IN THE ARBITRATION MATTER BETWEEN

AGNIPRASTHA PRIVATE LIMITED (AGPL)

(CLAIMANT)

V.

URALO INDIA PRIVATE LIMITED

(RESPONDENT)

FINAL ARBITRAL AWARD

2022

ARBITRAL TRIBUNAL CONSISTING OF:

MR. WANG LEE – PRESIDING ARBITRATOR

(FORMER SECRETARY OF SIAC)

MR. JHINGALIA – ARBITRATOR

(FORMER JUDGE OF THE SUPREME COURT OF INDIA)

MR. MILLER

(ENGLISH ARBITRATOR)

3RD SURANA & SURANA INTERNATIONAL ARBITRAL AWARD WRITING COMPETITION 2022

TABLE OF CONTENTS

CONTENTS

1. BACKGROUND OF FACTS

THE PARTIES AND THEIR REPRESENTATION

Agniprastha Pvt. Ltd (AgPl) (*Hereinafter referred to as the "**CLAIMANT**"*) is an Indian Public Sector Company based in Mumbai, Maharashtra. It is owned wholly by the Government of India, and is majorly involved in the business of production of Oil and Natural Resources. The CLAIMANT is the largest government owned oil and gas exploration company in India and it is responsible for supplying a majority of the oil and natural gas resources to the country. The CLAIMANT is represented by 'A' and 'B', Counsels at Law firm 'X'.

Uralo India Private Limited (*Hereinafter referred to as the "**RESPONDENT**"*) is a company incorporated under the Companies Act, 2013, having its registered office in Mumbai Maharashtra. It is a subsidiary of Uralo Ltd, which is a Russian based Private company with several businesses in Eastern Europe and developing countries of the world. The RESPONDENT is represented by 'C' and 'D', Counsels at Law Firm 'Y'.

STATEMENT OF FACTS

1. The CLAIMANT company is spearheaded Mr. Zal Billimoria who wished to develop the growing oil and natural gas industry in India. In order to fulfil this, he met Mr. Vasiliky Nobov, the President of Uralo Private Limited, who was known to be a leader in the field of oil and natural gas with an expansive business operation in the United States, Germany, and Spain among others. Mr. Billimoria met Mr. Nobov at a business conclave with the intention of developing a mutually advantageous business plan for sale and purchase of oil and natural gases, and proposed the same to Mr. Nobov. Meanwhile, in the high level meeting that took place between India and Russia, it was decided that a high level of collaboration in defence and energy research would be undertaken by the two countries, with a specific focus on research and development where AgPl would be playing an integral role.
2. Pursuant to this, Mr. Billimoria and Mr. Nobov met in London in 2017 and drew up a business plan for the purpose of purchase of oil and to enter into a Joint Venture company situated in India. The first step towards this was setting up Uralo India Private Limited (the RESPONDENT), a wholly owned subsidiary of Uralo Private Limited, which was to facilitate supply of oil and its profits would be invested in Synergy Ltd, which

is a joint venture company owned by the CLAIMANT and the RESPONDENT with a 49-51% shareholding respectively. Thus, on 26th December 2017, the CLAIMANT and the RESPONDENT entered into the Oil Purchase Agreement. This marked the beginning of a strong bond aimed towards exploring of oil and natural gas and research and development efforts towards it.

3. In 2019 alone, the CLAIMANT and the RESPONDENT earned a profit of $250 million. A portion of this profit was split between the two companies, and the remaining $100 million was given to Synergy Ltd to perform its research activities. The RESPONDENT saw this an opportunity to further expand its business in other parts of South Asia.
4. However, in 2020, unknown to either party, a Suez Canal event occurred in 2020. a cargo vessel which momentarily lost control and became caught in the canal's middle, blocking ships navigating through it. Broadly speaking, this was bad news for the world trade because the canal is a vital passageway for goods travelling from Europe to Asia. This meant the RESPONDENT would not be able to supply oil to the claimant.
5. Mr. Billimoria wrote a lengthy letter to Mr. Nobov on February 10, 2020, giving him one final chance to accept the offer of an alternative he made in a letter dated January 13, 2020, or the CLAIMANT would be forced to invoke the contract's termination provision while also suing the RESPONDENT for breach of contract and using the dispute resolution provision. The CLAIMANT eventually cancelled the contract by issuing a letter on 01.03.2020 due to the worsening circumstances.

