TEAM CODE 20R

8TH NATIONAL LAW SCHOOL-TRILEGAL INTERNATIONAL ARBITRATION MOOT COURT COMPETITION, 2015

IN THE MATTER OF ARBITRATION BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
UNDER THE OLIVE GARDEN-MYTHLAND BILATERAL INVESTMENT TREATY

Olively S.A. And Others
(Claimants)

V.

Republic of Mythland
(Respondents)

MEMORIAL *for* RESPONDENT

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

&- And

¶ - Page Number

%- Percentage

AF- Arbitration Forum

Apr.- April

ARB- Arbitration

Art.- Article

BAM- Banking and Mythland

BDPS- Bank Deposit Protection Scheme

BIS- Bank for International Settlements

BIT- Bilateral Investment Treaty

EC- European Commission

ECB- European Central Bank

Eds.- Edition

EFSF- European Financial Stability Facility

EHRR- European Human Rights Reports

ELA- Emergency Liquidity Assistance

ERM- Enforcement of Restrictive Measures

ESM- European Stability Mechanism

EU- European Union

FFA- Financial Facility Agreement

FSB- Financial Stability Board

FLOP- Framework for Lucky Bank Operationalisation Plan

FOBB- Framework for Resolution of Bhangi Bank

HAR- High Authority for Resolution

HIC- Hope in Committees

ICJ- International Court of Justice

ICSID- International Centre for Settlement of Investment Disputes

I.L.M. - International Legal Materials

I.L.R. - International Law Reports

IMF- International Monetary Fund

Kerboodle- Kerboodle and Kerboodle

LALU- Loss and Asset Liability Union

LLC- Limited Liability Company

L.P.- Limited Partnership

Mar. – March

MCB- Mythland's Central Bank

MoU- Memorandum of Understanding

MMP- Man-o-Man Party

Myth.- Mythland

MBF- Mythlandic Banks Forum

NAFTA- North American Free Trade Agreement

No. – Number

Olive Gar.- Olive Garden

Ors. – Others

R.I.A.A- Reports of International Arbitral Awards

Rep. – Report

SEC- Securities and Exchange Commission

UN- United Nations

UNCITRAL- United Nations Commission on International Trade Law

UNCTAD- United Nations Conference on Trade and Development

U.N.T.S- United Nations Treaty Service

VCLT- Vienna Convention on the Law of Treaties

v.- Versus

Vol.- Volume

Y.B Int'l. L. Comm.- Yearbook of the International Law Commission

INDEX OF AUTHORITIES

ARTICLES

BOOKS

CONVENTIONS, TREATIES AND DRAFT ARTICLES

CASES

INTERNATIONAL CENTRE ON SETTLEMENT OF INVESTMENTS DISPUTES

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

PERMANENT & INTERNATIONAL COURT OF JUSTICE

IRAN-US CLAIMS TRIBUNAL

INTERNATIONAL LAW REPORTS

WORLD TRADE ORGANIZATION

STOCKHOLM CHAMBER OF COMMERCE

INDIA

AD-HOC STATE-STATE ARBITRATION

STATEMENT OF JURISDICTION

Olively S.A. and others, the Claimants in the instant case, have invoked the Jurisdiction of this honourable tribunal persuant to Article 25 of the ICSID Convention and Article 11 of the Treaty concerning the Encouragement and Reciprocal Protection of Investments between Olive Garden-Mythland which states that:

"Article 11

1. Divergencies concerning investments between a Contracting state and an investor of the other contracting state should as far as possible be settled amicably between the parties in dispute.
2. If the Divergency cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting states, be submitted for arbitration. Unless the parties in disputes agree otherwise, the divergency shall be submitted for arbitration under the Convention of 18th March 1965 on the settlement of Investment Disputes between states and Nationals of other states.

The Respondent has the honour to submit this claim, while expressing reservations to the jurisdiction of this Tribunal under Article 25 of the ICSID Convetion and Article 11 of the Treaty concerning the Encouragement and Reciprocal Protection of Investments between Olive Garden-Mythland.

STATEMENT OF FACTS

THE RELEVANT CIRCUMSTANCES IN EUROPE

The small Mythland Republic is a member of the European Union (hereinafter EU) and adopted the Euro in 2008. The country has witnessed a large growth in its financial and banking sector, with over 70 per cent of the labour force being employed in the financial services industry. The deposits and debts held by Mythlandic banks were geographically concentrated in neighbouring countries. A significant share of the deposits in Mythlandic banks originate from Big Bear, while almost half of the debts owed to these banks were from Olive Garden. Thus, as a favoured destination for foreign investors, the country has historically been sensitive to region and global economic swings.

The largest player in Mythland's banking sector is Lucky Bank, followed by Bhangi Bank. 2006 saw 20.2 per cent of Bhangi Bank's shares being acquired by a consortium of Olive Garden investors both individually as well as jointly through an investment vehicle (Olively S.A). Mythlandic banks are overseen by the Mythlanic Central Bank (MCB), an independent regulator established by a private charter. While the Minister of Finance of Mythland has residual powers in the selection and removal of governors of the MCB, the MCB does not report to any governmental body.

THE IMPACT OF THE OLIVE GARDEN CRISIS

From early 2009 Olive Garden became entrenched in a worsening financial crisis. Citizens of Olive Garden were unable to pay their debts while the government was unable to pay salaries. The value of Olive Garden debt, and consequently, the government bonds held by Mythlandic banks plummeted. At the time, Mr. Confusicos was appointed governor of the MCB as the position had become vacant in the regular manner. By May 2011 international credit ratings agencies had downgraded Olive Garden to junk value and Mythland lost access to international markets.

THE BAM PLAN

In July of 2011 the EU 'Troika', consisting of the International Monetary Fund, European Central Bank and the European Commission, announced a program for Olive Garden which involved creditors taking a 50 per cent cut on any Olive Garden Debt owned by them. As a member of the European Union and the Eurozone, Mythland's ministry of finance made the Troika's program enforceable by virtue of Decree No. 59/2011. The Decree also required

debts in subsidiaries of Mythlandic banks situated in Olive Garden to be transferred onto the books of the holding company. Following a three day bank during which 30 per cent of Bhangi Bank's deposits were withdrawn, the bank had to secure €1 billion in ELA assistance to remain solvent. In light of the deteriorating economic situation, Mrs. Fixitforus was appointed as governor of the MCB. As opposed to applying for ESFS funds, Mrs. Fixitforus instituted the 'Banking and Mythland' (BAM) plan. This involved facilitating easier access to ELA funds and allowing the transferring back to Olive Garden the subsidiary debts. The BAM plan was supported by the Mythlandic Banking Forum (MBF), the country's premiere banking association. It was later predicted that Bhangi Bank would not survive even a temporary reduction in ELA, and thus CEO of the bank, Mr. Panicos, was removed.

THE DEMISE OF BHANGI

In June of 2012 the Olive Garden regulators refused to allow Mythlandic banks to transfer the debts of their subsidiaries back into Olive Garden. Unable to recover, the directors of Bhangi Bank asked the Ministry of Finance to take an ownership stake in the bank. New Class A shares were issued and the ministry took an 84 per cent stake in the bank and seven new directors were appointed. The new board of Bhangi Bank ordered an accounting firm, Kerbooodle and Kerboodle (Kerboodle) to investigate the bank's options. Kerboodle discovered an additional €9 billion debt that Bhangi Bank still owed European debtors through the MCB. This amount had been omitted since December of 2011. Kerboodle recommended forcing losses on creditors of senior bonds and possibly accessing ESFS funds. To cover it's over exposure to the Olive Garden crisis and maintain its public finances, the government of Mythland negotiated a €2.5 billion loan from Big Bear. The loan was to be paid back over 4.5 years at an interest rate of 4.5 per cent.

THE DOWNGRADING OF OLIVE GARDEN DEBT AND EFSF ASSISTANCE

On 25 June 2012 the international credit rating agencies downgraded Olive Garden debt to the lowest possible grade. The ECB allowed the MCB a one-time ELA allowance of €13 billion along with a free access to ELA credit for 6 months. At the end of 6 months, Mythland would either be required to reduce its ELA credit or the scheme would be scrapped. In the face of the drastically reduced value of Olive Garden debt, the Mythlandic government applied for €17 billion in ESFS assistance. By 22 November 2012 the Troika team announced that Mythland was in the 'pre-ESM' stage with only formalities remaining.

