

5TH DR. PARAS DIWAN MEMORIAL INTERNATIONAL ENERGY LAW
MOOT COURT COMPETITION, 2015

BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES
WASHINGTON D.C.

IN THE PROCEEDING BETWEEN

NIXIO PETROLEUM LIMITED

.....*CLAIMANT*

AND

REPUBLIC OF GONDWANA

.....*RESPONDENT*

ICSID CASE No. ARB/11/86

MEMORANDUM FOR CLAIMANT

MOST RESPECTFULLY SUBMITTED
COUNSELS APPEARING ON BEHALF OF CLAIMANT

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STATEMENT OF JURISDICTION

Nixio Petroleum, on its own behalf, has approached the Centre for Settlement of Investment Disputes, hearing issues relating to the violation of the rights conferred to it under the Energy Charter Treaty.

The Claimant humbly submits to the jurisdiction of this Centre.

STATEMENT OF FACTS

1. Gondwana is one of the fastest developing oil producing nations in Asia and is anticipated to be Asia's largest oil producer after explorations in CO-DWN 98 basin take place. Its laws and constitutional principles are in complete consonance with that of the Republic of India. For exploitation of these reserves, the Government of Gondwana embarked on an Exploration and Production Licensing Regime (EPLR) inviting foreign oil companies to invest, explore and produce oil & gas Gondwana under a Production Sharing Contract (herein after PSC) Model as per New Exploration Licensing Policy IX.
2. Attracted by the investment opportunity, Nixio Petroleum (a company incorporated in Republic of Cedonda) and the State owned Gondwana Oil Corporation Ltd. formed a consortium to participate in the bidding rounds for CO DWN-98-3 block and became the successful bidders. A PSC in respect thereof was entered into between the Government of Gondwana and the Contractor on 13 November 2001. Nixio was appointed as the operator under the agreement. Gondwana Oil Corporation has dominated Gondwana the oil sector even after liberalisation owing the the support that the company gets from the Government. The son of Petroleum and Natural Gas minister Mr. Ganesh Jhah is also a major shareholder in the company.
3. In 2005, a significant discovery was made and production started in 2006. The production increased steadily until 2010 but there was a sudden decrease in production in 2011-12 owing to certain geological factors that impeded production. Nixon sent a letter on 12 March 2012 providing justifications for the decrease but the Director General of Hydrocarbons (herein after DGH) conducted an inquiry comprising only of prominent oil company members and

arbitrarily concluded that the reasons cited by Nixio were baseless and Nixio was indulged in various malpractice reducing the profit share of the Government. Further, in May 2012 the Income Tax Department raided the office of Nixio and concluded that the essentiality certificate issued for the equipment had to be cancelled as many of the drilling equipments were no longer put to use, making Nixio liable for taxes on the equipments.

4. Acting upon the report of DGH and Income Tax Department and politically motivated to hoard more cash from investors, the Government terminated the contract as per Article 30.3 of the PSC and expropriated the participating interest of Nixio to Gondwana Oil Corporation. Nixio invoked arbitration under Article 33 of the PSC. Even though the arbitral tribunal gave an award against Nixio and held the validity of the termination, it is evident that the Gondwanan legal system has failed to administer justice or has been fair since the government, the national legislature, judicial authorities and other public authorities and agencies deliberately created numerous problems for Nixio and refused or unreasonably delayed the adoption of adequate corrective measures.
5. Being aggrieved by the actions and omissions of the Government which caused and are still causing material damage to the operations and have a direct negative impact on the reputations and market values of the company, Nixio Petroleum has moved to International Centre for Settlement of Investment Disputes under Article 26 of the Energy Charter Treaty (herein after ECT) seeking neutral forum for the violation the Treaty to which both countries are parties. Nixio Oil seeks an award of damages for breaches of the treaty and compensation for expropriation.

STATEMENT OF ISSUES

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

A. Whether the violation of the Energy Charter Treaty grants the jurisdiction of ICSID in the given matter?

B. Whether the unconditional consent to international arbitration under Article 26(3) of the ECT, satisfies the requirement of the written consent required for the purposes of Article 25 of ICSID?

2. WHETHER THE ACTIONS OF THE GONDWANA (RESPONDED) AMOUNT TO VIOLATION OF ART. 2 AND ART. 26 OF THE ENERGY CHARTER TREATY?

3. WHETHER THE RESPONDENT CAN EVOKE ART. 17 PART III OF THE ENERGY CHARTER TREATY?

A. Whether the imposition of the right under Article 17 is inconsistent since a reasonable notice was not given by the Respondent?

B. Whether the Burden of Proof lies on the party who makes the assertion?

4. WHETHER THE TERMINATION OF THE PSC AMOUNTS TO VIOLATION OF ART. 10 AND 21 OF THE ENERGY CHARTER TREATY?

A. Whether there is a failure on the part of the respondents to provide Fair and Equitable Treatment to the claimant?

B. Whether the taxation measures applied by the respondent arbitrarily discriminate against the claimant and amount to a violation of Article 21?

5. WHETHER TRANSFERRING OF PARTICIPATING INTEREST IN THE PSC AMOUNTS TO EXPROPRIATION BY THE GOVERNMENT UNDER ART. 10, 12 AND 13 OF THE ENERGY CHARTER TREATY?

SUMMARY OF ARGUMENTS

I. THE CLAIMS MADE BY CLAIMANT FALL WITHIN THE JURISDICTION OF ICSID

The International Centre for Settlement of Investment Disputes has jurisdiction over the present case as the requirements for *ratione materiae*, *ratione personae*, and *ratione temporis* have been fulfilled. The requirements relating to the nature of the dispute have been met as the dispute is legal in nature and arises directly out of an investment. Also, the requirements relating to the nature of the parties have been met as Cedonda, the country of which the claimant is a national, and Gondwana are both parties to ECT and ICSID. The dispute arose after the failure of the respondents to fulfil the obligations enshrined in the ECT, and the violation of the ECT grants ICSID's jurisdiction under Article 26. Furthermore, the requirement of a separate written consent on behalf of the respondents to evoke the jurisdiction of ICSID, is unnecessary by virtue of Article 26 (3) and (5) of the ECT.