Availing no response from Mr. Nobov, the CLAIMANT decided to claim damages of 20 Million Dollars and remove the RESPONDENT out of Synergy Ltd. The CLAIMANT invoked the arbitration clause on 10 March 2020 under Article 13 of the Oil Purchase Agreement and sent a notice of arbitration to the Registrar of SIAC and to the RESPONDENT. This was contested by the RESPONDENT on the grounds that the present dispute was an investor-state dispute not amenable to the jurisdiction of the Singapore International Arbitration Centre (*Hereinafter referred to as "**SIAC**"*).

2. ISSUES IN DISPUTE

~ ISSUE 1 ~

WHETHER THIS IS A CASE OF FORCE MAJEURE AND FUNDAMENTAL BREACH OF CONTRACT?

~ ISSUE 2 ~

WHETHER THE CASE IS AN INTERNATIONAL COMMERCIAL ARBITRATION OR AN INVESTOR-STATE ARBITRATION?

ISSUE 1: WHETHER THIS IS A CASE OF FORCE MAJEURE AND FUNDAMENTAL BREACH OF CONTRACT?

ARGUMENT OF THE CLAIMANT

The CLAIMANT submitted that the RESPONDENT cannot claim force majeure as a means to escape liability for their fundamental breach of contract in supplying the oil. All reasonable parties are expected to perform their contractual obligations unless an unusual intervening circumstance prevents their performance.

The CLAIMANT submitted the same in the following limbs: ***First***, the supply of oil was in control of the RESPONDENT (1), ***Secondly***, that the event was foreseeable (2), ***Third*** that the Respondent was in control of the Contract (3) ***and Lastly***, that the Respondent is liable for the fundamental breach of the contract (4).

The CLAIMANT relied on the ***Antwerpen case***, wherein it was held that if the defendant seeks to escape the consequences of the breach by pleading that he is protected by an exception clause, then the burden is on the defendant to prove that the facts are brought within the exception.[1] Hence, the claimant submitted that it is for the RESPONDENT to prove that his non-performance is excused by such a clause.

(1) THE SUPPLY OF OIL WAS IN THE CONTROL OF THE RESPONDENT

According to the doctrine of Force Majeure, a party may not be compelled to undertake an obligation if there exists an impediment which prevents the party from fulfilling its obligations. This impediment must be beyond the domain of control of the RESPONDENT, where they would be unable to reasonably ensure performance by exercising appropriate control. In ***Lebeaupin***

[1] The Antwerpen, [1994] EWHC 1 Lloyd's Rep.

v. Crispin, force majeure was defined to include all circumstances which are "*beyond the will of man, and which it is not in his power to control.*"[2]

The CLAIMANT submitted that in *casu*, the elements of Force Majeure have been satisfied as not only was the supply of oil within the control of the RESPONDENT but also that the RESPONDENT had the ability to foresee and ensure the supply of oil to the CLAIMANT Company. Moreover, if the impediment is one that is likely to occur during the course of the business, then the RESPONDENT cannot claim force majeure as a ground for non-performance of contractual obligations. Given the uncertainty and risk of supplying through the shipping network, increased traffic or hindrances in the global shipping routes should be foreseen by the party, especially in the Suez Canal which controls the majority of the global shipping trade.

Therefore, the CLAIMANT submitted that the RESPONDENT is not entitled to claim that they had not foreseen the possibility of supplying through alternative routes as it would be increasingly risky to rely solely on the Suez Canal. In addition, the RESPONDENT possessed the resources and capabilities to guarantee supply through alternative routes for which they were in a position to undertake, which was not done by them.

