be completed by a firm Loss and Asset Liability Union (LALU), appointed by the EU.

XIII

Chronology of events-2013

LALU'S REPORT- LALU proposed that the ESM fund 60% and the rest 40% be raised by forcing losses on creditors, depositors and by downsizing and restructuring the Respondent's banking sector. LALU's findings were confidentially submitted in January. On 8 March, Mrs. Fixitforus presented the new Prime Minister of Mythland (Mr. Narcissimo) with the LALU report, which was later uploaded on the Prime Minister's website by his junior. This was followed by a bank and public panic and the Government ordered the banks to shut down for a five day period. The Minister of Finance then issued a decision replacing Mrs. Fixitforus as the Governor but however she stayed as a special advisor for a period of three months.

BIG BEAR'S EMERGENCY TALKS- The Respondents held emergency talks with Big Bear and reduced the interest rate on the loan and extended the repayment period, but however the clause protecting Big Bear's investors in Respondent State was further strengthened and reiterated. On this same day, the government ordered the banks to remain closed indefinitely.

XIV

LAWS ENACTED- The Respondent Parliament enacted two laws namely, the Hope in Committees Law of 2013 and The Enforcement of Restrictive Measures Law of 2013, which

imposed capital controls against the ECB decision on 21 March 2013, which mandated the repayment of all outstanding ELA Loans.

NARCISSIMO-EU-TROIKA AGREEMENT- Mr. Narcissimo entered into a new agreement between the EU and Troika under which, €10 billion in ESM funds was to be offered to the Respondents in return for its commitment to raise €4 billion on its own, also specific provisions relating to Bhangi and Lucky bank were chalked down, under which, all the good assets and insured deposits of Bhangi Bank was to be transferred to Lucky Bank. And further legislations namely, Law Number 11/2013 and 101/2013 were passed which incorporated these provisions.

XV

CASE NO 702/2013- More than 3000 legal challenges in the form of administrative actions were commenced by the Respondents' and the other depositors of Bhangi and Lucky Banks challenging the validity of these laws. The Courts registered these cases as Case No 702/2013. And the Supreme Court held that these claims cannot succeed as there is no direct *locus standi* under administrative law and the proper forum to be approached was the Civil Courts.

XVI

FOBB AND FLOP- A High Authority for Resolution under the Hope in Committees Law of 2013, comprising of the Governor of MCB, along with Minister of Finance and the President of SEC, decided on a 'Framework for Resolution of Bhangi Bank' (*hereinafter*, **FOBB**) and Framework for Lucky Bank Operationalization Plan" (*hereinafter*, **FLOP**) under which Bhangi Bank would gradually be run down and all its 'good assets' shall be transferred to Lucky Bank, and no ESM funds shall be used to run down Bhangi Bank and these ESM funds were not to be used for Lucky Bank's purposes as well.

ESM FUNDS DISBURSED AND DECREES PASSED- Following this, the ESM funds were disbursed and the Respondent's was given the freedom to decide whether to use these amounts for bank recapitalization purposes or general financing needs of public sector. Many Decrees were passed which set the principles under FLOP and FOBB into effect and a new banking company called 'Lucky-Bhangi Bank Public Co.' was formed and Bhangi Bank ceased to exist. The Claimants tried to introduce the above Decrees as new facts before the Supreme Court of Mythland, but the Court dismissed the same without granting leave.

XVII

CRIMINAL CHARGES- Following this, the National Financial Fraud Bureau of the Respondent State filed criminal charges against the Claimants alleging them of insider dealing, mismanagement, tax evasion and siphoning off monies. These cases were then registered under the High Court of Respondent State.

XVIII

OPERATIONS OF LUCKY-BHANGI BANK SOLD TO BIG BEAR- The Prime Minister issued Decree No. 29/2013 which sold some operation of Lucky-Bhangi Bank to Big Bear and under this Decree a Big Bear Fund was established and investors with Big Bear nationality or corporate registration were given special preference in the Respondent's State.

XIX

PARLIAMENTARY INQUIRY- A parliamentary inquiry was initiated against the demise of Bhangi Bank and Parliamentary warrants and subpoenas were issued to Mr. Panicos and the Claimants on penalty of imprisonment.

XX

ARBITRATION INITIATED- On 6 July 2013, the Claimants and depositors in Bhangi Bank initiated a process of international protection against the Republic of Mythland in accordance with the procedure provisioned by the bilateral treaty regarding the protection of investments between Olive Garden and Mythland (Law 2100/92, Gov. Gazette A666 in force on 19 April 2005). The Respondents did not acknowledge the communications for an amicable settlement of the dispute therefore this case has been brought to the ICSID tribunal claiming damages for the loss of their investments amounting to approximately €900 million, of which €750 million relates to the value of their shares, €50 million relates to the value of their deposits with interest, and €100 million relates to moral and reputational damage. Following this, arbitral tribunal was constituted in March 2014. Further Procedural Order No. 2 of the Tribunal bifurcated the proceedings, and thus the present proceeding is limited to threshold, jurisdiction and merits issues only.

ISSUES RAISED

I. Whether the Tribunal has jurisdiction *ratione personae*?

II. Whether the Tribunal has jurisdiction *ratione materiae*?

III. Whether the Respondent has violated the BIT by denying *fair and equitable treatment* to the Claimants?

IV. Whether the Respondent has violated the BIT by not providing full protection and security to the Claimants?

V. Whether the Respondent has violated the BIT by unlawfully expropriating the investments of the Claimants?

VI. Whether the Respondent has violated the BIT by discriminating while granting reparations?

SUMMARY OF ARGUMENTS

I. THE TRIBUNAL HAS JURISDICTION RATIONE PERSONAE

The Claimants assert that Mr. Panicos is an investor under Article 3(a) of the BIT and further satisfies Article 25 of the ICSID Convention. Since Mr. Panicos had the nationality on both the critical dates and further he did not have the nationality of Respondent States on both the critical dates, as he had denounced it before the request for arbitration was submitted.

Further Olively is also an investor as the evidence of seat in the form of registration certificate, which the tribunal has looked into as an evidence of seat, is deemed to be the place of incorporation of Olively. Further, the objective of the seat is to prevent treaty shopping, and since Mr. Panicos has not indulged in such impropriety, the place of incorporation is the place where the seat lies.

The Claimants further assert that the ICSID Tribunal has used the control test instead of the seat test to protect the *de facto* investor and further to protect his indirect investments, and since there is no exclusion of interposed companies between the investment and the ultimate owner of the company, Olively is an investor.

Furthermore, the Claimants have come with clean hands as there is no local law compliance clause in the BIT and there is no substantial or circumstantial evidence to prove the alleged violations. Moreover, Claimants have not been convicted and are presumed to be innocent until proven guilty.

II. THE TRIBUNAL HAS JURISDICTION RATIONE MATERIAE

The non-exhaustive interpretation of the definition of investment under Article 1 by the ICSID tribunals encompasses shares and deposits. The acquisition of shares on the secondary market does not impact the protection of investment granted under the BIT. Moreover the requirement of territorial link is satisfied in the present case, as the doctrine of general unity of investment operations approves of such transactions as investment, without a physical transfer of funds. Therefore shareholdings and deposits of Olively and of other shareholders amounts to an investment under the BIT and the ICSID Convention.

III. THE RESPONDENT HAS VIOLATED THE BIT BY DENYING FAIR AND EQUITABLE TREATMENT TO THE CLAIMANTS

Fair and Equitable Treatment is one of the standards of rule of law. In this case the Respondent has contravened the principles of rule of law which include reasonableness, good faith, non-arbitrariness, due process and the administrative law principle of legitimate expectations. The Respondent's conduct in passing the supervisory measure lacked a legitimate public objective, as the measure invited additional burden on Mythlandic banks and thus was not reasonable. Moreover the bail-in mechanism adopted by Mythland does not adhere to the moral hazard principle.

The Respondent has failed to maintain legal stability, which caused a roller-coaster effect on the investor and thereby frustrated the legitimate expectations of a stable legal order of the Claimants. Further in providing solution to the Mythlandic bank crisis, the Respondent did not have a systemic approach, as Bhangi Bank was not benefited by the BAM plan and the re-subsidiarisation process. Therefore Bhangi bank was discriminated by not providing a requisite solution considering its financial status.

The MCB governor was acting in bad faith when requests for availing EFSF funds were rejected unjustifiably and Mr. Panicos was humiliated with colourable allegations of impropriety and whispering campaign against him by the MCB staff, so as to unseat him from the helm of Bhangi Bank administration. Therefore the Respondent's conduct was an abuse of administrative power, politically motivated and in bad faith.

The Respondent did not provide fair hearing and did not conduct proceedings in a comprehensible way or give reasons for its decisions. The HAR committee which decided on the administrative measures affecting Bhangi Bank and Lucky Bank did not follow the due process of providing a fair hearing to the stakeholders of the banks, and the transcript of the meeting was not open to the public. Further, the administration of justice by the Supreme Court of Mythland has been done is an inadequate manner by misapplication of law and thereby constituting denial of justice.