However, prior to EFSF disbursement, the EU appointed Loss and Asset Liability Union (LALU) to identify the capital requirements of Mythlandic banks.

On 1 January 2013 LALU recommended that Mythland raise 40 per cent of the assistance package internally. LALU additionally recommended that Mythland force losses on depositors as well as carve out for Lucky and Bhangi Bank's Olive Garden Operations through ESM funds. LALU's report was kept confidential till 8 March 2013 in light of the national elections in Mythland. Widespread public order followed the publishing of the report, however by 16 March a new deal was negotiated by Mr. Nacissimo (the new Prime Minister) and the Troika. The deal imposed levies on both uninsured as well as insured depositors. In light of this parliament refused the deal and Mythland was forced to renegotiate more favourable terms with Big Bear while strengthening the clause protecting Big Bear investors.

THE ECB ULTIMATUM AND EMERGENCY LAWS

On 21 March 2013 the ECB announced that Mythland's ELA approval would be terminated on 25 March. It also terminated Bhangi Bank's ELA credit and called in the bank's outstanding loans, to be paid by 26 March. Mrs. Fixitforus announced that the dissolution of Bhangi Bank would result in the bankruptcy of Mythland as the country could not cover all the insured depositors. The repayment of the bank's ELA facility would also result in the bankruptcy of the country. In light of this situation, the government passed the '*Hope in Committees Law'* as well as the '*Enforcement of Restrictive Measures (ERM) Law*'. Under these laws, a High Authority for Resolution (HAR) committee was formed to downsize and recover Mythlandic banks. The ERM law imposed capital controls to stop the capital outflow from Mythlandic banks.

On 25 March 2013 Mr. Narcissimo negotiated a new deal with the Troika. €10 billion was provided by the ECB, while Mythland raised €4 billion through corporate tax increases and privatisation of State assets. Additionally a 100 per cent levy was imposed on uninsured depositors of Bhangi Bank with a corresponding 47.5 per cent levy on depositors of Lucky Bank. Parliament enacted Law No. 100/2013 in furtherance of the Troika deal. This law received numerous legal challenges in administrative court by depositors of the banks, including the Claimants, against the MCB, the Governor of the MCB and the Republic of Mythland. The Supreme Court of Mythland dismissed the claims as merely contractual in nature, to be pursued in the country's civil courts.

FLOPP, FOBB AND THE BIG BEAR FUND

On 5 May 2013 the HAR committee announced the 'Framework for Resolution of Bhangi Bank' (FOBB) and the 'Framework for Lucky Bank Operationalisation Plan' (FLOP). Under FOBB; Bhangi Bank was to be placed in administration, split up into a good bank and a bad bank and the assets from the good bank were to be transferred to Lucky Bank. To repay the European loans, a 100 per cent levy was imposed on shareholders, bondholders and uninsured depositors. Under the FLOP plan; Lucky Bank was to absorb the good Bhangi Bank and recapitalisation was to occur through converting uninsured depositors into equity shareholders. As per Law No. 100/2013, 15 per cent of uninsured depositors could be withdrawn. Following the adoption of the FLOP and FOBB plans, and the creation of Lucky-Bhangi Bank Public Co. Ltd., the EFSF funds were disbursed on 8 May 2013.

On 5 July the National Fraud Bureau of Mythland filed criminal charges against Mr. Panicos and the other members of Olively S.A (Case No. 420 of 2013) for insider dealing, mismanagement, tax evasion and siphoning off monies. Additionally, a parliamentary inquiry into the mismanagement of Bhangi Bank issued warrants and subpoenas for the investors and Mr. Panicos. On 13 July the Prime Minister passed Decree No. 29/2013 that allowed Big Bear investors who had investments in Bhangi and Lucky Bank to convert their shares into Lucky-Bhangi shares or take compensation without any waiver of legal rights.

THE INVESTOR STATE ARBITRATION

Both Mythland and Olive Garden have been full signatories to the ICSID Convention (hereinafter the Convention) since 1982, such that the Jurisdiction of ICSID is exclusive. Additionally the parties have signed and implemented the BIT through Law 2100/92, which came into force on 19 April 2005. The Claimants sent Mythland a communication for amicable settlement of the Dispute on 6 July 2013 and revoked all honours conferred on them by Mythland. Proceedings were initiated on 9 December of 2013.

ISSUES RAISED

I. Whether the tribunal has jurisdiction over the present claim?

II. Whether the Respondent State has failed to accord adequate protection to the investments under the Bilateral Investment Treaty?

III. Whether the Respondent-State has expropriated the Claimant's Investments?

SUMMARY OF ARGUMENTS

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION AND THE CLAIMS ARE INADMISSIBLE

The Claimants have asserted that the Tribunal has jurisdiction, as the proceedings have been consented to by the parties, through Article 11 of the BIT. In response it is submitted that the Claimants have not complied with their obligations under Article 11, as the requested for arbitration one month prior to the mandatory *cooling off* period. The Respondent State further submits that the consent requirement under Article 11 is not met, as the Claimants have not complied with the doctrine of *clean hands*. This is indicative from the existence of pending criminal proceedings against the Claimant for siphoning off monies and their failure to appear before court in relation to the parliamentary inquiry with respect to the demise of Bhangi Bank.

The Claimants have asserted only their shareholdings to qualify as investments, but not deposits. In this regard, the Respondent State submits that the shareholdings and deposits of the Claimants do not qualify as investments under the BIT and Convention – *double barreled* test. The shareholdings of the Claimants do not satisfy the duration requirement, and thus dilute the risk and returns that accrue from such transactions. Additionally, these shareholdings were bought by the Claimant from British financial institutions, and do not comply with the *territoriality* requirement of an investment. Similarly, the deposits of the Claimants are minimal, such that there is no high risk. Additionally, the return accruing from deposits is contingent on the terms of the contract. Respondent further submits that the provisions of the BIT cannot be extended to include deposits as investments. Thus, the Tribunal lacks *ratione materiae* jurisdiction.

The Claimants also assert the Tribunal to have *ratione personae* jurisdiction, as individual investors are nationals of Olive Garden. In addition, Claimants contend that there is no test in the BIT to determine the nationality of a juridical person, and submit that Olively complies with the seat, incorporation and control test. However, the Respondent State submits that Claimants are nationals of the Respondent State, and thereby violate Article 25 of the Convention. It is further submitted that the BIT lays down the seat test to be the standard of ascertaining the nationality of a juridical person. Olively is an investment vehicle of the Claimants merely for the purpose of acquiring shares. Additionally, the acquired

shareholding is in Bhangi Bank that has its primary operations in Mythland. This implies that the effective seat of Olively is in Mythland and not Olive Garden.

The Claimants have asserted MCB to be a subdivision of the State. However, Respondent submits that the actions of MCB are not attributable to the Respondent State. The MCB was set up under its own private charter, such that the Government exercised a mere residual executive function in relation to the appointment of the governor and employees. Nevertheless, these employees were considered civil servant only for the purposes of labour law, and were not required to report to anyone outside the MCB. Thus, there is no government intervention in the functioning of the MCB. Respondents therefore submit that the *ratione personae* jurisdiction of the Tribunal is not complied with.

II. THE RESPONDENT STATE HAS NOT VIOLATED THE STANDARDS OF PROTECTION UNDER THE BIT

The Claimants have asserted Article 2 of the BIT to be an umbrella clause, and have contended their contractual claims to be treaty claims. In response it is submitted that Article 2 is not the umbrella clause. *In any case*, the Respondent State submits that an umbrella clause cannot be used to elevate such contractual claims to treaty claims, as the parties have not explicitly agreed to such terms in the BIT. Additionally, an elevation of contractual to treaty claims arises only when the measures of the state are targeted towards investors, the Claimants have complied with the forum selection clause of the contract, and the Respondent State is privy to the contract in question. In instant case, the measures of the Respondent State do not target investors and have a uniform application, intended at curbing the prevalent economic crisis in the country. Claimants have also failed to comply with the domestic forum clause, by failing to proceed to the civil court. Additionally, the contract in question is between Bhangi Bank and the Claimants, and the Respondent is not privy to this contract.

