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FDI Moot 2020: First Highest Ranked Claimant Memorial by National and Kapodistrian University of Athens

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In the Matter of the Arbitration under the UNCITRAL Rules

Between:

Goliath National Bank JSC (Claimant)

-and-

The Republic of Laoc (Respondent)

KCAB INTERNATIONAL CASE N° 15503/IS

Memorial for Claimant

Table of Contents

Index of Authorities

Legal Instruments

Argentina-Spain BIT	Agreement between the Argentine Republic and the Kingdom of Spain on the reciprocal promotion and protection of investments (28 September 1992)
ASNEC Charter	Founding Charter of the Association of Sovereign Nations for Economic Cooperation (3 February 2012)
ASNEC Treaty	Treaty Concerning the Encouragement And Reciprocal Protection Of Investments In The ASNEC Region of 19 May 2012
Coal Directive	Directive (ASNEC) 2016/87 of the Council of 17 February 2016 on the renewable sources of energy
Convention	Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.XI.1950
Law 66/2016	Law 66/2016 of 6 July 2016 "On the Phase-out of Coal Energy on the Territory of the Republic of Laoc"
Law 72/2016	Law 72/2016 of 5 December 2016 "on Energy Transition"
TFEU	European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01
UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010)
VCLT	Vienna Convention on the Law of Treaties (1969)

Awards

Abaclat	Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal (4 February 2014)
Abaclat-Dissenting	Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic), Dissenting Opinion on Jurisdiction and Admissibility of George Abi-Saab (28 October 2011)

AES	AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22 (23 September 2010)
African Holding	African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility (29 July 2008)
Alpha Projektholding	Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (19 March 2007)
Amco	Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction (25 September 1983)
AMTO	Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, Final Award (26 March 2008)
Antin	Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain, ICSID Case No. ARB/13/31, Award (15 June 2018)
Azinian	Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2, Award (1 November 1999)
Azurix	Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006)
Banro	Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo, ICSID Case No. ARB/98/7, Award (1 September 2000)
Bear Creek	Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Award (30 November 2017)
BG	BG Group Plc. v. The Republic of Argentina, UNCITRAL, Award (24 December 2007)
Bilcon	Bilcon of Delaware et al v. Government of Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015)
Blue Bank	Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB 12/20 (12 November 2013)

Burlington	Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (13 December 2013)
Canepa	Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain, ICSID Case No. ARB/19/4, Decision on the Proposal for Disqualification of Arbitrator Peter Rees (19 November 2019)
CC/Devas	CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India, PCA Case No. 2013-09, Decision on the Respondent's Challenge to the Hon. Marc Lalonde and Prof. Francisco Orrego Vicuña (30 September 2013)
Cementownia	Cementownia "Nowa Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2, Award (17 September 2009
Charanne	Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012, Award (26 August 2016)
CME	CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Final Award (12 March 2003)
CMS	CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award (12 May 2005)
ConocoPhillips	ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (27 February 2014)
Continental	Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award (5 September 2008)
Corn Products	Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility (15 January 2008)
Crystallex	Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016)
CSOB	Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Jurisdiction (24 May 1999)

Daimler	Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award (22 August 2012)
Duke Energy	Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award (18 August 2008)
EDF	EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award (12 June 2012)
Eiser	Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award (4 May 2017)
El Paso	El Paso Energy International Co v Argentina (Award) ICSID Case No ARB/03/15, Award (31 October 2011)
Electrabel	Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012)
Electrabel-Disqualification	Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal (25 February 2008)
Enron	Enron Corporation and Ponderosa Assets, LP v. Argentine Republic, ICSID Case No. ARB/01/3, Award (22 May 2007)
Fábrica de Vidrios	Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/2, Decision on the Proposal to disqualify L. Yves Fortier (5 May 2017)
Fedax	Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Award (9 March 1998)
Glamis Gold	Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award (9 June 2009) International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award (January 2006)
İçkale	İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands (11 July 2014)
ICW	I.C.W. Europe Investments Limited v. Czech Republic, PCA Case

	No. 2014-22, Award (15 May 2019)
Impregilo	Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award (21 June 2011)
KS Invest	KS Invest GmbH and TLS Invest GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/25, Decision on the Proposal to Disqualify Kaj Hobér (15 May 2018)
LG&E	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 (3 October 2006)
Merrill & Ring Forestry	Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award (31 March 2010)
Methanex	Methanex Corporation v. United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005)
Micula	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 [I], ICSID Case No. ARB/05/20, Final Award (11 December 2013)
Mihaly	Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award (15 March 2002)
Millicom	Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal, ICSID Case No. ARB/08/20, Decision on Jurisdiction (16 July 2010)
MNSS	MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award (4 May 2016)
Mobil	Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, (10 June 2010)
Mondev	Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, (11 October 2002)
MTD	MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile ICSID Case No ARB/01/7, Award (25 May 2004)
National Grid	National Grid plc v. The Argentine Republic, UNCITRAL, Decision on the Challenge to Mr Judd L. Kessler (3 December

	2007)
Nord Stream-Disqualification	Nord Stream 2 AG v. European Union, PCA Case No. 2020-07, Decision on Challenge to Peter Rees (9 December 2019)
Occidental	Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (5 October 2012)
OperaFund	OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36 (6 September 2019)
Pac Rim	Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on Jurisdiction (1 July 2012)
Parkerings	Parkerings Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Final Award (11 September,2007)
Participaciones	Participaciones Inversiones Portuarias SARL v. Gabonese Republic, ICSID Case No. ARB/08/17, Decision on Proposal to Disqualify an Arbitrator (2 November 2009)
Paushok	Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability (30 April 2011)
Phoenix	Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award (15 April 2009)
Pope & Talbot	Pope & Talbot Inc. v. The Government of Canada, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001)
PSEG	PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award (19 January 2007)
Raiffeisen	Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov (17 May 2018)
RosInvest	RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005, Award on Jurisdiction (1 October 2007)
Saint-Gobain	Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/13, Decision on

	Claimant's Proposal to Disqualify Mr Bottini from the Tribunal (27 February 2013)
Saluka	Saluka Investments BV v. The Czech Republic UNCITRAL, Partial Award (17 March 2006)
Sapec	Sapec, S.A. v. Kingdom of Spain ICSID Case No. ARB/19/23, Decision on Disqualification of Arbitrator James Spigelman (25 June 2020)
Sempra	Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award (28 September 2007)
Siemens	Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award (17 January 2007)
SPP	Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction (14 April 1988)
Suez	Suez Group Ltd. v. The Argentine Republic, UNCITRAL, Decision on Proposal for Disqualification of a member of a Arbitral Tribunal (22 October 2007)
Tecmed	Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (23 May 2003)
Teinver	Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012)
Thunderbird	International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award (26 January 2006)
Tidewater	Tidewater Inc. et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Claimant’s Proposal to Disqualify Professor Brigitte Stern (23 December 2010)
Total	Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/01, Decision on Argentine Republic’s Proposal to Disqualify Ms. Teresa Cheng (26 August 2015)
Universal	Universal Compression Int’l Holdings, S.L.U v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators (20 May 2011)

Urbaser	Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan (12 August 2010)
Valeri	Valeri Belokon v. Kyrgyz Republic, UNCITRAL, Decision on Challenges to Arbitrators Professor Kaj Hober and Professor Jan Paulsson (6 October 2014)
Vanessa Ventures	Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)04/6, Decision on Jurisdiction (22 August 2008)
Vito Gallo	Vito G. Gallo v. The Government of Canada, UNCITRAL, Decision on the Challenge to Mr. J. Christopher Thomas (14 October 2009)
Von Pezold	Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award (28 July 2015)
Waste Management II	Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, Award (30 April 2004)

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ECtHR/Cantoni	ECtHR, Cantoni v. France, Judgement (Grand Chamber) of 15 November 1996, application No. 17862/91, ECHR Reports 1996-V
ICJ/Reparation for Injuries	ICJ, Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174
PCIJ/Mavrommatis	PCIJ, The Mavrommatis Palestine Concessions (Greece v. the United Kingdom), Judgment of 30 August 1924, PCIJ Series A No. 2, p. 7
PCIJ/Oscar Chin-Anzilotti	PCIJ, Oscar Chinn (United Kingdom v. Belgium), Individual Opinion of M. Anzilotti, PCIJ Series A/B. No 63, p. 107
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UNCTAD	Investor-State Dispute Settlement: A sequel. UNCTAD Series on Issues in International Investment Agreements II, 2014

WHO Flooding	World Health Organization (2017), Regional Office For Europe, "Flooding: Managing Health Risks in the Who European Region"

List of abbreviations

BIT	Bilateral Investment Treaty
Challenge	Respondent's Challenge of Perry Mason, 16 June 2019
CJEU	Court of Justice of the European Union
EU	European Union
ECtHR	European Court of Human Rights
FET	Fair and Equitable Treatment
Facts	Statement of Uncontested Facts
Greene's email	Response to Respondent's challenge dated 16 June 2019 and the subsequent comments by Mr Mason
ICJ	International Court of Justice
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
ILC	International Law Commission
Notice	Notice of Arbitration, 31 January 2019
Response	Response to the Notice of Arbitration dated 28 February 2019
WTO	World Trade Organization
p. (pp.)	Page (Pages)
PO3	Procedural Order No. 3, 16 June 2020
PO4	Procedural Order No. 4, 31 August 2020
§ (§§)	Paragraph (Paragraphs)

Statement of Facts

Dramatis personae

[1] Goliath National Bank JSC ("**GNB**" or "**Claimant**") is a joint-stock company incorporated in the Republic of Mercuria ("**Mercuria**"). Claimant acquired the Investment and the right to initiate the present arbitration through an Assignment Agreement concluded with Mercurian First National Bank JSC ("**MFNB**"). MFNB is also a joint-stock company incorporated in Mercuria, reputed for providing high-quality business loans.

[2] The Republic of Laoc ("**Laoc**" or "**Respondent**") is a small developed country with extensive coal deposits. Laoc's economy is heavily dependent on coal-related activities, which contribute 20% to the Laocan GDP and employ 15% of its domestic workforce.

MFNB establishes a prosperous Investment

[3] Against this background, Mountaintop Investments LLC ("**Mountaintop**"), a company incorporated in Mercuria received authorization to build a state-of-the-art coal-fired power plant ("**T-1**") in the municipality of Ticadia. T-1's projected lifetime was 40 years. Notably, no environmental issues were raised prior to the construction of T-1. On the contrary, it was wholeheartedly supported by the local community. For the purpose of this project, Mountaintop constituted a Special Purpose Vehicle (SPV), Ticadia-1 LLC ("**Ticadia-1**").

[4] On 1 December 2010, Ticadia-1 entered into the Financing Agreement Nº 0940394 ("**Financing Agreement**") with MFNB. Hereby, MFNB lent USD 600 million to Ticadia-1 with a repayment horizon of 20 years. The loan was secured with the future power plant building, the shares of Ticadia-1, and Mountaintop's personal guarantee. Before granting the loan, MFNB itself held meetings with the Governor of Ticadia who specifically reassured MFNB about the favourable outlook of the investment.