II. ACTIONS OF THE RESPONDENT AMOUNT TO VIOLATION OF ARTICLE 2 AND ARTICLE 26 OF THE ECT

The Government of Gondwana has violated the objectives and the purpose of the treaty and the protection provided under Part III by discriminating against the company by specifically targeting Nixio and favouring the State owned Gondwana Oil Corporation, presenting several bureaucratic barriers by deliberately creating numerous problems and unreasonably delaying the adoption of adequate correction measures and failing to provide a fair and transparent legal

system. Further, Gondwanan Government failed to respect its contractual obligations under the PSC and didn't respect the acquired rights of the Nixio under PSC and the ECT.

III. THE REPUBLIC OF GONDWANA CANNOT EVOKE ARTICLE 17 OF THE ECT

The Centre has vehemently put it in various awards that the invocation of Article 17 by the host state is at best a half notice. Therefore, unless the host state does not provide for a inclination, via a public notice, that it wants to deny the benefits of the Treaty to the Investor, it is only then can the host state invoke the Article. Moreover, to say that any host state can arbitrary invoke their right under this Article, is to go against the principles of natural justice. Nevertheless, the burden of proof to prove that that the Claimant falls under the purview of the Article is of the host state.

IV. THE TERMINATION OF THE PSC AMOUNTS TO VIOLATION OF ARTICLES 10 AND 21 OF THE ECT

The termination of the PSC amounts to the violation of Article 10 and 21 of the ECT. Article 10 has been violated due to the failure on the part of the respondents to provide the necessary treatment under paragraph (3) and (7), Fair and Equitable Treatment, failed to create stable, equitable, favourable, and transparent conditions for investors of other Contracting Parties, failed to provide constant protection and security, and failed to accord at all times fair and equitable treatment by indulging in unreasonable and discriminatory activities as enshrined under paragraph (1). The violation of FET not only violated the provisions of the ECT, but also amounted to a breach of international law. Also, the taxation measures applied by the respondent arbitrarily discriminate against the claimant and amount to a violation of Article 21.

V. TRANSFERRING OF PARTICIPATING INTEREST IN PSC AMOUNTS TO EXPROPRIATION UNDER ART. 10, 12 AND 13 OF THE E.C.T.

The transferring of participating interest in the PSC amounts to unjustified, unlawful and uncompensated expropriation by the Gondwana government under Article 10,12 and 13 of the Energy Charter Treaty. The ECT requires four conditions for the expropriation to be deemed lawful and the breach of any one of these conditions is independently sufficient to contend violation of Article 13. They are (a) that the expropriation is in public interest; (b) that the measures are taken under due process of law; (c) that the measures are non-discriminatory and (d) that the measures are accompanied by provision for the payment of prompt, adequate and effective compensation. The Claimants claim that the measures taken by the Respondents don't comply with any of these conditions and are therefore unlawful.

ARGUMENTS ADVANCED

I. THE CLAIMS MADE BY CLAIMANT FALL WITHIN THE JURISDICTION OF ICSID

1. Claimant submits that the International Centre for Settlement of Investment Disputes (hereafter referred to as, “ICSID” or “Centre”), by virtue of, [A] the violation of the Energy Charter Treaty (hereafter referred to as, “ECT”) by the respondents, and the fact that the, [B] “Unconditional consent” to international arbitration under Article 26(3) of the ECT, satisfies the requirement of the written consent required for the purposes of Article 25 of ICSID; has jurisdiction over the given matter.

A. The violation of the Energy Charter Treaty grants the jurisdiction of ICSID in the given matter

2. Article 25 of the ICSID Convention states that the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between two contracting parties (including a national of another contracting party). Thus, the Article contains requirements relating to the nature of dispute i.e. *ratione materiae*, relating to the parties i.e. *ratione personae*, and relating to the time of the dispute i.e. *ratione temporis*.¹

3. The two essential conditions that are needed to fulfil the requirement relating to the nature of the dispute are that the dispute should be legal in nature and should have arisen directly

¹ Schreuer, Christopher H., Investment Protection and the Energy Charter Treaty-Chapter 2 Selected Standards of Treatment Available under the Energy Charter Treaty, Juris Publishing Inc., Dec. 2008, pg. 82

out of an investment. In the present case, these requirements are fulfilled. The ICJ has defined a dispute as a disagreement on a point of law or fact, conflict of legal views or interests between parties.² Also, The Report of the Executive Directors provides clarity on the meaning of a legal dispute and states that the dispute must concern the existence or scope of a legal right or obligation.³

4. In the present case, the respondents had the legal obligation of complying with the provisions of the ECT. It is contended that the respondents failed to provide fair and equitable treatment, constant protection, security of investments, and indulged in unreasonable and arbitrarily discriminatory practices against the claimant. Also, the respondents denied any compensation for the losses suffered on account of the expropriation and the Gondwanan legal system failed to administer justice on an impartial basis. These actions and omissions of the Government of Gondwana violate provisions under various articles of the ECT which are discussed in detail in the later arguments.
5. The ISCID tribunal, in *Fedax v. Venezuela*, has held that the “directness” in Article 25 of the Convention relates to the dispute and not the investment. This follows that jurisdiction exists so long as the dispute arises directly from such transaction.⁴ In the present case, the

² *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11; *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania* (first phase), I.C.J. Reports 1950, pp. 65, 74; *South West Africa*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328; *Northern Cameroons*, Judgment, I.C.J. Reports 1963, p. 27; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Reports 1988, p. 27, para. 35; *Case concerning East Timor*, I.C.J. Reports 1995, pp. 89, 99.

³ ICSID Reports 28.

⁴ *Fedax v. Venezuela*, ICSID Case No. ARB/96/3 (Decision on Jurisdiction, 11 July 1997, para. 24.)

dispute in question arises directly from the investment of the claimant in the territory of the respondent, and relates to the dispute between the two parties with regard to the failure of the Gondwanan legal system to administer justice. It has also been held that the claims for damages or other legal remedies are sufficient to establish jurisdiction even if both parties accept that the alleged facts, if proven, would justify the claims.⁵ Hence, the violations of the ECT, if proven, justify the claims made by the claimant. Therefore, the requirements relating to *ratione materiae* have been met as the present case entails a legal dispute arising directly out of an investment.