Claimants have asserted that the Respondent state has not provided Fair and Equitable treatment to the investments in question. In response it is submitted that there existed no legitimate expectations and the actions of the Respondent State were transparent. There were no overt representations were made to the Claimants for legitimate expectations to exist. Additionally, Claimant's expectations should be reasonable and justified. A balance should be struck between a state's regulatory interest and investor's legitimate expectations. In the instant case, risks were undertaken by the Claimants and compensation for the loss accruing

from these risks cannot be a legitimate expectation. The Respondent State was also transparent as they made no efforts to hide their intentions. Additionally it is submitted that these intentions, and subsequent policies were reasonably justified as they had to be adopted to save the Respondent state from bankruptcy. The policies treated all investors and investments equally and no special considerations were provided to any class of investors. The Respondent state provided for due process as Claimant's were able to bring their grievances to the Supreme Court.

The Respondent state did not violate the Non-Impairment standard. Arbitrariness requires for personal bias or preference to replace rule of law and a wilful disregard of law. No arbitrary or discriminatory measures were undertaken as all investors were treated equally.

Claimants have asserted that investors from Big Bear were treated more favourably than the Claimants themselves, thereby violating the MFN clause. In response it is submitted that MFN clause can be attracted only if investors are in similar situations, and a more favourable treatment has not been provided to investors from Big Bear. Also, specific provisions which have been negotiated by host state and third states cannot be invoked under the MFN clause. In the instant case the Claimants and Big Bear investors were not in similar situations as they belonged to different economic/business sectors. Equality of treatment does not require identical treatment to be provided. The compensation provided to the Big Bear investors arise from special provisions which have been negotiated between Big Bear and the Respondent state.

While the Claimants have not alleged a breach of Article 5 of the BIT, the Respondent State submits no such claim can be brought. The capital controls imposed by the *Enforcement of Restrictive Measures* (ERM) *Law* are valid exercises of the State's monetary sovereignty and in any case, justified by the principle of necessity. Article 5 of the BIT requires contracting states to allow for the free transfer of funds. However, a state has a wide margin of appreciation in enacting and enforcing monetary policy, especially where the state is at risk. In the instant case, the economy of Mythland itself was at risk. The ERM law was the only viable option that made a material contribution to the survival of the State.

III. THE ACTIONS OF THE RESPONDENT STATE DO NOT AMOUNT TO AN EXPROPRIATION

Claimants have asserted that the measures by the Respondent amount an illegal expropriation. In response, it is submitted that the actions of the respondent state merely amounted to regulatory expropriation. The actions of the Respondent State were due to the prevailing economic crisis and hence served a public purpose. Additionally, these regulations did not discriminate against an investor or a specific class of investors. The lack of overt commitments made by the host state vitiates any legitimate expectation that the Claimants might have had. Over and above this, the Claimants were not denied access to the courts of the Respondent State and hence a claim of denial of due process cannot be made and rendering the expropriation legal. In light of the regulations being non-discriminatory and enacted for a public purpose they do not attract compensation.

ARGUMENTS ADVANCED

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION AND THE CLAIMS ARE INADMISSIBLE

1. Article 25 of the Convention and Article 11 of the BIT determine the grounds for the jurisdiction of the Tribunal.[1] The Respondent State does not contend the existence of a *prima facie* case of treaty violations. It will be submitted in the merits stage that the claims are merely contractual. However, the Respondent State submits that the jurisdiction of the Tribunal is disputed as; the parties have not consented to the proceedings (A), the Tribunal lacks *ratione materiae* jurisdiction (B), and the Tribunal lacks *ratione personae* jurisdiction (C).

A. THE PARTIES HAVE NOT CONSENTED TO THE PROCEEDINGS

2. The Claimants assert that the parties have consented to the proceedings consequent to Article 11 of the BIT. The Respondent State does not contest Article 11 to be reflective of consent, but submits that the Claimants have failed to observe their obligations as; the period to amicably resolve the dispute was not observed (i), and Claimants' have engaged in corruption and misconduct (ii).

i. *Cooling off* period has not been complied with

3. Claimants have asserted that the consent requirement is met, as the Respondent failed to a*cknowledge* their communication to amicably resolve the dispute. However, the obligation to comply with this period is deemed to be a *jurisdictional* requirement.[2] The period for amicable settlement mandates an *obligation of best efforts*.[3] Article 11(2) of the BIT should be construed as a strict reference to the duration of the *cooling off* period.[4]

[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 25, Mar. 18, 1965, 575 U.N.T.S. 159; Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Olive Gar- Myth., art. 11, Apr. 19, 2005.
[2] Murphy Exploration and Production Company International v. Republic of Ecuador, ICSID Case No. ARB/08/04, Award on Jurisdiction (2010).
[3] Ambiente Ufficio S.p.A and Others v. The Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction (2013).
[4] Ambiente Ufficio v. Argentina, ICSID Case No. ARB/08/9, Dissenting Opinion of Santiago Torres Bernardez, (2013).

4. In the instant case, the Claimants have requested for arbitration one month prior to the expiration of the *cooling off* period.[5] The negotiation process cannot be rendered futile, as there exists sufficient time to respond. Thus, contrary to the Claimants' submission, the consent requirement has not been complied with.

ii. The Claimants' have engaged in corruption and misconduct

5. Criminal prosecution in a Respondent State is deemed to be *irrefutable proof* of allegations of corruption.[6] Additionally, the Tribunal lacks jurisdiction, consequent to the doctrine of *clean hands*.[7] The Claimants have failed to acknowledge the domestic criminal proceedings that the Respondent State submits to have violated the consent requirement.[8]
6. In the instant case, the Claimants have been prosecuted for siphoning off monies, insider trading, among other offenses.[9] A parliamentary inquiry was opened with respect to the demise of Bhangi Bank, for which subpoenas were issued against the Claimants'. Consequent to their failure to appear, warrants were issued.[10] Thus, the Claimants' cause of action is in contravention to the *clean hands* doctrine.

B. THE TRIBUNAL LACKS *RATIONE MATERIAE* JURISDICTION

7. The Respondent State does not contend the existence of a legal dispute. However, contrary to the Claimants' assertions, Respondent submits that the transaction at hand, does not qualify as an investment as; an investment is not limited to a definition in the BIT (i), and the transaction does not qualify as an investment under the Convention and the BIT (ii).

[5] Moot Court Problem ¶ 27.
[6] African Holding Company of America, Inc. and Societe Africane de Construction au Congo S.A.R.L. v. La Republique democratique du Congo, ICSID Case No. ARB/05/21, Decision on Jurisdiciton and Admissibility, (2008).
[7] Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL, Final Award, 15 December 2014.
[8] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Olive Gar- Myth., art. 11, Apr. 19, 2005.
[9] Moot Court Problem ¶ 26.
[10] Moot Court Problem ¶ 27.

i. An investment is not limited to the definition of the BIT

8. The Claimants have asserted that the existence of an investment is only dependent on the definition in the BIT, as "investment" is not defined in the Convention. However, Claimants have acknowledged the *Salini criteria,*[11] which characterises investments beyond a definition provided for in a BIT. Thus, the Claimants have accepted that a transaction must satisfy the *double barrelled* test.[12] In the instant case, contrary to the Claimants' submission, the Respondent State submits that there exists no investment under the *double barrel test*.

9. A transaction cannot qualify as an investment under the Convention and BIT, merely because of its financial and economic characteristics.[13] The Tribunal has continuously identified the Convention to provide for an *objective definition* of "investment", independent of its BIT definition.[14] This *objective definition* comprises of; duration, risk, substantial contribution, economic development, and returns.[15] Thus, even if a transaction qualifies as an investment under the BIT, it is still required to be within the limits of the Convention to constitute an investment.[16]

ii. The Transaction does not qualify as an investment under the Convention and BIT

10. For a transaction to qualify as an investment under the Convention and BIT it must; exist for a sufficient duration, entail an assumption of risk, constitute a substantial contribution and contribute to economic development. The Tribunal has held bank guarantees,[17] and shares not to be investments,[18] as the transaction did not comply with the *objective*

[11] Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Jurisdiction (1997); Salini Consturri S.p.A. and Italstrade S.p.A v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 6 ICSID Rep. 400 (2004).
[12] Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania, ICSID Case No. ARB/10/13, Award (2015); 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 (2012).
[13] Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction (2010).
[14] Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction (2004).
[15] Salini Consturri S.p.A. and Italstrade S.p.A v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 6 ICSID Rep. 400 (2004).
[16] 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 (2012).
[17] Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction (2004).
[18] KT Asia Investment Group B.V. v Republic of Kazakhstan, ICSID Case No. ARB/08/9, Award, (2013).

definition. In the instant case, Claimants have asserted only shares to be investments, and not deposits. However, the Respondent State submits that both shareholdings and deposits do not constitute a substantial contribution.

