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IN THE INTERNATIONAL COURT OF JUSTICE PEACE PALACE, THE HAGUE, THE NETHERLANDS

3rd TILA ONLINE INTERNATIONAL MOOT COURT COMPETITION ON ENERGY

&

INTERNATIONAL LAWS 2020

THE CASE CONCERNING THE DISPUTES RELATING TO ACTIONS OF TILAWIN

UNITED STATES OF DGEM (APPLICANT)

V.

UNION OF TILAWIN (RESPONDENT)

MEMORIAL FOR THE APPLICANT

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TABLE OF ABBREVIATIONS

Ꝑ	Page Number
¶	Paragraph
BIT	Bilateral Investment Treaty
CEPA	Comprehensive Economic Partnership Agreement
UNCITRAL	United Nations Commission on International Trade Law
FET	Fair and Equitable Treatment
ICJ	International Court Of Justice
TPO	Targaryen Power Co. Ltd.
MFN	Most Favoured Nation
GEAC	Global Energy Arbitration Centre
NT	National Treatment
PCIJ	Permanent Court Of International Justice
UN	United Nation
VCLT	Vienna Convention On The Law of Treaties, 1969

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STATEMENT OF JURISDICTION

The United States of Dgem [hereinafter Dgem or Applicant] humbly submits the following dispute to the International Court of Justice [hereinafter this Court or ICJ]. Pursuant to Article 36 paragraph 1 of the Statute of the ICJ, jurisdiction of this Court comprises of all cases and matters which the parties refer to it and all matters specially provided for in the Charter of the United Nation or in treaties and conventions in force. The present dispute arises out of CEPA which was duly registered under Article 102 of Charter of United Nations, 1945. Dgem, therefore, have jurisdiction under Article 36(1) as per the CEPA.

STATEMENT OF FACTS

THE STATES AND THE CORPORATIONS

- Targaryen Power Co, Ltd. (hereinafter referred to as TPO), a leading supplier and power industry in the United States of Dgem (Applicant State), started its power business in April 2001. TPO was initiated in a separation from Dgem's electric power co. under Dgem Power Industry Restructuring Act and it takes up to 10% of generating capacity comprised of thermal and combined cycle. TPO is in the process of deregulation and privatization.
- White Walkers Gas Power Plant Ltd. operating 400 MW project in a district of Winterfell, Union of Tilawin (Respondent State).

BILATERAL RELATIONSHIP (TREATY AND CONVENTION)

- United States of Dgem and Union of Tilawin entered into a BIT in 1996. This treaty aims at providing appropriate protection to each other's investor in their respective states and to maintain a balance between investor's rights and government's obligations
- Apart from BIT Contract between TPO and White Walkers is governed by Comprehensive Economic Partnership Agreement (CEPA) was signed between Dgem and Tilawin in 2009, registered under article 102 of Charter of United Nations, 1945.

INVESTMESNT

- TPO has made an investment in Tilawin and owns a majority stake in White Walkers
- TPO has claimed in 2012 that Dgem investment decision was based on the legal and policy framework made by the Federal and Winterfell government, apart from entities such as the Directorate General of Hydrocarbons, power and petroleum ministries, Central Electricity Authority, Gas Authority of Dgem, Petroleum and Natural Gas Regulatory Board and standing parliamentary committee reports that painted a healthy picture of the Tilawin's natural gas

THE CONTRACT BETWEEN TPO AND WHITE WALKERS

- ***Contract between TPO and White Walkers includes an arbitration clause which states that every dispute arising between the parties will be resolved through arbitration.***

- BIT includes a provision in its treaty that each contracting party shall provide a fair and equitable treatment to the investors of other contracting party in its territory. Tilawin violated the provision by not allocating the gas to White Walkers.
- On 11th March 2020, WHO declared a pandemic caused due to Covid-19, about 1.5 million people were infected and 85,000 lost their lives by the 1st week of April 2020. The world economy had crippled due to the lockdown imposed across countries and Government clarification stated that this pandemic will be considered as 'Force Majeure' event by declaring 'Covid-19' as Natural Calamity.

THE DISPUTE

- The Gas supply has not been supplied since 10th April, 2020. TPO issued a notice seeking gas supply, neither Government replied nor the Gas supply made available to it.
- To protect and restore the interest of TPO, Govt. of Dgem tried to contact the Govt. of Tilawin to resolve the issue.
- Dgem's carbon-reduction program, power generation companies (Including TPO) are obligated to cut emissions by investing in renewable projects in the country and in carbon-neutralization projects in the developing nations.
- An arbitration notice has been issued by TPO against the Union of Tilawin and demanded $500 million in compensation. After the issuance of notice of arbitration, an inter-ministerial committee was set up by the Federal Govt. in Tilawin.
- The committee, in its report recommended for the allocation of fuel to the project. Since government of Tilawin could not reach to any consensus on project revival, TPO filed for international arbitration on 26th July.
- The notice of arbitration has been sent to the Prime Minister's Office and cabinet secretariat besides the ministries of finance, commerce, oil and gas and power.
- The notice stated that due to lack of gas allocation the plant's commissioning had been delayed, and that it could not participate in the government's scheme for stranded gas-based plants as Gas Authority of Tilawin did not complete its pipeline in time.
- Govt. of Tilawin wants the seat of arbitration to be Kings Landing, a south-east Asian country and resolve the dispute in the Global Energy Arbitration Centre (GEAC) based in Kings Landing, Tilawin.

- TPO is against the same, as Kings Landing is not mentioned in the gazette of Tilawin. Hence, to protect the interest of its company govt. of Dgem approached the International Court of Justice to resolve the issue.

MEASURES AT ISSUE

[1] WHETHER THE INTERNATIONAL COURT OF JUSTICE HAS THE JURISDICTION IN THE PRESENT MATTER?