6. The Convention does not indicate at what time a dispute must have arisen and it ultimately depends upon the terms of the consent to the Centre's jurisdiction.⁶ The Convention itself does not impose jurisdictional requirements of *ratione temporis* relating to the dispute. However, in the present case the decisive time for the applicability of the consent to arbitration is the time at which the dispute has arisen.⁷ It must be noted that the time of the dispute is not identical with the time of the events leading to the dispute. By definition, the incriminated acts must have occurred sometime before the dispute. There is a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. This sequence of events has to be taken into account in establishing the critical date for determining the consent necessary to establish

⁵ *AGIP v. Congo*, ICSID ARB 74/1 (unpublished), (Award, 30 November 1979); and *Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, (Award, 17 February 2000.)

⁶ *Supra* 1. At pg. 95

⁷ *Id.*

ICSID's jurisdiction.⁸ It is submitted that in the present case, the dispute arose after the failure of the respondents to fulfil the obligations enshrined in the ECT.

7. The requirements for *ratione personae* have also been met as Cedonda, the country of which the claimant is a national, and Gondwana are both parties to ECT and ICSID. Article 26 of the ECT provides for the provisions for the international arbitration under ICSID in the case of the violation of ECT (elaborated upon in subsequent arguments).
8. Therefore, the Claimant submits that due to the violation of the provisions of the ECT and the fulfilment of the requirements of *ratione materiae* and *ratione personae*, ICSID has jurisdiction over the present case.

B. "Unconditional consent" to international arbitration under Article 26(3) of the ECT, satisfies the requirement of the written consent required for the purposes of Article 25 of ICSID

9. Claimant submits that the requirement of a separate written consent on behalf of the respondents to evoke the jurisdiction of ICSID, is unnecessary by virtue of Article 26 (3) and (5) of the ECT. Article 26 of the ECT which refers to the settlement of dispute between an investor and a contracting party, under paragraph (3), provides for an unconditional consent on behalf of each contracting party for the submission of a dispute to international arbitration.
10. Claimant further submits that pursuant to Article 26, paragraph (5), of the ECT, the consent given in paragraph (3), along with the already submitted written consent of the investor i.e. Nixio Petroleum Limited., satisfies the requirement of a written consent of the respondents to a dispute for the purposes of ICSID's jurisdiction.

⁸ *Maffezini v. Spain*, ICSID CASE NO. ARB/97/7, (Decision on Jurisdiction, 25 January 2000, paras. 90–98.)

11. Having regard to the fact that under Article 26, paragraph (2), the investor can exercise a choice with regard to the mode of dispute settlement; it is imperative to differentiate between paragraphs (2)(b) and (2)(c), in light of the present case. Both, subparagraphs (2)(b) and (2)(c) provide for dispute settlement through any previously agreed dispute settlement procedure or by the provisions of Article 26 (including the right to approach ICSID), respectively. The claimant has evoked subparagraph (2)(c) and subsequently paragraph (4)(a)(i) of Article 26, which provides for the jurisdiction of ICSID through a written consent by the investor, by submitting a written consent for the same.
12. Respondents claim that due to the fact that the domestic arbitration under Article 33 of the PSC has been concluded, arbitration in a different forum on the same issue cannot be evoked. It is accepted that domestic law may not be used as an excuse for the non-compliance with international obligations.⁹ It is also accepted that important changes in domestic law that undermine the investor's legitimate expectations or the stability of the investment's legal environment are contrary to the FET standard.¹⁰ It is submitted that in the case of *Jan de Nul v. Egypt*, the ICSID tribunal held that the dispute that gave rise to the proceedings before the Egyptian courts and authorities was related to the questions of contract interpretation and of Egyptian law; whereas the dispute before the tribunal dealt with the alleged violations of the treaty in relation to the provisions of fair and equitable treatment, protection, and the obligation to promote investments.¹¹ With regard to the

⁹ J. Crawford, *The International Law Commission's Draft Articles on State Responsibility* 207 (2002), Article 32 of the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session in 2001: "The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part."

¹⁰ *PSEG v. Turkey*, ICSID Case No. ARB/02/5 (Award, 19 January 2007), para. 250.

¹¹ *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, para. 117.

question of jurisdiction, it concluded that the claimant's case was directly based on the alleged wrongdoing of the Ismailia Court, and hence the original dispute was recrystallized into a new dispute when the Ismailia Court rendered its decision.¹²

13. Also, *AGIP v. Congo*¹³ clarified the discrepancy with regard to the jurisdiction of ICSID in the presence of a prior agreement. In this case, the government of Congo had expropriated the claimant's assets without compensation in violation of a prior agreement and had declared that there was no longer any dispute. The tribunal held that there was indeed an existence of a dispute as there was injustice with regard to the compensation.¹⁴ Therefore, it is submitted that in the present case, the two disputes arising from domestic and international arbitration are fundamentally different issues, and hence, Article 26, paragraph (4)(a)(i) of the ECT can be evoked.

14. In light of the above cases, it is contended that even though domestic arbitration has been concluded, the ICSID still has jurisdiction over the given matter as both the cases are fundamentally different. In the first instance, the domestic arbitration was concluded with reference to the dispute of the violation of the PSC. However, in the second instance of international arbitration under ICSID, the violation of the ECT is in question, and not the violation of the PSC. Thus, the claims of the respondents are unsustainable as the two disputes are fundamentally different, and the claimant is free to choose the mode of dispute settlement as desired under paragraph (2)(c). Therefore, it is submitted that the "Unconditional consent" to international arbitration under Article 26(3) of the ECT,

¹² *Id.* At para. 128.

¹³ *AGIP v. Congo*, ICSID ARB 74/1 (unpublished), (Award, 30 November 1979)

¹⁴ *Id.* paras. 38, 39.

satisfies the requirement of the written consent required for the purposes of Article 25 of ICSID.

II. ACTIONS OF THE RESPONDENT AMOUNT TO VIOLATION OF ARTICLE 2 AND ARTICLE 26 OF THE ECT

15. The actions of Gondwana amount to violation of Art. 2 and Art. 26 of the ECT. The purpose of the Treaty, as defined in the Article 2 of the Treaty, is to establish a legal framework in order to promote long-term investment cooperation in energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter. The Charter, as defined in Art. 1(1) of the Treaty is the Concluding Document of the Hague Conference on the European Energy Charter that lays down the objectives of the ECT. These objectives focus on the principle of non-discrimination, access to energy resources, removal of technical, administrative and other barriers and formulation of a stable and transparent legal frameworks.