11. Claimants have further asserted *economic development* to be an *overlooked* characteristic of an investment. Contrary to this position, Respondent submits that economic development is *implicitly covered* by the other characteristics of the *Salini criteria.*[19] Additionally, the object and purpose of the Convention mandates economic development.[20] The Respondent State submits that shares do not contribute to any economic development in the host state.
12. A transfer of capital into the host state is essential to the existence of an investment.[21] In the context of *intangible assets*, an assessment of economic development is a viable option to determine such territoriality.[22]
13. The Respondent submits that an investment generally requires a duration of two to five years.[23] A lack of duration dilutes the regularity of return and risk of the transaction.[24] In the instant case, the Claimants' can dispose of their shares at any point of time. Similarly, deposits of the Claimants can be withdrawn at any point in time. The Claimants further purchased the shares from British financial institutions, thus failing to comply with the territoriality requirement.
14. The deposits of the Claimants in Bhangi Bank are also minimal as investors from Big Bear hold more than half of the deposits in the Mythlandic banking sector.[25] Additionally, deposits don't accrue high risk, and the returns are also contingent. Respondents further

[19] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29), Decision on Jurisdiction (2005); Phoenix Action Ltd v. Czech Republic, ICSID Case No.ARB/06/5, Award (2009); Patrick Mitchell v. The Democratic Republic of Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (2006).
[20] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, prmbl., Mar. 18, 1965, 575 U.N.T.S. 159.
[21] Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/1, Excerpts of Award (2014); Abaclat and Ors v. Republic of Argentina, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, IIC 504 (2011).
[22] Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/1, Excerpts of Award (2014).
[23] Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction (2006); Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6, Decision on Jurisdiction (2003).
[24] KT Asia Investment Group B.V. v Republic of Kazakhstan, ICSID Case No. ARB/08/9, Award, (2013).
[25] Moot Court Problem ¶ 1.

submit that *claims to money* cannot be construed to include such financial instruments.[26] Thus, the dispute does not directly arise from the investment.

C. THE TRIBUNAL LACKS *RATIONE PERSONAE* JURISDICTION

15. *Ratione personae* jurisdiction is established, if the dispute is between a contracting state and a national or juridical person of a contracting state other than the host state.[27] Respondent submits that the Tribunal lacks *ratione personae* jurisdiction as; the depositors and shareholders are nationals of the host state (i), *Olively S.A.*is not *seated* in Olive Garden (ii), and MCB is not a subdivision of the host state (iii).

i. Shareholders and investors are nationals of the host state

16. The Claimants have asserted the individual shareholders and depositors to be nationals of Olive Garden, on the grounds of holding an Olive Garden Passport. However, Claimants have failed address the implications of the honorary citizenship granted to them by the Government of Mythland.[28]
17. Article 25(2)(a) of the Conventions stipulates that a Claimant must not be a national of the host state, at the time of consent and request for proceedings.[29] In determining Claimants' nationality, a tribunal's decision is not precluded by the application of domestic law or certificates of nationality.[30] The principles of international law stipulate that the domestic nationality law can be disregarded in the absence of a *genuine link* between the state and the party.[31] The Tribunal has held that the existence of such dual nationality, absolves the Claimants from approaching the Tribunal.[32]
18. In the instant case, Respondent submits that the Claimants were dual nationals at the time they consented to arbitrate. In addition, the Claimants were majority shareholders in a bank incorporated in Mythland, such that they were in charge of the administration and

[26] Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction (2004).
[27] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 25, Mar. 18, 1965, 575 U.N.T.S. 159.
[28] Moot Court Problem ¶ 6.
[29] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 25 (2) (a), Mar. 18, 1965, 575 U.N.T.S. 159.
[30] Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, Award (2004).
[31] Nottebohm Case (Liechenstein v. Guatemala) [1955] I.C.J. 1.
[32] Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction (2003).

functioning of its business. The Respondent State submits that there was no *effective link* between the Claimants and Olive Garden. Thus, there exists no *ratione personae* jurisdiction of the Tribunal.

ii. Olively S.A. is not *seated* in Olive Garden

19. The Claimants assert that the BIT does not provide for a specific test to establish a juridical persons' nationality. While the Respondent State does not contend that Olively was incorporated in Olive Garden, it is submitted that Article 2 of the BIT indisputably lays down the *seat* test to be standard of ascertaining the nationality. The *seat* test requires the centre of administration of a juridical person to be in either contracting state.[33] It is submitted that Olively does not comply with this standard.
20. In the instant case, Olively S.A. is an investment vehicle set up by the Claimants, merely to acquire shares in Bhangi Bank.[34] Consequently, its place of incorporation is not indicative of its *effective seat*. Thus, the primary centre for administration is in fact the Respondent State. *In any case*, even an application of the control test,[35] would result in the attribution of Mythlandic nationality to Olively, given the honorary citizenship conferred on the Claimants and the lack of an effective link between the Claimants and Olive Garden.

iii. The MCB is not a subdivisions of the Respondent State

21. The Claimants have asserted the MCB to be an instrumentality of the Respondent State consequent to its specific purpose and legal personality. Contrary to this assertion, Respondent State submits that the acts of MCB are not attributable to the State of Mythland. The determination of whether a constituent subdivision constitutes an organ of the State is dependent on the domestic law of the State.[36] The existence of a constituent subdivision is contingent on the nature of its functions, as opposed to its legal

[33] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Olive Gar- Myth., art. 2, Apr. 19, 2005.
[34] Moot Court Problem ¶ 5.
[35] Amerasinghe, C. F., *The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation*, 9 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 793 (1976).
[36] Italian Republic v. Republic of Cuba, Ad-Hoc State-State Arbitration, Final Award (2008), http://www.italaw.com/sites/default/files/case-documents/ita0435_0.pdf.

personality.[37] Thus, a regulatory body that is an autonomous private employer, whose rules and regulations do not have the force of law, cannot be construed as an agency of the State.[38]

22. In the instant case, the MCB is an independent regulator that is set up under its own charter.[39] The ministry of finance merely exercises a residual *e*xecutive function, in relation to the appointment of the governor and its employees. These employees need not report to anyone outside the MCB.[40] Therefore it is submitted that the actions of the MCB are not attributable to the State.

II. THE RESPONDENT STATE HAS NOT VIOLATED THE STANDARDS OF PROTECTION UNDER THE BIT

23. Claimants have asserted that the Respondent State has not provided protection under the BIT. However, it is submitted that there cannot be a breach of obligations under the BIT, as an umbrella clause cannot elevate contractual claims to treaty claims (A). Assuming but not conceding to the claims being treaty claims, the Respondent State further submits that; fair and equitable treatment has been provided (B), the non-impairment standard has not been breached (C), third states have not been treated more favourably (D), and the measures are justified, due to economic necessity (E).

A. AN UMBRELLA CLAUSE CANNOT ELEVATE CONTRACTUAL CLAIMS TO TREATY CLAIMS

24. The Claimants have asserted Article 2 to be the umbrella clause, and consequently contend contractual claims to be treaty claims. Contrary to this, the Respondent State submits that Article 2 of the BIT is not the umbrella clause, and *in any case* an umbrella clause cannot be invoked to elevate such contract to treaty claims.
25. Contractual claims are elevated to treaty claims only when there exists an explicit intention between parties.[41] Tribunals recognise contractual breaches only when; the

[37] Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (2000).
[38] Zee Telefilms and Ors. v. Union of India and Ors., (2005) 4 SCC 649; A.C. Muthiah v. BCCI & Anr., (2011) 6 SCC 617.
[39] Moot Court Problem ¶ 5.
[40] Moot Court Problem ¶ 5.
[41] Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (2003).

investor complies with forum selection clauses,[42] the host state is party to the investment contract,[43] the state has entered and/or breached the contract through an action of *ius imperii*,[44] and the action of a state is *targeted* at the investors.[45] The actions of legislative assemblies adopting laws, often in a short time without debate, are justified during times of emergency and economic crisis.[46]

26. In the instant case, the Claimants failed to approach a civil court and initiated proceedings in administrative tribunals against the host state. This implies that there existed a domestic forum clause in the contract, which has not been complied with.
27. Additionally, the Respondent State was not a party to the contract in question and the measures of the government were uniform, and taken to control the deteriorating economic conditions within the host state. Thus, the recognition of such claims as treaty claims is in direct contravention of the BIT and Convention.