IV. THE RESPONDENT HAS VIOLATED THE REQUIREMENT OF FULL PROTECTION AND SECURITY

The Respondent was obligated under the BIT to provide full protection and security which is a standard of due diligence. In the instant case the Respondent by abusing their administrative

and economic powers, not only defaulted in providing full protection and security, but created a situation by which the investments of the Claimants were devalued and made victim of the Mythlandic financial crisis. Thus the Respondent has failed to provide full protection and security to the Claimants' investments.

V. THE RESPONDENT HAS VIOLATED THE BIT BY UNLAWFULLY EXPROPRIATING THE INVESTMENTS OF THE CLAIMANTS

The Claimants assert that Respondent has directly and indirectly expropriated the investments of the Claimants, thus violating Article 4(2) of the BIT. The whispering campaign by the Respondent led to the removal of Mr. Panicos, which ultimately deprived the Claimants of their control under the BoD. This act of the Respondent amounts to indirect expropriation because depriving investors of the control over their investments, has been considered by the Tribunals as substantially depriving the owner's ability to use and enjoy the property. Further due to the appointment of the new CEO in Bhangi Bank, who was a related party to the Respondent, the rating of the debt instruments of Bhangi Bank downgraded, because of which it ceased to be collateral to the ECB. Thus it now could not have got any assistance from the ECB the manner in which it assisted the private sector of Olive Garden.

Since the Bank was shut down, it was indeed for a significant period of time. Moreover it wasn't for a *bona fide* public purpose because they used the control in the Bhangi Bank to ultimately buy the shares of the bank, becoming the majority shareholders, which further diluted the control of investors. Since the Respondent used tax payer's money to buy the shares of the bank which was going through a crisis, it indeed wasn't for a *bona fide* public purpose. Thus the measures affected the legitimate expectation of the Claimants as not only was Mythland an offshore banking centre and a favoured destination for private investors, but also because it had guaranteed to the Claimants under Article 2(3) that it will not impair management, use and enjoyment of the investments.

Thus these acts of the Respondent are a violation of Article 4(2) of the BIT which prohibits '*measures whose effects could be tantamount to expropriation*'. In *Middle East Cement Shipping and Handling Co. v. Egypt*, the Tribunal equated the above expression to indirect expropriation.

Further, the measures of Respondent led to direct expropriation by imposing a 100% levy on the uninsured depositors. The exceptions to expropriation cannot be invoked because the

Claimants, through Article 3 of the BIT, were entitled to get no less favourable treatment than was guaranteed to Big Bear depositors under the loan agreement. Further the requirements for lawful expropriation also has not been fulfilled as it was not for a public purpose and the Claimants were further given no compensation.

VI. THE RESPONDENT HAS VIOLATED THE BIT BY DISCRIMINATING WHILE GRANTING REPARATIONS

The Respondent by issuing Decree No. 29/2013 granted reparations to Big Bear uninsured depositors but not that of Olive Garden, thus violating the MFN clause under Article 3 of the BIT. Further the non-precluding clauses cannot be invoked when interpreted in the light of rule of law which is an obligation of every EU member and in the light of doctrine of necessity. Since the Respondent themselves had contributed to the state of necessity and further, the interest to be safeguarded wasn't for imminent and grave peril as granting reparations to one and not other was not for imminent danger. Further, there were other ways which could have safeguarded the interest of Respondent as a 100% levy could have been avoided if all the investors would have been treated equally.

In arguendo, even if the measures were for the state of national emergency, the Respondent is obligated not to discriminate while granting reparations under Article 4(4) r/w clause (3). Therefore the Claimants assert that the Respondent has violated the MFN clause in the BIT.

ARGUMENTS ADVANCED

I. THE TRIBUNAL HAS JURISDICTION RATIONE PERSONAE

The Claimants assert that the ten Olive Garden investors, including Mr. Panicos **[A]** and Olively **[B]** are investors under Article 1(3) of the BIT and have come with clean hands **[C]**.

A. MR. PANICOS IS AN INVESTOR AND THEREFORE HIS CLAIMS ARE ADMISSIBLE

The Claimants assert that Mr. Panicos is as an investor for the current dispute. Article 25(1) of the ICSID Convention provides that the jurisdiction of the Centre extends to the disputes arising between the national of the Contracting State and that of the Host State.[1] To determine nationality, Article 25(2)(a) provides a two pronged test: *Firstly*, that the person bringing the claim shall have the nationality of the Contracting State on the 'critical dates', and *secondly*, he should not have the nationality of the Host State on those 'critical dates'. The critical dates refers to the date on which parties consented to submit a dispute of arbitration and the date on which the 'request is registered' by Secretary-General,[2] wherein the former consent includes consent as agreed upon under the BIT.[3] Further, to access ICSID, even under Article 15 of the UDHR, the person having dual citizenship can relinquish the Host State's nationality before the jurisdiction of the ICSID is perfectly formed.[4]

In the instant case, Mr. Panicos had the nationality at both the critical dates,[5] satisfying the first requirement. Moreover, the second test is also satisfied as Mr. Panicos did not have the nationality of Mythland on the date of consent and was given honorary citizenship only after the investment and further did not have the nationality on the date of registration of the request, as he had denounced the citizenship even before the request was submitted.[6]

B. OLIVELY IS AN INVESTOR UNDER THE BIT

Olively S.A qualifies as an investor for the current dispute because it satisfies the requirement of having its seat in Olive Garden which is a requirement under Article 1(3) of the BIT. The

---

[1] International Centre for Settlement of Investment Disputes (ICSID), 17 UST 1270, TIAS 6090, 575 UNTS 159. (Hereinafter ICSID).

[2] CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY, (2nd ed. Cambridge University Press, 2009).

[3] *Id* at 206-208; The Olive Garden-Mythland Bilateral Investment treaty, art. 11.

[4] *Id*. at 274, 276; Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award, ¶320 (May 8, 2008).

[5] Moot Problem at 5, 28.

[6] Moot Problem at 27-28.

Tribunal in *Tokios v. Ukraine*, while determining the seat test, took into consideration evidence such as, *inter alia*, registration certificate and statute of incorporation.[7] In the instant case since Olively is incorporated in Olive Garden, its registration certificate and statute of incorporation is deemed to be having the address of Olive Garden.

Further, the Tribunal in *Yaung case*[8] observed that the objective of having the seat test is to prevent treaty shopping or illegality, and in the absence of such impropriety '*there would be a presumption that effective management seat once established is not readily lost, especially since the effect will be the loss of treaty protection*'.[9] In the instant case the nationality of the company would be the seat of incorporation[10] as there has been no indication to prove that the Claimants have indulged in any such impropriety.

Interpreting the *Barcelona Traction case*[11] it was observed[12] that under international law, the first method of determining the nationality is that of the place of incorporation, and then second method being the place of seat, and control or substantial interest being the third method which requires the use of piercing the veil formula. The Claimants assert that due to lack of consensus on the very definition of seat[13] if it cannot be established where the seat lies, this Tribunal should consider the law that has been laid down in the *Barcelona Traction case*. The Claimants satisfies both the other requirements: as the place of incorporation is in Olive Garden and further all the Claimants are nationals of Olive Garden.

Also, while interpreting a similar clause which provided *only* for the seat test, the Tribunal has in various occasions,[14] instead applied the control test for protecting the *de facto* investors

---

[7] Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 43 (April 29, 2004).

[8] Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar, ICSID Case No. ARB/01/1, Award (March 31, 2003).

[9] *Id*.

[10] *Id*.

[11] Barcelona Traction, Light and Power Company Limited, Second Phase (Belg. v. Spain), Judgment, 1970 I.C.J. 3 (Feb. 5).

[12] 11 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW (Armin von Bogdandy and Rudiger Wolfrum eds., Martinus Nijhoff Publishers, 2007).

[13] CYNTHIA DAY WALLACE, THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALISATION, 133-134 (Martinus Nijhoff Publishers, 2002).

[14] Mr. Franz Sedelmayer v. The Russian Federation, SCC, Ad hoc Tribunal, Arbitration Award, (July 7, 1998); Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004).

by piercing the corporate veil.[15] The scope of lifting the corporate veil cannot be restricted to fraud cases as even the *Barcelona Traction case* does not define the precise scope of conduct.[16] The Tribunal in *Franz Sedelmayer case* had further observed that using the control test is more reasonable because the main aim of the Treaty is the promotion of investment, and thus granting protection to the investors would be in line with the said purpose,[17] and further that this approach '*would have the advantage of allowing the financial reality to prevail over legal structures*'.[18] Further, in *Siemens v. Argentina*, the Tribunal reiterated the same and termed these investments as indirect investments which neither in that case,[19] nor in the instant case are excluded because '*the Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company*'.[20] In the instant case Olively is the intermediary company through which the investors have indirectly invested in the Bhangi Bank, therefore the indirect investments should be protected.