1.1 ***The Respondent cannot claim commercial loss as a ground to invoke Force Majeure***

The CLAIMANT submitted that according to the "***doctrine of commercial frustration***", the contract must be evaluated on whether the change in circumstances would compel a radical change in the obligations placed on the party. Hence, the test considers whether the party to the given contract could perform the task if the performance is rendered impossible by some supervening event.

The CLAIMANT submitted in *casu* that the blockage in the Suez Canal forces the RESPONDENT to supply the oil through the Cape of Good Hope, requiring higher freight fees. This concludes that the performance of the contract is "***possible***" even though it requires higher costs. To facilitate the supply and higher costs, the CLAIMANT Company offered a bank guarantee and negotiated 5 million dollars, which matches the quote issued by the RESPONDENT. Therefore,

[2] Leubeaupin v. Crispin, [1920] 2 KB 714, P. 719.

neither is this a case of commercial impracticability nor has the CLAIMANT placed an unfair burden on the RESPONDENT to perform the contract.

(2) THE RESPONDENT FAILED TO FULFIL ITS DUTY OF BEST EFFORTS

In ***Paradine v. Jane***, it was held that if a supervening event is not clearly included in the contract, a party is not exempted from acting under the terms of the agreement.[3] For the RESPONDENT to claim Force Majeure, the event must be beyond the "*reasonable control*" of the RESPONDENT. This does not, however, imply that the RESPONDENT can escape responsibility for circumstances that were beyond its own control. The term "*reasonable control*" includes the RESPONDENT Company adopting certain measures to prevent any impediments from affecting its performance.[4] Additionally, a party cannot rely on their own actions or omissions in order to claim force majeure.

The CLAIMANT submitted that in *casu*, the RESPONDENT cannot claim Force Majeure solely on the ground of the blockade in the Suez Canal as they were required to undertake basic measures to guarantee the supply of oil to AGPl. This involves using alternative routes of transportation along with the agreement of different payment terms due to the situation at hand. Moreover, the failure to supply is attributable to the RESPONDENT refusal as they would be subject to higher costs, for which the CLAIMANT company is willing to bear. This concludes that the RESPONDENT could have supplied the oil.

2.1 *The Respondent is obligated to display that the event was unforeseeable*

According to ***Craig***, if the criteria of lack of foreseeability is not satisfied, the RESPONDENT could be discharged from its contractual obligations or immune from liability. Similarly, Brunner, in ***ICC Case No. 1703***, held that this must be judged in accordance with a "***reasonable businessman standard"*** as such persons are highly sophisticated and possess strong business acumen, especially in international transactions.

[3] Pradine v. Jane, 82 Eng. Rep. 519 (K.B. 1647).

[4] Entertain Video Ltd. v. Sony DADC Europe Ltd., [2020] EWHC 972 (TCC).

To further this argument, the CLAIMANT relied on ***Trade and Transport Inc. v. Lino Kalun Kalsha Limited***[5] case wherein it was observed that a party would be ineligible to rely on information to support a force majeure claim if those facts were reasonably expected to be known by the party prior to the contract's conclusion. Similarly, reliance was placed on ***Royal & Sunalliance du Canada v. Cam-Nord St-Felix Incorporated***, where it was held that the presence of a force majeure event will not absolve a contracting party from performing if there is fault on its part.[6] In addition, if the party invoking the force majeure clause is at fault in either inducing or avoiding the force majeure event, it will not benefit from the clause.[7]

The CLAIMANT argued that the RESPONDENT cannot claim that the event was unforeseeable as disruption in the supply chain is one that should have been foreseen by the RESPONDENT, given the volatility in the shipment industry. ***First***, the Suez Canal is the busiest and congested canal in the world where multiple ships attempt to pass through it. Even if this could not result in a blockade, congestion and delays are common and are generally taken into account when framing the contract as well. And ***Second***, shipping prices are in constant fluctuation and are subject to impact of multiple factors such as fuel, parts and crew salaries. Therefore, the claimant submitted that even if the Respondent claimed that blockages and delays are rare, increased costs of shipping should have been foreseen in the supply of oil. Hence, the event is within the scope of occurrence and it cannot be subjected to the defence of force majeure.