16. Further, Article 26 of the Treaty concerns disputes arising out of breach of Part III of the Treaty, which deals with promotion and protection of investments. Article 10(1) of Part III sets out a number of basic principles for the treatment of foreign investments like fair and equitable treatment, most constant protection and security of investments, discrimination and a special umbrella clause that emphasizes the principle of *pacta sunt servanda* making it mandatory for the host state to observe any obligations it has entered into with foreign investors of any other contacting party.

17. The Claimant submits that the Government of Gondwana has violated the objectives and the purpose of the treaty, and has failed to provide the protection under Part III by

discriminating and against Nixio, presenting various barriers, failing to provide a fair and transparent legal system and not observing its contractual obligations towards Nixio Petroleum.

18. The Respondent discriminated against Nixio Petroleum by specifically targeting Nixio and favouring the State owned Gondwana Oil Corporation. After the termination of the contract, the participating interest of Nixio went to the State owned Gondwana Oil Corporation, while no measures were taken against the State owned corporation even though it was a party to the PSC. The terms of the PSC under Article 7.3 clearly provide that no party of the PSC can be relieved from their contractual obligations and liabilities. This discrimination is further clear from the fact that even after liberalization, the National Oil Companies have dominated Gondwana's Oil Sector mainly because of the Government support and there exists a belief that the bidding remains biased towards NOCs.¹⁵ The Government is ill-motivated and seeks to advance its profits given the fact that CO DWN-98-3 basin has one of the largest reserves of the country and full state ownership of the block will yield high return for the treasury.
19. Additionally, the Respondent created several bureaucratic barriers by deliberately creating numerous problems and unreasonably delaying the adoption of adequate correction measures. The legislature, the judicial authorities and other public authorities including Director General of Hydrocarbons (DGH) and the Income Tax Department purposely created problems for Nixio, refused or perversely delayed the adoption of necessary corrective measures and have not been transparent and just in their functioning. The inquiry conducted by the DGH comprised of all national oil company members, not any neutral

¹⁵ 'The Nixio Oil Crisis,' Gondwana Economic Times 15th July 2014, Fact Sheet

parties and thus gave a biased opinion. It is evident from the actions of Gondwana that the Gondwana legal system is prejudiced and unfair towards the investors.

20. The Government of Gondwana further failed to respect its contractual obligations under the PSC and did not respect the acquired rights of Nixio under the PSC and ECT. The rule of *pacta sunt servanda* is not only laid down under Article 10 of ECT but is also generally applied as a universal legal principle, both in civil and international law.¹⁶ Furthermore, the respect for acquired rights is another principle of law accepted by international tribunals.¹⁷ Under Article 31 of the PSC, any non-performance by any party to the contract of any of its obligations under this Contract shall be excused if such non-performance or delay in performance is caused by Force Majeure. Force Majeure includes any natural phenomena or calamities, earthquakes, typhoons, fires, wars declared or undeclared, hostilities etc. It is argued that the fall in production of oil took place because of certain geological factors which were influencing the amount that can be extracted and also on how fast it can be extracted. Under such conditions, the non-performance of Nixio should have been excused as per Article 31 of the PSC. The Government of Gondwana, on the contrary took actions against Nixio and terminated the contract.

21. The Claimant submits that the Respondent did not adhere to its contractual obligations Article 31 and the contract was wrongfully terminated. Further, the right of being excused for non-performance acquired under Article 31 was not given to the

¹⁶ *Amco v. Indonesia*, ICSID Case No. ARB/81/8, Decision on Jurisdiction of September 25, 1983, 1 ICSID REPORTS at ps. 407/8, Resubmitted Case: Award of June 5, 1990, 1 ICSID REPORTS at p. 606; *Klöckner v. Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment of May 3, 1985, 2 ICSID REPORTS at ps. 140/1; *SPP v. Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction of November 27, 1985, 3 ICSID REPORTS at p.123.

¹⁷ *Sapphire International Petroleum Ltd. V. National Iranian Oil Co.*, 35 ILR at p. 136 (1967)

Claimant.

22. Nixio Petroleum is a responsible and honest company having immense goodwill which is reflected by the fact that it has been ranked Number One among private E&P companies in Asia and third in the world. Further, Nixio Petroleum has had a clean track record and it was selected as the contractor after careful scrutinization process.¹⁸ It is submitted that the allegations and the activities of the Gondwanan Government were politically motivated to harass Nixio and hoard more cash from the investors and are in clear violation of the purpose of the Treaty as under Article 2 and the legal duties of the Claimant arising under Article 26 of the ECT.

III. THE REPUBLIC OF GONDWANA CANNOT EVOKE ARTICLE 17 OF THE ECT

23. The Contracting State invoking the application of Article 17(1) is the judge in its own cause. That is a license for injustice; and it treats a covered investor as if it were not covered under the ECT at all. Understanding the Denial-of-Benefits clause as giving a state a possibility to decide whether an investor has or not a right to bring a claim against it would be contrary to the well-established principle *nemo iudex in causa sua*.¹⁹ [A] Applying the principle, the Claimant in this case has not been given a reasonable notice to evoke Article 17. [B] In any event, the burden to prove that the Claimant falls under the ambit of Article 17 is of the Respondent State.

¹⁸ Parameters for Bid Evaluation, Annexure I, Fact Sheet

¹⁹ *Plama Consortium Limited v. Republic of Bulgaria*, Decision on Jurisdiction ICSID Case No. ARB/03/24.

A. The imposition of the right under Article 17 is inconsistent, a reasonable notice not being given by the Respondent

24. Article 17 of the ECT provides for the exclusion of the provisions of Part III, the substantial remedial part of the treaty. Originally, the ‘denial of benefits’ clause was incorporated to specifically direct “enemy companies.”²⁰ Similarly, the true purpose of this article is to prevent nationals of a non-Contracting Party from opportunistically incorporating a "mailbox" company in a Contracting Party so as to indirectly benefit from the protection of the ECT.²¹

25. The Contracting Party has a right under Article 17(1) ECT to deny a covered investor the advantages under Part III; but it is not required to exercise that right; and it may never do so.²² In considering Bulgaria's jurisdictional objections, the tribunal held that Article 17(1) contains a reservation of rights mechanism which needs to be exercised to be effective.²³ In the Tribunal's view, the existence of a "right" is distinct from the exercise of that right.²⁴ The language of Article 17(1) is unambiguous, as the Tribunal very vehemently puts it. The Tribunal also considered whether the requirement for the exercise of rights is inconsistent with the ECT's object and purpose. On this count, it says that the exercise necessarily has to be associated with publicity or other notice to become reasonably available to investors and

²⁰ Loukas A. Mistelis and Crina Mihaela Baltag, *Denial of Benefits and Article 17 of the Energy Charter Treaty*, available at <http://pennstatelawreview.org/articles/113%20Penn%20St.%20L.%20Rev.%201301.pdf>, (last visited, March 16, 2015).