[2] WHETHER THE SEAT OF ARBITRATION SHOULD LIE IN GLOBAL ENERGY ARBITRATION CENTRE (GEAC) BASED IN KINGS LANDING?

[3] **WHETHER THE 'FORCE MAJEURE' CLAUSE CAN BE INVOKED IN THE PRESENT CONTRACT?**

LEGAL PLEADING

ISSUE 1

WHETHER THE INTERNATIONAL COURT OF JUSTICE HAS THE JURISDICTION IN THE PRESENT MATTER

[1.1] THIS HON'BLE COURT HAS JURISDICTION RATIONAE PERSONAE TO ADJUDICATE

The present case will fall under the Contentious Jurisdiction of ICJ. In the Contentious Jurisdiction it is clearly stated that only state can be a party before ICJ[1]. Howbeit states are authorized and entitled to sponsor the disputes and claims of their Nationals by using "Diplomatic Protection" (*Diplomatic Espousal*)[2]. Dgem at its discretion can sponsor the claims of TPO but it needs to fulfill two essential pre-requisites to lawfully avail Diplomatic Protection[3]. At very first instance the party who incurred losses i.e. Dgem (injured party), must have a *genuine link* with the protected party i.e. TPO [1.3.1] and Secondly there should be exhaustion of all Local Remedies prima facie remedy should not merely notional or illusionary rather it should be effective in nature. [1.3.2]

[1.1.1] TPO IS A NATIONAL OF DGEM

TPO is a leading supplier and innovator in the field of power industry functioning in Dgem. It was established in the year 2001. It was initiated by separating from Dgem Electric Power Corporation under Dgem Power Industry Act[4]. The above facts explicitly states that TPO was earlier part of a government owned power Industry Company i.e. Dgem Electric Power Corporation and it was established by separating from the same corporation under their Local or Municipal legal provisions i.e. Dgem Power Industry Restructuring Act. In the *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*[5], ICJ states that for determining the Nationality of a Corporation it must be controlled by the Municipal Laws of the country, In

[1] Article 34(1),Statute of the ICJ
[2] ILC, 1st report on Diplomatic Protection, UN Doc A/CN.4/506 (2000) at p.11.
[3] Id.
[4] Moot Proposition
[5] Barcelona Traction, Light and Power Co Ltd. (Belgium v. Spain), Judgement, 1970 I.C.J.

the present case the principle of ***Siege social*** [6] will also apply as there is *"Genuine Link"*[7] between TPO and Dgem as TPO is not just incorporated under municipal laws of Dgem but the fact that it is the leading supplier and Innovator of Dgem establish the Effective Nationality of TPO. Thus, it establishes an international minimum standard for the treatment of foreigners, including foreign companies, and addresses the protection of their person and property while abroad.[8]

TPO deriving its Nationality under internal laws of State, as a result of which Dgem has the right to address the issue of protection of its property and person abroad. The doctrine is premised on the theory that any injury done to a foreigner will be an injury to their state and the respective home state can bring action on Nationals' behalf[9]. As it was held in the *Rights of Nationals of the United States of America in Morocco case (France v. United States of America)*[10] that nationality is a legal bond having its basis as a social factor of attachment, a genuine connection of existence, interests and sentiments[11]. Therefore, TPO bears the nationality of Deem and it has the right to espouse the dispute and claims on behalf of TPO, injured by wrongful conduct of Tilawin.[12]

[1.1.2] THERE IS EXHAUSTION OF LOCAL REMEDIES

Diplomatic Protection can only be exercised under international law by the concerned state if all the available local remedies under the jurisdiction of the state in which the injury was suffered had been exhausted by the injured party.[13]

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[6] https://www.encyclo.co.uk/meaning-of-Si%C3%A8ge_social.
[7] Nottebohm (Liechtenstein v. Guatemala), Judgement, 1955 I.C.J.
[8] EDWIN M. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD, (1953), ¶25–9, 39; M. SORNARAJAH, FOREIGN INVESTMENT, (2017), 4th edit. P. 18; AMERASINGHE, STATE RESPONSIBILITY, p. 56; CLYDE EAGLETON, RESPONSIBILITY OF STATES IN INTERNATIONAL LAW, (1928) ¶.3, 6, 22
[9] M. SORNARAJAH, FOREIGN INVESTMENT, (2017), 4th edit, pp. 18, 121. It was a notion articulated in the eighteenth century by E DE VATTEL, THE LAW OF NATIONS, Book II, Ch. VI (1758) (translation) 136: '[w]hoever ill-treats a citizen injures the State, which must protect that citizen
[10] Rights of Nationals of the United States of America in Morocco, (France v. United States of America), I.C. J. Reports 1952, p. 176
[11] ILC, First report on diplomatic protection, UN Doc A/CN.4/506 (2000) at p. 11. http://legal.un.org/ilc/documentation/english/a_cn4_506.pdf
[12] *Id.*
[13] United Nations Conference On Trade And Development, DISPUTE SETTLEMENT, (2003), https://unctad.org/en/Docs/edmmisc232add19_en.pdf

[A] EXCEPTIONS TO ELR WILL APPLY

[A.1] THERE IS NO LOCAL JUDICIAL REMEDY AVAILABLE

Diplomatic protection under international law can be exercised by the State of nationality only after the person concerned has exhausted local/judicial remedies available in the jurisdiction of the State in which the person has suffered the legal injury[14]. However it is also required that the remedies shouldn't just be available but rather effective[15] prima facie local remedies need not be exhausted where "there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress."[16] As held in *Mushikiwabo and others v Barayagwiza*[17], that local remedies need not be sought where the respondent State does not have an adequate system of judicial protection[18]. In present case, sheer display of discrimination and arbitrariness was shown by not allocating the gas (fuel) to TPO, not replying to the notice send by TPO and investor's confidence is not being restored even after the communication of Dgem's government with the government of Tilawin[19]. Even if local judicial remedies existed, TPO do not have a reasonable expectation of redress. Thus, there is no reasonable remedy available for TPO.