[5] On 15 December 2010, Ticadia-1 received a construction permit. On 25 September 2014, it acquired a commercial operation license for 40 years.

The foundation of ASNEC and the path towards the Coal Directive

[6] On 3 February 2012, the Association of Sovereign Nations for Economic Cooperation ("**ASNEC**") was established. ASNEC is a Regional Economic Integration Organization ("**REIO**") whose purpose is to bolster economic development in the ASNEC region. In this regard, ASNEC and its Member States concluded on 21 June 2012 the ASNEC Energy Investment Treaty ("**ASNEC Treaty**"). ASNEC Treaty is a typical multilateral International Investment Agreement ("**IIA**"), which provides for substantive protection to foreign investments and investor-State arbitration.

[7] In the aftermath of disastrous floods, Laoc showed a shift in its political trajectory. The dominant, since 2000, coal-friendly party of the Laocan Workers Movement ("**LWM**"), lost the majority in 2015 elections. This paved the way for an environmental coalition to be formed.

[8] In December 2015, Laoc signed together with ASNEC and its Member States the Seoul Agreement on Climate Change ("**Seoul Agreement**"). Laoc ratified the Seoul Agreement on 11 January 2016.

[9] Subsequently, ASNEC enacted Directive 2016/87 on the renewable sources of energy ("**the Coal Directive**"), which envisaged the phasing-out of coal-fired power plants in the ASNEC region by December 2028. It also bestows on ASNEC Member States the discretion to introduce support schemes for the renewables.

Laws 66/2016 and 72/2016: a tectonic shift in Laoc's energy regime

[10] Notwithstanding the ever-standing coal-dependent energy regime in Laoc and the foreign investments therein, the Laocan Parliament transposed the Coal Directive by enacting Law 66/2016 and Law 72/2016 (together "**the impugned measures**").

[11] Law 66/2016 dictated the phase-out of all coal-fired power plants by 2028. Pursuant to it, T-1 was forced to shut down 26 years before the end of its expected 40-year lifetime.

[12] Law 72/2016 provided renewables installations with priority access to the electricity grid and a premium feed-in tariff ("**FiT**") scheme. In addition, it envisaged the creation of the state-owned and controlled Laocan Renewables Company PLC ("**LRC**"). LRC is tasked with headlining investments in the renewables, including constructing large-scale facilities. Importantly, these installations constructed by LRC will also benefit from the abovementioned support scheme.

The aftermath: MFNB facing insolvency

[13] Consequently, Ticadia-1 was unable to perform its obligations under the Financing Agreement. Further, the value of the pledged assets fell significantly. MFNB tried to enforce Mountaintop's guarantee in a commercial arbitration but eventually lost.

[14] All the above extruded MFNB to the brink of insolvency. Having insufficient funds to initiate the current proceedings, MFNB assigned all its rights pertaining to the Financial Agreement to Claimant. The right to claim compensation against Laoc under the ASNEC Treaty ("**the investment claim**") was also explicitly assigned to Claimant.

The initiation of the current proceedings and Respondent's dilatory tactics

[15] Claimant notified Respondent for the present dispute on 7 October 2018 and engaged in amicable negotiations, which ultimately were futile. On 31 January 2019, Claimant filed a Notice of Arbitration ("**Notice**") pursuant to UNCITRAL Rules. Claimant appointed Mr Perry Mason as its arbitrator.

[16] On 28 February 2018, Respondent filed its Response to the Notice of Arbitration ("**Response**") denying all claims and raising objections as to the Tribunal's jurisdiction and the claim's admissibility.

[17] On 16 June 2019, Respondent filed a challenge against Perry Mason ("**Challenge**"). Respondent alleges lack of impartiality on the grounds of Mr Mason's sitting in *Hewer Plants v. Wellfalcon* ("**Hewer Plants**") and *C-Energy v. Wellfalcon* ("**C-Energy**"), his laconic Twitter post and his podcast interview in the Arbitration Station, dated 9 May 2018.

[18] On 16 June 2019, Mr Mason responded to Laoc's allegations and, in the spirit of transparency, provided further information.

Summary of Arguments

[19] **CHALLENGE OF MR PERRY MASON**. The challenge of Mr Mason is inadmissible because it was not filed on time. In any event, Mr Mason's conduct does not raise justifiable doubts as to his impartiality or independence. Mr Mason is not subject to issue conflict. Additionally, Mr Mason's non-disclosure does not constitute a ground for challenge.

[20] **JURISDICTION**: First, this Tribunal has jurisdiction *ratione personae* because Claimant is the Investor Party to the dispute and has validly acquired the investment claim against Laoc. Second, this Tribunal has jurisdiction *ratione materiae* since the dispute is related to an Investment.

[21] **ADMISSIBILITY: ABUSE OF PROCESS**. The claim brought before this Tribunal is admissible because the initiation of the current proceedings does not constitute an abuse of process.

[22] **ATTRIBUTION**. Law 66/2016 is not attributed to ANSEC by virtue of Articles 6 and 7 ARIO; rather it is solely attributed to Laoc.

[23] **MERITS**: **FET**. Laoc violated Article II(1) ASNEC Treaty because it failed to accord FET to the Claimant's Investment. Laoc frustrated Claimant's legitimate expectations through the enactment of Laws 66/2016 and 72/2016.

[24] **MERITS**: **MOST CONSTANT PROTECTION AND SECURITY**. Laoc violated Article II(1) ASNEC Treaty since it failed to provide the most constant protection and security to Claimant's Investment.

[25] **MERITS: NON-IMPAIRMENT STANDARD**. Laoc violated the non-impairment standard under Article II(1) ASNEC Treaty by enacting unreasonable and discriminatory measures.

[26] **NON-PRECLUDED MEASURES**. Laoc's responsibility is not exempt under the ASNEC Treaty.

Part I: Challenge of Mr Perry Mason

[27] Respondent, seeking to delay the current proceedings, challenged the experienced arbitrator Mr Perry Mason.[1] Respondent's challenge is based on Mr Mason's sitting in *Hewer Plants* and *C-Energy,* his subsequent Twitter post, the career advice he provided in The Arbitration Station, and the non-disclosure of these facts.[2] However, Respondent fails to discharge its burden of proof.[3]

[28] In particular, Claimant submits that Respondent's challenge should be rejected since: **(I)** it was not filed on time; in any event, (**II**) Mr Mason's conduct does not raise justifiable doubts as to his impartiality or independence.

I. Respondent's challenge was not filed on time

[29] Article 13(1) UNCITRAL Rules provides:

> *"a party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 [that give rise to justifiable doubts as to the arbitrator's impartiality or independence] became known to the party."*

[30] A party may file a challenge only within 15 days after the notice of appointment of the arbitrator; otherwise, the right to challenge is deemed to be waived.[4] This is particularly the case, when easy-to-access and publicly available information grounding the challenge predate the notice.[5] The parties are expected to inquire into the arbitrator's background once notified about their appointment.[6]

[31] In this vein, the tribunal in *Alpha Projektholding* noted that it is standard practice to perform some investigation into the background of an appointed arbitrator at the early

[1] Challenge, §§1-8.
[2] *Ibid*, §§2, 5-6.
[3] Daele (2012), p. 145; Koch (2003), p. 332.
[4] Caron & Caplan (2013), p. 403; *Suez,* §26.
[5] Malintoppi & Yap (2018), p. 160; *Valeri,* §60.
[6] Loewenstein (2015), p. 345.

stages of the proceedings.[7] This is so because, with the emergence of applications like "Google" and "Wikipedia", such an inquiry has become relatively simple.[8]

[32] In case of a series of facts, the deadline initiates at the time of the notice, if a primary fact forming the challenge was already publicly available prior to the notice.[9] Otherwise, the challenging party would invoke minor circumstances allegedly forming the factual basis of the challenge, in order to postpone the kick-off point of the deadline, and, thereby, delay the proceedings.[10]

[33] For instance, in *Burlington*, Ecuador grounded its challenge on repeat appointments of Professor Vicuña.[11] The tribunal opined that when facts publicly available suffice to ground a challenge, the challenging party should not postpone its filing.[12] Elsewise, the challenge should be dismissed as inadmissible.[13]

[34] *In casu,* Respondent's challenge is based on a series of facts: Mr Mason's career advice in The Arbitration Station, Mr Mason's sitting in *Hewer Plants* and *C-Energy*, and his Twitter post.[14] Nevertheless, Respondent acknowledges that the Arbitration Podcast sufficed, in and of itself, to ground a challenge.[15] The Arbitration Podcast was publicly available online as early as 9 May 2018.[16] Thus, it predated the notice of arbitration dated 31 January 2019.[17]

[35] Therefore, the kick-off point of the deadline is the date the parties have been notified of the appointment of the challenged arbitrator.[18] Thus, Respondent should have filed

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[7] *Alpha Projektholding*, §80.
[8] *Ibid*, §80.
[9] *Valeri,* §55; *see Burlington,* §§74-75.
[10] Daele (2012), p. 151.
[11] *Burlington,* §§22, 25.
[12] *Ibid*, §74.
[13] *Ibid*, §75.
[14] Challenge, §§1-8.
[15] *Ibid*, §7.
[16] Exhibit, R-8.
[17] Notice, §16.
[18] Article 13(1), UNCITRAL Rules.

its challenge 15 days after the Notice, *i.e.* by 15 February 2019. However, Respondent chose to file its challenge on 16 June 2019.[19]

[36] For these reasons, Respondent's challenge should be dismissed as inadmissible.