C. CLAIMANTS HAVE COME WITH CLEAN HANDS

The charges against Claimants are not substantial evidence and are based on mere inferences.[21] Since the Claimants are not convicted, mere frivolous charges[22] cannot bar them from approaching the Tribunal, as there is a presumption of innocence until proven guilty. [23] Moreover there is no implied requirement of legality and good faith under the ICSID Convention.[24]

---

[15] *Id*; TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award (Dec. 19, 2008).

[16] Tokios Tokeles, *supra* n. 7 at ¶56.

[17] Mr. Franz Sedelmayer, *supra* n. 14 at 27, 58-59.

[18] Banro American Resources Inc. and Ors. v. Democratic Republic of Congo, ICSID Case No. ARB/98/7, Award (Sept. 1, 2000); Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Dissenting Opinion of Chairman Prosper Weil (April 29, 2004).

[19] Siemens A.G., *supra* n. 14.

[20] Siemens A.G., *supra* n. 14.

[21] Gustav F. W. Hamster GmbH & Co. KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (June 18, 2010); Establishment of Middle East country X v. South Asian construction company, Case no. 4145 of 1984, Second interim award, 97, Yearbook XII (1987); International Chamber of Commerce, Final Award in Case no. 5622 of 1988, 19 Y.B. Com. Arb. 105 (1994).

[22] Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh and Ors., ICSID Case No. ARB/10/11, Decision on Jurisdiction (Aug. 19, 2013).

[23] UN General Assembly, *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, art. 14(2) vol. 999, p. 171 (Dec. 16 1966); UN General Assembly, *Universal Declaration of Human Rights*, art. 11, Dec. 10 1948, 217 A (III).

[24] Mr. Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 111 (July 14, 2010).

II. THE TRIBUNAL HAS JURISDICTION RATIONE MATERIAE

The Claimants assert that the Tribunal has jurisdiction *ratione materiae* because the shares and deposits constitute investments under the BIT **[A]**, and *secondly*, *in any event* the shares and deposits meet the objective requirements under the ICSID Convention **[B]**. Moreover, there is no conflict between the jurisdiction of the EU Courts and the ICSID Tribunal **[C]**.

A. THE CLAIMANTS SHARES AND DEPOSITS ARE INVESTMENTS UNDER THE BIT

The preamble of the BIT[25] when interpreted in good faith and in accordance with its ordinary meaning[26] indicates the broad scope of investment protection[27] and explicitly provides for the contractual protection of investments. Article 1 of the BIT defines investment to include 'every kind of asset'[28] which necessitates a non exhaustive interpretation.[29] The term asset denotes 'property of any kind'[30] which can be used to determine the jurisdictional scope of investment.[31] The ICSID tribunals[32] have also relied on broad terms in the BIT like 'any kind of property' and used the same to encompass a particular transaction as an investment,[33] whether direct or indirect investment.[34] Shares and deposits are *assets* which form a part of the definition of investment under the BIT and therefore shares **[1]** and deposits **[2]** constitute investment under the BIT and satisfy the requirements of territorial nexus **[3]**. Further *in any event* requirement of territorial link is absent under the BIT **[4]**.

---

[25] The Olive Garden-Mythland Bilateral Investment treaty, *Preamble*.

[26] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331. (Hereinafter VCLT); Lanco International Inc. v. The Argentine Republic, ICSID Case no. ARB/97/6, Jurisdiction of Arbitral Tribunal, ¶27 (Dec. 8, 1998); Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 140 (Feb. 8, 2005).

[27] SGS Societe Generale de Surveillance S.A. v. Republic of Philippines, ICSID Case No. ARB/02/6, Decision of Tribunal on Objections to Jurisdictions, ¶116 (Jan. 29, 2004).

[28] The Olive Garden-Mythland Bilateral Investment treaty, art. 1.

[29] Abaclat and Ors. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 351-356 (Aug. 4, 2011).

[30] Black's Law Dictionary (9th ed. 2009).

[31] Saipem S.P.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (Mar. 21, 2007); Mobil Corporation, Venezuela Holdings, B.V. and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction (Jun. 10, 2010).

[32] NOAH RUBINS, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION: A PRACTIONERS GUIDE, 291 (Oceana TM 2005); Saipem S.P.A., *supra* n. 31.

[33] Ceskoslovenska Obchodní Banka A.S. (CSOB) v. Slovak Republic, ICSID No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶77 (May 24, 1999).

[34] Siemens A.G., *supra* n. 14 at ¶ 21-26.

1. SHARES CONSTITUTE INVESTMENT UNDER THE BIT

The definition of investments under the BIT expressly encompasses '*shares and other kinds of interest in companies*' and further reference to other kinds of interests in the BIT signifies that the participation in the company need not be a controlling one[35] and includes minority shareholders. [36] Further a shareholding in a local company is sufficient to constitute investment for the purposes of treaty protection.[37]

In relation to claims to money under the BIT, the term investment encompasses commercial transactions unless explicitly excluded.[38] Unless and until portfolio investments are explicitly excluded, the BIT includes such investments on the basis of the existing treaty practice[39] and thus shares and other interests in a company are broad enough to cover portfolio as well as direct investment.[40] The acquisition of shares on the secondary market also constitutes an investment[41] and it has been held by the Tribunal[42] that '*although the identity of the investor will change with every endorsement, the investment will remain constant*'. Moreover the investor is not required to make the investment himself and the acquisition of the investment suffices jurisdiction.[43] Further, regardless of the place of payment, the contribution of money qualifies as an investment when '*the object of the payment and raison d'être of the*

[35] CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, ¶51 (Jul. 17, 2003).

[36] CMS Gas Transmission Co. v Argentine Republic, ICSID Case no. ARB/01/08, Decision of the Ad hoc committee on the Application for Annulment of the Argentine Republic, ¶69 (Sept. 25, 2007); Lanco International Inc., *supra* n. 26 at ¶10.

[37] Lanco International Inc., *supra* n. 26.

[38] UNCTAD, *Scope and Definition*, 61 (UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York, Geneva, 2011).

[39] Investment Agreement for the Comesa Common Investment Area (CCIA) (May 23, 2007); South African Development Community (SADC) 2012 Model BIT Template, 9-11; David Gaukrodger, *Investment Treaties and Shareholders Claims; Analysis of Treaty Practice*, ¶ 9,11 OECD Working Papers on International Investment 2014/03, (OECD Publishing, 2014).

[40] THOMAS POLLAN, LEGAL FRAMEWORK FOR THE ADMISSION OF FDI, ¶32 (Eleven International Publishing, 2006).

[41] Abaclat, *supra* n. 29 at ¶359,376; Holiday Inns S.A Occidental Petroleum Corporation et al v. Government of Morocco, ICSID ARB/72/1, Decision on Jurisdiction, ¶¶350,351 (May 12, 1974); 5 (2) Jay Alexander and Devashish Krishan, *Venezuelan Investment: Locating a Safehouse and Achieving a Reverse Calvo,* (OGEL 2, 2008); Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, PCA Case No. 2011-17, UNCITRAL, Award, ¶351 (Jan 31, 2014).

[42] Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶13, 19 (Jul. 11, 1997); Inmaris Perestroika Sailing Maritime Services Gmbh and Ors. v. Ukraine, ICSID Case No ARB/08/8, Decision on Jurisdiction, ¶124 (Mar. 8, 2010).

[43] CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award, ¶ 384 (Sept. 13, 2001).

transaction'[44] were located in the Host State. Therefore the acquisition of shares from British financial institutions constituted investment under the BIT.

2. BANK DEPOSITS CONSTITUTE AN INVESTMENT UNDER THE BIT

In the *Anderson Et Al.* case,[45] relying on the ordinary meaning of the word 'assets' which includes 'anything of value,' the Tribunal concluded that the Claimants' deposits constituted assets under the BIT. The asset-based definition includes 'anything of value'[46] which terms deposits as assets, and further the deposit of funds promises a specific return at a pre-determined interest rate.[47] Deposits also possess the requisite characteristics of investment as there is a commitment of capital by way of deposit with the expectation of gain in the form of interest and further significant risk was assumed in the present case by maintaining deposits even after the financial crisis of 2008. The Claimants therefore submit that '*claims to money having a financial value*' includes deposits.[48]

3. THERE EXISTS A TERRITORIAL LINK BETWEEN THE INVESTMENT AND THE HOST STATE'S TERRITORY

In *Fedax case*,[49] the Tribunal held that '*it is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary*'. A transaction can qualify as an investment even in the absence of physical transfer of funds[50] and a territorial nexus can be established even when the shares are purchased from the secondary market.[51] Moreover it is not necessary for an investment of a purely financial nature to be linked to an economic operation in the Host State[52] when the

[44] Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 229 (Sept. 27, 2012).

[45] Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award (May 19, 2010).

[46] *Id*. at ¶48.

[47] *Id*. at ¶ 49.

[48] American Manufacturing & Trading Inc v. Republic of Zaire, ICSID Case No ARB/93/1, IIC 14, Award, 1997; M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (3rd ed. Cambridge University Press, 2010).

[49] Fedax N.V, *supra* n. 42 at ¶ 41.