[A.2] THERE IS EXHAUSTION OF ADMINISTRATIVE LOCAL REMEDIES

There was an arbitration clause in the contract between TPO and White Walker, which clearly states that in case of all the disputes and issues arising of or in connection with the present contract should be resolved or settled through arbitration[20]. This arbitration clause implies that the local administrative remedy in the present case was arbitration proceedings.

In the case of *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*[21], it was stated that local remedy doesn't only include the judicial (municipal) court rather any competent tribunal will also fall under the ambit of local remedies and violation of same is sufficient for

[14] *Id.*
[15] DADP, supra note 34, Article 15(a)
[16] Id., Brownlie, (n 8) 496; Judge Lauterpacht's Separate Opinion in Certain Norwegian Loans (n 2), 497
[17] Mushikiwabo and others v Barayagwiza N0. 94 Civ. 3627, 1996 US Dist. LEXIS 4409 (SDNY Apr. 9, 1996) [2]
[18] Id.
[19] Moot Proposition
[20] Id.
[21] Case concerning ElettronicaSiculaS.p.A (US v. Italy), Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989

admissible of international claim. Similarly in the present case the local administrative remedy is arbitration proceedings and the same has been violated as well.

On 10th April when the gas allocation to TPO was stopped a notice was issued by TPO regarding the same but neither the response nor the gas was allocated, and after repeated ignorance by the government of Tilawin, TPO issued an arbitration notice against the government of Tilawin, based on which an inter-ministerial meeting was set up in Tilawin, despite of the positive report of committee regarding re-allocation of fuel, the government of Tilawin didn't able to reach any consensus on project revival as a result of which it is clearly inferred that TPO has exhausted its local remedy of settling the dispute using Arbitration proceedings. Therefore the administrative local remedy is exhausted and there is no other local remedy available for TPO.

[1.2] THIS COURT HAS JURISDICTION RATIONAE MATERIAE TO ADJUDICATE THE PRESENT DISPUTE

The Subject Matter of Dgem's application falls under the provisions of CEPA as a consequence the dispute is one which the Court has jurisdiction rationae materiae to entertain.[22] CEPA is Lex Specialis agreement binding the contract between TPO and White Walkers, and is duly registered under Article 102 of Charter of United Nation[23]. Therefore if there is violation of any provision of CEPA as a consequence both the parties i.e. Dgem and Tilawin have the right to approach ICJ under Article 36(1)[24]. In the case of *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua[25]) and Fisheries Jurisdiction (Spain v. Canada)[26]* it was stated that it is necessary for a treaty to be registered under Article 102 of Charter of United Nation, in order to ratify the jurisdiction of the court, same was also declared in the *Declaration of judge Ad Hoc Simma[27]*.

In the present case there is violation of various provisions of CEPA by Tilawin, due to which the dispute in the present case is one in which the court has Jurisdiction. Furthermore Dgem's application is admissible in Court.

[22] Oil Platforms (Iran/USA), Preliminary Objections, 1996 I.C.J. 803 (Dec. 12), P.16.
[23] https://www.un.org/en/charter-united-nations/index.html
[24] https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf
[25] Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua), Judgement, 2018 I.C.J.
[26] Fisheries jurisdiction case (Spain v. Can.), I. C.J. Reports 1998
[27] https://www.icj-cij.org/files/case-related/165/165-20180202-JUD-01-06-EN.pdf

[1.2.1] CHARACTERIZATION OF THE PRESENT DISPUTE

The present dispute is related to the losses incurred to TPO and indirectly to Dgem, due to which an International Arbitration has been initiated by Dgem and now the dispute is in front of ICJ. In the present case the rights are being abused by Tilawin prima facie violating several clauses of CEPA and BIT which are binding the contract between TPO and White Walkers[28] including Transparency Clause[29], Providing Unfair and Inequitable treatment and National Treatment by not allocating the gas (fuel) to TPO which resulted in delaying of plant's commissioning and due to non-completion of pipeline by Gas Authority of Tilawin resulted in non-participation of TPO in government based stranded gas plants also government of Tilawin failed to reach on consensus against Arbitration notice issued by TPO due to which there was no allocation of fuel for Dgem's Carbon-Reduction program.[30]

[1.2.2] THE *RATIONAE MATERIAE* ARISES UNDER CEPA

CEPA is Lex Specialis agreement binding the contract between TPO and White Walkers. In the present dispute Tilawin has abused various provisions of CEPA which includes Article 10.3 (National Treatment Clause)[31], Art.10.4 (Minimum Standard of Treatment Clause)[32] and Art.10.7 (Transparency Clause)[33], Tilawin has not provided or allocated any gas to TPO after 10th April, which leads to violation of Article 10.3 and 10.4 of CPEC[34] as they acted in a discriminatory manner which is unfair and inequitable in nature due to which TPO's projects remain un-operated and they suffer losses because there was no gas allocation by Tilawin to TPO which resulted in delaying of plant's commissioning and due to non-completion of pipeline by Gas Authority of Tilawin resulted in non-participation of TPO in government based stranded gas plants[35], this discriminatory and arbitrariness by the government of Tilawin and are clearly violating Article 10.3[36] and 10.4[37]. The Transparency clause under Article 10.7[38] is also violated

[28] Moot Proposition
[29]CEPA, https://commerce.gov.in/writereaddata/trade/INDIA%20KOREA%20CEPA%202009.pdf
[30] SupraNote. 28.
[31]CEPA, https://commerce.gov.in/writereaddata/trade/INDIA%20KOREA%20CEPA%202009.pdf
[32] Id.
[33] Id.
[34] Id.
[35] Moot Proposition
[36] SupraNote. 29
[37] Id.

in the present case as on 10th April, when the gas allocation had been stopped by Tilawin, a notice has been issued by TPO to the government of Tilawin seeking gas supply but no response or reply had been made by the government. Therefore the Transparency Clause under Article 10.7 has been violated and abused, as a consequence of violation of various provisions of CPEC the present matter have *Rationae Materiae*, and a similar reasoning can be taken from *Oil Platforms (Iran/USA) Case*[39].