²¹ P. Pinsolle, *The Dispute Resolution Provisions of the Energy Charter Treaty*, INTALR 86 (2007).

²² *Supra* 19, para 157

²³ *Id.* para.155

²⁴ *Id.*

their advisers. By itself, Article 17(1) ECT is at best only half a notice; without further reasonable notice of its exercise by the host state, its terms tell the investor little; and for all practical purposes, something more is needed.²⁵

26. The Tribunals in the succeeding cases have elaborated on what constitutes ‘reasonable notice’ and when should it be delivered. The tribunal emphasized that the right could only have *prospective* effect from that date on which the public notice was given.²⁶ Moreover, the tribunals, in justification, have taken the view that to treat denial as retrospective, would, in the light of the ECT’s ‘Purpose’, as set out in Article 2 of the Treaty be incompatible ‘with the objectives and principles of the Charter.’ Paramount among those objectives and principles is ‘Promotion, Protection and Treatment of Investments’ as specified by the terms of Article 10 of the Treaty. Retrospective application of a denial of rights would be inconsistent with such promotion and protection and constitute treatment at odds with those terms.²⁷

27. Since the Respondent State has not been able to provide a ‘reasonable public notice’ for invocation of its rights under Article 17, the State is unable to exercise its rights according to the jurisprudence laid down by the tribunals in the preceding cases.

B. The Burden of Proof lies on the party who makes the assertion.

28. The claimant by evoking article 17 claims that Nixio, is a ‘legal entity owned or controlled by citizens or nationals of a third state’. Several provisions distinguish between a Contracting Party and third State (for example, Articles (1)(7), 10(3) and 10(7), and 17) and

²⁵ *Id*, paras. 161-62.

²⁶ *Amtco v. Ukraine SCC Case No. 080/2005*, para. 61

²⁷ *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227; para.458.

that there is no equation in the ECT between a Contracting Party and a third State. This conclusion is further supported by the travaux préparatoires, which demonstrate that the term ‘third state’ was substituted for the term ‘non-Contracting Party’.²⁸ In this case, however, Nixio is a petroleum company incorporated according to the laws of Republic of Cedonda, who is also a party to the Treaty, thereby making it a Contracting Party.²⁹

29. It is well established in international law that the burden of proof initially rests on the party who makes an assertion.³⁰ The old Roman maxim *actori incumbit onus probandi* still holds, in the practice of both municipal and international fora.³¹ Based on the foregoing, the host state, willing to effectively carve out an ‘investor’ from the category of ‘protected investors’ under the ECT, must exercise the right to deny the advantages of Part III of the Treaty (i) publicly, (ii) in explicit terms, unambiguously indicating the denial of benefits under the ECT, and (iii) sufficiently prior to any prospective arbitration for the denial to be deemed to cover the disputed period.³² The state is reasonably presumed to be cognizant of the circumstances, justifying an exercise of the ‘right to deny’ under Article 17(1), at the time of effecting the denial. That being said, the denying state must be in possession of some evidence of a third state’s ownership or control and the investor’s lack of a genuine link to a state of incorporation before the commencement of an arbitration proceeding. To

²⁸ *Id.* para.544

²⁹ Article 1 (2) of the Energy Charter Treaty.

³⁰ Anna L. Linne, *Burden of Proof Under Article 35 CISG*, Pace Intl. L. Rev., Paper 282, 32 (2008), available at <http://digitalcommons.pace.edu/intlaw/282>, (last visited, March 16, 2015)

³¹ Mojtaba Kazazi, *Burden of Proof and Related Issues: a Study on Evidence before International Tribunals* 369 (Martinus Nijhoff Publishers 1996).

³² Elvira R. Gadelshina, *Burden of Proof Under the ‘Denial-of- Benefits’ Clause of the Energy Charter Treaty: Actori Incumbit Onus Probandi?*

hold otherwise would be equivalent to saying that the host state may arbitrarily or randomly deny advantages under the ECT, which would be against the principles of natural justice. In light thereof, the burden of proof rests on the Respondent state who has not furnished any evidence in the regard and therefore, it cannot be presumed that, one, Nixio is owned and controlled by citizens or nationals of a third state, and secondly that Gondwana does not seek to maintain diplomatic relations with any Investor of that third state. In light whereof, Gondwana cannot evoke Article 17 of the Treaty.

IV. THE TERMINATION OF THE PSC AMOUNTS TO VIOLATION OF ARTICLES 10 AND 21 OF THE ECT

30. Claimant submits that the termination of the PSC amounts to the violation of Article 10 and 21 of the ECT due to the [A] failure on the part of the respondents to provide Fair and Equitable Treatment as enshrined under Article 10; and due to the fact that the [B] taxation Measures applied by the respondent arbitrarily discriminate against the claimant and amount to a violation of Article 21.

A. Failure on the part of the respondents to provide Fair and Equitable Treatment as enshrined under Article 10

31. Article 10(1) of the ECT provides for the obligation of a Contracting Party to ensure stable, equitable, favourable and transparent conditions for investors of other contracting parties to make investments in its territory. Within the Article, the standard of Fair and Equitable Treatment (hereafter, referred to as FET) is embedded in a complex provision that also refers to constant protection and security, to prohibition of unreasonable or discriminatory

measures to treatment required by international law, and an umbrella clause with regard to the observance of any obligations entered into between a Contracting Party and an Investor of another Contracting Party.³³ This provision makes clear that Contracting Parties are not merely forbidden from taking unreasonable actions to harm foreign investors and their investments; they are affirmatively obligated to create the favourable conditions required for those investments to exist and thrive, at all times.³⁴ Moreover, it is widely accepted that the most important function of the FET standard is the protection of the investor's legitimate expectation through the creation of a transparent and stable legal framework.³⁵

32. Accordingly, tribunals have held that the FET standard requires a transparent, and consistent legal framework that protects the investors' legitimate expectations, freedom from coercion and harassment, procedural propriety and due process and generally action in good faith.³⁶ Article 10(1) of the ECT in its entirety intended to ensure a fair and equitable treatment of investments. Thus, it regarded FET as an overarching principle that embraces all the other standards mentioned in the article.³⁷

³³ Schreuer, Christopher H., *Investment Protection and the Energy Charter Treaty-Chapter 2 Selected Standards of Treatment Available under the Energy Charter Treaty*, Juris Publishing Inc., Dec. 2008, pg 64-65

³⁴ Emmanuel Gaillard and Mark McNeill, *Arbitration under International Investment Agreements Energy Charter Treaty*, Shearman, 2010

³⁵ *Tecnicas Medioambientales Tecmed S. A. v. The United Mexican States*, ICSID CASE No. ARB (AF)/00/2 (Award, 29 May 2003, ILM 43 (2004): 133.)