[50] CSOB, *supra* n. 33 at ¶78.

[51] Abaclat, *supra* n. 29 at ¶ 358, 360, 366; Fedax N.V, *supra* n. 42 at ¶ 40.

[52] Abaclat, *supra* n. 29 at ¶ 374.

treaty specifically protects financial instruments.[53] In *Abaclat case*[54] the Tribunal stated that that need for the territorial link depends on '*the benefit for whom the funds are ultimately used, and not the place where the funds were paid out or transferred*'. This reasoning has been approved by various tribunals[55] and scholars.[56] Furthermore, the doctrine of '*general unity of investment operations*' dictates that certain transactions should be considered an investment when it forms a part of the entirety of the investment operation.[57] In the instant case deposits are a part of the overall investment operation. Analyzing these parameters it is thus concluded that the requirement of territorial nexus is satisfied by the Claimants.

4. ALTERNATIVELY THE REQUIREMENT OF TERRITORIAL LINK IS ABSENT FROM THE DEFINITION OF INVESTMENT

The VCLT requires that the substantive provisions of a treaty are given priority over generalized principles such as those contained in preamble.[58] This is applicable both to the ICSID Convention's requirement of economic contribution and the territorial link under the BIT. The treaty contains numerous references to the term territory but in the instant case, Article 1 of the BIT which defines investment, does not require the territorial conditionality. The tribunal whilst interpreting the territorial requirement held, "*...preamble does not impose any independent requirement for purposes of establishing the existence of an 'investment'... the references to 'territory' refer to the benefit that the Host State expects to derive from the investment, rather than the place of contribution.*"[59] This proposition has been accepted by

[53] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/02, Award (Oct. 31, 2012).

[54] Abaclat, *supra* n. 29 at ¶ 374.

[55] Ambiente Ufficio S.P.A v. The Argentine Republic, ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility, ¶ 498,499 (Feb. 8, 2013); Fedax N.V, *supra* n. 42 at ¶ 41; SGS Societe, *supra* n. 27 at ¶ 111.

[56] SCHREUER, *supra* n. 2 at ¶ 197,198; MARIEL DIMSEY, THE RESOLUTION OF INTERNATIONAL INVESTMENT DISPUTES: CHALLENGES AND SOLUTIONS, 139 (Eleven International publishing, 2008).

[57] Ambiente Ufficio S.P.A., *supra* n. 55 at ¶429.; SGS Societe, *supra* n. 27; Holiday Inns S.A, supra n. 41 at ¶¶350,351; Occidental Petroleum Corporation et al v. Government of Morocco, ICSID ARB/72/1, Decision on Jurisdiction. ¶¶350,351 (May 12, 1974); Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009); Consortium Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria, ICSID Case No. ARB/03/8, Award, ¶ 13 (Jan. 10, 2005).

[58] VCLT, *supra* n. 26, art. 3, 32.

[59] Romak S.A. (Switzerland) v. Republic of Uzbekistan, UNCITRAL Award, ¶ 237 (Nov. 26, 2009).

numerous tribunals[60] and also satisfied in the present case due to the presence of the requisite elements of contribution, duration and risk.[61]

B. IN ANY EVENT THE SHARES AND DEPOSITS MEET THE OBJECTIVE REQUIREMENTS OF THE ICSID CONVENTION

The Claimants contend that the autonomous criterion of the ICSID Convention must give deference to the consent of the parties under the BIT **[1]** and the investments in question meet the objective conditions of the ICSID Convention **[2]**.

1. DEFERENCE MUST BE GIVEN TO THE CONSENT OF THE PARTIES UNDER THE BIT

The Claimants assert that the definition of investment under the ICSID must be deferred to the BIT definition. The consent of the parties has been considered as the essential criterion in determining jurisdiction by numerous tribunals[62] which impose a construction of investment under Article 25 on a subjective basis rather than employing an autonomous objective criterion. Therefore the ideological basis of the *Salini test* is rather a typical set of features whose strict construction conjunctively defeats the object and purpose of the ICSID Convention.[63] By giving an interpretation under the ICSID Convention which overrides the BIT,[64] Article 25(1) cannot be used to limit the definition of investment as defined under the BIT in the form of a fixed and mandatory *Salini test.*[65] The elements of the *Salini test* have been considered as '*mere examples and not necessarily as elements that are required for*'[66] under Article 25 of the ICSID Convention and therefore the consent of the parties forms the

---

[60] Victor Pey Casado, *supra* n. 4 at ¶ 232; LESI, S.P.A. and Astaldi, S.P.A. v People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3, Award on Jurisdiction, ¶ 72 (Jul.12, 2006).

[61] Romak S.A. (Switzerland), *supra* n. 59.

[62] Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, ¶ 59, 65 (Dec. 8, 2003); Camuzzi International v. The Argentine Republic, ICSID Case No. ARB/03/2, Decision on Objection to Jurisdiction (May. 11, 2005); Fraport AG Frankfurt Airport Services Worldwide v. The Republic of Philippines, ICSID Case No. ARB/03/25,Award, ¶305 (Aug. 16, 2007); IBM World Trade Corp. v Republic of Ecuador, ICSID Case No. ARB/02/10, Decision on Jurisdiction and Competence, ¶ 11, 18 (Dec.22, 2003).

[63] D. Krishan, *A Notion of ICSID Investment*, TDM 1 (2009).

[64] The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Jurisdiction, ¶ 107 (Apr. 18, 2008).

[65] Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, (April 16, 2009); Biwater Gauff (Tanzania) v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 312 (Jul. 24, 2008); CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY, 140 (2nd ed. Cambridge University Press, 2001); Deutsche Bank AG, *supra* n. 53 at ¶ 306.

[66] M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, (Jul 31. 2007).

essential criteria for determining the scope of investment.

2. THE INVESTMENTS IN QUESTION SATISFY THE OBJECTIVE REQUIREMENTS UNDER THE ICSID CONVENTION

In an asset-based definition under a BIT[67] the purpose is to give protection to a wide range of assets.[68] Therefore contribution to economic development cannot be introduced as an independent requirement under the ICSID[69] which is considered an expected consequence of the investment.[70] The criterion of economic development has been rejected as a ground under the *Salini test* on a preambular interpretation[71] as an objective standard by the tribunals[72] and scholars[73] and moreover is criticized as a jurisdictional condition.[74] In the alternative, if the Tribunal considers that compliance with an additional test is required, the Claimants contend that the objective definition under the ICSID Convention requires the satisfaction of only three elements: contribution in money or other assets, duration and risk.[75] Further the requirement of economic development under the *Salini test* is subsumed under the three elements of the ICSID.[76]

In the instant case, the Claimants purchased shares in 2006 and continue to hold the shares, which qualify the requirement of duration.[77] The Claimants have also contributed financial

[67] UNCTAD, *Scope and Definition*, *supra* n. 38 *at* 61.

[68] Malaysian Historical Salvors, SDN, BHD, *supra* n. 65 at ¶60.

[69] Consortium Groupement L.E.S.I.-DIPENTA, *supra* n. 57 at ¶13.

[70] Mr. Saba fakes, *supra* n. 24 at ¶111; Deutsche Bank AG, *supra* n. 53 at ¶ 306.

[71] Malaysian Historical Salvors, SDN, BHD, *supra* note 65 at ¶80; Victor Pey Casado, *supra* n. 4 at ¶ 238.

[72] Saluka Investments B. V. (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award , ¶209, 211(March 17, 2006); Consortium Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria, ICSID Case No. ARB/03/8, Decision on Jurisdiction, ¶ 72(iv) (Jul. 12, 2006).

[73] 5 (1) Velimir Zivkovic, *Recognition of Contracts as Investments in International Investment Arbitration*, EUR. J. LEGAL STUD. 174-192 (2012).

[74] Malaysian Historical Salvors, SDN, BHD, *supra* n. 65 at ¶80.

[75] Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 218 (Sept. 27, 2012); Victor Pey Casado, *supra* n. 4; Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 85 (April 15, 2009); Mr. Saba fakes, *supra* n. 24 at 110.

[76] Victor Pey Casado, *supra* n. 4 at ¶ 232; Consortium Groupement L.E.S.I.-DIPENTA, *supra* n. 72 at ¶ 72(iv).

[77] Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (Jul. 31, 2001).

resources and expertise through Mr. Panicos which amounts to a contribution of assets.[78] Even after the financial crisis the holding of shares and deposits constituted an assumption of economic risk. The Claimants also fulfil the criterion of expectation of return as deposits demand an interest rate and shares in the form of dividend. Further, the value of the deposits is substantial enough[79] to constitute a commitment of capital and moreover meets the durational requirement under the *Salini test.*[80] The Host State's political and economic climate[81] after the financial crisis in 2008 constitutes a substantial risk to the deposits. Therefore there was a commitment of capital, expectation of profit and assumption of risk,[82] which meets the objective requirements of deposits as an investment under the ICSID Convention.

Summarizing, the Claimants assert that shares and deposits are investment under the BIT.