II. In any event, Mr Mason's conduct does not raise justifiable doubts as to his impartiality or independence

[37] Article 12(1) UNCITRAL Rules stipulates:

> *"Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."* (emphasis added)

[38] Impartiality refers to the absence of bias or predisposition towards a party.[20] Independence is characterized by the absence of external control.[21] Both independence and impartiality *"protect parties against arbitrators being influenced by factors other than those related to the merits of the case."*[22]

[39] The standard set in Article 12(1) UNCITRAL Rules is objective: the question is whether a reasonable and well informed third person has doubts as to the arbitrator's impartiality or independence.[23] If it sufficed for the doubts to arise in the mind of the challenging party, the word "justifiable" would have been redundant.[24]

[40] An equivalent standard is contained in the IBA Guidelines, which reflect international best practices,[25] and, thereby, provide useful guidance in the present analysis.[26] In fact,

[19] Challenge.
[20] *Saint-Gobain,* §56; *Suez,* §29; Redfern et al (2004), §4.55; Caron & Caplan (2013), p. 359; Koch (2003), p. 3; Croft et al (2013), §11.4.
[21] *Ibid.*
[22] *KS Invest,* §76; *Raiffeisen,* §70.
[23] Croft et al (2013), §11.8; *Vito Gallo,* §19; *National Grid,* §80; *Nord Stream-Disqualification,* §30; *Suez,* §22.
[24] Caron & Caplan (2013), p. 359.
[25] Malintoppi & Yap (2018), p. 177; *ICS,* §2.
[26] *Abaclat*, §78; *Blue Bank*, §62; *Fábrica de Vidrios*, §34; *Raiffeisen,* §85.

several tribunals have consistently used them as reference for resolving conflicts of interest in international arbitration.[27]

[41] Evaluations as to the arbitrator's impartiality have predominantly focused on whether the adjudicator is closely affiliated with the subject matter of the relevant case, thus facing an "issue conflict".[28] Should the arbitrator be persistently adhered to their voiced views, this would set the ground for a challenge based on an issue conflict.[29] On the contrary, the non-disclosure of such circumstances cannot, in and of itself, sustain a challenge on the arbitrator's impartiality.[30]

[42] Respondent alleges that Mr Mason's conduct raises justifiable doubts as to his impartiality to adjudge the present case because *first* he is faced with a purported "issue conflict";[31] and, *second*, he has failed to disclose.[32]

[43] In stark contrast, Claimant submits that Mr Mason's conduct does not raise justifiable doubts as to his impartiality since: (**A**) Mr Mason is not subject to an issue conflict; and (**B**) Mr Mason's non-disclosure does not constitute a ground for challenge.

A. Mr Mason is not subject to an issue conflict

[44] Claimant submits that Respondent's arguments are ill-founded, since neither (**1**) Mr Mason's sitting in *Hewer Plants* and *C-Energy*, nor (**2**) his Twitter post and interview in the Arbitration Podcast create an issue conflict.

1. Mr Mason's sitting in *Hewer Plants* and *C-Energy* does not raise an issue conflict

[45] Respondent alleges that Mr Mason is subject to an issue conflict due to his previous

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[27] *Total,* §98; *Burlington,* §69.
[28] Brubaker (2008), p. 140; Malintoppi & Yap (2018), §8.86; Griffith & Kalderimis (2015), p. 607; *ConocoPhillips*, §55.
[29] ASIL-ICCA, §2.
[30] IBA Guidelines, p. 18.
[31] Challenge, §4.
[32] *Ibid*, §7.

participation in *Hewer Plants* and his concurrent appointment in *C-Energy.*[33] However, Claimant submits that: (***i***) Mr Mason's sitting in *Hewer Plants* and *C-Energy* does not *per se* constitute a ground for challenge; alternatively, (***ii***) *Hewer Plants* and *C-Energy* are dissimilar to the present case.

i. Mr Mason's sitting in Hewer Plants and C-Energy is not per se a sufficient ground for challenge

[46] Arbitrators should not be disqualified simply because they faced or are facing similar legal and factual issues in another case.[34] For, investment arbitration involves the interpretation of a limited number of similarly worded treaty clauses, resulting in similar or identical issues arising in different cases.[35] Moreover, it is recognized that the pool of experienced arbitrators in investment arbitration is overwhelmingly limited.[36]

[47] In this vein, arbitral jurisprudence has firmly and consistently indicated that previous or concurrent sitting is inadequate to raise an issue conflict, even in similar cases.[37]

[48] For instance, in *Sapec*, Judge James Spigelman was challenged due to his previous participation in *Cube.*[38] The cases involved vast majorities: Spain's alterations of the renewables regime.[39] Nevertheless, the tribunal held that previous sitting does not *per se* create issue conflict.[40]

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[33] Challenge, §2.
[34] *Tidewater,* §83; *Universal,* §83; *KS Invest,* §90; Norton (2018), p. 280.
[35] Cleis (2017), p. 86.
[36] Malintoppi & Yap (2018), § 8.72.
[37] *Içkale,* §§118–122; *Suez*, §37; *Tidewater,* §67; *Universal,* §83; *Electrabel-Disqualification*, §41; *Urbaser*, §§44-45.
[38] *Sapec,* §26.
[39] *Ibid,* §56.
[40] *Ibid,* §§61-63.

[49] Additionally, in *Tidewater*, Brigitte Stern was challenged due to her participation in a similar ongoing case.[41] However, the tribunal decided that concurrent sitting does not constitute a sufficient ground for challenge. [42]

[50] In the present case, Mr Mason has participated in *Hewer Plants* and is currently appointed as an arbitrator in *C-Energy*.[43] However, his previous and concurrent sitting is insufficient as ground for challenge. Besides, Mr Mason has served as an arbitrator appointed by both States and investors.[44] Thus, his experience in over 30 investor-State arbitrations further guarantees his impartiality.[45]

[51] In conclusion, Mr Mason's previous and concurrent sitting in these cases does not raise *per se* an issue conflict.

ii. In any case, Hewer Plants and C-Energy are dissimilar to the present case

[52] Issue conflict does not arise when the challenged arbitrator has participated in dissimilar cases.[46] For, the fact that an arbitrator made a factual finding or a legal determination in one case does not preclude the arbitrator from deciding impartially - or indeed differently- in another case.[47]

[53] The present case is by no means similar or alike to *Hewer Plants* since they involve different investments; different parties; and different impugned measures.

[54] In particular, *Hewer Plants* and *C-Energy* concerned a lignite-fired power plant connected with an open cast lignite mine,[48] whereas the present case refers to a coal-

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[41] *Tidewater,* §18.
[42] *Ibid*, §68.
[43] Facts, §32.
[44] Greene's email.
[45] *Ibid*.
[46] *Içkale*, §§118-122; *Participaciones,* §30; *Suez*, §36.
[47] *Universal*, §83.
[48] Exhibit R-9; PO4, §8.

fired power plant;[49] *Hewer Plants* and *C-Energy* filed their claims against Wellfalcon*,*[50] whereas the present claim is filed against Laoc;[51] further, in *Hewer Plants* and *C-Energy* the alleged violation was based not only on the shutting-down of power plants, but also on the closure of the connected mines,[52] whereas in the present dispute the alleged violation is grounded on the phase-out of coal-fired power plants and the undue advantages provided to the renewables.[53]

[55] Especially, as per *C-Energy*, the award is confidential.[54] In short, the exact factual and legal background of the case remains unknown.[55] Thus, C-Energy cannot, in any way, constitute a ground for challenge.

[56] It follows that Mr Mason participated in three entirely dissimilar cases. Thus, his previous sitting in *Hewer Plants* and his current sitting in *C-Energy* do not create an issue conflict.

2. Mr Mason's Twitter post and his interview in the Arbitration Podcast do not create an issue conflict

[57] Abstract legal opinions, *i.e.* non case-specific legal views, do not reveal any relationship with the subject matter of the dispute, and, thereby, they cannot give rise to an issue conflict.[56] The same holds for an arbitrator's online conduct.[57] Besides, the arbitrators, as legal practitioners and/or academics, are not deprived of their academic freedom.[58] Holding otherwise would lead to an undesirable chilling-effect of academic writings in the field.[59]

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[49] Facts, §11.
[50] Exhibit R-9; Facts, §32.
[51] Notice.
[52] Exhibit R-9; PO3, §16; PO4, §8.
[53] Exhibit R-9; PO3, §16.
[54] PO3, §16.
[55] *Ibid*.
[56] Malintoppi & Yap (2018), p. 177; ASIL-ICCA, §108.
[57] Sanubari (2017), p. 15.
[58] *CC/Devas*, §64.
[59] Schill (2014), p. 6.

[58] For this reason, legal opinions are included in the Green List of the IBA Guidelines, which encompasses innocuous situations that under no circumstances give rise to justifiable doubts.[60] In particular, paragraph 4.1.1 stipulates:

> *"The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case)"*

[59] In this vein, in *Urbaser*, Professor McLachlan was challenged due to his previously expressed abstract legal views on the interpretation of MFN clauses.[61] The tribunal opined that a challenge should be rejected, unless the views expressed were of such force as to prevent the arbitrator from taking full account of the facts and the arguments presented by the parties in the particular case.[62] The mere showing of an abstract opinion relevant to the case is an insufficient ground for challenge.[63]

[60] Similarly, *in casu*, Mr Mason did not make any comprehensive legal analysis, nor did he adopt any firm legal position on issues relative to the case, in its interview in the Arbitration Station.[64] In fact, the genuine context and purpose of the interview was merely career advising.[65] The loose and informal character of the discussion connotes that Mr Mason did not engage in an in-depth analysis upon a complex legal debate.

[61] Further, Mr Mason's Twitter post cannot be considered a legal opinion at all.[66] In this post, Mr Mason merely informed his followers on his participation in *Hewer Plants*.[67] The adjective "groundbreaking" pinpoints that *Hewer Plants* is the first case regarding environmental measures in the ASNEC region.[68] Indeed, the characterization of the case with one single word cannot be read as a legal opinion.

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[60] IBA Guidelines, p. 7.
[61] *Urbaser,* §§20–32.
[62] *Ibid*, §§54, 59.
[63] *Ibid,* §45.
[64] Exhibit R-8.
[65] *Ibid*.
[66] Exhibit R-10.
[67] Facts, §33.
[68] Exhibit R-8.

[62] It follows that Mr Mason's interview in the Arbitration Station, and Twitter post do not entail an in-depth legal analysis on case-specific legal issues; let alone an analysis of such force that would prevent Mr Mason from taking full account of the facts and the arguments presented by the parties in the present case.

[63] Therefore, Mr Mason's online conduct does not create an issue conflict.

B. Mr Mason's non-disclosure does not constitute a ground for challenge

[64] Respondent alleges that Mr Mason's non-disclosure of his previous appointment in *Hewer Plants* and his interview in the Arbitration Station constitutes an autonomous ground for challenge.[69]

[65] Yet, Claimant submits that: (**1**) non-disclosure is not an autonomous ground for challenge; in any case, (**2**) Mr Mason had no duty to disclose.

1. Non-disclosure does not constitute an autonomous ground for challenge

[66] Grounds of challenge are exhaustively listed in Article 12(1) UNCITRAL Rules. In the words of *Amoco, "an arbitrator may be disqualified on grounds of lack of impartiality or independence, not failure to disclose."*[70] In the same vein, IBA Guidelines reiterate that *"non-disclosure cannot by itself make an arbitrator partial."*[71] Hence, non-disclosure cannot *per se* give rise to justifiable doubts as to arbitrator's impartiality and justify disqualification.[72]

[67] *In casu*, Mr Mason did not disclose his previous sitting in *Hewer Plants* and *C-Energy*, his interview in the Arbitration Station and his Twitter post. However, non-disclosure cannot create justifiable doubts as to his impartiality, absent any issue conflict. Thus, non-disclosure does not constitute an autonomous ground for challenge.