³⁶ Supra 33; C. Yannaca-Small, 'Fair and Equitable Treatment Standard in International Investment Law', In *International Investment Law: A Changing Landscape*, OECD ed. (2005) p. 73; C. Schreuer, 'Fair and Equitable Treatment in Arbitral Practice', *The Journal of World Investment & Trade* 6 (2005): 357; R. Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties,' *The International Lawyer*, 39 (2005): 87.

³⁷ *Petrobart v. The Kyrgyz Republic*, Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration No. 126/2003 (Award, 29 March 2005, *loc. cit.* 91)

33. Claimant submits that the provisions under paragraph (3) of the article, intend to assure an absolute minimum standard of treatment.³⁸ It provides that the treatment accorded to the investments of investors of other Contracting Parties shall in no case, be less than that required by international law. This standard of FET is derived from international law and has, through its frequent application by tribunals in BIT and NAFTA arbitrations, become an important principle of investment protection.³⁹ In *PSEG v. Turkey* it was held that the concept of FET has acquired a standing of its own, which is separate and distinct from that of other standards, albeit closely related to them, and thus ensuring that the protection granted to the investment is fully safeguarded.⁴⁰ Thus, Article 10(1) refers to FET and to the observance of general international law as two independent principles.⁴¹

34. In *Genin v. Estonia*,⁴² the Tribunal referred to FET as an “international minimum standard” that is separate from domestic law, but that is, indeed a minimum standard. The Tribunal was not referring to the international minimum standard under customary international law, but was merely pointing out that treaty provision containing the obligation to offer FET constituted a minimum standard below which the domestic law shall not fall.⁴³ Also, in *Azurix v. Argentina*, the Tribunal interpreted the Argentina-United States BIT which

³⁸ Craig Bamberger, Jan Linehan & Thomas Waelde, *The Energy Charter Treaty in 2000: In a New Phase*, Oxford University Press, Dec 2000

³⁹ Hober Kaj, *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), pp. 153–190

⁴⁰ *PSEG v. Turkey*, ICSID Case No. ARB/02/5 (Award, 19 January 2007) para 239

⁴¹ C. Schreuer, *Fair & Equitable Treatment*, BIICL, Investment Treaty Forum, 9 September 2005

⁴² *Genin, Eastern Credit Ltd. Inc. and AS Baltoil v. Republic of Estonia*, 6 ICSID Reports 241, (Award, 25 June 2001).

⁴³ *Id.*, para. 367.

provided for treatment no less than that required by international law, by affirming that FET as a standard is separate and higher than the one under international law.⁴⁴

35. Hence, the standard of FET referred to in Article 10(1) of the ECT is equivalent to an autonomous standard that is additional to general international law, and is not merely a restatement of customary international law.⁴⁵ In *CME v. The Czech Republic*, it was held that the broad concept of FET imposes obligations beyond customary international requirements of good faith treatment.⁴⁶ Unlike the relative standards of national treatment and most favoured nation status, FET is an absolute minimum standard. It is independent of the treatment given to the host State's nationals or to nationals of a third State.⁴⁷ Therefore, the violation of FET would not only amount to a violation of the ECT under the breach of the treaty provisions, but also amount to a breach of international law.

36. Article 10(3) of the ECT, defines “treatment” as one which is accorded by a Contracting Party to its own investors or to investors of any other Contracting Party, whichever is most favourable. Also, paragraph (5) provides for the obligation of Contracting Parties to limit to the minimum, the exceptions to the Treatment described in paragraph (3). The Award in *Waste Management Inc. v. United Mexican States* held that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, or unjust.⁴⁸

⁴⁴ *Azurix Corp. v. The Argentine Republic*, PCA CASE NO. 2010-18 / BCB-BZ (Award, 14 July 2006, available at <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>).

⁴⁵ *Supra* 33.

⁴⁶ *CME v. The Czech Republic*, UNCITRAL, (Partial Award, 13 September 2001).

⁴⁷ *Id.*

⁴⁸ *Waste Management, Inc. v. United Mexican States*, ICSID Case No ARB (AF)/00/3 (Award, 30 April 2004)

37. Claimant submits that in the present case, the respondents have failed to satisfy the obligations enshrined under Article 10 of the ECT by deliberately indulging in unreasonable, arbitrary, and discriminatory practices. The respondents deliberately created numerous problems and unreasonably delayed the adoption of corrective measures, resulting in material damage to the operations in the CO DWN-98-3 block and had a direct negative impact on the reputation and the market value of the Nixio Group companies.

38. Accordingly, it is submitted that the respondents failed to administer justice. This can be inferred from the fact that the National Oil Companies (hereafter, referred to as NOCs), have previously dominated Gondwana's Oil Sector, and are immensely supported by the government. The presence of bureaucracies' has deterred the scenario and has prevented the formation of coherent policy. Thus, it is contended that the biddings remain biased towards NOCs. An instance can be traced back to a similar arbitral award between the government of Gondwana and Terra Petroleum Ltd over the validity of the termination of the PSC. Also, this becomes more plausible given the fact that the inquiry conducted by the DGH consisted of "prominent NOC members" and that the son of Mr. Ganesh Jhah, the minister of petroleum and natural gas of Gondwana, is a shareholder in Gondwana Oil Corporation Ltd. It is submitted that in *GAMI v. Mexico*⁴⁹, the claimant demonstrated that the relevant domestic regulations had not been carried out in accordance with their terms.⁵⁰ Mexico's response was that the Tribunal did not have the mandate to control the application of

⁴⁹ *GAMI v. Mexico*, In proceedings pursuant to NAFTA Chapter 11 and the UNCITRAL Arbitration Rules (Final Award, 15 November 2004, *ILM* 44 (2005): 545.)