C. MOREOVER, THERE IS NO CONFLICT BETWEEN THE JURISDICTION OF THE EU COURTS AND THE ICSID TRIBUNAL

The Tribunals have held that Intra-EU BIT's are not supplanted by EU Law[83] and this has been confirmed by the Frankfurt Court of Appeals on the basis that *'Article. 344 of the Treaty on the Functioning of the European Union only apply to EU Member States. It therefore does not prohibit investment arbitration between a private investor and an EU Member State*'.[84] Moreover multi-party proceedings are permitted under the ICSID Convention.[85]

---

[78]Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, ¶100 (Aug. 27, 2009); Deutsche Bank AG, *supra* n. 53.

[79] Lanco International Inc., *supra* n. 26.

[80] Salini, *supra* n. 77 at ¶ 54; Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶110,111 (May.17, 2007).

[81] Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶117 (Jul. 6, 2007).

[82] Fedax N.V, *supra* n. 42 at ¶ 42, 44; CSOB, *supra* n. 33 at ¶77,90.

[83] Achmea B.V. (formerly Eureko) v. The Slovak Republic, PCA Case No. 2008-13, UNCITRAL, Award on Jurisdiction, (Oct. 26, 2010); Eastern Sugar B.V. (Netherlands) v. The Czech Republic, UNCITRAL ad hoc arbitration in Paris. SCC No. 088/2004, Partial Award (Mar. 27, 2007); Eureko B.V. v. Republic of Poland, UNCITRAL-Ad Hoc Tribunal, IIC 98 (2005), Partial Award, (Aug. 19, 2005); Ioan Micula and Ors. v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction (Sept. 24, 2008);

[84] ANDREA BJORKLUND, YEARBOOK ON INTERNATIONAL LAW AND POLICY, 243 (OUP, 2014).

[85] Ambiente Ufficio S.P.A., *supra* n. 55 at 141.

III. THE RESPONDENT VIOLATED THE FAIR AND EQUITABLE STANDARD UNDER THE BIT

Fair and equitable treatment (*hereinafter,* **FET**) is one of the core concepts governing the relationship between the investors and Host States which is invoked by investors as a basis for state responsibility.[86] It is a rule of law standard that the legal systems of Host States have to embrace as a standard for the treatment of foreign investors.[87] The Claimants submit that the principles of rule of law constituting reasonableness **[A]**, consistency and legal stability **[B]**, action in good faith and non-arbitrariness **[C]**[88] and due process **[D]** have been breached by the Respondent and thereby amounts to a violation of the FET standard.

A. THE RESPONDENT HAS VIOLATED THE REASONABLENESS PRINCIPLE

The FET standard has been interpreted in accordance of rule of law,[89] under which a core principle is reasonableness[90] which requires that the Host State's conduct be reasonably related to a legitimate public policy objective.[91]

In the instant case the Decree No. 59/2011 issued by the Respondent lacks a legitimate public policy objective. It has been held in the *Saluka case* that FET requires the Host State's conduct should bear a reasonable relationship to some rational policy[92] and in '*the implementation of that policy, the State's acts have to be appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors*'.[93]

In the instant case, by taking the supervisory measure under Decree No. 59/2011, which was not required by EU, the Mythlandic banks had to bear the additional burden of the Olive

[86]Stephen W. Schill, *Fair and Equitable Treatment under Investment treaties as an embodiment of Rule of Law*, 2 (ILJ Working Papers, NY School of Law).

[87]*Id*.

[88] Kenneth J. Vandevelde, *A Unified Theory Of Fair And Equitable Treatment,* 43 N.Y.U.J. INT'L L. & POL. 43 (2011).

[89]*Id*; Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, ¶ 138 (April 30, 2004); Stephan W. Schill, Fair and Equitable Treatment, the Rule of Law and Comparative Public Law, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 155, 159-163 (Stephan W. Schill ed.,OUP 2010); CMS Gas Transmission Co. v. Argentina, ICSID Case no. ARB/01/08, Award, ¶ 289-291 (12 May 2005).

[90]Vandevelde, *supra* n. 88.

[91]*Id*.

[92] Saluka, *supra* n.72 at ¶ 309.

[93]Ioan Micula, and Ors. v. Romania, ICSID Case No. ARB/05/20, Award, ¶525 (Dec. 11, 2013).

Garden debt, held by their subsidiaries.[94] Moreover the act of the Respondent was taken at a time when the biggest and most imminent risk was the Olive Garden debt holdings.[95]

The Claimants therefore assert that the aforementioned decisions and the bail-in mechanism were devoid of rationality as any act of the State which is unreasonable at the time in which it is done, violates the reasonableness principle and thereby the FET standard.[96]

B. THE RESPONDENT HAS FRUSTRATED THE LEGITIMATE EXPECTATIONS OF CONSISTENCY AND LEGAL STABILITY

Stability of the legal and business framework in the State is an essential element of the FET standard.[97] The frustration of legitimate expectation of the investor for legal stability and predictability (business framework), which is the dominant element of FET standard,[98] is a ground for the violation of the FET standard.[99] The Respondent has failed to maintain stability in their legal order **[1]** and further their solution was not systemic **[2]**.

1. THE RESPONDENT FAILED TO MAINTAIN STABILITY IN THEIR LEGAL ORDER

The FET standard under the BIT has been interpreted in the light of Article 31 of the VCLT.[100] Interpreting the BIT in good faith,[101] the Preamble r/w Article 2 of the BIT, provides 'to create favourable conditions'[102] for foreign investments.[103] Moreover, Mythland was an offshore banking centre and a favoured destination of private investors, so the Claimants had a legitimate expectation that the Respondent would maintain stability and an environment which promotes investment.

---

[94] Moot Problem at 8.

[95] Moot Problem at 7.

[96] Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008).

[97] LG & E Energy Corp and Ors.v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, ¶124 (Oct. 3, 2006).

[98] R. Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, The International Lawyer, 87-106 (Spring, 2005).

[99] Occidental Exploration and Production Company (OEPC) v. Ecuador, LCIA Case No. UN3467, Final Award, ¶ 183 (Jul. 1, 2004).

[100] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶112, 113 (May 25, 2004).

[101] *Id*. at 112.

[102] The Olive Garden-Mythland Bilateral Investment treaty, art. 2.

[103] MTD Equity, *supra* n. 100 at ¶ 113.

The supervisory measure, declining to avail EFSF funds, the re-subsidiarisation order and then the enactment of two legislations, were contrary to a stable and predictable business environment for investors and these actions created a *roller-coaster* effect for the investor and undermine the predictability of the legal regime.[104] This uncertainty and contradiction in Respondent's conduct frustrated legitimate expectation of Claimants.[105] Therefore the evisceration of arrangements in reliance of which the foreign investor was induced to invest constituted a breach of the obligation of fair and equitable treatment standard.[106]

2. THE SOLUTION TO THE MYTHLANDIC BANK CRISIS WAS NOT 'SYSTEMIC'

The introduction of the Banking and Mythland Plan [*hereinafter*, **BAM**], which proclaimed the solution to the bank crisis, was devoid of a 'systemic' solution. Systemic solution means the solution that would have an equal effect on the stakeholders, i.e., the banks in the instant case.[107] Under the BAM plan, the threshold for ELA eligibility was lowered, to maintain liquidity in the banks. However the Bhangi Bank was already eligible for ELA, hence BAM plan provided no respite to Bhangi bank crisis. Further the BAM plan allowed for re-subsidiarisation, but Bhangi Bank still needed recapitalization assistance, which was known to the Mythland's Central Bank [*hereinafter*, **MCB**]. Therefore there lacked a systemic solution to the crisis, as Bhangi bank was not treated in consideration of its financial position**.** The Claimants had reasonable expectation that the solution to overcome the problems of Mythlandic Banks, considered by the govt. would have a systemic effect. By not doing so, the Respondent has breached the fair and equitable obligation.

C. THE ACTS OF RESPONDENT WERE ARBITRARY AND DID NOT ADHERE TO THE PRINCIPLE OF GOOD FAITH

In investment law, '*the principle of good faith permeates the whole approach to investor protection*' and '*acts as a guiding beacon*' to the obligations,[108] and is therefore a basic obligation under the FET standard.[109] A measure would be arbitrary '*if it inflicts damage on*

[104] PSEG Global, Inc., and Ors. v. Republic of Turkey, ICSID Case No. ARB/02/5.Award, ¶250 (19 Jan. 2007).

[105] Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2013).

[106] CME Czech Republic B.V., *supra* n. 43 at 611.

[107] Saluka, *supra* n.72 at ¶ 352.

[108] Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 299 (Sept. 28, 2007).