[A] THERE IS VIOLATION OF BIT

BIT is Lex Generalis binding the contract between TPO and White Walkers apart from Lex Specialis CEPA. In the present case there is also violation of various provisions of BIT by Tilawin including Article 2[40] and Article 3[41] which states about protection, promotion and fair and equitable treatment of investments of each contracting party and National Treatment respectively. Tilawin has not allocated the gas (fuel) to TPO which resulted in delaying of plant's commissioning and due to non-completion of pipeline by Gas Authority of Tilawin resulted in non-participation of TPO in government based stranded gas plants, this discriminatory and arbitrariness by the government of Tilawin leads to violation of Article 2 and Article 3 as they wasn't able to complete the pipeline which is required under Article 2 i.e. creating of favorable conditions for investment by the contracting party and by not allocating gas to TPO after 10th April,2020 leads to violation of Article 3 i.e. fair and equitable treatment. Henceforth there is violation of Article 2 and Article 3 of BIT by Tilawin.

[1.3] APPLICATION OF LEX SPECIALIS ENTAILS THE JURISDICTION OF THIS COURT.

The principle that special law derogates from general law suggests that Among agreements which are equal, that should be given preference which is most specific and approaches most nearly to the subject in hand[42], for special provisions are ordinarily more effective than those that

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[38] Id.
[39] Oil Platforms (Iran/USA), Preliminary Objections, 1996 I.C.J. 803 (Dec. 12), P.16
[40] https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1568/download
[41] Id.
[42] PAPINIAN, Dig. 48, 19, 41 and Dig. 50, 17,80; THE DIGEST OF JUSTINIAN vol. IV,(Philadelphia: University of Pennsylvania Press, 1985) Latin text ed. by T. Mommsen and P. Kruger); Lord A.D. McNair, THE LAW OF TREATIES (Oxford: Clarendon Press, 1961) 2nd edit, ¶393-399.

are general[43]. As held by *Iran-United States Claims Tribuna* [44] that it is a well-recognized and universal principle of interpretation that a special provision overrides a general provision. The Tribunal here invoked lex specialis so as to argue that "the terms of the Claims Settlement Declaration are so detailed and so clear that they must necessarily prevail over the purported intentions of the parties, whatever they could have been"[45].

Thus, lex specialis is a general principle of law recognized by both the parties in the present case extending to the procedural provisions of the lex specialis, including those relating to the settlement of disputes[46]. Hence, this Court has jurisdiction under CEPA.

[1.3.1] CEPA IS LEX SPECIALIS.

CEPA is one of the agreements apart from BIT which is binding the contract between TPO and White Walkers. CEPA being a preferential trade, economic and investment related agreement prima facie a pact related to liberalize and facilitate trade, establish a cooperative and conducive economic framework, transparent rules related to investment and trade, economic partnership and cooperation and improving the efficiency of investment and trade between both the parties[47] i.e. Dgem and Tilawin. CEPA require Tilawin to allocate gas to TPO for following the norms of Minimum Standard Treatment and National Treatment; even if they are not able to allocate the fuel then, Tilawin require obeying the Transparency Clause. Thus, CEPA approaches most nearly to the subject in hand and regulates the matter more effectively than BIT. Furthermore, special rules are better able to take account of particular circumstances and the need to comply with them is felt more acutely than is the case with general rules[48]. Moreover, CEPA being a special law governing the concerns of Dgem provides for better access to what the parties have willed.[49]

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[43] HUGO GROTIUS, DE JURE BELLI AC PACIS. LIBRI TRES, Edited by JAMES BROWN SCOTT, THE CLASSICS OF INTERNATIONAL LAW (Oxford: Clarendon Press, 1925) Book II, Chap. XVI, Sect. XXIX, P.428.

[44] Iran-United States Claims Tribunal Reports, Case No. A/2, Iran v.US, C.T.R. vol. 1, 1981-1982, p.104.

[45] Id.

[46] Mavromattis Palestine Concessions (Greece v. Gr. Brit.), 1924 P.C.I.J. Ser. A, No.2, at 11 (Aug. 30), at 30-31

[47] SupraNote. 29

[48] PIERRE MARIE DUPUY, L'UNITÉ DE L'ORDRE JURIDIQUE INTERNATIONALE. COURS GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC, RECUEIL DES COURS, vol. 297 (2002), ¶ 428-9

[49] JOOST PAUWELYN, CONFLICT OF NORMS ,p. 388; NANCY KONTOU, THE TERMINATION OF TREATIES IN LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW (Oxford: Clarendon Press, 1994) p. 142

[1.3.2] APPLICATION OF LEX GENERALIS DOES NOT EXCLUDE THE APPLICATION OF BIT.

CEPA have greater clarity and definiteness and is thus felt more binding than BIT which may stay in the background and be applied alongside. BIT is a limited general regime while CEPA deals specifically with wider ambit of issues in present dispute. As held by Iran-US Claims Tribunal in the Amoco International Finance Corporation v. Iran[50], that a lex specialis in the relations between the two countries, the Treaty supersedes the lex generalis, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provision."[51] Therefore, the more general rule, BIT remains in the background providing interpretative direction to the special one.