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[69] Challenge, §4.
[70] *Amoco,* §255.
[71] IBA Guidelines, p. 18.
[72] *Suez,* §§47-48; *ConocoPhillips,* §60; *Canepa,* §53; *Total,* §142; Cianco (2014), p. 447.

2. In any case, Mr Mason had no duty to disclose

[68] Article 11 UNCITRAL Rules provides:

> *"when a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence"*

[69] Article 11 UNCITRAL Rules does not specify the exact circumstances that need to be disclosed. Nonetheless, the IBA Guidelines provide useful references by classifying the potentially required disclosures in three distinctive categories.[73]

[70] Green List refers to innocuous situations that do not require disclosure by the arbitrator while the other two lists consider disclosure mandatory.[74] Disclosure of previous sittings is necessary only if they involve the same party or an affiliate of the same party.[75] Legal opinions also fall under the Green List.[76]

[71] In the present dispute, Mr Mason has not served as an arbitrator in any case involving the same parties. Specifically, in *Hewer Plants* and *C-Energy* the claim was brought against *Wellfalcon*; instead, the present claim is brought against Laoc. Further, the interview in the Arbitration Station is an abstract legal view. As such, it falls genuinely under the Green List.

[72] In conclusion, Mr Mason had no duty to disclose any of these circumstances; thus, his non-disclosure does not create any justifiable doubts as to his impartiality.

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[73] *Abaclat*, §78; *Blue Bank*, §62; *Fábrica de Vidrios*, §34; *Raiffeisen,* §85.
[74] Daele (2012), p. 14.
[75] IBA Guidelines, §3.1.5.
[76] *Ibid*, §4.1.1.

Part II: Jurisdiction

[73] The scope of the tribunal's jurisdiction is determined by the consent of the contracting parties.[77] The parties' consent is often articulated in the investment treaty's dispute settlement clause.[78] Thus, the tribunal should define its jurisdiction by reference to the dispute settlement clause in question.[79]

[74] Dispute settlement clauses should not be interpreted restrictively.[80] Rather, international tribunals should adopt a *bona fide* interpretation,[81] by considering the range of the commitments the parties may be considered as having reasonably and legitimately envisaged.[82]

[75] Article X ASNEC Treaty provides:

> *"(1) Disputes related to Investments, which concern an alleged breach of an obligation of a Contracting Party shall, if possible, be settled amicably.*
>
> *(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may submit the dispute to an arbitral tribunal established in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules as in force at the commencement of the proceedings. [...]"* (emphasis added)

[76] Accordingly, Article X ASNEC Treaty sets two jurisdictional preconditions: *first,* claimant should be "the Investor party to the dispute" (*ratione personae*); *second,* there should be a "dispute related to an Investment" (*ratione materiae*). Compliance with these preconditions affords claimant standing in the arbitral proceedings.[83]

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[77] *Abaclat-Dissenting*, §8.
[78] Dolzer & Schreuer (2012), p. 259.
[79] Douglas (2009), pp. 141-143.
[80] *SPP*, §8.
[81] Article 31(1), VCLT.
[82] *CSOB*, §34; *Amco*, §14.
[83] *Millicom*, §89; Fontanelli (2017), pp. 16-17.

[77] *In casu,* Respondent objects to Claimant's standing on both grounds.[84] However, Respondent utterly fails to discharge its burden of proof.[85] In this regard, Claimant submits that the Assignment Agreement concluded with MFNB does not deprive GNB of its standing before the present Tribunal. Particularly, Claimant submits that it has standing in the present proceedings since both (**I**) *ratione personae* and (**II**) *ratione materiae* jurisdictional preconditions are met.

I. This Tribunal has jurisdiction *ratione personae*

[78] It is Claimant's submission that jurisdiction *ratione personae* cannot be challenged in the present case if two preconditions are met; *first*, if the claimant is "the Investor party to the dispute";[86] *second*, if the investor owns a valid investment claim,[87] *i.e.* the secondary right for reparation *vis-à-vis* the host State.[88] The second precondition is implicitly deduced from the *raison d'être* of investment treaties, which is to provide a forum for adjudication of investors' rights under the same treaty.[89]

[79] In this regard, Claimant submits that: (**A**) it is the Investor party to the dispute; and (**B**) it has validly acquired MFNB's investment claim.

A. Claimant is the Investor party to the dispute

[80] Article X(2) ASNEC Treaty requires that Claimant is *first,* a protected Investor and *second,* the party to the dispute. *In casu,* Claimant fulfills both requirements: (**1**) Claimant is a protected Investor under ASNEC Treaty; and (**2**) Claimant is the party to the present dispute.

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[84] Response, §§5, 7.
[85] *Pac Rim*, §2.11; *Von Pezold*, §176.
[86] Article X(2), ASNEC Treaty.
[87] Fontanelli (2017), pp. 16-17.
[88] Goh (2019), p. 24.
[89] Tietje et al. (2008), p. 24.

1. Claimant is a protected Investor

[81] The Tribunal's jurisdiction *ratione personae* extends to an individual or legal entity which has the nationality of another contracting party in accordance with the relevant provision in the investment treaty.[90]

[82] Pursuant to Article I(4) ASNEC Treaty, *"Investor of a Contracting Party"* is:

> *"(b) a company or other organisation organised in accordance with the law applicable in that Contracting Party."*

[83] In the present case, Claimant is organised and incorporated in accordance with the laws of Mercuria.[91] Mercuria is a contracting party of ASNEC Treaty.[92] Therefore, Claimant is a national of a contracting party and, as such, it is a protected Investor under ASNEC Treaty.

2. Claimant is the party to the present dispute

[84] The term "dispute" is defined as *"a <u>disagreement</u> on a point of law or facts, a <u>conflict</u> of legal views or of interests between two persons"* (emphasis added).[93] Inevitably, for a dispute to exist, a minimum of communication between two persons is a prerequisite.[94]

[85] The tribunal in *Teinver* dealt with a cooling-off period requirement in the Argentina-Spain BIT.[95] The tribunal opined that, when a cooling-off period is required, the dispute arises when the negotiations begin.[96] Thereupon, the parties to the dispute are the parties participating in the negotiation process.[97]

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[90] Roe et al. (2011), p. 65; Fontanelli (2017), p. 80.
[91] Exhibit C-12.
[92] Preamble, ASNEC Treaty.
[93] PCIJ/*Mavrommatis,* p. 11.
[94] Baumgartner (2016), p. 189.
[95] Article X(2), Argentina-Spain BIT.
[96] *Teinver,* §120.
[97] *Ibid*.

[86] *In casu*, Article X(1) ASNEC Treaty requires an amicable settlement before the submission of the dispute. Pursuant to it, Claimant notified the dispute to Respondent on 7 October 2018. From this day onwards, Claimant began its efforts to resolve the dispute amicably.[98] Since the negotiations proved futile, Claimant submitted the dispute to the present Tribunal.

[87] Accordingly, the dispute arose at the time Claimant notified Respondent and, consequently, Claimant is the Investor party to the present dispute.

B. Claimant has validly acquired MFNB's investment claim

[88] Investors are equipped with direct rights under investment treaties,[99] including the secondary right for reparation *vis-à-vis* the host State.[100] The investor exercises exclusive control over the investment claim.[101] Hence, it is entitled to freely dispose it,[102] including assigning it to someone else.[103] This is even more so, given the absence of any such express prohibition in the investment treaty.[104]

[89] Besides, the assignment of investment claims genuinely serves the objectives of the ISDS.[105] On the one hand, the assignment of an investment claim might be the only way for the investor to mitigate its damages due to the injurious conduct of the host State.[106] Hence, the investor shall be allowed to freely dispose it, in order to reap its value.[107] On the other hand, the assignment under no circumstances deteriorates the legal position of the host State: the host State owes the exact same obligation, but to a

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[98] Notice, §3.
[99] Douglas (2009), p. 459; Paulsson (1995), p. 256; *Corn Products,* §169.
[100] Peters (2016), p. 285.
[101] Douglas (2003), p. 169.
[102] Braun (2014), p. 108; Di Bella (2020); Goh (2019), p. 6.
[103] Goh (2019), p. 27; Di Bella (2020).
[104] Kirtley (2009), p. 427.
[105] Claussen (2019), p. 4.
[106] Di Bella (2020).
[107] Goh (2019), p. 29.

different person, the assignee.[108] Absent any legal interest, the consent of the host State is not required.[109]

[90] As a corollary, an investment claim is not *intuitu personae* and may be freely assigned.[110] The assignment may take place along the underlying investment.[111]

[91] In this vein, the tribunal in *Fedax* found that where an investment, such as a negotiable promissory note, is freely transferable to third parties then all rights attached to that investment, including the investment claim, may also be transferred.[112]

[92] Additionally, in *CME*, the acts allegedly violating the BIT occurred when the investment was owned by the claimant's predecessor.[113] Nevertheless, the tribunal noted that *"any claims deriving from the claimant's predecessor's investment (also covered by the Treaty) follow the assigned shares."*[114] Therefore, the claimant was entitled to claim compensation against the Czech Republic.

[93] Similarly, *in casu*, ASNEC Treaty confers direct rights to investors without prohibiting the assignment of claims. At the time of the enactment of the impugned measures MFNB was indisputably a qualified investor.[115] Hence, MFNB had an investment claim against Respondent.[116] Subsequently, Claimant acquired MFNB's investment through the Assignment Agreement.[117] The assignment of the investment entailed the assignment of the right to claim compensation against Respondent. For the sake of clarity, the Assignment Agreement explicitly provides that the investment claim was also assigned to Claimant.[118]

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[108] Di Bella (2020).
[109] Douglas (2003), p. 172.
[110] Burgstaller & Zarowna (2019), p. 236; Kirtley (2009), p. 427; Claussen (2019), p. 21.
[111] *Daimler,* §145.
[112] *Fedax*, §29.
[113] *CME*, §§5, 15.
[114] *Ibid,* §423.
[115] Response, §5.
[116] Facts, §30.
[117] *Ibid*.
[118] Exhibit C-12.

[94] Therefore, Claimant has validly acquired MFNB's investment claim against Respondent.

II. The Tribunal has jurisdiction *ratione materiae*

[95] The Tribunal has jurisdiction *ratione materiae*, if the "*dispute is related to an Investment*".[119] "Related to" means that the impugned measure must affect the Investment.[120]

[96] According to Article I(1) ASNEC Treaty, *"Investment means any kind of asset"*. In paragraphs (a) to (f), the ASNEC Treaty features a non-exclusive list of assets. Pursuant to Article I(1)(a) ASNEC Treaty, *"leases, mortgages, liens, and pledges"* qualify as Investment. Similarly, Article I(1)(c) ASNEC Treaty states that *"claims to money"* also qualify as Investment.