B. THE RESPONDENT STATE HAS PROVIDED FAIR AND EQUITABLE TREATMENT

28. Article 2(2) of the BIT imposes an obligation on the contracting states to act in accordance with Fair and Equitable treatment (FET).[47] The Respondent state submits that there has been no breach FET as; the legitimate expectations of the Claimants have not been frustrated (i), the good faith principle has been complied with (ii), and, due process has been provided (iii).

[42] Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction (2012); Bosh International Inc. and B&P Ltd Foreign Investments Enterprise v. Ukraine, ICSID Case No. ARB/08/11, Award (2012).
[43] Burlington Resources Inc. v. Republic of Ecuador, ICISD Case No. ARB/08/5, Decision on Liability (2012).
[44] Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, April 28 2011.
[45] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006.
[46] Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, April 28 2011.
[47] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Olive Gar- Myth., art. 2(2), Apr. 19, 2005.

i. Legitimate expectations of the claimants have not been frustrated

29. Legitimate expectations arise when states, through representations, create a reasonable and justifiable expectation towards investors.[48] Laws in a contracting state contribute towards the legitimate expectations towards investors.[49] These expectations must be reasonable and legitimate in light of the circumstances.[50] The Respondent State submits that legitimate expectations have not been frustrated as; no overt representations were made by the Respondent State (a), the Respondent State's actions were transparent (b), and, contractual breaches do not lead to a violation of the FET standard (c).

a. No overt representation were made by the Respondent State

30. A representation can be either implicit or explicit in nature.[51] Investors should rely on such implicit or explicit representations by a state at the time of making an investment.[52] A balance needs to be adopted between an investors' legitimate expectations and a states regulatory interests.[53] The BIT has to be interpreted, in accordance with the VCLT.[54] Thus, an investor's expectations should be reasonable and justified, given a state's right to exercise its legislative powers in response to different circumstances.[55]

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[48]International Thunderbird Gaming Corporation v. The United Mexican States, Award, NAFTA, UNCITRAL, 26 January, 2006; National Grid plc v. The Argentine Republic, UNCITRAL, Award, November 3 2008.

[49] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (2000); Ethyl Corporation v. The Government of Canada, NAFTA, UNCITRAL, Award on Jurisdiction, 24 June 1998; International Thunderbird Gaming Corporation v. The United Mexican States, Award, NAFTA, UNCITRAL, 26 January, 2006

[50] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006.

[51] Christoph H. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 THE JOURNAL OF WORLD INVESTMENT & TRADE (2005); Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006; Toto Construzioni Generali SpA v. Republic of Lebanon, ICSID Case No. ARB/07/12, Award (2012); Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Award (2013).

[52] Tecnicas Medioambientales Tecmed SA v. The United Mexican States, ICSID Case No ARB(AF)/00/02, Award (2003).

[53] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006.

[54] Compana de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic, ICSID Case No. ARB/97/3, Award, IIC 307 (2007); LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (2006).

[55] Parekrings- Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (2007); El Paso Energy International Corporation v. The Argentine Republic, ICSID Case No. ARB/03/15, Award (2011); S.D. Myers, Inc v. The Government of Canada, NAFTA, UNICITRAL Arbitration, First Partial Award (2000); LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (2006); Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, (2007).

31. Economic stability cannot be a reasonable expectation and a state is not expected to freeze its legal system.[56] If state is undergoing a transition, the state cannot be at fault for modifying laws even if they have adverse effects on investments.[57] Losses that accrue; due to business risks undertaken by experienced business men, or in a less stable economic or socio-political environment of a developing state is not protected under the BIT.[58] Thus, investor conduct is pertinent to assess breach of the FET Treatment.[59]
32. The Claimants assert that their legitimate expectations were breached due to a lack of legal stability in the Respondent State. However, the BIT doesn't require absolute legal stability from the contracting State. The Claimants were businessmen who had made substantial investments in Bhangi Bank.[60] As CEO of Bhangi Bank, Mr. Panicos undertook a significant business risk by choosing not to sell Olive Garden government bonds throughout 2010-11.[61] The loss suffered by Bhangi Bank, due to the deterioration of these government bonds[62] directly contributed to its demise. Thus, the Respondent State submits that the BIT is not an assurance against business risks.

b. <u>The Respondent State's actions were transparent</u>

33. A Lack of Transparency is in violation of the FET.[63] Transparency requires policies to be made available to the public,[64] allowing for informed decisions.[65] This principle is not breached when investors are in a position to know the regulations beforehand.[66]

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[56] El Paso Energy International Corporation v. The Argentine Republic, ICSID Case No. ARB/03/15, Award (2011); Impregilo SpA v. Pakistan, ICSID Case No ARB/03/3, Award (2005); Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL, Final Award, April 23 2012.
[57] Parekrings- Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (2007).
[58] MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (2004); Parekrings- Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (2007); AUGUST REINISCH, STANDARDS OF PROTECTION BOOK (2008).
[59] Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (2010); Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability (2010).

[61] Moot Problem ¶ 7
[62] Moot Problem ¶ 8
[63] Tecnicas Medioambientales Tecmed SA v. The United Mexican States, ICSID Case No ARB(AF)/00/02, Award (2003).
[64] MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (2004).
[65] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (2000).
[66] Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Award (2006).

34. Claimants have not asserted a lack of transparency by the Respondent State. However, it is submitted that such a contention cannot be raised, as all the policies were made available to investors. Minutes of MCB meetings were kept[67], and all policies were actively discussed between the Governor and private bankers.[68] The Claimants were also aware that the Troika agreement required major restructuring of Bhangi Bank and Lucky Bank[69], and even raised legal challenges against the measures under the agreement.

c. *Contractual Breaches are not governed under FET*

35. Legitimate expectations do not exists with respect to contractual claims.[70] The expectation that a party fulfils its contractual obligations is not an obligation under the BIT.[71] Such an interpretation of the FET principle would result in it being analogous to an Umbrella clause.[72] Legitimate expectations do not exist, even when alleged contractual breaches occur due to sovereign acts.[73]

36. In the instant case, the Claimants have asserted the Umbrella clause to elevate a contractual breach to a violation of FET. Claimants have further asserted the contractual claims to be treaty claims, and contend that there exists an obligation on the State to comply with *pacta sunt servanda.* However, as has been submitted earlier, Article 2 of the BIT is not the umbrella clause and *in any case* the Umbrella clause cannot be invoked to elevate contractual claims to treaty claims.

ii. The good faith principles have been complied with

37. The principle of good faith is an essential element of FET,[74] Tribunals have interpreted Good faith to include transparency, consistency and reasonableness.[75] Good faith requires the conduct of a state to be bona fide, and its public policy to be reasonably justified.[76]

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[67] Moot Problem ¶ 10.
[68] Moot Problem ¶ 9,10,11.
[69] Moot Problem ¶ 19.
[70] C. Schreuer, '*Fair and Equitable Treatment: Interactions with other Standards'*, 4 TRANSNATIONAL DISPUTE MANAGEMENT, 18 (2007).
[71] Parekrings- Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (2007).
[72] Gustav F. W. Hamester GmBH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (2010).
[73] Gustav F. W. Hamester GmBH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (2010).
[74] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, 17 ICSID Rev. (2001); Azurix Corporation v. Argentine Republic, ICSID Case No. ARB/01/12, Award (2006).

38. The Claimants assert that the Respondent State did not act in good faith as their actions were inconsistent in nature. In the instant case, all policies of the Respondent State were directed at curbing the economic crisis. These policies treated all investors and investments equally as no special consideration was given to nationals or any other foreign investor.[77]

iii. Due Process have been provided

39. Due process is an essential element of FET.[78] Due process is breached when state conduct grossly offends judicial propriety and results in a failure of a natural justice.[79] This includes a right to be heard,[80] a right to be notified of regulations and policies,[81] and no intervention by a state in court proceedings.[82]

40. Claimants have not contended a violation of due process as part of FET. *In any case,* the Respondent State submits that there was no intervention in the court proceedings initiated by the Claimants. In fact, the Claimants were heard by the Apex court of Mythland. Additionally, they were notified of the policy changes, consequent to several public statements detailing terms of various agreements.[83]

C. THE NON-IMPAIRMENT STANDARD HAS NOT BEEN BREACHED

41. Article 2(3) of the BIT provides for a non-impairment standard. Non-impairment protects investments against arbitrary or discriminatory measures.[84] Arbitrary acts include;