[109] Waste Mgmt., Inc., *supra* n. 89 at ¶138.

the investor without serving any legitimate purpose and without a rational explanation, and that instead rests on prejudice or biasness'.[110]

Mrs. Fixitforus, who was an outspoken critic of oversized banking industry by virtue of her leftist inclinations, had made colourable allegations of impropriety against Mr. Panicos. The MCB staff also denied requests for meetings with Mrs. Fixitforus by Mr. Panicos.[111] The repeated requests for availing EFSF funds by Mr. Panicos, MBF, and offer of support by EFSF administrators, the availing of which was in 'national interest' and inevitable to 'preserve essential stability', were unreasonably rejected by Mrs. Fixitforus.[112]

Therefore the failure of MCB to act in an unbiased, even-handed, transparent and consistent way and the unreasonable refusal to communicate with Mr. Panicos and other stakeholders, prove that MCB's conduct was in bad faith, unfair and inequitable.[113] Further, MCB engaged in whispering campaign against Mr. Panicos, which proves that the acts of Mrs. Fixitforus were driven by xenophobic motives and were politically motivated.[114]

Summarizing, the Claimants assert that the aforementioned acts of Respondent constitute abuse of administrative power coupled with political motives, and therefore breach of the FET obligations.[115]

D. DUE PROCESS WAS NOT OBSERVED

Right to fair hearing as an essential element of FET and rule of law,[116] requires domestic administrations to grant to foreign investors a fair hearing,[117] conduct proceedings in a comprehensible way and give reasons for the decision.[118]

---

[110] UNCTAD, *Fair and Equitable Treatment*, 78 (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012).

[111] Moot Problem at 11.

[112] Moot Problem at 11.

[113] Saluka, *supra* n.72 at ¶407.

[114] 13(1) Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 31 SANTA CLARA J. INT'L L. (2014).

[115] Impregilo S.P.A. v. Argentine Republic, ICSID Case No.ARB/07/17, Concurring and Dissenting Opinion of Charles N. Brower, ¶7 (June 21, 2011).

[116] Giacintodella Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, 9 Eur. Publ. L. 563 (2003); Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000)..

[117] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

[118] SCHILL, *supra* n. 86 at 24.

In the instant case, the two administrative measures, which had significant impact on both Banks and investments therein, were passed without following due process. The transcript of the meeting was released but it was not open to public, and further no representatives of the banks were present.[119] FET requires the domestic administrations to give reasons to facilitate the legal review of an administrative decision,[120] and thus lack of reasons contributes to facilitating arbitrariness in decision making.[121] Therefore the proceedings lacked transparency and due process of fair hearing and the need to give reasons for their decisions.

Further the Claimants assert that there has been denial of justice by Respondent's Supreme Court, as the case filed by the Claimants was dismissed on unjustifiable grounds, and the judgement constituted a mistake of substantive law and misapplication of law.[122]

IV. THE RESPONDENT HAS VIOLATED THE REQUIREMENT OF FULL PROTECTION AND SECURITY

Full Protection and Security [*hereinafter*, **FPS**] means a State's guarantee of stability in a secure environment, including physical, commercial and legal.[123] The standard is one of due diligence.[124] The Host State is obligated to ensure that neither by amendment of its laws, nor by actions of its administrative bodies, is the agreed and approved security and protection of the foreign investor's investment[125] withdrawn or devalued.[126] The FPS obligation was breached by active and abusive exercise of state powers, aimed at destroying the investments[127] and the harassment caused by domestic and economic powers.[128]

---

[119] Moot Problem, at 24.

[120] Técnicas Medioambientales Tecmed, S.A., *supra* n. 105 at ¶ 123.

[121] Joseph Charles Lemire v Ukraine, ICSID Case No. ARB/06/18 (ICSID), Decision on Jurisdiction and Liability, ¶ 315, 316 (Jan. 14, 2010).

[122] 1 (2) Michael D. Goldhaber, *The Rise of Arbitral Power over Domestic Courts*, STAN. J. COMPLEX. LITIG.

[123] Biwater Gauff Tanzania (Ltd.). *supra* n. 65 at ¶729.

[124] R DOLZER AND M STEVENS, BILATERAL INVESTMENT TREATIES, 61 (Martinus Nijhoff, The Hague 1995); R. DOLZER AND C. SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 149-150 (OUP, Oxford 2008).

[125] The Olive Garden-Mythland Bilateral Investment treaty, art.4(2).

[126] CME Czech Republic B.V., *supra* n. 43 at ¶ 384.

[127] Ronald S. Lauder v. Czech Republic UNCITRAL, Award, ¶ 314 (Sept. 3, 2001).

[128] Christoph Schreuer, *Full Protection and Security*, J. INT'L DISP. SETTLEMENT (2010).

V. THE RESPONDENT HAS VIOLATED THE BIT BY UNLAWFULLY EXPROPRIATING THE INVESTMENTS OF THE CLAIMANTS

The Claimants assert that the Respondent's acts amounts to unlawful expropriation. This submission is threefold. *Firstly*, removal of Mr. Panicos through a whispering campaign interfered with the controlling rights in Bhangi Bank of Olive Garden shareholders which amounts to indirect expropriation **[A]**. *Secondly*, by enacting Law no. 101/2013, the Respondent's acts amounts to direct expropriation **[B]**. *Thirdly*, for lawful expropriation, the identified customary law conditions have not been fulfilled **[C]**.

A. THERE HAS BEEN INDIRECT EXPROPRIATION

Expropriation includes not only deliberate taking of property or issuing a law or decree[129] but also '*covert or incidental interference with the use of property*'[130] '*the effect of which is to deprive the investor of the use and benefit of his investment*'[131] or neutralize the enjoyment of the property.[132] The Respondent indulged in a whispering campaign and made the other shareholders believe that it would not entertain any requests on exemption for reassessment from Mr. Panicos, knowing that if the Bank is not given an exemption, it would have faced imminent bankruptcy.[133] This act of interference of the Respondent amounts to expropriation as it led to the removal of Mr. Panicos,[134] by which the Claimants lost control in the BoD.

In *Lauder v. Czech Republic*,[135] the question of expropriation was decided on three grounds: *firstly*, whether the evidence produced had the effect of depriving the use or interfering with the property; *secondly*, the action did result in interference with the property rights, and *thirdly*, the State or any other entity related to it benefitted from it. In the instance case all the above requirements have been fulfilled, as there was an interference by the Respondent through a whispering campaign and moreover there was a direct benefit for the Respondent as they appointed one of their own person as the CEO thereby having a control in the BoD of Bhangi Bank through the new CEO. Further, by covertly removing Mr. Panicos from the

[129] Starrett Housing Corp. v. Islamic. Republic of Iran, 4 Iran-U.S.C.T.R. 4 (Dec. 19, 1983).

[130] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 103 (Aug. 30, 2000).

[131] Middle East Cement Shipping and Handling Co. v. Egypt, ICSID Case No. ARB/99/6, Award, ¶ 107 (April 12, 2002).

[132] Ronald S. Lauder, *supra* n. 127.

[133] Moot Problem, at 18.

[134] Moot Problem, at 13.

[135] Ronald S. Lauder, *supra* n. 127.

BoD, the govt. through the new CEO acquired 84% of the shareholders, after which Bhangi Bank no more fulfilled the conditions of the EU Directive[136] and other common law countries[137] which required that atleast 25% of the shares should be in public hand, and ultimately restricted the right of the Claimants to freely sell their shares in the stock market. The Claimants further submit that the measure of restricting the depositors from withdrawing their deposits amount to '*measures the effects of which are tantamount to expropriation*', thus violating Article 4(2). Further Article 65 of the TFEU allows derogation from the principle of free movement of capital only on the grounds of public policy or public security, which are absent in the present case.[138]

The Claimants therefore assert that the aforementioned acts of Respondent amount to indirect expropriation because they fulfill the requirement under Article 4(2) of the BIT **[1]** and other criteria of indirect expropriation **[2]**.

1. INDIRECT EXPROPRIATION IS UNLAWFUL UNDER THE BIT

Article 4(2) of the BIT prohibits '*other measures the effects of which be tantamount to expropriation*'. In *Middle East Cement Shipping and Handling Co. v. Egypt*,[139] the Tribunal equated the above expression to indirect expropriation, holding the Republic of Egypt liable to pay compensation. In the instant case, the act of depriving the Claimants of control and further restricting their rights to freely sell their shares, amounts to measures '*tantamount to expropriation*' which is violative of Article 4(2) of the BIT.

2. THE MEASURES OF RESPONDENT FULFILL THE OTHER CRITERIA OF INDIRECT EXPROPRIATION

The Claimants submit that the measure of Respondent resulted in *substantial depriving* of owner's ability to use or enjoy the property and that it interfered with the investment for a *significant period of time* **[i]**. Moreover, the measure was not intended for a *bona fide* public purpose **[ii]** and further it affected Claimant's *reasonable expectations* **[iii]**.

---

[136] Directive 2001/34/EC of the European Parliament and of the Council, art 48 (Official J. of E.C. May 28, 2001).

[137] Rule 19A, Securities Contracts (Regulation) Rules, 1957; Listing rules of UK- LR 6.1.19- Financial Conduct Authority, *available at* https://fshandbook.info/FS/html/FCA/LR/6/1 (Last Visited at April 2, 2015).

[138] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 2008/C 115/01 (Dec. 13 2007).