[97] Importantly, Article I(1) ASNEC Treaty stipulates that "*[a] change in the form in which assets are invested does not affect their character as investments*." Accordingly, the assets do not relinquish their *status* of Investment by the mere fact that they change hands.[121] In the words of *MNSS, "[t]he assignment changed the creditor. [...] The change of creditor changes the investor but not the substance of the investment."*[122]

[98] Neither the value of the assignment does it affect the *status* of the Investment. In *Vannessa Ventures,* the claimant had acquired the investment for the nominal price of USD 50.[123] Notwithstanding Venezuela's contentions that the claimant had not made an investment, the tribunal found jurisdiction *ratione materiae*.[124]

[99] Similarly, in *RosInvestCo,* claimant acquired shares of the Yukos company through an assignment.[125] The tribunal held that the assignment of shares did not alter their

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[119] Article X(1), ASNEC Treaty.
[120] Douglas (2009), p. 245; Roe et al. (2011), p. 45.
[121] *Fedax,* §40; *African Holding*, §74.
[122] *MNSS,* §203.
[123] *Vannessa Ventures,* §84.
[124] *Ibid,* §105.
[125] *RosInvest,* §1.

characterization as an investment,[126] despite the fact that they were purchased at half price.[127]

[100] *In casu*, MFNB's investment consisted of claims to money against Ticadia-1 and Mountaintop, and pledges on Ticadia-1's assets. All these rights arose out of the loan granted to Ticadia-1 in order to finance the construction of T-1.[128] Respondent does not contest that these assets qualified as an Investment.[129] Claimant acquired the exact same assets through the Assignment Agreement in exchange of USD 150 million.[130]

[101] In light of the above-cited jurisprudence, the assignment does not affect the *status* of the Investment. Thus, Claimant possesses assets that qualify as an Investment under the ASNEC Treaty.

[102] To sum up, since Respondent's measures affect Claimant's assets, the dispute is sufficiently related to Claimant's Investment. *Ergo,* the Tribunal has jurisdiction *ratione materiae.*

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[126] *RosInvest,* §§322-328, 339.
[127] *Ibid,* §53.
[128] Exhibit C-4.
[129] Response, §5.
[130] Exhibit C-12.

Part III: Admissibility

[103] While jurisdiction concerns the scope of the tribunal's authority, based on the State's consent to arbitrate, admissibility is focused on the particular claim raised by the claimant.[131] Respondent bears the burden of proving the inadmissibility of the claim.[132] A claim may be held inadmissible when its adjudication contravenes a public policy objective.[133]

[104] In this regard, Respondent may object to the admissibility of Claimant's claims alleging an abuse of process. In this event, Claimant submits that no instance of abuse arises in the instant proceedings, since the Assignment Agreement served a legitimate purpose.

I. The initiation of the present proceedings does not constitute an abuse of process

[105] The notion of abuse of process denotes the use of procedural rights for purposes that are alien to those for which the rights were established.[134] In this respect, tribunals hold assigned claims inadmissible, when the assignment aims to provide the assignee with a better right than that of the assignor.[135] Nonetheless, when the assignor has itself access to the investment tribunal, no abuse of process arises.[136]

[106] Under this prism, in *Millicom,* the assignor, a Dutch company, had itself access to the tribunal since it genuinely met the nationality requirement.[137] On this basis, the tribunal found that the assignment of the investment claim to another entity with the same nationality did not provide the assignee with a better right than its predecessor.[138] Thus, the subsequent initiation of proceedings did not constitute an abuse of process.[139]

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[131] Heiskanen (2014), p. 7; Roe et al. (2011), p. 39.
[132] Fontanelli (2017), p. 142.
[133] Heiskanen (2014), p. 11; Fontanelli (2017), p. 87.
[134] Baumgartner (2016), p. 204; Gaillard (2017), p. 18.
[135] *Mihaly,* §24; *Banro,* §5; *Phoenix,* §142; *Cementownia,* §117; *Mobil,* §§204-205; *Société Générale,* §110.
[136] Goh (2019), p. 37.
[137] *Millicom,* §84.
[138] *Ibid,* §58.
[139] *Ibid*, §§82-84.

[107] Besides, it is compatible with ISDS rationale that the aggrieved investor receive funds in exchange for the assignment of its investment claim.[140] A damaged investor does not often have the necessary funds to afford the costly investment arbitration.[141] In this regard, the legitimate goal of this form of funding is to alleviate the aggrieved investor, which, due to host State's wrongfulness, could not otherwise initiate proceedings.[142] Consequently, it would be inappropriate, if States were allowed to evade the adjudication of claims acquired under these circumstances.[143]

[108] Here, similarly to *Millicom*, it is undisputed that MFNB, the assignor, had itself access to the present Tribunal.[144] Yet, due to Respondent's measures, MFNB found itself in lack of liquidity.[145] Therefore, it was financially impossible for MFNB to initiate proceedings itself against Laoc. In this context, MFNB assigned the investment claim against Laoc to Claimant, through an arm's length transaction.[146]

[109] Thus, the Assignment Agreement did not provide GNB with a better right than MFNB had. On the contrary, this transaction served the legitimate purpose of alleviating the aggrieved investor and, concomitantly, salvaging the claim against Respondent.

[110] All things considered, the initiation of the current proceedings does not constitute an abuse of process.

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[140] Di Bella (2020); Klaussen (2019), p. 17.
[141] UNCTAD, p. 145.
[142] Roughton & Prince (2019), p. 4.
[143] Burgstaller & Zarowna (2019), p. 238.
[144] Response, §5.
[145] Facts, §29.
[146] *Ibid*, §30.

[111] An internationally wrongful act of a State arises when a conduct is, *first,* attributed to the State and, *second*, constitutes a breach of an international obligation of this State.[147] Claimant submits that Laws 66 and 72/2016 constitute an internationally wrongful act of Respondent. The question of attribution is discussed in **Part IV**; subsequently, the question of the breach is discussed in **Part V**.

Part IV: Attribution

[112] Attribution is the process whereby international law establishes whether the conduct of a natural person or entity can be considered as an act of a State.[148] A tribunal which is asked to attribute an act or omission to a responding State first needs to identify the applicable rules.[149]

[113] In the present dispute, Article X(4) ASNEC Treaty provides that, along with the investment instrument, this Tribunal should apply *"rules and principles of international law"*. Absent any specific rules of attribution in the ASNEC Treaty, rules of general international law apply. In fact, under customary international law,[150] the conduct of an organ of a State is generally attributed to that State.[151]

[114] Yet, in allocating the attribution of conduct between an International Organization ("**IO**") and its Member States, recourse should also be made to the internal rules of the IO.[152] In this context, Article 120 ASNEC Charter provides for two distinct rules of attribution by reference to Articles 6 and 7 on the Responsibility of International Organizations ("**ARIO**").[153]

[115] Accordingly, Claimant submits that Laws 66 and 72/2016 are exclusively attributed to Respondent and not to ASNEC. Since Respondent does not raise any objection as per

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[147] Article 2, ASRIWA; Crawford (2013), p. 93.
[148] Crawford (2013), p. 113.
[149] Roe et al. (2011), p. 164.
[150] Crawford (2013), p. 45.
[151] Article 4, ARSIWA.
[152] Article 64, ARIO.
[153] Exhibit R-3.

Law 72/2016,[154] the following analysis will be constrained to the attribution of Law 66/2016. Specifically, neither (**I**) Article 6 nor (**II**) Article 7 ARIO may lead to the conclusion that the enactment of this Law is attributed to ASNEC.

I. The enactment of Law 66/2016 is not attributed to ASNEC pursuant to Article 6 ARIO

[116] Article 6 ARIO stipulates:

> *"The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization." (emphasis added)*

[117] It is Claimant's submission that the Laocan Parliament is neither (**A**) an organ nor (**B**) an agent of ASNEC.

A. The Laocan Parliament is not an organ of ASNEC

[118] Article 2(c) ARIO stipulates:

> *"organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization*

[119] A person or entity is characterized as "organ" insofar as it is organically tied with the IO according to its internal rules.[155] IOs possess a distinct legal personality with distinct organic structure than that of their Member States.[156] In this context, Member States' organs cannot be characterized as IOs' organs under Article 6 ARIO.[157]

[120] In the instant case, ASNEC, as an IO, possesses a distinct legal personality and its own organs. ASNEC's organs are stipulated in ASNEC Charter. For instance, ASNEC Council is the competent organ to enact ASNEC's legal acts.[158] These acts are qualitatively distinct from those of the Member State organs', such as the Laocan

[154] Response, §§9-13.
[155] Casteleiro (2016), p. 69; Stegmann (2019), p. 83.
[156] Crawford (2013), p. 175.
[157] 7th Report, §33.
[158] Article 115 (1), ASNEC Charter.

Parliament. ASNEC Charter does not bestow any competence on the Member States' parliaments. Hence, the Laocan Parliament solely exercises the competences conferred to it by and within the realm of the Laocan Constitution.

[121] In this vein, the Laocan Parliament is by no means organically tied to ASNEC, and thereby, it cannot be considered as an ASNEC *organ*.

B. The Laocan Parliament is not an agent of ASNEC

[122] Article 2(d) ARIO stipulates:

> *"agent of an international organization" means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts."*

[123] The ordinary meaning of the term "agent" connotes any person authorized to act on behalf of another party and bind the latter with its acts.[159] IOs commonly authorize natural or legal persons in order to extend their sphere of action.[160] Although they may not be IO's officials, these persons are entrusted with a part of those IO's functions.[161] Thus, an agency relationship is established when an IO authorizes such persons to perform part of the IO's functions.[162]

[124] To be more precise, international practice suggests that not even the implementation of a binding act of an IO establishes an agency relationship between the state organ and the IO.[163] As a corollary, the State is internationally liable for the implementation of IO's binding acts.[164]

[159] ARIO Commentary, Article 6(2); *ICJ/Reparation for Injuries,* p. 177; Black's Law Dictionary, p. 70.
[160] Couzigou (2014), p. 336.
[161] ARIO Commentary, Article 6(3).
[162] Roe et. al. (2011), p. 180.
[163] Couzigou (2014), p. 344; Roe et. al. (2011), p. 182.
[164] 7th Report, §33.

[125] To cite an example, in *Bosphorus,* the ECtHR held Ireland responsible for complying with the provisions of an EU regulation. The Strasbourg Court found that:

> *"a Contracting Party is responsible [...] for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations."*[165]

[126] In the present case, ASNEC has not authorized the Laocan Parliament to perform any of its functions. In this regard, Laocan Parliament does not exercise its legislative power on behalf of ASNEC; instead, it performs solely the Laoc's functions. Thus, its conduct solely binds Respondent.

[127] Even if Law 66/2016 was necessary for Laoc to comply with its international obligations *vis-à-vis* ASNEC, this does not render the Laocan Parliament an *agent* of ASNEC. As in *Bosphorus,* solely Respondent incurs international responsibility for any act of the Laocan Parliament, including Law 66/2016.