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[75] Tecnicas Medioambientales Tecmed SA v. The United Mexican States, ICSID Case No ARB(AF)/00/02, Award (2003).
[76] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006.
[77] Moot Problem ¶ 22,25.
[78] Tecnicas Medioambientales Tecmed SA v. The United Mexican States, ICSID Case No ARB(AF)/00/02, Award (2003); Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/ 98/3, Award (2003).
[79] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award (2004).
[80] International Thunderbird Gaming Corporation v. The United Mexican States, Award, NAFTA, UNCITRAL, 26 January, 2006.
[81] Tecnicas Medioambientales Tecmed SA v. The United Mexican States, ICSID Case No ARB(AF)/00/02, Award (2003); Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (2000).
[82] Petrobart Limited v. The Kyrgz Republic, SCC Case No. 126, 2003, Arbitral Award, March 29 2005.
[83] Moot Problem ¶ 24, 25.
[84] Ronald S. Lauder v. The Czech Republic UNCITRAL, Final Award of September 3, 2001; Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006; EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award (2009).

replacing the rule of law with prejudice, preference or bias,[85] measures which damage investments without legitimate purpose,[86] wilful disregard for the law,[87] and, a divergence between the reason a measure was enacted, and the reason provided by the State.[88]

42. However, the non-impairment standard only provides protection against arbitrary state actions.[89] Changes due to adverse political and economic conditions reflects clear legitimate policy.[90] The mere fear of a state protecting its own nationals over foreign investors does not reflect arbitrariness.[91] To show discriminatory measures, one has to show unequal treatment without a reasonable justification.[92] Discrimination requires, either intent or a discriminatory effect.[93]
43. In the instant case, Claimants assert the Respondent States' actions to be arbitrary, due to the BAM plan and a denial of EFSF assistance. However, it is submitted that the actions of the Respondent State were directed at curbing the economic crisis, and its subsequent effect on the State's sovereignty.

D. THE RESPONDENT STATE DID NOT TREAT THIRD STATES MORE FAVOURABLY

44. Article 3 of the BIT does not allow investors from a third state to be treated more favourably.[94] Claimants have asserted that the Most favoured Nation (MFN) clause applies to all treatments accorded to investors. In response it is submitted that, consequent to the ejusdem generis principle, the MFN Clause applies solely to the standards of

[85] Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (2010); Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v. Republic of Estonia, ICSID Case No. ARB/99/2, Award (2001).
[86] EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award (2009).
[87] Ronald S. Lauder v. The Czech Republic UNCITRAL, Final Award of September 3, 2001; Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction (2004); Azurix Corporation v. Argentine Republic, ICSID Case No. ARB/01/12, Award (2006).
[88] EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award (2009).
[89] Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, April 28 2011.
[90] Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v. Republic of Estonia, ICSID Case No. ARB/99/2, Award (2001).
[91] Ronald S. Lauder v. The Czech Republic UNCITRAL, Final Award of September 3, 2001.
[92] Reinhard Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/09/20, Award (2012); Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award (2012).
[93] LG&E Energy Corp., LG&E Capital Corp. and LG&E Inter-national Inc. v. The Argentine Republic, ICSID Case No. ARB/02/1, Decision Of the Arbitral Tribunal on Objections to Jurisdiction (2004).
[94] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Olive Gar- Myth., art. 3, Apr. 19, 2005.

protection provided for in the BIT.[95] Thus, rights not enumerated in the BIT are not protected under the MFN clause.[96]

45. The MFN Clause in the present BIT can only be invoked for matters under Article 4.[97] Thus, the Respondent State submits that the MFN clause is not breached as; the Claimants and Big Bear investors were not in similar situations (i), and Big Bear investors have not been granted more favourable treatment (ii).

i. <u>The Claimants and Big Bear Investors are not in similar situation</u>

46. Equality of treatment exists between equal parties.[98] Equality amongst parties is determined by assessing contractual terms and surrounding circumstances.[99] For similar circumstances to exist; both parties must be foreign investors in the same economic or business sector,[100] and third state investors should be accorded a more favourable treatment.[101] Differentiating between investors on the grounds of financial distress or the different capacities of investors,[102] is not a violation of MFN. Negotiations between contracting states and third party states with respect to specific provisions of a contract do not violate the MFN clause.[103]

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[95] Draft Articles on Most-Favoured Nation Clauses with Commentaries, [1978] 2 Y.B. Int'l L. Comm'n, U.N. Doc A/33 10/ 1978; Ambatielos Case (Greece v. United Kingdom) [1952] I.C.J. 1.
[96] Impregilo SpA v. Argentine Republic, ICSID Case No ARB/07/17, Award (2011).
[97] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Olive Gar- Myth., art. 4(4), Apr. 19, 2005.
[98] Metalpar S.A. and Buen Aire S.A. v. Argentina, ICSID Case No. ARB/03/5, Award (2008); Bayinder Insaat TurizmTicaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award (2009).
[99] Bayinder Insaat TurizmTicaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award (2009); Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (2012).
[100] Parekrings- Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (2007); Bayinder Insaat TurizmTicaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award (2009); S.D. Myers, Inc v. The Government of Canada, NAFTA, UNICITRAL Arbitration, First Partial Award (2000); Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (2002); Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/04/5, Award (2007).
[101] Bayinder Insaat TurizmTicaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award (2009).
[102] Parekrings- Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (2007); GAMI Investment Inc. v. Mexico, UNCITRAL Ad Hoc Arbitration, Award, 15 November 2004.
[103] Tecnicas Medioambientales Tecmed SA v. The United Mexican States, ICSID Case No ARB(AF)/00/02, Award (2003); AUGUST REINISCH, STANDARDS OF PROTECTION (2008); ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTISE OF INVESTMENTS TREATIES: STANDARDS OF INVESTMENTS TREATY (2010).

47. The Claimants have asserted that the Respondent State provided more favourable treatment to Big Bear investors. However, it is submitted that, while both sets of investors are from foreign states, they do not belong to the same business or economic sector. While Big Bear investors merely held deposits in Bhangi Bank, the Claimants were shareholders as well.[104]

48. Additionally, it is submitted that the loan agreement between the Respondent State and Big Bear was the result of a separate negotiating proceeding with respect to a pre-existing loan from Big Bear. The treatment of Big Bear investors was only possible due to the government of Big Bear allowing for the returns on the pre-existing loan to be used to compensate investors through the Big Bear Fund.[105] Thus, the compensation provided to Big Bear investors was from a fund already accruing to the government of Big Bear. No such fund or agreement existed with the government of Olive Garden.

ii. Big Bear investors have not been granted more favourable treatment

49. A different treatment being accorded to investments does not imply less favourable treatment.[106] Treatment is only less favourable if it is discriminatory and unjustified.[107] Governmental policy in the pursuance of public interest are not discriminatory.[108] Even if such policy is not the most effective or efficient, they do not amount to a violation of MFN.[109] As has been submitted earlier, the treatment provided to Big Bear investors stemmed from the pre-existing loan between the two countries.

E. EVEN IF THE CLAIMANTS ALLEGE A VIOLATION OF ARTICLE 5 OF THE BIT, THE MEASURES ARE JUSTIFIED DUE TO ECONOMIC NECESSITY

50. Article 5 of the BIT guarantees the free transfer of payments in connection with an investment.[110] The ERM Law imposed capital controls on the entire State of Mythland.[111] The Respondent State submits that Claimants cannot contend the ERM law to be in

[104] Moot Problem ¶ 7.
[105] Moot Problem ¶ 26.
[106] Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award (2012).
[107] Parekrings- Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (2007).
[108] Pope & Talbot Inc. v. The Government of Canada, UNCITRAL, Awards on Merits, April 10 2011; Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award (2009); GAMI Investment Inc. v. Mexico, UNCITRAL Ad Hoc Arbitration, Award, 15 November 2004.
[109] GAMI Investment Inc. v. Mexico, UNCITRAL Ad Hoc Arbitration, Award,15 November 2004.
[110] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Olive Gar-Myth., art. 5, Apr. 19, 2005.
[111] Moot Problem ¶ 22.

violation of Article 5 of the BIT as; the measures were an exercise of monetary sovereignty (i), and, the measures were necessary, due to Mythland's economic crisis (ii).

i. The measures were an exercise of monetary policy

51. States are allowed to exercise their sovereignty against internal and external threats in the interests of public order.[112] This concept extends to the economic security of a state.[113] Thus, states have a wide margin of appreciation in choosing economic and monetary policies in times of crisis.[114] Tribunals have explicitly refrained from subjecting past economic policies to any form of judicial, administrative or political review.[115] Additionally, the Respondent State submits that the act was non-discriminatory and did not target the investments of the Claimants.[116]