(3) THE CHANGE IN CIRCUMSTANCE CANNOT BE A GROUND FOR FRUSTRATION OF CONTRACT

The CLAIMANT submitted that in ***Satyabrata Ghose v. Mugneeram Bangur***,[8] the Supreme Court of India came to the conclusion that a contract is not invalidated only because its terms have changed. It further held that "*In the course of business, circumstances always change, but agreements cannot be broken because of a little adjustment. It is necessary to determine if there*

[5] Trade and Transport Inc. v. Kalsha Limited 310 F. Supp. 463.

[6] Royal & Sunalliance du Canada v. Cam-Nord St-Felix Incorporated, [2006] J.Q. no 5258 (QCCt) (Can).

[7] PJM Delereq, *Modern Analysis of the Legal Effects of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 JOURNAL OF LAW& COMMERCE (1995).

[8] Satyabrata Ghose v. Mugneeram Bangur, 1954 AIR 44.

has been a substantial change in the contract's performance circumstances that makes it impossible to carry out."

Therefore the question to be evaluated is whether "*what fundamental change occurred that caused the work the contractual party had undertaken to become a task of a different sort that the contract did not foresee and to which it could not apply?*" The CLAIMANT in the present case submitted that the only change was the route that the RESPONDENT was expected to undertake. Neither the contract nor did any negotiation specify that alternative routes were not to be taken. The change in circumstances was fairly minor and did not affect the performance of the contract.

3.1 *The Alternative route to supply oil was not fundamentally different than supplying through the Suez Canal*

The claimant submitted that in ***Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH***,[9] It was determined that the Suez canal closure did not impede the flow of commodities across the Cape of Good Hope and that a simple increase in freight costs does not fundamentally affect the essential terms of the contract. On the sole basis that the supply would be more difficult to complete, obligations cannot be cancelled and the delivery might still be made. Similarly, according to the principles laid down by ***Chitty on Contracts***, a rise in cost or price is not a ground for the frustration of the contract. Hence, the RESPONDENT cannot claim frustration on this ground.

3.2 *The obligation is not impossible to perform*

The CLAIMANT submitted that for a party to claim force majeure, they must first display that the performance of the task is impossible and that no alternatives exist to fulfil the obligation. Economic difficulties do not extend to excuse performance of an obligation of contract. In ***Tennants (Lancashire) Ltd. v. C. S. Wilson***, the Court of Appeal of England held that force

[9] Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH, [1961] 2 WLR 633.

majeure cannot be applied, even though the goods in question rose by 20-30%.[10] Therefore, force majeure cannot be applicable in the present case.

3.4 ***The Hindrance threshold is high under Contract Law***

The CLAIMANT submitted that the threshold for hindrance is significantly high. According to Lord Loreburn, "***Hinderance***" meant "*to place a merchant in the position of being unable to deliver unless he dislocates his business and breaks his contracts in order to fulfil one that surely hinders delivery.*" However, a mere rise in price rendering the contract more expensive to perform will not constitute ***"hindrance"***. This only amounts to a rise in prices as neither is the RESPONDENT company going to suffer a significant loss and nor will they be fundamentally affected, as the CLAIMANT Company is willing to match the increased freight costs.

3.4 *In any event, the concern only qualifies as a Hardship to Performance of Contract*

The CLAIMANT submits that the concern only qualifies the threshold of hardship which refers to the fact that a party whose performance becomes more difficult is typically still required to comply. Force Majeure cannot be claimed, if the event taken place renders the performance harder. In *casu*, the increased cost of freight is a hardship that ought to be borne, especially when the functioning of the CLAIMANT Company is at stake. The CLAIMANT company had agreed to furnish the remaining amount through a bank guarantee, which does not render the obligation impossible to perform.