⁵⁰ *Id.*, 86, 88, 103, 108.

national law by national authorities. The Tribunal rejected that argument and stated that a government's failure to comply with its own law may violate the FET standard.⁵¹

39. Furthermore, Article 7.3 of the PSC states that the functions of the Contractor shall be performed by the Operator i.e. Nixio Petroleum Ltd, and that this provision shall not be construed as relieving the constituents of the contractor i.e. Gondwana Oil Corporation Ltd, from any of its obligations or liability under the contract. Hence, it is contended that since Gondwana Oil Corporation formed a part of the contractor, the lack of action taken against it and the preferential treatment provided to it by the respondent in comparison to Nixio is evident of the inherent discrimination and bias exercised by the government of Gondwana.

40. The principle of National Treatment is quintessential to all Indian BITs. However, while this principle ensures that a foreign investor is treated at par with a domestic investor and is not subject to any unfair treatment, the principle of Most Favoured Nation (hereafter, referred to as MFN) enables the investor to claim any favourable right that is available to any other state having a BIT with the host state. In *White Industries Australia Ltd. v. India*⁵², the claimant successfully used the MFN clause in the Australia-India BIT to import substantive protections from the India-Kuwait BIT, guaranteeing the claimant effective means of asserting claims and enforcing rights. It is submitted that in the present case, the respondents have violated the provisions under Article 10(12) which provide for the obligation of a contracting party to ensure that its domestic laws provide effective means of assertion of claims with respect to investments by indulging in arbitrary practices which are inherently discriminatory. Therefore, the actions and omissions of the government of

⁵¹ *Id.*, para. 90.

⁵² *White Industries Australia Limited v. The republic of India*, UNCITRAL Arbitration (Final Award pg 43 para 4.4.3)

Gondwana amount to the violation of the obligations of national treatment as well as the MFN treatment enshrined under Article 10(3) and (7), which provide for the equal treatment of the investments of national and foreign investors.

41. Respondents claim that the applicable law in the dispute is that of Gondwana. However, it is evident that the Gondwanan legal system has failed to administer justice or has been fair. Hence, the claimant seeks a neutral forum which would administer justice in a non-discriminatory manner in the form of international arbitration outside the jurisdiction of the host state.

42. Therefore, it is submitted that the termination of the PSC amounts to the violation of Article 10 of the ECT as the respondent failed to provide the necessary national as well as MFN treatment under paragraph (3) and (7), failed to create stable, equitable, favourable, and transparent conditions for investors of other Contracting Parties, failed to provide constant protection and security, and failed to accord at all times fair and equitable treatment by indulging in unreasonable and discriminatory activities as enshrined under paragraph (1). The violations of FET, not only amount to the violations of the Treaty provisions but also amount to the violation of international law. Hence, the respondent is liable to compensate for the same.

B. Taxation Measures applied by the respondent arbitrarily discriminate against the claimant and amount to a violation of Article 21

43. Claimant submits that that the actions of the respondent with regard to the tax measures imposed, amount to a violation of the principles enshrined under Article 21 of the ECT. Provisions under Article 21(3)(b) prevent the use of taxation measures which are discriminatory in nature. Moreover, it states that Article 10(2)and (7) shall apply to taxation

measures, other than those on income and capital, in the event where any taxation measure arbitrarily discriminates against an investor of another Contracting Party, or arbitrarily restricts the benefits accorded under the investment provisions of the Treaty.

44. Article 24 of the Model Convention with respect to Income and Capital of OECD provides non-discrimination principles. It states that the nationals of a Contracting State shall not be subjected to any taxation or requirement which is more burdensome than the taxation and requirements to which the nationals of that state, in the same circumstances, are subjected to.⁵³ Thus, it is submitted that the respondents had a responsibility under Article 10 to impose reasonable and non-discriminatory taxes and treat the interests of the Claimant in the same way as that of the nationals of Gondwana.

45. Furthermore, Claimant submits that the provisions of Article 13 apply to the present case as the alleged tax constitutes expropriation and is discriminatory under Article 21(5). In *Yukos v. The Russian Federation*, The Permanent Court of Arbitration held that Russia violated Article 10 and 13 of the ECT as its primary objective was not to collect taxes but rather to harass and bankrupt Yukos and appropriate its valuable assets. Moreover, this was in the interest of the largest state-owned oil company, Rosneft, which took over the principle assets of Yukos virtually cost free. It stated that even though Russia had not explicitly expropriated Yukos, the measures that it had undertaken had an effect “equivalent to nationalization or expropriation”.⁵⁴ Also, in the case of *Feldman v. Mexico*, it was held that

⁵³ Model Convention on income and capital of OECD

⁵⁴ Supra 27.

confiscatory taxation and unreasonable regulatory regimes are considered amounting to expropriation.⁵⁵

46. Claimant submits that in the present case, the government of Gondwana relied on the DGH's report that stated that Nixio was showing front-load expenditure, and was thereby cutting down the profit oil share of the government and undermining the capacity utilization of the reserve. Also, it cancelled the essentiality certificate issued for the equipment as they were no longer put to use, making Nixio liable for taxes on the equipment. Articles 17.5 and 17.6 of the PSC state that the machinery, plant, equipment etc. imported by the Contractor solely and exclusively for use in the petroleum operations under this contract shall be exempt from custom duties or other charges; and the government would have the right to inspect the items to determine that the items have solely and exclusively been imported for reason the exemption was given. In the case where the items are being used for other purposes, the contractor shall immediately become liable for the payment of the applicable custom duties.

47. It is contended that the report of the DGH is biased and that Nixio was only showing as much front-load expenditure as was necessary for the production to continue. Furthermore, the sudden decrement in production, which were due to certain geological factors, coupled with the insensitive acts of the government in relation to the restrictions on taking adequate corrective measures, added pressure on Nixio to try and continue to produce at the same levels which resulted in higher expenditure. Also, the cancellation of the essentiality contract was improper as the government acted on impulse and did not see the situation in

⁵⁵ *Feldman v. The United Mexican States*, ICSID ADDITIONAL FACILITY CASE NO. ARB (AF)/99/1, (November 3 & 4, 2003)

the context of the recent events such as the sudden decrease in production due to natural factors which were outside the control of the claimant. It is submitted that the equipment in concern was not being put to use due to the reduction in production.