52. The banking and financial sector of Mythland was closely linked to the growth of the state and welfare of its population.[117] Despite the various conditions imposed on the Mythlandic banking sector by the Troika, the MoU on 24 April 2013 made no mention of repealing the ERM law. Additionally, the Respondent State submits that the Government was in the best position to understand the public order situation in the State, and the ERM law was an exercise of monetary sovereignty to maintain public order.[118]

ii. The measures were necessary due to Mythland's economic crisis

53. International law allows for the derogation from treaty obligations in extenuating circumstances.[119] The determination of a valid measure involves a balancing of factors including the importance of the common interests, the impact of governmental measures,

[112] Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award (2008).
[113] Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award (2008).
[114] Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award (2008).
[115] Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award (2008); LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, Decision on Liability, 3 October 2006, ICSID Case No. ARB/02/1.
[116] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006.
[117] Moot Problem ¶ 1.
[118] Moot Problem ¶ 20.
[119] International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001), art.25; General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX, 61 Stat. A-11, 55 U.N.T.S. 194.

and a lack of alternatives.[120] The Respondent State submits that the prevailing economic crisis in Mythland constituted a situation of necessity as; the economy of Mythland was at risk and required protection (a), the ERM law made a material contribution to the protection sought (b), and, the ERM law was the only measure available (c).

a. The economy of Mythland was at risk and required protection

54. A necessary measure need not be indispensable to the survival of a state, but must protect a vital common interest.[121] The more vital a common interest, the more necessary a measure is.[122] An interest can be judged on qualitative as well as quantitative standards.[123] Bank runs and capital flight must be slowed as there is a risk of bankruptcy to the state.[124]
55. In the instant case, there was a public panic followed by a three day long bank run. Protecting the financial sector is vital to the Respondent State's interest as 70% of the population was employed in the sector. In March 2013 Mrs. Fixitforus' proclaimed that both allowing Bhangi Bank to dissolve, or paying back the ELA debts would have bankrupted the entire country. Thus, the Respondent State submits that the entire economy of Mythland was at risk and the ERM law protected the state from bankruptcy.

b. The ERM law made a material contribution to the protection sought

56. A measure is necessary when it materially contributes to the protection of a vital interest.[125] The greater the contribution to such protection, the greater legitimacy the measure has.[126] It difficult to isolate the impact of a measure when it is part of a

[120]Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161, WT/DS161/AB/R (Dec. 11, 2001); Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 166, WT/DS135/AB/R (Mar. 12, 2001); Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 146,WT/DS332/AB/R (Dec. 3, 2007).
[121] Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161, WT/DS161/AB/R (Dec. 11, 2001).
[122]Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161, WT/DS161/AB/R (Dec. 11, 2001).
[123] Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 166, WT/DS135/AB/R (March 12, 2001).
[124] Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award (2008).
[125] Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award (2008).
[126] Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161, WT/DS161/AB/R (Dec. 11, 2001).

comprehensive policy.[127] Some contributions may only be evaluated with the benefit of time.[128] Additionally there is no need for a contribution to be justified quantitatively.[129]

57. The three day long bank run resulted in 30% of Bhangi Bank's deposits being withdrawn. This reduced foreign investor's confidence in Mythlandic banks, accelerating the capital flight. In response to these events, the ERM law was passed. Respondents submit that the immediate effectiveness of the ERM law is evidenced by the opening of the banks on 28 March 2013, only 6 days after the ERM law was enacted.

c. The ERM law was the only measure available

58. A measure cannot be necessary when there exists a lesser restrictive measure.[130] Such a measure must make an equivalent contribution to the level of protection sought by the State.[131] It must not be merely theoretical, involve probative costs or substantial technical difficulties.[132] The imposition of a bank freeze is a typical measure in order to reduce capital flight.[133] Thus, the Respondent State submits that the only way to limit the capital flight in the short term was to impose capital controls.

III. THE ACTIONS OF THE RESPONDENT STATE DO NOT AMOUNT TO AN EXPROPRIATION

59. The act of Expropriation occurs when the State acquires private property. [134] Expropriation can occur either through the direct seizure of property or through the

[127] Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 146, WT/DS332/AB/R (Dec. 3, 2007).
[128] Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 146, WT/DS332/AB/R (Dec. 3, 2007).
[129] Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 146, WT/DS332/AB/R (Dec. 3, 2007).
[130] Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award (2008); Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161, WT/DS161/AB/R (Dec. 11, 2001); Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, WT/DS10/R (Feb. 20, 1990); Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 308, WT/DS285/AB/R (April 7, 2005).
[131] Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award (2008).
[132] Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 308, WT/DS285/AB/R, (April 7, 2005).
[133] Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award (2008).
[134] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (2002).

imposition of regulatory measures.[135] Depreciation in the value of the foreign investments can also amounts to expropriation.[136] The Respondent State submits that their actions have not resulted in a violation of Article 4(2) of the BIT, as the measures taken do not amount to an indirect expropriation (A), the expropriation not illegal (B).

A. THE ACTIONS OF THE RESPONDENT STATE DO NOT AMOUNT TO INDIRECT EXPROPRIATION

60. The Claimants assert that the measures of the Respondent State have caused a substantial deprivation and were not proportional by virtue of being permanent. However, the Respondent State submits; that their actions are proportional (i), the Claimants cannot raise a contention of legitimate expectations (ii) and, *in any case*, a substantial deprivation by virtue of regulatory expropriation is not illegal (iii).

i. The actions of the Respondent State are proportional

61. To determine the proportionality of a measure, the interest of the public must be weighed against individual rights.[137] A measure must not target an individual or class of individuals, but must be uniform in application.[138]
62. The Claimants have asserted the Respondent State's actions to be disproportionate, consequent to their permanent nature. However, in the instant case, Bhangi Bank submitted a plan for recapitalization of the Bank on 25 November 2011. Upon their failure to find private investors, the board of directors themselves requested the State to take an ownership stake in the Bank.[139]
63. On March 19, 2013, the Respondent State's Parliament rejected the draft legislation intending to implement burdens on depositors due to public protests.[140] However, the imposition of losses on depositors was a precondition to the EFSF assistance by the

[135] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (2000).
[136] Ethyl Corporation v. The Government of Canada, NAFTA, UNCITRAL, Award on Jurisdiction, 24 June 1998.
[137] Tecnicas Medioambientales Tecmed SA v. The United Mexican States, ICSID Case No ARB(AF)/00/02, Award (2003); LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, Decision on Liability, 3 October 2006, ICSID Case No. ARB/02/1; H. Mountfield, *Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights*, 11 N.Y.U. ENVTL L. J. 136 (2003).
[138] Find citation.
[139] Moot Court Problem ¶ 15.
[140] Moot Court Problem ¶ 20.

Troika, and consequently the economic survival of Mythland itself.[141] It is submitted that the Respondent State's actions were intended at curbing the economic crisis that affected the public uniformly. Thus, the Claimant's assertion of placing their individual rights over and above public interest should not be accepted.

ii. The Claimants cannot raise a contention of legitimate expectations

64. An investor cannot rationally expect the investment climate of the host state to remain favorable indefinitely.[142] The host state is empowered to enact legislations to moderate investment climate, in pursuance of its economic policy.[143] Thus, every foreign investor has to assume the risk of being governed by host state laws.[144]

65. If an investor knowingly makes an investment in an unstable economy then the defense of legitimate expectation cannot be made.[145] In such a situation, the divergence from legitimate expectations is not a valid contention.[146] A legitimate expectation is furthered by overt representations by the government towards investors.[147] Moreover, disappointing an investor's expectation is not a sufficient basis to establish expropriation[148] as an investor is deemed to be aware of possible financial crises before making an investment.[149] As has been submitted earlier, due to the unstable economy, the Claimants cannot have had legitimate expectations.