[128] Based on the foregoing, the Laocan Parliament cannot be considered as an *agent* of ASNEC.

II. The enactment of Law 66/2016 is not attributed to ASNEC pursuant to Article 7 ARIO

[129] Article 7 ARIO provides:

> *"The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization <u>exercises effective control</u> over that conduct."* (emphasis added)

[130] Article 7 ARIO seeks to cover cases, in which a person or entity -albeit a state organ or agent- is seconded to an IO.[166] The decisive criterion for attribution of conduct to

[165] *ECtHR/Bosphorus*, §137.
[166] ARIO Commentary, Article 7(1).

the IO under the above-cited article is the existence of the IO's *effective control* over the State's organ.[167]

[131] It is Claimant's submission that the threshold of effective control is not met in the present case. In specific, (**A**) ASNEC's normative control over Laoc does not amount to effective control. In any event, (**B**) the discretion provided under the Coal Directive is incompatible with the notion of effective control.

A. ASNEC's normative control over Laoc does not meet the threshold of effective control

[132] On the one hand, normative control is a form of control exercised exclusively through legal means.[168] Normative control provides the basis for and defines the scope of Member States' action.[169] This control is exercised by imposing legal sanctions upon Member States, so as to ensure conformity.[170]

[133] On the other hand, effective control is tantamount to "exclusive direction and control" and refers to the factual and/or operational link between a state organ and the receiving IO.[171] Effective control is a matter of degree[172] and requires an actual domination over the State's conduct rather than a mere oversight.[173]

[134] Such a degree of domination does not exist in the case of normative control.[174] Indeed, the criterion of effective control under Article 7 ARIO was designed for military operations and is "*less adequate for deciding attribution in the case of other types of cooperation between international organizations and States or other international*

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[167] ARIO Commentary, Article 7(4).
[168] Hernández (2014), p. 651; Casteleiro (2016), pp. 73-74.
[169] Stegmann (2019), pp. 85-86.
[170] Casteleiro (2016), p. 48.
[171] ARIO Commentary, Article 7(4); Couzigou (2014), p. 350.
[172] Arribas (2013), p. 51.
[173] Hernández (2014), p. 650.
[174] Stegmann (2019), p. 89.

organizations".[175] Thus*,* the normative control of an IO does not amount to a concept of control as strong as the effective control.[176]

[135] In the present case, the control ASNEC exercised over Laoc upon the enactment of Law 66/2016 is purely normative. In case of non or improper transposition of ASNEC's legal acts, such as the Coal Directive, the only option for ASNEC would be to impose sanctions over Laoc.[177] In this regard, there is neither an operational link between ASNEC and the Laocan Parliament, nor any direct command.

[136] Consequently, ASNEC's normative control over Laoc may under no circumstances amount to *effective control. Ergo,* Article 7 ARIO does not apply by virtue of ASNEC's normative control over the enactment of Law 66/2016.

B. In any event, the discretion provided under the Coal Directive is incompatible with the notion of effective control

[137] Even if, *arguendo,* normative control in certain instances constitutes effective control, this is definitely not the case, when discretion is provided upon Member State's organs.[178] For, effective control demands a direct command bestowing no discretion as to its execution.[179] Hence, effective control is not exercised when discretion is granted to the state organ.[180]

[138] It is for this reason that EU Directives do not constitute a direct command due to the discretion provided to the Member States.[181] In specific, Article 288 TFEU stipulates that an EU Directive *"shall leave to the national authorities the choice of form and methods"*. The purpose of Directives is to provide States with regulatory space and

[175] 7th Report, §25; Möldner (2012), p. 294.
[176] Hoffmeister (2010), p.727; Casteleiro (2016), p. 74; Hirsch (1995), p. 87.
[177] Article 124, ASNEC Charter.
[178] Hirsch (1995), p. 87.
[179] Möldner (2012), p. 293-295.
[180] Casteleiro (2016), pp. 73.
[181] Stegmann (2019), p. 84; Casteleiro (2016), p. 74.

give the national authorities the option to select the appropriate measures to transpose the Directive.[182]

[139] In this sense, the ECtHR has opined that an EU Member State cannot relinquish responsibility for transposing an EU Directive. The act transposing a Directive entails full responsibility for the Member State. In *Cantoni*, for instance, the ECtHR held that even though a piece of the impugned legislation *"is based almost word for word on Community Directive 65/65 [...] [it] does not remove it from the ambit of [...] the Convention."*[183]

[140] On the contrary, only upon the enactment of Regulations and Decisions could it be argued that effective control is exercised. These legal acts are, in fact, binding on their entirety and bestow no discretion whatsoever on the Member States.[184] It was in this context, that the tribunal in *Electrabel* held that Hungary would not be liable for complying with an EU Decision.[185]

[141] The identity of Article 115 ASNEC Charter and 288 TFEU provides the basis of comparison between the function of ASNEC and EU legal acts. As with EU Directives, ASNEC Directives also provide for discretion to Member States as to their implementation. In particular, the Coal Directive, as any Directive, confers procedural leeway to ASNEC Member States as to its implementation. Characteristically, Article 7(2) Coal Directive calls States to consider *"their specific circumstances",* while it *"<u>encourage[s]</u> them to <u>gradually</u> reduce their final gross production of energy from coal-fired power plants before 31 December 2028"* (emphasis added).

[142] Consequently, any sense of effective control is precluded. Only an ASNEC Regulation or Decision would have constituted a direct command, and thus, an instance of effective control.

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[182] Schütze (2015), pp. 120-122.
[183] *ECtHR/Cantoni,* §30.
[184] Article 288, TFEU.
[185] *Electrabel,* §6.76.

[143] Based on the foregoing, ASNEC did not exercise effective control upon the Laocan Parliament when the latter enacted Law 66/2016. Thus, Article 7 ARIO does not apply, and Law 66/2016 is solely attributed to Respondent.

Part V: Merits

[144] Article II(1) ASNEC Treaty stipulates:

> *"Each Contracting Party shall accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. The Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations."* (emphasis added)

[145] Accordingly, it encompasses various standards of protection, *inter alia* fair and equitable treatment ("**FET**"), the most constant protection and security, and non-impairment by unreasonable or discriminatory measures. As the inclusion of the words "and" and "also" implies, the three standards provide distinct guarantees of protection and, thereby, separate grounds for violation of the Article.[186] Therefore, Claimant is entitled to invoke all standards on the grounds of the same or different state conduct.[187]

[146] It is Claimant's submission that Law 66/2016 and Law 72/2016 violate Respondent's obligations under Article II(1) ASNEC Treaty. In particular, (**I**) Respondent failed to accord Claimant fair and equitable treatment, (**II**) the most constant protection and security and (**III**) impaired the Investment by unreasonable and discriminatory measures. In addition, (**IV**) Respondent's responsibility is not exempt under the ASNEC Treaty.

I. Respondent failed to accord Claimant fair and equitable treatment

[147] FET is an autonomous standard,[188] whose protection extends beyond customary international law.[189] The tribunal in *Azurix*, dealing with the same wording as the ASNEC Treaty, eloquently held that international law sets "a floor, not a ceiling".[190] Should the contracting parties have wished to equate the afforded protection with

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[186] *See* Jacob & Schill (2015), §162.
[187] *AMTO,* §74.
[188] *Tecmed,* §155.
[189] *PSEG,* §239; *MTD*, §91; *Siemens,* §§291-299, *Saluka,* §295.
[190] *Azurix*, §361.

customary international law, they would have simply done so.[191] Therefore, the threshold for an FET violation under the ASNEC Treaty is lower than the one under customary international law.

[148] Protection of legitimate expectations is the dominant element of the FET standard[192] and demands that the host State does not renege on a prior commitment.[193]

[149] Claimant submits that (**A**) the Investor legitimately expected a stable energy policy; and (**B**) both Law 66/2016 and Law 72/2016 frustrated the Investor's legitimate expectations.

A. The Investor legitimately expected a stable energy policy

[150] Any possible governmental action may give rise to legitimate expectations.[194] Whether the State subjectively wished to bind itself is indifferent; what matters is whether objectively its conduct created such an appearance of expectations.[195] During the whole lifespan of the investment, the host State can generate legitimate expectations, anew or reinforce the already existing ones.[196]

[151] MFNB's fundamental expectation was that its long-term investment in the T-1 project would at least break-even, in the sense that the 600 million USD loan would be repaid.[197] The repayment would require that the T-1 coal-fired power plant would not be stripped of its key-features, *i.e.* the minimum preconditions for operation.

[152] In concrete terms, three preconditions should be met cumulatively so as for MFNB's expectation to be satisfied. *First*, it expected that T-1 would operate for a total of 20 years, which was necessary for it to break-even.[198] *Second*, it expected that it would be

[191] Schreuer (2008), p. 77.
[192] *Saluka,* §302; *Waste Management,* §98, *Tecmed,* §154; *El Paso,* §348.
[193] Jacob & Schill (2015), §54; *Charanne,* §486.
[194] Schreuer & Kriebaum (2008), p. 273.
[195] *Micula,* §669.
[196] Schreuer & Kriebaum (2008), p. 274.
[197] Exhibit C-4.
[198] Facts, §12.

able to use its electricity generation technology. *Third*, that it would have equal access to the electricity grid.

[153] Claimant submits that such an expectation is a legitimate one. Indeed, the (**1**) 40-year license granted to Mountaintop for the operation of the T-1 coal-fired power plant along with the (**2**) specific representations of government officials evince the legitimacy of MFNB's expectations. Ultimately, (**3**) the socio-economic conditions prevailing at the time of the Investment further reinforced MFNB's legitimate expectations.

1. The license provided for T-1's operation until 2054

[154] A license, as a specific commitment provided by the host State, is a primary source of investor's legitimate expectations.[199] The terms of the license demarcate the operational framework which the investor may legitimately expect.[200]

[155] In *Bear Creek*, Peru granted an authorization to acquire, own and operate a mine.[201] The tribunal found that the authorization was a primary source of legitimate expectation and based on that, the investor could reasonably anticipate that the investment would continue to run.[202]

[156] Similarly, in *BG*, the 35-year exclusive license to distribute natural gas in Buenos Aires created the investor's legitimate expectations for long-term stability of the operational framework.[203]

[157] In this sense, the license granted to Ticadia-1 in the present case defines the legitimate expectations of the investor both in terms of its life span and of the operational conditions. In specific, the license provided for a 40-year life span, subject to a single condition: that T-1 would comply with Laocan legislation.[204]

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[199] Talus (2010), p. 454; McLachlan et al (2017), p. 311.
[200] Schreuer & Kriebaum (2008), p. 273
[201] *Bear Creek,* §149.
[202] *Ibid,* §376.
[203] *BG*, §306.
[204] Exhibit R-1.