[139] Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, ¶ 107 (April 12, 2002).

i. THE MEASURE HAS RESULTED IN SUBSTANTIAL DEPRIVATION

Control over a company is considered an interest in company, which one if deprived of '*ripes into an outright taking of title'*[140] and thus can be considered as expropriation. Further, depriving investors control over their investment has been referred to depriving one of '*fundamental rights of ownership*' and depriving one of its property interests, [141] which leads to deprivation of the effective use of their property.[142]

In the instant case, after the Claimants lost control, Bhangi Bank through the new CEO, which was their own, filed financial records with a massive improvement of €9 billion which later were termed fraudulent as it omitted €9 billion that Bhangi Bank had owed to ECB under TARGET2 Mechanism. [143] Due to this revelation, international credit rating downgraded the Olive Garden debt held by Bhangi Bank to the lowest grade and it ceased to be acceptable as collateral by the ECB for any monetary policy operations.[144]

The Claimants assert that this downgrading of Olive Garden debt meant that Bhangi Bank would not be given financial aid from the ECB, like it provided to Olive Garden on July 2011 whereby ECB would '*even directly buy debt owned by a country's private financial institutions*' in emergency situations.[145] Thus, if this fraudulent act would not have been done, Bhangi Bank would have not been closed as the ECB could have bought its Olive Garden's debts. But since the Bank was closed down, the shareholders suffered, which eventually happened because Claimants had lost their control in the BOD. Thus, the decisions of the new CEO to file fraudulent financial reports amounts to substantial deprivation of Claimants ownership rights, which in turn amounts to expropriation.[146]

Further, when 84% of the shares were covertly brought by the Respondent, the Claimants lost the control over the company thereby depriving the Claimants of effective use, control and

---

[140] Sedco Inc. v. Islamic Republic of Iran, 9 Iran-U.S. Cl. Trib. Rep, 276-279; Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, Award, 6 Iran-U.S. Cl. Trib. Rep., 219 (1984).

[141] Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, Award, 6 Iran-U.S. Cl. Trib. Rep, 219 (1984).

[142] Starrett Housing Corporation, and Ors., v. The Government of the Islamic Republic of Iran, Bank Omran, Bank Mellat, Final Award, 24 Iran-U.S. Cl. Trib. Rep. (1987).

[143] Moot Problem at 16.

[144] Moot Problem at 17.

[145] Moot Problem at 7.

[146] Tippetts, Abbett, McCarthy, Stratton, *supra* n. 140 at 219.

benefits of their property rights,[147] which is a substantial deprivation. Furthermore, it is mandatory[148] for a listed company to distribute atleast 25% of the subscribed capital in the hands of public. BoD of Bhangi Bank which no more had representation of the Claimants offered the govt. to buy its shares. The govt. bought the shares through the BoD and became owners of 84% of the Bhangi Bank shares which meant that the Bank no more fulfilled the requirements of listing conditions and thus the company seized to be listed, which deprived the shareholders from freely selling[149] their shares in the stock market, thus, depriving the Claimants of their property interests substantially. Moreover, since the control led to the Bank being run down, and further capital control on deposits were for indefinite period, therefore the deprivation of property was for a significant period of time.

ii. THE MEASURE WAS NOT INTENDED FOR A BONA FIDE PUBLIC PURPOSE

By buying 84% of the shares of an entity which is already running in losses, the Respondent has instead used tax payer's money and further their act of covertly gaining the control of Bhangi Bank was in fact against the public benefit. Moreover, removal of Mr. Panicos from the BoD by Mrs. Fixitforus who disliked him, and later with no causes charging the Claimants with insider dealing, and mismanagement charges[150] so that their act of indirect expropriation is justified were not for public purpose.

iii. THE MEASURES AFFECTED CLAIMANT'S REASONABLE EXPECTATIONS

Article 2(3) of the BIT is an instance of reasonable expectation which guarantees that the Respondent will not impair, *inter alia*, management, use and enjoyment of the investments. The Respondent has violated the aforementioned clause and as proved in the above contention that the legitimate expectations have been frustrated[151] which deprived Claimants of their property interest.

B. ENACTMENT OF LAW NO. 101/2013 AMOUNTS TO UNLAWFUL EXPROPRIATION

The Claimants assert that by enacting Law no. 101/2013 amounts to direct unlawful expropriation **[1]** and further the exceptions to expropriation cannot be invoked **[2]**.

---

[147] Starrett Housing Corp. v. The Government of Islamic Republic of Iran, Award, 16 Iran-U.S. Cl. Trib. 112 (1987).

[148] *supra* n. 136 and 137.

[149] Amoco International Finance Corp. v Islamic Republic of Iran, Award, 15 Iran-U.S. Cl. Trib. Rep, 189 (1987).

[150] Moot Problem at 26.

[151] Arguments Advanced - III (B).

1. RESPONDENT'S MEASURE WAS 'TANTAMOUNT TO AN EXPROPRIATION' OF CLAIMANT'S CONTRACTUAL RIGHTS

The expropriation can be of intangible property such as bank accounts[152] or shares.[153] Further, the use of sovereign authority[154] by the State interfering with the contractual rights of the investor can amount to expropriation of contractual rights.[155] Since the contractual rights fall under the definition of investment,[156] therefore the Respondent has caused the breach of contract through its decree which amounts to expropriation.[157] In the instant case, the Respondent enacted Law no. 101/2013, which imposed a 100% levy on the bank accounts and destroyed the shareholdings of the Claimants.[158] Thus, even if the there is no contractual link between the Govt. of Mythland and Claimants, Respondent's measure of enacting Law no. 101/2013 amounts to measure which are '*tantamount to an expropriation*', which is a breach of Article 4(2) of the BIT and of EU Directive.[159]

2. EXCEPTIONS TO EXPROPRIATION CANNOT BE INVOKED

Article 4(4) of the BIT provides that the investors of Olive Garden enjoy the MFN treatment which means that the Host State has to extend the treatment that is no less favourable than what it accords to the foreign investors of any other State.[160] The Respondent had guaranteed Big Bear depositors on 23 Dec. 2011, an assurance to not prejudice their position *in any case*

---

[152] American Bell Int'l Inc. v. Islamic Republic of Iran, 6 Iran-U.S. Cl. Trib. Rep, ¶170, 151 (1986).

[153] Rumeli Telekom A.S. and Ors. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶¶707-708 (July 29, 2008).

[154] Impregilo S.P.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 260 (Apr. 22, 2005); Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, ¶180 (Aug. 27, 2009); Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, ¶345 (Aug. 18, 2008); STEPHEN M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW (1st ed., Cambridge University Press, June 30, 2011); Consortium FRCC v. Royaume du Maroc, ICSID Case. No. ARB/00/6, Award, ¶ 65 (Dec. 22, 2003).

[155] Phillips Petroleum Co. Iran v. Iran et al., Award, 21 Iran-U.S. Cl. Trib. Rep. 79 (1989); Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶267 (Feb. 6, 2007).

[156] The Olive Garden-Mythland Bilateral Investment treaty, Preamble r/w art. 1.

[157] Siemens A.G., *supra* n. 155 at ¶ 267.

[158] Moot Problem, at 22-23.

[159] Directive 2009/14/EC of the European Parliament and of the Council (Off. J. of E.C., March 11, 2009).

[160] UNCTAD, *Most Favoured Nation Treatment*, (UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York-Geneva, 2010); Emilio Agustin Maffezini v. Kingdom of Spain , ICSID Case No. ARB 97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶37-38 (Jan. 25 2000).

of financial restructuring. The clause to protect the depositors of Big Bear was strengthened on 20 Mar. 2013 by which Mythland guaranteed to fully protect the financial position of investors '*irrespective of form*' and to provide special treatment to individuals that own deposits in Mythland account.[161]

Thus, invoking Article 4(4), the Claimants assert that by virtue of the agreement between Big Bear and Mythland, the treatment guaranteed to Big Bear depositors should have been accorded to even the uninsured depositors because the financial position of investors had to be fully protected *irrespective of form* and *in any case* of financial restructuring.

C. THE REQUIREMENTS FOR LAWFUL EXPROPRIATION UNDER CUSTOMARY INTERNATIONAL LAW HAVE ALSO NOT BEEN FULFILLED

Under customary international law, in order for an expropriation to be legal, it should be for, *inter alia*, for a *public purpose*[162] and accompanied by *compensation*[163] . In the instant case, the expropriation is unlawful as it is not for public purpose,[164] and was not accompanied by compensation. The Claimants had been unjustly enriched and therefore are entitled to reparations.[165] *In arguendo*, even if the expropriation was for public interest, Respondent is entitled to pay compensation under Article 4(2) which provides that the investments cannot be expropriated except 'against compensation'.[166]

---

[161] Moot Problem at 21.

[162]ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006); The Olive Garden-Mythland Bilateral Investment treaty, art. 4 (2); UNCTAD, *Expropriation*, UNCTAD series on issues in International Investment Agreements II, (United Nations, New York & Geneva, 2012).