(4) THE RESPONDENT HAS FUNDAMENTALLY BREACHED THE CONTRACT

The CLAIMANT noted that a violation or non-performance of the agreed upon terms of a binding contract is regarded as a breach of a contract. A party to a contract is obligated to deliver what they initially promised and the receiving party is entitled to the delivery. They possess the right to claim damages, in lieu of their failure to perform the terms of the contract. In *casu*, the failure of the RESPONDENT to deliver the oil in pursuance of Clause 4 of the Contract constitutes a

10 Tennants (Lancashire) Ltd. v. C. S. Wilson & Co. Ltd. [1917] A.C. 495.

breach as ***First***, the RESPONDENT cannot be excused from the performance of the contract as the defence of Force Majeure cannot be invoked. ***Second***, the refusal of the RESPONDENT to supply oil at the delivery facility despite the availability of alternative routes constitutes a non-performance of their obligations.

4.1 *The breach is Fundamental*

The CLAIMANT submitted that there is a fundamental breach of contract. The CLAIMANT relied on In ***Spurling Limited. v. Bradshaw,*** wherein it was held that a breach is considered to be fundamental if the defeat the object of the contract where the claimant party would be unable to rely on the terms of the contract to seek relief and in ***B.V. Nagaraju v Oriental Insurance Co. Limited***, it was laid down that the non-performance of the core purpose of the contract amounts to a fundamental breach.

4.2 *The Supply of Oil constituted the base of the Contract*

The CLAIMANT submitted that the Parties intended the formation of the contract to ensure that AgPl is supplied with the oil from the Russian Market. In essence, the contract was an ***"oil supply agreement"*** between both the parties where fuel would be supplied to the delivery point in accordance with Cl. 4 of the contract. The creation of the joint venture, oil exploration and discovery was subsidiary to the purpose of the contract. This was enhanced by the fact that the Joint Venture would only carry out these activities from the profits of the sale of oil by AGPl and not independently in its absence. This concludes that the primary task which forms the core essence of the contract is the supply of oil as the subsidiary tasks cannot be undertaken if the RESPONDENT breaches its obligation under Section 4 of the contract.

4.2 *The Injury faced by the Claimant is substantial to be regarded as a fundamental breach*

The CLAIMANT submitted that to evaluate the impact of the injury on the party, due consideration must be provided for the gravity of the consequences of breach, the unwillingness of the party to perform and the offer to assist in facing the fundamental breach. The gravity of the breach is material, as not only affects the ability of AGPl to sell oil, but also affects the functioning of the joint venture between the companies. The consequences indicate that the extent of loss is material. Moreover, the RESPONDENT is unwilling to perform the terms of the contract even though the CLAIMANT has offered alternative means to match the higher quote offered by the RESPONDENT.

The CLAIMANT relied on the case of ***Luna Park Limited v. Tramways Advertising***, where it was laid down that a condition is considered to be fundamental if a party would not have entered into the contract in the absence of that condition. AGPl would not have entered into the contract with Uralo if the condition for sale was not agreed upon. The sole reason to enter into an agreement was to access the Russian Market as against the other players internationally. Hence, the breach is material and fundamental.

4.3 *The non-performance affects the Claimant Company's responsibilities under the Contract*

The doctrine of fundamental breach extends to all those situations where the affected party is left considerably weaker due to the breach which affects its ability to claim all potential benefits of the contract in the absence of the breach. As argued above, not only is the CLAIMANT unable to engage in selling oil in India, but also would not be able to invest the proceeds of the sale into the joint venture. This impairs the functions of Synergy Limited, the joint venture between the parties as its functioning is contingent on the profits being reinvested into it.

ARGUMENT OF THE RESPONDENT

All reasonable parties expect to perform on their contract unless some unusual intervening circumstance prevents their performance. Every partner to a contract is obligated to keep his end of the bargain. However, there are situations when it is physically or legally impossible to do so. However, RESPONDENT submits that they cannot perform the task at hand in lieu of the blockade in the Suez Canal. This event invokes force majeure as it renders the performance of the contract impossible as the Respondent would be unable to supply oil without the claimant matching the increased freight costs of travelling through the Cape of Good Hope.

The RESPONDENT submits that ***First***, the event could not be foreseen (1), ***Second***, that the event was beyond the control of the Respondent (2) and ***Finally***, the Respondent is liable for the fundamental breach of the contract (3).