48. Therefore, it is submitted that the actions and the taxation measures imposed by the respondent are in violation of Article 21 of the ECT as they arbitrarily discriminate against the claimant.

V. TRANSFERRING OF PARTICIPATING INTEREST IN PSC AMOUNTS TO EXPROPRIATION UNDER ART. 10, 12 AND 13 OF THE E.C.T.

49. The transferring of participating interest in the PSC amounts to unjustified, unlawful and uncompensated expropriation by the Gondwanan government under Article 10,12 and 13 of the Energy Charter Treaty. The participating interest as per Article 1.71 of the Production Sharing Contract (PSC) is in respect of each Party constituting the Contractor, the undivided share expressed as a percentage of such Party's participation in the rights and obligations under this Contract.

50. The Participating Interest in the PSC amounts to investment as per Article 1(6)(b), (c) and (f) of the Energy Charter Treaty. The Claimant clearly had participating interest, the percentage of which was defined in Article 2 of the PSC that amounted to investment which was unlawfully expropriated.

51. Under Article 13 of the ECT, no Contracting Party may nationalize or expropriate, or subject to one or more measures having equivalent effect, the investment of the investor of another Contracting Party, except: for a public purpose; on a non-discriminatory basis; in accordance with due process of law; and when accompanied by prompt, adequate and

effective compensation -- amounting to fair market value immediately before the expropriation or impending expropriation became known in such a way as to affect the investment's value, and with interest to the date of payment.

52. The ECT requires four conditions for the expropriation to be deemed lawful and the breach of any one of these conditions is independently sufficient to contend violation of Article 13. They are (a) that the expropriation is in public interest; (b) that the measures are taken under due process of law; (c) that the measures are non-discriminatory and (d) that the measures are accompanied by provision for the payment of prompt, adequate and effective compensation. The Claimant claim that the measures taken by the Respondents don't comply with any of these conditions and are therefore unlawful.

53. As per the first condition, the measures must be taken in public interest. It is contended that the public interest doesn't anywhere figure in the Gondwanan Government's actions. The measures were politically motivated to hoard more cash from the Claimant and harass Nixio. The Gondwanan press (The Gondwana Economic Times) reports the real purpose behind the expropriation measures which is the personal financial gains of the Gondwana Oil Corporation Ltd. and of the son of Mr. Ganesh Jhah, the minister of petroleum and natural gas, who is a shareholder in the Gondwana Oil Corporation Ltd. The allegations of Respondent that Nixio was concealing material facts from the Government affecting the Government's share of petroleum were based on a biased inquiry comprising only of prominent national oil company members who sought to advance the interests of the Respondent.

54. It is therefore concluded that no "public interest" justification is apparent and the Respondent fails to meet the first condition of the Article 13 of the ECT.

55. The Claimant contends that the expropriation was not made under the due process of law. A due process of law requires that the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that “the actions are taken under due process of law” rings hollow.⁵⁶

56. It is evident from the previous acts of the Gondwanan government, judicial authorities and other public authorities that the Respondent deliberately created numerous problems for the Claimant and unreasonably delayed the adoption of adequate corrective measures. Hence, there exists no reasonable chance for Nixio to claim its legitimate rights within the legal mechanisms of Gondwana.

57. The Respondent failed to provide the Claimant the right to a fair hearing, an impartial adjudicator and investigating agency and effective means for assertion of claims and enforcement of rights.

58. As regards the third condition of non-discrimination, it is contended that actions of Gondwana were discriminatory in nature as they were specifically targeted against Nixio Petroleum. Article 10(1) of the ECT provides the most constant protection and security to the investments and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment and disposal. Further, Article 10(3) provides that every Contracting Party should accord a treatment to the foreign which is no less favourable than that which it accords to its own investors.

59. The Government of Gondwana accorded a treatment to Nixio which was less favourable

⁵⁶ *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, International Centre for Settlement of Investment Disputes, Case No. ARB/03/16, para. 435 (Award, Oct. 2, 2006)

than that conceded to State owned Gondwana Oil Corporation Ltd. in spite of the fact that Gondwana Oil Corp. was also a party to the Production Sharing Contract (PSC) and the terms of the contract under Article 7.3 provide that neither party to the contract shall be relieved of their obligations and liabilities under the same.

60. Therefore, even if the Contract is breached, as is alleged by the Respondent, Gondwana Oil Corp. should have been accorded the same treatment as Nixio. The fact that the Gondwanan Government not only neglected to take any such measures against Gondwana Oil Corp. but also transferred Nixio's participating interest to the State owned company shows that the Respondent discriminated against the Claimant.

61. Finally, it is argued that the measures taken by the Gondwana Government were not accompanied by "prompt, adequate and effective" compensation. As per the provisions of the Article 13 of the ECT, Nixio Petroleum is entitled to a prompt, adequate and effective compensation which amounts to fair market value of the investment accompanied by interest at a commercial rate and expressed in a freely convertible currency. In so arguing, it is claimed that since the expropriation was not accompanied by provision for the payment of just compensation, was discriminatory and devoid of public interest, the measures of the Respondent are unlawful *per se*⁵⁷ under the Energy Charter Treaty.

62. Therefore, the measures taken by the Gondwana Government are not in accordance with any of the four conditions set by the ECT to make an expropriation lawful and hence the transferring of participating interest of the Claimant in the PSC amounts to unjustified, unlawful and uncompensated expropriation under Article 10,12 and 13 of the ECT.

⁵⁷*Amoco International Finance v. Iran, International law Reports*, Vol. 83. p. 500; I. Brownlie, *Principles of Public International Law*, 4th ed., Oxford, Clarendon Press, 1990, pp. 538-539.

PRAYER

In light of the issues raised, arguments advanced and authorities cited, respondents most humbly request this Tribunal to adjudge and declare that:

- I. The Centre has jurisdiction over the matter.
- II. The actions of the Respondent violate Article 2 and 26 of the Energy Charter Treaty
- III. The Respondent cannot evoke A. 17 and deny the benefits of Part III of the Treaty
- IV. The termination of the PSC amounts to violation of Art. 10 and 21 of the Energy Charter Treaty
- V. The transfer of participating interest in the PSC amounts to expropriation under Art. 10, 12 and 13 of the Energy Charter Treaty and is not in terms with the PSC.

All of which is humbly prayed,

Agents for Claimant