As in the recent Oil Platforms case[52], the general law concerning the use of force was applied to give meaning to a wide standard of "necessity" in the relevant lex specialis, the 1955 Treaty of Amity between Iran and the United States. It was not that a particularly important lex generalis would have set aside lex specialis but that the latter received its meaning from the former.[53] Moreover, the specific agreement CEPA would be read and understood within the confines or against the background of the general standard treaty BIT, typically as an elaboration, updating or a technical specification of the latter[54]; the specific and the general point, as it were, in the same direction.

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[50] Amoco International Finance Corporation v. Iran, Iran-US. C.T.R., vol. 15 1987-II, p.222

[51] Id.

[52] *Oil Platforms* SupraNote. 39

[53] EMMANUEL JOUANNET, LE JUGE INTERNATIONAL FACE AUC PROBLÈMES DE L'INCOHERENCE ET D'INSTABILITÉ DE DROIT INTERNATIONAL. QUELQUES REFLEXIONS À PROPOS DE L'ARRÊT, CIJ du 6.11.2003, RGDIP vol. 108 (2004),p. 933, 936.

[54] JAN B. MUS, CONFLICTS BETWEEN TREATIES IN INTERNATIONAL LAW, Netherlands International Law Review, vol. XLV (1998) pp. 214-217, p. 218; SIR GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 1951-4: TREATY INTERPRETATION AND OTHER TREATY POINTS, BYBIL, vol. 33 (1957) p. 236.

[1.3.3] PRESENT DISPUTE IS A MATTER OF PARALLELISM OF TREATIES UNDER INTERNATIONAL LAW

It is a common place of International law and State practice for more than one treaty to bear upon a particular dispute[55]. There is frequently parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes[56]. The doctrine of treaty parallelism addresses precisely two things; firstly, to coordinate the reading of particular instrument; Secondly, to see them in mutually supportive light. CEPA complements BIT by providing for specific trade, investment and dispute settlement subjects and both instruments are mutually supportive in encouraging trade between both the countries.[57] As held in Southern Bluefin Tuna Case[58], the UNCLOS and Fisheries treaties were cordially used. Even if BIT completely covered all relevant obligations it would not supersede them, there would simply be a parallelism of obligations which is usual in international practice. Therefore, dispute between Dgem and Tilawin over the present issue is consistent with both CEPA and BIT, however, BIT will only apply to extent that its provisions are compatible with CEPA.[59]

[55] JOOST PAUWELYN, supra note 10 ,p. 388; NANCY KONTOU, supra note 10, (Oxford: Clarendon Press, 1994) p. 142.
[56] Southern Bluefin Tuna Case, ITLOS CASE NO. 3-4, at β182, ¶52, β40.
[57] Convention of Biological Diversity, MARINE AND COASTAL BIODIVERSITY: REVIEW, FURTHER ELABORATION AND REFINEMENT OF THE PROGRAMME OF WORK, UNEP, https://www.cbd.int/doc/meetings/sbstta/sbstta-08/information/sbstta-08-inf-03-rev1-en.pdf
[58] Southern Bluefin Tuna Case, supra note 56, ¶74.
[59] VCLT, Article 30; Southern Bluefin Tuna Case, supra note 56, at ¶38, β23.

ISSUE 2

WHETHER THE SEAT OF ARBITRATION SHOULD LIE IN GLOBAL ENERGY ARBITRATION CENTRE (GEAC) BASED IN KINGS LANDING?

The Applicant humbly submits that the Govt. of Tilawain cannot decide the seat of arbitration as the King's Landing by taking the undue advantage of the absence of the Arbitrations clause. International commercial arbitration generally confers upon **parties the discretion to choose for them the juridical seat of arbitration.**[60]

In the *Taizhou Court Case*[61], the court held that arbitration clause was invalid and the parties did not mention the suitable arbitral seat in the agreement. Parties should avoid giving the right to choose the seat of arbitration to respondent because unless the parties have agreed on the law governing the arbitration clause this will only result in uncertainties and give chances to the respondent to frustrate the arbitration agreement by choosing an invalid seat of arbitration.

Here it must be pertinent to note that "seat" is in some ways a more accurate word than "place". "Seat" means the juridical base of the arbitration, whereas "place" can mean the place (or places) where the parties assemble to hold deliberations, which need not always be at the "seat". The original agreement has not mentioned the information about the seat of arbitration and in absence of any clause; the agreement shall be governed by the Comprehensive Economic Partnership Agreement (CEPA) and Bilateral Investment Treaty (BIT) and UNCITRAL Model Law on International Commercial Arbitration, 1985[62].

[60] The Seating Arrangement- Controversies in Choice of Seat of Arbitration, Pooja Chakrabarti, 4November , 2019 https://www.mondaq.com/india/arbitration-dispute-resolution/860058/the-seat39ing-arrangement--controversies-in-choice-of-seat

[61] T*aizhou Haopu Investment Co., Ltd. v Wicor Holding AG, Taizhou Court, P. R. China, Case Docket Number: [2015] Tai Zhong Shang Zhong Shen Zi, No. 00004 (2 June 2016)*

[62] UNITED NATIONS PUBLICATION, Sales No. E.08.V.4, ISBN 978-92-1-133773-0

[2.1] THE SEAT OF ARBITRATION SHOULD NOT LIE IN GEAC BASED IN KINGS LANDING AS PER UNCITRAL

In the present case UNCITRAL[63] is the governing law i.e. curial law for the arbitration proceedings. In the absence of any clause regarding the seat of arbitration in the contract the question of choosing the seat of Arbitration will dealt with the provisions mentioned in UNCITRAL. As per the Article 20 of UNCITRAL[64], in the absence of any mention about the seat of arbitration in the agreement then the right to decide the Seat of Arbitration lies with the Arbitration Tribunal.