The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties.

(1) THE IMPEDIMENT COULD NOT BE FORESEEN BY THE PARTY

In ***Taylor vs. Caldwell*** in which it was ruled that it is not necessary to continue performing a contract if an unforeseeable incident happens during performance that prevents performance in the sense that the contract's essential terms apply, since insisting on such performance would be unfair. Although impediments such as natural disasters, war or price fluctuations could be predicted, a blockade in a shipping route is one that could not be foreseen by any party.

Canals undertake the most sophisticated technology to ensure safe passage of ships. Through the history of the Suez Canal, no ship has malfunctioned and blocked access to the entire canal. This event is one which is novel and hence could not be foreseen by a party, during both the performance of the contract and at the time of entering into an agreement. Moreover, given that it was a maritime dispute, neither party had included the same within the scope of the contract as well. This concludes that the event was one which does not take place during the normal course of the business and hence cannot be foreseen by the party.

1.1 ***The Impediment was beyond the likelihood of occurrence***

According to ***Craig***, if the criteria of lack of foreseeability is not satisfied, the RESPONDENT could be discharged from its contractual obligations or immune from liability. Obligations can be extended to the party if the degree of control should have been a factor when entering into the contract. However, this must be in accordance with the likelihood of that impediment happening. For instance, if X is an impediment that is constantly faced by the parties in their course of business, the obligated party must consider this impediment and undertake measures to fulfil the obligations.

In *casu*, the occurrence of a ship blocking the Suez Canal, is a rare occurrence that neither the Respondent or the Claimant could have foreseen. Despite thousands of ships passing through the major canals of the world, no ship has blocked the accessibility of ships in the canal. This concludes that the possibility of such a risk affecting the contract is so remote that the Respondent could not be required to assume the risk in question.

In ***Satyabrata Ghose v. Mugneeram Bangur***, the Supreme Court of India held that "*The performance of an act may not be literally impossible but it may be impracticable and unless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.*"

Hence, given the fact that the occurrence of the event renders the supply impossible, it affects the foundation of the contract which requires supply of oil through the Suez Canal at affordable rates. The equilibrium of the bargain has been shifted, which means that performance is not possible, unless the CLAIMANT matches and covers the freight costs of supplying the oil.

1.2 ***The Respondent operated from a Reasonable Businessman Standard***

In ***ICC Case No. 1703***, it was held that the ability to foresee must be judged in accordance with a "***reasonable businessman standard"*** as such persons are highly sophisticated and possess strong business acumen, especially in international transactions. In this case, the RESPONDENT was aware and had factored in possible fluctuations in price as well as potential damage to the goods. However, the inability to access any shipping route is one that falls beyond conventional business reasonability as such routes are accessible for commercial purposes. Therefore, the CLAIMANT cannot claim that the RESPONDENT failed to undertake foresight as the Respondent has been cut off from accessing the routes both commercially and physically.

1.3 ***It would be unreasonable to expect the Respondent to address the impediment suffered***

Any obstacle that cannot be removed through normal business operations is regarded as unreasonable. Schlechtriem contends that the obstacle the party seeks to overcome must be both reasonable and doable. Due to the blockade in the Suez Canal, the RESPONDENT would be required to supply oil to AGPl through the Cape of Good Hope.

No other alternative route exists nor is there another means of transportation as it would require the Respondent to operate under a considerable loss of 5 Million Dollars. This is more than a mere hardship or an increase in price of operations, as it would defeat the purpose of economic efficiency. The RESPONDENT does not have the ability to ensure supply of oil through the rate offered by the CLAIMANT as there exist only two direct routes between the companies. Since options of both have been exhausted, it is rather impossible for the RESPONDENT to fulfil the obligations under the contract.

Moreover, to ensure that the supply obligations are met, the RESPONDENT would have to offer a higher quote as the ship would have to be diverted from the conventional route. However, the CLAIMANT is unable to furnish the freight charges due to the longer route. This would result in the RESPONDENT Company facing significant losses as the economic equilibrium has been shifted, which concludes that supplying at the rate proposed by the Claimant is an unreasonable burden, which is excessive than the original obligations specified in the contract.