[141] Moot Court Problem ¶ 16.
[142] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006; Fireman's Fund Insurance Co. v. The United Mexican States, ICSID Case No ARB (AF)/02/1, Award (2006).
[143] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006; MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Final Award (2004).
[144] Oscar Chinn Case (Britian v. Belgium), [1937] P.C.I.J. (ser. A/B) No. 70.
[145] Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award (2003).
[146] Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, Award (2004).
[147] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (2002); Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (2000).
[148] Azurix Corporation v. Argentine Republic, ICSID Case No. ARB/01/12, Award (2006).
[149] Robert Azinian, Kenneth Davitian & Ellen Bacca v. The United Mexican States, ICSID Case No. ARB(AF)/97/2, Award (1999).

iii. *In any case*, a substantial deprivation by virtue of regulatory expropriation is not illegal

66. Regulatory expropriation occurs, when a state uses its sovereign powers to pass legislations that affect private property. A state is accorded a wide margin of appreciation with respect to enacting legislations, in a time of public crisis.[150] A legislation that is non-discriminatory and pursues a public purpose amounts to a valid regulatory expropriation. [151] States must also maintain an element of transparency in such situations.[152] This is dependent on the context of individual cases.[153] The Respondent State submits that their actions amount to a valid regulatory expropriation as; the actions pursued a public purpose (a), and, the measures were not discriminatory (b).

a. *The actions pursued a public purpose*

67. Measures that pursue the general welfare of a state amount to a valid regulatory expropriation.[154] Such actions aimed at maintaining public order justify a government's expropriatory measures and are not unlawful.[155] A public purpose is deemed to be met when a State acts in honest belief and good faith.[156] When determining public purpose, a state is awarded a wide margin of appreciation.[157] This public purpose extends to the expropriation of. [158]

[150] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006; Tecnicas Medioambientales Tecmed SA v. The United Mexican States, ICSID Case No ARB(AF)/00/02, Award (2003); S.D. Myers, Inc v. The Government of Canada, NAFTA, UNICITRAL Arbitration, First Partial Award (2000).

[151] Methanex Corporation v. United States of America, NAFTA, UNCITRAL Arbitration, Final Award (2005); Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006; Fireman's Fund Insurance Co. v. The United Mexican States, ICSID Case No ARB (AF)/02/1, Award (2006).

[152] Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, Award (2004).

[153] Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award (2003); Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006.

[154] G.C. Christie, *'What Constitutes a Taking of Property under International Law'*, 72 AJIL 17.

[155] INA Corporation v. Government of the Islamic Republic of Iran, Award No. 184- 161-1, 13 August 1985, 8 Iran-US CTR (1985); Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006.

[156] Methanex Corporation v. United States of America, NAFTA, UNCITRAL Arbitration, Final Award (2005).

[157] Amoco International Finance Corporation v. Iran, Award No. 310-56-3, 24 July 1987, 15 Iran- US CTR (1987); Libyan American Oil Company v. Libya, Award, 62 ILR 140 (1977).

[158] Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, ICSID Case No, ARB/96/1, Award (1992) 158.

68. The Claimants have alleged that the actions of the Respondent State do not pursue a public purpose due to the intentional nature of the governmental acts. However, the Board of Directors of Bhangi Bank themselves requested the Respondent State to take an ownership stake in the Bank.[159] Additionally the Respondent State agrees with the Claimants that the effects of governmental measures supersede the intention of the government. In the instant case, the effect of the regulations protected the citizens from a deteriorating economic crisis.
69. The Respondent State submits that there existed a public purpose. As of March 2013, either allowing Bhangi Bank to dissolve, or paying back the ELA debts would have bankrupted the entire country.[160] Thus, the expropriatory actions by the government were directed at preventing the bankruptcy of the country and the subsequent economic hardships.

b. *The actions taken were not discriminatory*

70. The absence of discrimination results in a valid regulatory expropriation.[161] An expropriatory policy targeting a specific investor, or class of investors is discriminatory.[162] However, a rational basis for differentiating between different classes of investors is valid.[163]
71. The Claimants have not contested the actions of the Respondent State to be discriminatory. *In any case*, the Respondent State submits that the effect of prime ministerial decree No.43/2012 was applicable to all shareholders of Bhangi Bank.[164] If the shareholding of the Claimants were depleted by the purchase of freshly issued Class A shares, so were the shareholding of others.
72. On the basis of the 25 March 2013 Agreement, the Respondent State was required to raise €4 billion as a precondition for EFSF assistance by imposing a uniform levy on all

[159] Moot Court Problem ¶ 15.
[160] Moot Court Problem ¶ 21.
[161] Pope & Talbot Inc. v. The Government of Canada, UNCITRAL, Awards on Merits, April 10 2011
[162] ADC Affiliate Limited and ADC & ADMC Management Limtied v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award (2006); Eureko B.V. v. Republic of Poland, ICISD Case No. ARB/07/19, Partial Award (2005); Petrobart Limited v. The Kyrgyz Republic, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration No. 126/2003, Award, 29 March 2005.
[163] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (2002).
[164] Moot Court Problem ¶ 16.

depositors within the same bank.[165] Additionally, the State made a reasonable distinction between Bhangi and Lucky Bank, with regards to the FLOP and FOBB[166] plans, on the basis of the former's overexposure to the Olive Garden Crisis,[167] and its excessive use of ELA funds.

B. **THE EXPROPRIATION IS NOT ILLEGAL**

73. As has been submitted earlier, the measures of the Respondent State are directed towards a public purpose, and are non-discriminatory. The Respondent State further submits that the measures also provide for due process (i), thereby rendering the expropriation not illegal. Therefore, compensation need not be awarded (ii).

74. Measures that maintain public order, and are done by the Government in good faith are deemed to pursue a public purpose.[168] An expropriatory measure cannot target a specific investor or class of investors.[169] In the instant case, the measures of the Respondent State were directed at curbing an ongoing economic crisis, and the measures were uniformly applicable.

i. Due process was provided to the Claimants

75. A right to fair hearing,[170] and access to public hearings, [171] are necessary for due process to be complied with. Denial of due process is deemed to be a denial of justice.[172] Additionally, Article 4 (2) of the BIT provides for the full protection of security.[173] For

[165] Moot Court Problem ¶ 22.
[166] Moot Court Problem ¶ 24.
[167] Moot Court Problem ¶ 2.
[168] INA Corporation v. Government of the Islamic Republic of Iran, Award No. 184- 161-1, 13 August 1985, 8 Iran-US CTR (1985) 373, 378; Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006; Methanex Corporation v. United States of America, NAFTA, UNCITRAL Arbitration, Final Award (2005).
[169] ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award (2006); Eureko B.V. v. Republic of Poland, ICISD Case No. ARB/07/19, Partial Award (2005); Petrobart Limited v. The Kyrgyz Republic, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration No. 126/2003, Award, 29 March 2005.
[170] ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award (2006).
[171] Methanex Corporation v. United States of America, NAFTA, UNCITRAL Arbitration, Final Award (2005).
[172] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (2002).
[173] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Olive Gar-Myth., art. 4 (1), Apr. 19, 2005.

FPS to be violated, there must be a substantial denial of justice.[174] When the circumstances in the State do not permit for the full protection of security, the State must provide protection in accordance with the 'means at its disposal'.[175] Thus, FPS does not provide a blanket guarantee against investments being 'occupied or disturbed.'[176] As has been submitted before, the Claimants appeared before the Supreme Court of Mythland, and there was no violation of due process.

ii. Compensation need not be awarded

76. Compensation need not be awarded, in the event that the measures of a state pursue a public purpose, are non-discriminatory, proportional, and provide due process.[177] It is unreasonable to restrict a government from exercising its regulatory powers, when the measures are aimed at the general welfare of the people.[178] A restriction on the regulatory powers of a state, by virtue of a fear to compensate foreign investors is unreasonable.[179]

77. As has been submitted earlier the measures of the Respondent State comply with the prerequisites for public purpose, non-discrimination, proportionality and due process. Thus, there is no requirement for the Claimants' to be compensated for the Respondent State's regulatory measures.

[174] International Thunderbird Gaming Corporation v. The United Mexican States, Award, NAFTA, UNCITRAL, 26 January, 2006; Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (2002).
[175] British Claims in the Spanish Zone of Morocco, (1925) II UNRIAA 639.
[176] Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy), [1989] I.C.J. Rep. 15.
[177] Methanex Corporation v. United States of America, NAFTA, UNCITRAL Arbitration, Final Award (2005); LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, Decision on Liability, 3 October 2006, ICSID Case No. ARB/02/1.
[178] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, March 17 2006.
[179] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB (AF)/99/1, Award (2002).

PRAYER FOR RELIEF

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

1. Declare that the tribunal does not jurisdiction over the present claim and the claim is inadmissible.
2. Hold that the Respondent State has not illegally expropriated the investments of the Claimants.
3. Hold that the Respondent State has not breached any standard of protection provided under the Bilateral Investment Treaty.
4. Declare that no compensation is to be provided to the Claimants under the Bilateral Investment treaty.

All of which is respectfully affirmed and submitted

Sd/-

Counsel for Respondent