1. Article 20 of UNCITRAL[65] states the Place of Arbitration as
    i) The parties are free to agree on the place of arbitration. ***Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal*** *having regard to the circumstances of the case, including the convenience of the parties.*
    ii) Notwithstanding the provisions of paragraph (1) of this article, ***the arbitral tribunal may,*** *unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.*

The law suggests the seat of Arbitration be decided by ***Arbitration Tribunal*** at the time of dispute by keeping the following factors in the mind

- having regard to the circumstances of the case
- including the convenience of the parties
- Meet at any place it considers appropriate for consultation among its members.
- For hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

The above-stated ingredients have to be established to decide the Seat of the Arbitration at the time of dispute or when the seat of Arbitration is not decided while coming into the agreement. Here, as it is clearly stated that in the time of pandemic of COVID-19 causing high

[63]UNCITRAL Model Law on International Commercial Arbitration, 1985
[64] Article 20, UNCITRAL Model Law on International Commercial Arbitration, 1985
[65]Id.

inconvenience to the parties[66]. Also, it is important to go through the law and procedure established to decide the seat of arbitration.

In the Case of ***WohHup (Pte) Ltd v Property Development Ltd***[67] the court has decided that when the seat of arbitration is not clear and the court has to interfere for the same, then the court could only assist in appointing the arbitration tribunal and the ***seat of arbitration will be decided by the Arbitral Tribunal.***

In the case of *IMAX corporation v E-City Entertainment (India) Pvt. Ltd*[68]*.,* whereby the Court observed that in the said case the seat of arbitration had not been specified in the arbitration clause and the only stipulation given the contract was that the arbitration was to be conducted as per ICC Rules. In IMAX Corporation, Court held that the parties had agreed to have seat of arbitration as decided by the curial law i.e. ICC.

By applying the similar reasoning in the present case, there is no mention of specific seat or place of arbitration, the only thing which is mention is the law governing the Arbitral proceedings i.e. UNCITRAL. Hence the seat of arbitration will be decided as per UNCITRAL and which states in the absence of any pre decided seat of arbitration by the parties the seat of arbitration will be decided by the Arbitral tribunal. Henceforth Tilawin has no right to select the seat of arbitration as a result of which the seat selected by Tilawin i.e. GEAC based in King's Landing is not the appropriate seat of Arbitration.

[2.2]TILAWIN CAN NOT CHOOSE THE SEAT OF ARBITRATION AS PER LEX SPECIALIS CEPA

CEPA is the governing agreement of the contract between TPO and White Walkers, various provisions of CEPA i.e. Article 10.21[69] and Article 14.3[70] states that the law which will govern the agreement in case of any dispute.

[66] Moot Proposition
[67] Woh Hup Pte Ltd v Property Development Ltd [1991] 3 MLJ 82
[68] *IMAX corporation v E-City Entertainment (India) Pvt. Ltd,* 2020 (1) ABR 82
[69] Article 10.21, CEPA
[70] Article14.3, CEPA

[2.2.1] SEAT OF ARBITRATION AS PER ARTICLE 10.21 OF CEPA

Article 10.21 of Section C of CEPA[71] has the provision for the settlement of Investment Disputes between a contracting party and an investor of the other Contracting Party. Article 10.21(3) (b) clearly states about the applicable curial law i.e. UNCITRAL. Therefore law governing the procedure of the arbitration as per BIT is also UNCITRAL when it is read with facts of the present case (as UNCITRAL Law is governing the present case[72]).

Since, it's clearly stated in CEPA that UNCITRAL will be the governing law. Therefore Tilawin has no right in choosing the place of Arbitration as the place of Arbitration would be decided by the Arbitration Tribunal which is clearly mentioned in Article 20 of UNCITRAL as a result of which the seat selected by Tilawin i.e. GEAC based in King's Landing is not the appropriate seat of Arbitration.

[2.2.2] SEAT OF ARBITRATION AS PER ARTICLE 14.3 OF CEPA

Article 14.3[73] has the provision for the "*CHOICE OF FORUM*". It's clearly stated in Article 14.3(1)

"Disputes regarding any matter covered both by this Agreement and the WTO Agreement or any agreement negotiated there under, or any successor agreement thereto, ***may be settled in the forum selected by the complaining Party"***

As per the above quoted text of Article 14.3(1) it's clearly inferred that in case of any dispute covered by this agreement (CEPA), the forum should be selected by the complaining party. Moreover the present dispute is about the violation of various provisions of CEPA including Article 10.3 (National Treatment Clause)[74], Art.10.4 (Minimum Standard of Treatment Clause)[75] and Art.10.7 (Transparency Clause)[76] [*Proved in Issue 1*]. Since, the present dispute falls under the ambit of CEPA as a result of Article 14.3(1) will apply and the complaining party i.e. Dgem has the right to choose the forum for settlement of dispute. Henceforth Tilawin has no right to select the forum for Dispute settlement due to which GEAC based in King's Landing is not the appropriate seat of arbitration.

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[71] Article 10.21, CEPA
[72] Moot Proposition, NOTE
[73] Article 14.3, CEPA
[74] CEPA,https://commerce.gov.in/writereaddata/trade/INDIA%20KOREA%20CEPA%202009.pdf
[75] Id.
[76] Id.

[2.3]TILAWIN CAN NOT CHOOSE THE SEAT OF ARBITRATION AS PER LEX GENERALIS BIT

BIT is the governing treaty of the contract between TPO and White Walkers, various provisions of BIT i.e. Article 8[77] states that the law which will govern the agreement in case of any dispute. Article 8[78] of BIT has the provision for the settlement of Investment Disputes between a contracting party and an investor of the other Contracting Party. Article 8(3) (c)[79] clearly states about applicable curial law i.e. UNCITRAL. Therefore law governing the procedure of the arbitration as per BIT is also UNCITRAL when it is read with facts of the present case (as UNCITRAL Law is governing the present case[80]).