1.4 ***A Hindrance is sufficient to invoke Force Majeure***

A mere "*hindrance*" may be enough to invoke a Force Majeure Clause as a party may not be compelled to undertake an obligation if there exists an impediment which prevents the party from fulfilling its obligations. This impediment must be beyond the domain of control of the RESPONDENT, where they would be unable to reasonably ensure performance by exercising appropriate control. It is also required to be "*materially impossible in the circumstances to perform the obligation.*"[11] Given the nature of the impediment to be one that cannot be addressed unless the Polar Ice Caps melt, the lack of access to the Suez Canal is considered to be an impediment material enough to invoke force majeure.

(2) THE EVENT IS UNCONTROLLABLE BY THE RESPONDENT

In the case of ***Lebeaupin v. Crispin***, force majeure includes all circumstances which are "*beyond the will of man, and which it is not in his power to control.*"[12] The occurrence must have been "beyond the control" of, or "external" and unrelated to, the party alleging force majeure in order to invoke this defence. The occurrence must not have been brought on or provoked by the party.

In *casu*, the CLAIMANT claims that obligations can be extended to the party if the degree of control should have been a factor when entering into the contract. As submitted above, the blockade in the Suez Canal was caused by an independent ship which had malfunctioned. The blockade of the Suez Canal is never considered during entering conventional maritime agreements, as it is a situation that does not take place. The event which has ultimately prevented the supply of oil is beyond the domain of control of the RESPONDENT. This was not factored in the contract and nor could it have been done so.

2.1 *The Respondent has fulfilled their duty to the best efforts*

[11] Rainbow Warrior (N.Z. v. Fr.) Judgement, Fr.-N.Z. Arb. Trib., 82 I.L.R. 500 (1990).

[12] [1920] 2 KB 714, P. 719.

In ***Paradine v. Jane***, it was held that if a supervening event is not clearly included in the contract, a party is not exempted from acting under the terms of the agreement.[13] Hence, the event must be beyond the "*reasonable control*" of the RESPONDENT. The question hereon is whether the RESPONDENT undertook the best possible efforts to ensure supply. As submitted above, the RESPONDENT company had explored the supply of oil through both possible routes. They had agreed to do so if the CLAIMANT company covered the cost of the freight charges. This was communicated directly among the CEO's as well. Hence, the RESPONDENT took active measures to provide the best possible quote to the CLAIMANT, even though the Suez Canal was blocked.

(3) THERE HAS BEEN A FUNDAMENTAL CHANGE IN THE CIRCUMSTANCES OF THE CONTRACT

It might be claimed that the promisor finds it difficult to carry out the deed that he had committed to accomplish if an unfortunate incident or change in circumstances completely upends the entire basis upon which the parties formed their agreement. Moreover, according to the "***doctrine of commercial frustration***", the contract must be evaluated on whether the change in circumstances would compel a radical change in the obligations placed on the party. Hence, the test considers whether the party to the given contract could perform the task if the performance is rendered impossible by some supervening event.

In *casu*, the contract was built on the assumption that the CLAIMANT would be able to cover the costs of freight in supplying the oil, as it would be unreasonable for the respondent to bear the same. Transportation through the Suez Canal formed the basis of the commercial transaction and if not the Suez, any other route which the CLAIMANT Company was willing to bear the costs of. In the absence of this equilibrium, a mere bank guarantee is not sufficient to cover the upfront freight costs of transporting the oil through the Cape of Good Hope. Hence, the contract stands commercially frustrated, as the RESPONDENT would have to absorb a loss of 5 million dollars upfront to ensure supply.

[13] 82 Eng. Rep. 519 (K.B. 1647).