[158] It is commonplace that legislation is subject to amendments. Yet, for the past 25 years the only amendments in Laoc's legislation applicable to the operation of power plants were exclusively concentrated in meeting the Best Available Techniques within the method of operation already employed by the producer.[205]

[159] Most importantly, granting a license to a coal-fired power plant connotes that the issuing authority accepts the key feature of such facility, *viz.* the use of coal as energy source. In fact, coal energy producers cannot switch into capital intensive renewable energy sources without cost prohibitive alterations and in a short period of time.[206]

[160] In light of the foregoing, it was legitimate for the Investor to expect that any regulatory amendments would reserve the fundamental investment structure if not until 2054, at least for 20 years which was estimated to be the break-even point of the investment.[207]

2. Laoc assured that energy regulation would remain stable

[161] Investors are entitled to rely on representations as to regulatory stability made by host State's authorities with the purpose to lure investments.[208] For instance, in *Bilcon,* provincial representatives held numerous meetings with Bilicon's delegates and actively encouraged them to invest in a marine quarry.[209] The tribunal concluded that the representatives' conduct was a valid source of legitimate expectations.[210]

[162] In specific, officials' representations foster legitimate expectations if *first,* they are made by a competent state organ, *second,* they are directed to the investor itself at the time of the investment and *third,* they are specific enough. [211]

[163] In the present dispute, Laoc's assurances meet all the preconditions in order to generate legitimate expectations. *First,* they were made by a state organ of the Laocan Republic,

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[205] Exhibit C-1; PO3, §12.
[206] *WTO/Canada-Renewables,* §§5.171-5.174.
[207] Facts, §12.
[208] *Sempra*, §298; *Glamis Gold,* §799; *CMS,* §277; Téllez (2012), p. 436.
[209] *Bilcon,* §§462, 468.
[210] *Ibid,* §589.
[211] Palombino (2018), p. 108; Mairal (2010), p. 438; *Methanex,* Part IV, Ch. D, §8.

namely Ticadia's Governor, whose competency extends to investments in the municipality of Ticadia.[212] *Second*, the representations addressed MFNB itself. In fact, governmental officials held several meetings, as in *Bilcon,* with the executive directors of MFNB prior to making the Investment.[213] *Third*, in addition to his campaign to attract coal investments,[214] the Governor of Ticadia specifically assured MFNB that the investment would be economically beneficial, thereby strongly encouraging it to proceed with the Investment.[215] A few months later he repeated to a press statement:

> *"During our negotiations with Mountaintop and MFNB we strived to convince our partners that from an economic perspective, Ticadia would be the best place in Laoc to build a power plant."*[216]

[164] In this regard, he particularized his concrete assurances as to the long-term financial sustainability of the T-1 project. Relied on these assurances and the overall conduct on behalf of Ticadia's representative, the Investor could legitimately expect that T-1 would remain in place, being economically viable at least until its break-even point.

3. Laoc's ever standing legal and socio-economic framework fostered the Investor's legitimate expectations

[165] Host State's legal framework at the time of the investment is crucial for the investor's decision to invest and, thereby, may generate legitimate expectations.[217] The degree of legitimacy is determined objectively by taking into consideration the broader surrounding circumstances which a prudent investor is expected to examine before investing.[218] In this regard, the social and economic trajectory of the host State is of a particular importance.[219]

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212 PO3, §1.
213 Exhibit C-3; Facts, §3.
214 PO3, §1.
215 Exhibit C-3.
216 Exhibit C-5.
217 *Saluka,* §301; *Azinian,* §§95-97; *Mondev,* §156; *Thunderbird,* §147; Dolzer (2013) p. 22; Zannoni (2020), p. 456; Téllez (2012), p. 434.
218 *Parkerings*, §331.
219 *Duke Energy*, §340.

[166] In *Micula,* for instance, the tribunal found that Romania's regulatory framework encompassed an implied commitment on the part of Romania with a view to attract investors.[220] Thus, the latter could legitimately rely on it.[221]

[167] In the present case, the regulatory framework and broader circumstances had already been favoring coal-related investments for over 25 years.[222] The dominant political party, from 2000 onwards, fervently supported coal investors, while opposing voices remained an insignificant minority.[223] Notably, although neighboring countries opted for cleaner forms of energy, Laoc's policy remained persistent to coal.[224] Thanks to the grand coal deposits in Laoc's territory, the Laocan economy was heavily dependent on coal.[225] Specifically, in 2008 the coal industry amounted to 20% of the Laocan GDP and employed 15% of the domestic workforce.[226]

[168] From a reasonable point of view, an investor in the coal industry could have plausibly expected that those standing and enduring conditions would continue to exist. Thus, the expectations of MFNB were legitimate in the circumstances.

B. The phase-out shuttered Investor's legitimate expectations

[169] The protection of legitimate expectations does not entail the freezing of the legal world and the social universe.[227] Indeed, the investor's legitimate expectations are not violated by *de minimis* alterations of the legal regime.[228] Nonetheless, the host State shall abstain from stripping the regulatory regime out of its key-features.[229]

[170] *In casu*, Laws 66 and 72/2016 eliminated the very basis of Laoc's energy regime. *First*, Law 66/2016 provides for the phase-out of coal fired power plants by 2028, *i.e.* 6 years

[220] *Micula,* §§677-678.
[221] *Ibid,* §717.
[222] Facts, §5.
[223] *Ibid*, §6.
[224] *Ibid*, §6; Exhibit C-1.
[225] *Ibid*, §3.
[226] Exhibit C-1.
[227] *Impregilo,* §§290-1; *Parkerings,* §332.
[228] *ICW*, §542.
[229] *Eiser,* §365; *Antin,* §532; *OperaFund*, §508.

before the Investment's break-even point. *Second*, Law 72/2016 provides investors in renewables with a FiT scheme and priority access to the electricity grid.

[171] These incentives are expected to lure a high number of investors in renewables.[230] This will lead to an electricity production surplus, whereas the demand will remain unchanged. Hence, given the renewables' priority access, this demand will be satisfied in its entirety by the electricity produced from these facilities. This is especially so, since Laoc itself, via LRC, will develop large-scale renewable facilities, also benefiting from Law 72/2016.[231]

[172] Therefore, in a short period of time, the demand for the electricity produced from the T-1 power plant will be nullified. Inevitably, lack of electricity demand comes with the exclusion of the T-1 from the electricity market.[232]

[173] In conclusion, Respondent not only *de jure* phases-out the T-1 six years before breaking even; but also, Respondent *de facto* displaces T-1 from the electricity market long before the formal phase-out.

[174] *Ergo,* Respondent frustrated MFNB's legitimate expectations.

II. Respondent failed to provide the most constant protection and security

[175] The full protection and security standard (**"FPS"**) is interpreted to reach any measure that deprives an investment of protection and security, including legal security.[233] Characteristically, the tribunal in *Azurix* held that the inclusion of the adjective "full" connoted that the afforded protection and security went beyond protection against physical harm, and extended to the obligation to assure a stable legal environment.[234] Further, the protection of intangible assets under investment treaties necessarily implies that the FPS standard also extends to legal security; otherwise, some forms of

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[230] *See Eiser,* §465.
[231] Article 7(4), Law 72/2016.
[232] See *Canada-Renewables,* §4.2.
[233] *National Grid,* §187; *CME,* §613; McLachlan et al. (2017), p. 334; Junngam (2018), p. 33.
[234] *Azurix,* §408.

investments would not be covered by the standard.[235]

[176] ASNEC Treaty instead of the adjective "full" includes the synonymous superlative adjective "the most constant". Further, the definition of Investment under Article I(1)(a) ASNEC Treaty encompasses intangible assets as well. Therefore, Respondent is also obliged to accord legal security under the most constant protection and security standard.

[177] Legal security requires stability of the legal framework, *i.e.* that the prevailing law does not change unpredictably.[236] In *CME*, the tribunal held that the FPS standard is violated when the host State's legal amendments lead to the withdrawal or devaluation of the investment.[237] Accordingly, changes in laws that have the effect of "*dismantling the very legal framework constructed to attract investors"*[238] violate the FPS standard.[239]

[178] The magnitude of the alterations of Respondent's legal framework contradicts any sense of legal security.[240] Thus, Respondent has violated the most constant protection and security standard.

III. Respondent violated the non-impairment standard by enacting unreasonable and discriminatory measures

[179] Article II(1) ASNEC Treaty imposes upon Laoc the obligation not to introduce unreasonable or discriminatory measures. Claimant submits that: (**A**) Laoc's response to environmental disasters is unreasonable; and (**B**) the priority access afforded only to renewables is discriminatory.

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235 *Siemens,* §303.
236 Jacob & Schill (2015), §67; *Siemens,* §303.
237 *CME,* §613.
238 *LG&E*, §139.
239 National Grid, §189.
240 For an extensive analysis *see supra* Section I.B.

A. Laoc's response to environmental disasters is unreasonable

[180] Under the non-impairment standard, investors are protected from unreasonable amendments of the host State's legal framework.[241] The reasonability standard is met when a rational policy exists and the measure in question correlates with it.[242] A measure is unreasonable when the means employed are not causally related to the ends sought to be achieved.[243]

[181] This reasonable causal relationship is the outcome of science backed assumptions that the measure taken by the host State is scientifically expected to reach a certain result.[244] In this regard, the tribunal in *Crystallex* emphasized that the host State is under a positive obligation to scientifically justify this reasonable causal relationship.[245]

[182] In the present dispute, Respondent's measures ostensibly aim to eliminate the floods occurring in Laoc.[246] Yet, even the task force constituted by Respondent admitted that: *"there is no empirical evidence to show that floods are caused by the greenhouse emissions of the coal plants operated in Laoc".*[247] In this regard, Respondent failed to discharge its burden of scientifically justifying the correlation between the impugned measures and the management of natural phenomena.

[183] Therefore, Respondent acted unreasonably.

B. The priority access afforded only to renewables is discriminatory

[184] Discrimination occurs when investors in like circumstances receive less favorable treatment without justification.[248] Hence, a finding on discrimination depends on three

[241] *CME,* §613.
[242] *AES,* §§10.3.7-10.3.9; *Saluka,* §§307, 460.
[243] *Micula,* §525.
[244] Kurtz (2016), pp. 136–167
[245] *Crystallex,* §§591, 594.
[246] Response, §17.
[247] Exhibit R-2.
[248] *Saluka,* §313; Kläger (2011), p. 196.

factors: *first*, like circumstances; *second,* differential treatment; and *third*, lack of justification.[249]

[185] In this regard, Claimant submits that the priority access granted to electricity producers in renewables by virtue of Law 72/2016[250] is a discriminatory measure. In particular, Ticadia-1 and electricity producers in renewables, (**1**) albeit in like circumstances, (**2**) are treated differently (**3**) without justification.