Since, it's clearly stated in BIT that UNCITRAL will be the governing law. Therefore Tilawin has no right in choosing the place of Arbitration as the place of Arbitration would be decided by the Arbitration Tribunal which is clearly mentioned in Article 20[81] of UNCITRAL as a result of which the seat selected by Tilawin i.e. GEAC based in King's Landing is not the appropriate seat of Arbitration.

[2.4] GEAC BASED IN KING'S LANDING IS NOT THE APPROPRIATE SEAT AS PER SUBSTANTIVE LAW GOVERNING THE ARBITRATION

Substantive law is the law governing the contract, in the present case the disputed arbitration problem shall be governed by the UK contract Law[82]. When the proper law of the contract is expressly chosen by the parties, such law must, in the absence of any mention of arbitration seat or place, govern the arbitration agreement which is a part of such a contract.[83]

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[77] Article 8, BIT
[78] Id.
[79] Article 8(3)(c), BIT
[80] Moot Proposition, NOTE
[81] Article 20, UNCITRAL
[82] SupraNote. 9
[83] Substantive Law VS Curial Law: In International Commercial Arbitration, VSAlaya Legal 13March,2013, https://www.mondaq.com/india/arbitration-dispute-resolution/226610/substantive-law-vs-curial-law-in-international-commercial-arbitration#:~:text=Curial%20Law%20%3A%20In%20International%20Commercial%20Arbitration,-13%20March%202013&text=Such%20choice%20can%20be%20express,the%20parties%20to%20the%20dispute

In the present case since the contract between both the parties is a per the UK Contract law[84]. Therefore the substantive law i.e. law of UK will govern the seat of the Arbitration.

It was contended that the principle laid down in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc*[85], would be applicable which provides that **when any specific choice is absent on the law governing the arbitration agreement, the same would be determined by the substantive law of contract.** The case dealt with the provisions related to the seat/place of arbitration and states that the territorial relationship between place of arbitration and law governing arbitration. The seat of arbitration shall have a good relation to the governing law. Similarly, in the given case, the governing laws do not belong to the respondent party or the place recommended by the respondent parties. Hence, the King's Landing cannot be the appropriate place for the arbitration.

ISSUE 3-

WHETHER THE 'FORCE MAJEURE' CLAUSE CAN BE INVOKED IN THE PRESENT CONTRACT?

[3.1] WHETHER THERE IS A FORCE MAJEURE EVENT IN THE PRESENT CASE

No, the Force Majeure clause cannot be invoked in the present case. The Contract Law of U.K. do accept the Force Majeure in the law though there is the mention of the doctrine of frustration.

In Davis contractors Ltd. Vs Fareham UDC[86] the court decided the Frustration -:

Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract

In the case of National Carriers Ltd v Panalpina (Northern) Ltd,[87]the question before the court arose is of the application of the doctrine of frustration, Lord Russell observed that , the doctrine

[84] SupraNote 9
[85]2016 (4) SCC 126
[86] [1956] AC 696
[87] National Carriers Ltd v Panalpina (Northern) Ltd, [1981] AC 675, [1981] 1 All ER 161, [1981] 2 WLR 45

of frustration was developed by the law as an expedient to escape from injustice The law was founded on comprehensive principles: compartmentalize. To deny the extension of the doctrine of frustration to leaseholds would produce many undesirable anomalies. The tenants failed to raise a triable issue and therefore, doctrine of frustration could not apply.

Force majeure clauses are common clauses in commercial contracts and their purpose is to excuse parties from liability in the event of an unforeseeable and unavoidable occurrence. A force majeure event is an unexpected event that prevents the performance of a contractual obligation. Usually, these are events that are beyond the parties' control and could not have been foreseen or prevented by the parties at the time the contract was entered into.

A successful claim of force majeure must fulfill five conditions: [88]

1. There must be an unforeseen event or an irresistible force;
2. The event or force must be beyond the control of the state;
3. The event must make it 'materially' impossible to perform an obligation;
4. The state must not have contributed to the situation; and
5. The state must not have assumed the risk of the situation occurring.

In the present case, the government had declared Covid-19 as a pandemic in the month of March which also led to the lockdown across the countries. As Covid-19 was an unforeseen event, it was also beyond the control of the State and National Lockdown was imposed to prevent the spread of the disease. However, it doesn't satisfy requirement No. 3 that the event must make it 'materially' impossible to perform an obligation, as it is evident from the correspondence on record that even after the "Pandemic" the State was performing other trades and commerce on an international level and the pandemic was declared in the first week of April and last allocation of gas supply was made on 10th of April.

State at default has even failed to prove the fact that due to this event of Covid-19 it became 'materially impossible' to perform its contractual obligations, therefore all the conditions are not satisfied while imposing the "Force Majeure " in the event of Covid-19. Hence, the defaulting state (Union of Tilawin) is liable to pay damages.

[88] F Paddeu and F Jephcott, "COVID-19 and Defences in the Law of State Responsibility, Walters Kulwer ,17 March 2020

In *Metropolitan Water Board v Dick Kerr & Co*[89], the clause purported to cover delays "howsoever caused". It was stated that the delays in such situations cover only “minor delays” and not the major ones. In the present case losses caused to an unlimited extent and this cannot be covered under the Force Majeure.

Therefore, the clause of Force Majeure cannot be applied in the said case and the compensation needs to be paid by the respondents.

So, from the unfulfilled condition and an observation done in the above mentioned case it can clearly be seen that the State at default has given unreasonable measures and need to pay the compensation for the damages.

In case of Tsakiroglou & Co. Ltd. Vs Noblee Thori[90] the court observed that the mere closure of the Sue Canal, when there is alternative way of transporting goods through the Cape of Good Hope, does not qualify as a condition for the frustration of the contracts just because the alternative route is longer than the original one.