[163] OECD, *Indirect Expropriation and the Right to Regulate in International Investment Law*, 3 (OECD Working Papers on International Investment 2004/04, OECD Publishing 2004).

[164] Arguments Advanced, IV (A) (2) (ii).

[165] Factory at Chorzów, Germany v. Poland Factory at Chorzow (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 12 (Order of Nov. 21); ADC Affiliate Limited, *supra* n. 162; UNCTAD, *Expropriation*, (UNCTAD series on issues in International Investment Agreements II, United Nations, New York & Geneva, 2012); Rep. of Int'l Law Comm'n, 53rd Sess., *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, art. 31 (Nov. 2001), G.A., 56th Sess., Supp. No. 10 (A/56/10), [Hereinafter ARSIWA].

[166] Azurix Corp v. Argentine Republic, ICSID Case No. ARB/01/12, Award (Jul. 14, 2006); S.D. Myers, Inc. v. Government of Canada, NAFTA/UNCITRAL, Partial Award (Nov. 13, 2000).

VI. THE RESPONDENT HAS VIOLATED THE BIT BY DISCRIMINATING WHILE GRANTING REPARATIONS

By issuing Decree No. 29/2013, the Respondent granted reparations to Big Bear investors only and not to Olive Gardens' which is violation of Most Favoured Nation [*hereinafter* "MFN'] treatment guaranteed to investors under Article 3 of the BIT. Further, the Claimants assert that the defences available to the Respondent under non-precluding clause (Ad Article 3) of the attached Protocol to the BIT cannot be invoked because, *firstly*, the measures taken by the Respondent were not for public security and order as discriminately granting reparations would not hamper the elementary needs of the citizens[167] or infringe the civil peace threatening the legal order.[168] *Secondly*, even the defence of public morality cannot be invoked as the public morals clause should not be abused for disguising measures against member states for political reasons or in order to justify protectionism,[169] which in the instant case, the Respondent has indulged in.

Moreover, when the non-precluding clause is read under the light of rule of law **[A]** or interpreted in the light of customary international law concerning the state of necessity **[B]**, the Respondent does not meet the conditions fixed for it **[C]**.

A. THE DEFENCES HAVE TO BE INTERPRETED IN THE LIGHT OF RULE OF LAW

It is an obligation of every EU member[170] to implement the rule of law which is a guarantee against arbitrariness and unfettered discretion.[171] If there is an intervention by public authorities in the sphere of private activities, it is a must to provide for protection against arbitrary or disproportionate intervention,[172] and in a community based on rule of law, its

---

[167] Jurgen Kurtz, *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis* (Jean Monnet Working Paper 06/08, European Union, 2008).

[168] Cont'l Cas. Co., *supra* n. 96 at 82.

[169] Katarina Jakobsson, *The Dilemma of the Moral Exception in the WTO*, 31 (Faculty of Law, Stockholm University).

[170] European Union, Treaty on European Union, Feb. 7 1992, art. 2, 49; Charter of Fundamental Rights of the European Union: Preamble, (2012/C 326/02) Off. J. E.U.; Council of Europe, Statute of the Council of Europe, European treaty Series No. 1, London 5.V.1949.

[171] Annexes to The Communication from the Commission to the European Parliament and the Council, Annex 1, *The Rule of law as a foundational principle of the Union* (European Commission, Strasbourg, 2014).

[172] Kusheshwar Prasad Singh v. State of Bihar & Ors., (2007) 11 SCC 447; Mritunjoy Pani and Anr. v. Narmanda Bala Sasmal and Anr., AIR 1961 SC 1353; Hoechst v. Commission [1989] ECR 02859 at ¶19.

institutions are subject to judicial review.[173] The ICSID Tribunal[174] has also taken into account EU law. Therefore an unfettered power cannot be given to a member State to derogate from its treaty obligations without being accountable for it and that Ad Article 3 shall be qualified to few conditions such as that required for under the doctrine of necessity.

B. NON-PRECLUDING CLAUSES ARE SUBJECT TO ARTICLE 25 OF THE ARSIWA

The Claimants assert that since the defences available under non-precluding clause are not self judging[175] and moreover not defined[176] therefore they are subject to the same conditions which the doctrine of necessity is under customary international law.[177] Therefore, if the test which is laid down under the law of necessity is not met, then Respondent's defence to invoke Ad Article 3 will also not be met.[178]

C. RESPONDENT DOES NOT MEET THE CONDITIONS TO INVOKE THE DEFENCE UNDER CUSTOMARY INTERNATIONAL LAW

The Respondent's wrongful act of expropriating the investments of the Claimants and further violating the MFN treatment clause cannot be precluded under the umbrella of necessity under general principal of law, which prevents a party from taking advantage of its own fault.[179] In order to invoke the necessity defence, customary international law mandates that the State must fulfill, *inter alia*, three conditions: *Firstly*, the interest to be safeguarded must be against a grave and imminent peril **[1]**; *secondly*, the act was the only way for State to safeguard its interest **[2];** and *thirdly*, the State should not have contributed to the situation of necessity **[3]**. The Claimants assert that Respondent has failed to assert facts to satisfy any of the above conditions.

---

[173] Case C- 50/00, P Unión de Pequeños Agricultores v. Council of the European Union, [2002] ECR I-06677, ¶¶ 38, 39 (July 25, 2002).

[174] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award, ¶ 69, 70 (Nov. 13, 2000). Electrabel S.A. v the Republic of Hungary, ICSID Case No. ARB/ 07/19 Decision on Jurisdiction, Applicable Law and Liability, ¶4.112 (Nov. 30, 2012); ICSID, *supra* n. 1, art. 42(1).

[175] Sempra Energy International, *supra* n. 108 at ¶374; Enron Creditors Recovery Corp. and Ors. v. The Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, ¶401,402 (July 30, 2010).

[176] Sempra Energy International, *supra* n. 108 at ¶ 376.

[177] CMS Gas Transmission Co., *supra* n. 89 at ¶374; Sempra Energy International, *supra* n. 108 at ¶ 375;

[178] LG & E Energy Corp, *supra* n. 97 at ¶245.

[179] 13 Marie Christine Hoelck Thjoernelund, *State of Necessity as an Exception from State Responsibility for Investments*, Max Planck Y.B. of U.N. Law, 423-480 (2009).

1. THE INTEREST TO BE SAFEGUARDED WAS NOT FOR A GRAVE OR IMMINENT PERIL

The Respondent sold some of the operations of Lucky-Bhangi Bank to Big Bear, and gave reparations to Big Bear investors to restore their financial position.[180] It is submitted that the obligation of the Respondent to fulfil the promises made to Big Bear cannot be termed as necessity as failure to fulfil the promises cannot be termed as grave and imminent peril. They had the financial resources and were capable enough to compensate the investors.

2. THE ACT WAS NOT THE ONLY WAY TO SAFEGUARD ITS INTEREST

The plea of necessity cannot be made when there are other means available, even if they are more costly and less convenient.[181] In this case the imposition of a 100% levy was never required by the EU Troika. Respondent could have imposed a levy on all the depositors of Bhangi Bank irrespective of nationality, even if it may have been less convenient for them. By doing so, a 100% levy on a particular group of depositors could have been avoided.

3. THE RESPONDENT CONTRIBUTED TO THE SITUATION OF NECESSITY

Passing of supervisory measure, not availing EFSF/ESM funds when it was foreseeable that short term credit would not be of assistance, arbitrary implementation of BAM plan, the omission of TARGET2 pre-clearance payments which when revealed led to massive deposit outflows and which further ceased the debt of the bank from being a collateral for the ECB, are all cogent evidence which were all the result of its own series of unreasonable acts.

Summarising, Respondent violated the MFN clause under the BIT.

In arguendo, even if the measures of the Respondent were under the state of national emergency, Article 4(4) r/w clause (3) requires '*an obligation of equality of treatment with respect to investment losses*'[182] and thus lays down that if investments suffer losses owing to, *inter alia*, a state of national emergency, the investors shall not be accorded less favourable treatment that it accords to its own investors or investors of third parties[183] as regards '*indemnification, compensation and other valuable considerations*'. By issuing Decree No. 29/2013, wherein Big Bears depositors were given special considerations, the Respondent has violated MFN clause under Article 4(4).

---

[180] Moot Problem at 27.

[181] ARSIWA, *supra* n. 165.

[182] Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v. The Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 271 (July 30, 2010).

[183] The Olive Garden-Mythland Bilateral Investment treaty, art. 4(4) (3).

PRAYER

In the light of the facts presented, issues raised and arguments advanced, the Counsel for Claimants, respectfully requests the Tribunal to:

1. Dismiss all the Respondent's objections and declare that it has jurisdiction
2. Declare that the actions of the Respondent were a violation of the BIT entered into between Olive Garden and the Republic of Mythland

for the present phase proceedings which are limited to threshold, jurisdiction and merits only according to Procedural Order No. 2. issued by this Arbitral Tribunal.

All of which is respectfully affirmed and submitted

Date: Sd/-

Place: Counsel for Claimants