1. T-1 and electricity producers in renewables are in like circumstances

[186] The criterion of "like circumstances" requires a competitive relationship between the investors compared.[251] Accordingly, likeness in circumstances exists when the compared investors produce competitive and substitutable goods and services.[252]

[187] Illustratively, in *Corn Products*, the tribunal found that a high fructose corn-syrup producer was "in like circumstance" *vis-à-vis* cane-sugar producers.[253] In specific, the tribunal held that when products are *"interchangeable and indistinguishable from the point of view of the end-users (that is, the purchaser of soft drinks), the products, and therefore the respective investments, are in like circumstances."*[254]

[188] *In casu,* electricity produced by coal-fired power plants and by renewable energy facilities is *"interchangeable and indistinguishable from the point of view of the end-users"*. Since electricity is physically identical irrespective of the source of production, it performs the exact same end-uses. Differently put, whether electricity is produced from coal or renewables is indifferent for the end-users.

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249 *Pope & Talbot,* §38.
250 Article 3(1), Law 72/2016.
251 *Total,* §210; *Occidental,* §173; Mitchell et al (2016), p. 50.
252 *Paushok,* §315.
253 *Corn Products,* §56.
254 *Ibid,* §126.

[189] Consequently, investments in the electricity sector are directly competitive with each other, and thus, they are deemed in "like circumstances" for the purpose of the present assessment.

2. Respondent treated T-1 differently than electricity producers in the renewables

[190] Discriminatory effect is the decisive factor to ascertain differential treatment under the non-impairment standard.[255] Accordingly, when a measure although apparently neutral, has an incidental discriminatory effect, it is equally prohibited.[256]

[191] Further, damage upon the investor is not a prerequisite to assert discrimination; benefitting other investors in like circumstances impliedly disadvantages those who cannot access the same advantage.[257] As formulated by *Merrill & Ring Forestry:* "*regulations which end-up creating benefits for a certain industry, to the detriment of an investor, might be incompatible with what that investor might reasonably expect from a government.*"[258]

[192] In the present dispute, Law 72/2016 provided electricity producers from renewable energy sources with priority access to the energy grid.[259] In addition, the renewable facilities constructed by the state-owned LRC will also benefit from priority access.[260] Notably, T-1 has no such privilege.

[193] These measures constitute an undue advantage conferred directly upon T-1's competitors. Therefore, T-1 is differentially treated in comparison to its competitors in renewables.

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[255] *Electrabel,* §7.152; Orellana (2011), p. 5.
[256] Mitchell et al (2016), p. 8; Kriebaum (2015), §45.
[257] Mitchell et al (2016), p. 7.
[258] *Merrill & Ring Forestry,* §233.
[259] Article 3(1), Law 72/2016.
[260] Article 7, Law 72/2016.

3. Respondent's discrimination is unjustifiable

[194] A differential treatment is deemed unjustified when the reason behind a measure is different from the one invoked by the State during the implementation.[261]

[195] *In casu,* Law 72/2016 provided FiTs to electricity producers in renewables, in order to be able to offset their construction and operational costs. In doing so, it levelled the playing field among energy suppliers. Nevertheless, Law 72/2016 also provided renewable investors with priority access to the grid, which ultimately created unsurmountable competitive constraints for conventional producers. Since the purpose of Law 72/2016 had already been satisfied by the enactment of FiT, the "priority access" incentive was unjustified.

[196] In this regard, Ticadia-1 was treated differently without apparent justification. Thus, Laoc enacted discriminatory measures to the detriment of T-1.

IV. Respondent's responsibility is not exempt under the ASNEC Treaty

[197] Article IX encompasses the Non-Precluded Measures ("**NPM**") of ASNEC Treaty. In particular, it stipulates:

> *"(1) The Treaty shall not preclude any Contracting Party from adopting or enforcing any measure:*
>
> > *(a) <u>necessary</u> to protect human, animal or plant life or health;*
> >
> > *(b) <u>essential</u> to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party,*
>
> *(2) Such measures shall be duly motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Treaty to an extent greater than is <u>strictly necessary</u> to the stated end."* (emphasis added)

[198] Pursuant to Article 31(3)(c) VCLT, the interpretation of a treaty term shall take into account any relevant rules of international law applicable between the treaty parties.[262]

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[261] Dolzer & Schreuer (2012), p. 193; *EDF,* §303.
[262] Dörr & Schmalenbach (2011), p. 562.

Such rules include customary international law rules.[263] Particularly, both Article 25 ARSIWA and Article IX(1) ASNEC Treaty encapsulate an identical purpose; they excuse conduct that would otherwise be unlawful and thus they remove responsibility.[264]

[199] Under this prism, the term "necessary" of Article X(1)(a) and the synonymous term "essential"[265] of Article X(1)(b) ASNEC Treaty shall be interpreted by recourse to the relevant defence of necessity in customary international law, as depicted in Article 25 ARSIWA.[266] In any case, given that the object and purpose of investment treaties is to protect investors even in harsh circumstances, a strict interpretation is mandatory.[267]

[200] In the event that Respondent invokes Article IX ASNEC Treaty, Claimant submits that Respondent's conduct does meet the strict requirements of said provisions. In particular, (**A**) Law 66/2016 does not fall within the scope of Article IX(1)(a), and (**B**) Law 72/2016 does not fall within the scope Article IX(1)(b).

A. Law 66/2016 does not fall within the scope of Article IX(1)(a)

[201] Article IX(1)(b) and Article IX(2) ASNEC Treaty allow derogation from the treaty's substantive obligations insofar as the enacted measure is *strictly* necessary to protect human, animal or plant life or health.

[202] In this vein, a measure is necessary only if it is the *only way* to achieve the sought objective.[268] The host State bears the burden to prove *"the impossibility of proceeding by any other method than the one contrary to law"*.[269] Likewise, a measure is not

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263 *Ibid,* p. 565.
264 *Continental*, §168; *CMS,* §354; *Sempra,* §§373, 388; *Enron,* §331.
265 Oxford Dictionary, p. 407.
266 *See* Bücheler (2015), p. 230.
267 *Enron,* §331; *CMS,* §354.
268 *Continental,* §189.
269 *PCIJ/Oscar Chin*-Anzilotti, p. 114.

necessary, when other measures existed, even if they were most costly and possibly less effective.[270]

[203] This approach has been followed by the tribunals in *CMS*,[271] *Enron*,[272] and *Sempra*.[273] Accordingly, all these tribunals overruled Argentina's plea of NPM clause. They found that the impugned measures were not necessary even in the face of an unprecedented economic and social crisis, such as the one that Argentina faced.[274]

[204] *A fortiori*, in the present dispute, where Respondent had significant time to respond to its climate change concerns, it cannot be argued that there were no less restrictive alternatives. In fact, floods were occurring throughout 15 whole years, between 2000 and 2015.[275] Even if, *arguendo,* coal-fired power plants were somehow related to flooding,[276] there were less restrictive alternatives available to reduce emissions which were not sought by Respondent. The installment of filters or the adherence to Best Available Techniques could be alternatively implemented.

[205] Therefore, Law 66/2016 is not necessary to protect human life, as less restrictive measures were available. *Ergo,* it does not fall within the scope of Article IX(1)(a).

B. Law 72/2016 does not fall within the scope of Article IX(1)(b)

[206] Article IX(1)(b) ASNEC Treaty excuses contracting States enforcing measures in conditions of short supply of energy materials and products arising from causes outside the control of the host State.

[207] Respondent might argue that the promulgation of Law 72/2016 was dictated by an electricity short supply faced by Laoc. Claimant submits that (**1**) Laoc is not in

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270 ARSIWA Commentary, Article 25(15); Reinisch (2010), p. 72; *CMS,* §324.
271 *CMS,* §373.
272 *Enron,* §334.
273 *Sempra,* §376.
274 *CMS,* §324; *Enron,* §339; *Sempra,* §350.
275 Facts, §17.
276 *See* Section III.A.

condition of electricity short supply. In any event, (**2**) the electricity short supply did not arise from causes outside Laoc's control.

1. Laoc was not in condition of electricity short supply

[208] The notion of "short supply" refers to a situation of scarcity, in which the available quantity of a product is insufficient to meet the demand in the market.[277] Notably, Article IX(1)(b) ASNEC Treaty does not refer to short supply in national production. Hereinafter, if the State can import energy materials and products, lack of domestic manufacture does not give rise to short supply.[278]

[209] Further, the term "in condition" excludes products at risk of short supply.[279] Instead, short supply must exist at the time the measure is enacted.[280]

[210] In the present case, Laoc at the time of the enactment of Law 72/2016 was not in condition of electricity short supply. *First,* given that electricity generated from renewable energy sources has seen a 300% increase in the ASNEC region,[281] Laoc could at any time import electricity from neighboring countries. *Second,* the phase-out of coal-fired power plants in Laoc will take place in 2028.[282] Hence, even if it would indeed lead to an electricity short supply, this will not occur earlier than 2028.

[211] Therefore, in 2016 Laoc was not *in condition* of short supply.

2. In any event, the electricity short supply did not arise from causes outside the control of Laoc

[212] According to Article IX(1)(b) ASNEC Treaty, a measure is precluded only if the conditions necessitating its implementation arise from causes outside the control of the

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277 *India-Solar Cells,* §7.236.
278 *See ibid,* §7.224.
279 *Ibid,* §7.245.
280 *Ibid,* §7.250.
281 Exhibit C-6.
282 Facts, §23.

State. Hence, if the situation of short supply has occurred due to the host State's actions, it cannot invoke IX(1)(b) ASNEC Treaty.[283]

[213] *In casu,* the electricity shortage, if any, occurred due to Respondent's own actions. The enactment of Law 66/2016 phased-out all coal-fired power plants without taking into account the dependence of Laoc's electricity production on this sector.[284] It was more than foreseeable that the majority of the available electricity supply would significantly diminish.

[214] Thus, the electricity short supply leading to the promulgation of Law 72/2016 did not arise from causes outside the control of Laoc. *Ergo,* it does not fall within the ambit of Article IX(1)(b).

[283] *See* Grasso (2018), §24.02.
[284] Facts, §5.

Part VI: Prayers for Relief

[215] In light of the above, Claimant hereby respectfully requests the Arbitral Tribunal to:

a. Reject the challenge of Mr Mason requested by Respondent under Article 12 UNCITRAL Rules;

b. Find that it has jurisdiction over the present dispute;

c. Find that the impugned measures are solely attributed to Respondent;

d. Declare that Respondent violated Article II ASNEC Treaty;

e. Find that Respondent's liability is not precluded by way of Article IX ASNEC Treaty;

f. Order Respondent to pay to Claimant compensation amounting to no less than USD 450,000,000 (four hundred fifty million dollars) plus interest as of the date of the violation;

g. Order Respondent to compensate Claimant for all of Claimant's costs in this Arbitration and to bear alone the costs of the Tribunal and of KCAB International.