[3.1.1] THERE IS NO FORCE MAJEURE CLAUSE AS PER CEPA

Apart from BIT, CEPA was also governing the parties as when the clause (1) of article 10.16 read with clause 2 Article 10.16 of CEPA[91] comprehension can be made that clause 2 is stating about the remedy of what is mentioned in clause (1) i.e. any contracting party should not waive or otherwise derogate such measures for the establishment expansion or retention for an investment. It infers that the party when do not have measures to perform the act does not mean it will waive the contact. There is no Force Majeure clause available because article 10.16 clause (2) does not give right to any contracting party to waive off or derogate the contract.

=) As per mentioned in article 10.18 clause (b) of CEPA[92], that it is necessary to protect Human, Animal, or Plant life or the environment.

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[89] 1918 AC 119

[90] Tsakiroglou & Co. Ltd. v. Noblee Thorl [GmbH, 1961 (2) All ER 179

[91] ARTICLE 10.16, CEPA

[92] Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between States where like conditions prevail, or a disguised restriction on investors and investments, nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures:
(b) necessary to protect human, animal or plant life or health, or the

The clause states about taking the necessary steps to protect Human, Plant or Animal life or the environment, but the clause had not specified that the "necessary step" would be the force majeure. This is the presumption made by the respondent state by decreasing the ambit of the word "necessary steps" that it will be construed to Force Majeure Clause. Hence, Force majeure clause could not be invoked on the presumption and therefore, made liable to the respondent state to pay the damages to the TPO (Applicant state).

[3.1.3] THERE IS NO FORCE MAJEURE CLAUSE AS PER BIT

Bilateral Investment Treaty was signed between the two contracting parties United States of Dgem and Union of Tilawin. . According to Article 10 clause (2) of BIT[93], no contracting party can be prohibited from taking any action in order to prevent the spread of disease and other health issues on a reasonable and non-discriminatory basis.

Step taken by the respondent was not reasonable as they did not consider any other method or measure and was only relying on their profit.

The contract was discriminatory as the article 2 of BIT talks about the fair and equitable treatment of parties. Both the law they invoked is discriminatory in nature as it is violating the articles of BIT. Hence, the condition which is making a law to an extent will avoid any harm to the Human, Plants or Animal lives or spread of disease is not applicable because the prerequisite which are required for that law i.e. the law needed to be non discriminatory and reasonable nature is not fulfilled. Therefore, Force Majeure cannot be invoked under BIT.

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environment

[93] ARTICLE 10- Applicable Laws

2. The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions or take action in accordance with its laws normally and reasonably applied in good faith, on a non-discriminatory basis and to the extent necessary, for the prevention of the spread of diseases and pests in animals or plants.

In the case of Seadrill Ghana Operations Ltd v Tullow Ghana,[94] the question was raised if whether a party was entitled to rely on a force majeure clause in terminating a contract?
and the Hon'ble Court held that the Tullow was unable to establish that it had failed to comply with its obligations under the Contract as a result of a force majeure event

[3.3] WHETHER NECESSARY STEPS HAVE BEEN TAKEN TO MITIGATE THE EVENT

What it means for a party to be required to use reasonable endeavours to mitigate or avoid a force majeure event. The context of this particular clause concerning force majeure that the reasonable endeavours clause did not permit to invoke the Force Majure clause because it would be non-profitable to do so.

Though the judicial trend illustrates that international tribunals and courts tend to adopt a narrow and restrictive approach in interpretation, there is not unanimity of approach in all legal systems. Tribunals have shown a certain degree of resistance and tend to be conservative in excusing non-performance on the ground of force majeure events.

The approach is clear that the performance of the contract was not impossible in the time of pandemic it was very much possible and necessary for the government to perform the contractual obligations. The failure in enough supply for energy cannot be excused as the Force Majeure in the time of the pandemic. The decision in National Oil Case[95] relied upon by the Respondents, where an arbitral tribunal ruled that the measures alleged did not constitute force majeure excusing Sun Oil's failure to perform its obligations under its production sharing contract with the Libyan National Oil Corporation because Sun Oil could have used its foreign affiliates' non-United States ('US') personnel and technology without violating US regulations.
The Tribunal held that the test of 'impossibility' of performance applied to contracts governed by Libyan law unless the parties expressly provide for a different standard in their force majeure clause.

[94] Ltd 179 ConLR 51
[95] *National Oil* Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800

As per the facts, the respondent state had not exhausted the other measures or steps to save the contract from being frustrated. The rationale adopted by the Tribunal in this decision was a welcome departure from the otherwise restrictive approach adopted by tribunals in interpreting force majeure clauses.

In the case of Silverman VS Charmac Inc[96] the court opined that where one by his contract undertakes an obligation which is absolute, he is required to perform within the terms of the contract or answer in damages, despite an act of God, unexpected difficulty, or hardship, because these contingencies could have been provided against by his contract. So, referring to the facts respondent ought to pay the damages claimed by the TPO.

[96] 414 so.2d 892, 894 (Ala 1982)

PRAYER FOR RELIEF

Wherefore in lights of issues raised, arguments advanced and authorities cited, it is most humbly prayed and implored before this Hon'ble Court that it may be pleased to hold, adjudge and declare that:

1. *This Honourable court has jurisdiction over the present Investment related arbitral dispute; and that*

2. *Tilawin's measures are discriminatory in nature and therefore Tilawin has violated its international obligations; also that*

3. *The Force Majeure clause can be invoked in the present contract between Tilawin and Dgem ; and also*

Pass any such orders as the Hon'ble Court may deem fit in the lights of equity, justice and good conscience.

All of which is most respectfully affirmed and submitted

Agents for the Applicant