3.1 ***The Respondent had immediately notified the Claimant on their inability to perform the Contract***

According to Craig, the Respondent must notify CLAIMANT of its inability to continue with the performance of the contract as soon as it becomes aware of an impediment. This would ensure that the CLAIMANT would have adequate time to undertake alternative measures to address the impediment faced. The CEO of the Respondent immediately informed the CLAIMANT of the impediment and their inability to supply the oil. This also allowed the parties to explore an alternative proposal and means to supply the oil through the cape of good hope. However, since the CLAIMANT company was unable to furnish the increased cost of transportation, the RESPONDENT company would be unable to meet the requirements as it would be unreasonable to operate on a lack of economic equilibrium.

(4) **THE RESPONDENT HAS FUNDAMENTALLY BREACHED THE CONTRACT**

A breach of contract is one where there exists a violation or non-performance of the agreed upon terms of a binding contract. A party to a contract is obligated to deliver what they initially promised and the receiving party is entitled to the delivery in so far as it is feasible to do so and is not excused by the doctrine of force majeure.

In *casu*, the RESPONDENT has not fundamentally breached any terms of the contract as they were the oil in pursuance of Clause 4 of the Contract due to the blockade in the Suez Canal. Therefore, ***First***, the RESPONDENT must be excused from the performance of the contract as the defence of Force Majeure is invoked. ***Second***, the refusal of the CLAIMANT to furnish the increased freight costs means that the RESPONDENT was willing to undertake its obligations under the contract until it was unable to do so.

4.1 ***The breach is not Fundamental***

The CLAIMANT submits that there is a fundamental breach of contract where the claimant relied on ***Spurling Limited. v. Bradshaw***, wherein it was held that a breach is considered to be fundamental if the defeat the object of the contract where the claimant party would be unable to rely on the terms of the contract to seek relief and in ***B.V. Nagaraju v Oriental Insurance***

Co. Limited, it was laid down that the non-performance of the core purpose of the contract amounts to a fundamental breach.

4.2 *The Supply of Oil was one of the terms of the contract*

The CLAIMANT submitted that the Parties intended the formation of the contract to ensure that AgPl is supplied with the oil from the Russian Market. However, the contract was entered into to undertake oil exploration and foster partnerships with Russian Players in long term oil manufacturing. This was eluded through the creation of the joint venture as well as undertaking oil exploration and discovery purposes.

The supply of oil ensured that AGPl could continue its activities but it cannot be said that the supply of oil forms the core essence of the contract and the rest are subsidiary tasks. Equal weightage must be provided to all parts of the contract as they constitute the essence of the agreement.

4.3 *The alleged injury faced by the Claimant is not substantial for it to be regarded as a fundamental breach*

The CLAIMANT submitted that to evaluate the impact of the injury on the party, due consideration must be provided for the gravity of the consequences of breach, the unwillingness of the party to perform and the offer to assist in facing the fundamental breach. The gravity of the non-supply is not material, as it only means that AGPl would not be supplied with oil during the time time of the blockade, which would be for a maximum of two months. In the meantime, the joint venture, Synergy Limited, could continue functioning in its efforts and ensure that oil exploration and discovery is carried out, especially as 100 crores of shared up capital was provided by the RESPONDENT.

Moreover, the CLAIMANT relied on the case of ***Luna Park Limited v. Tramways Advertising***, where it was laid down that a condition is considered to be fundamental if a party would not have entered into the contract in the absence of that condition. AGPl not only entered into the contract for the supply of oil, but also to establish a Joint Venture. Therefore, it cannot be said that in the absence of the supply, the partnership would not have been agreed upon.

4.4 *The non-supply does not affect the Claimant Company's responsibilities under the Contract*

The doctrine of fundamental breach extends to all those situations where the affected party is not left considerably weaker as the operations would be halted for the duration of the blockage. However, the claimant company also had access to an alternative route, for which they are unwilling to undertake. Moreover, the Joint Venture is not left weaker and will still continue to function. Hence, the supply of oil to AGPl is not material to ensure the functioning of the joint venture.

ISSUE 2: WHETHER THE PRESENT CASE IS TO BE RESOLVED THROUGH INVESTOR-STATE ARBITRATION OR INTERNATIONAL COMMERCIAL ARBITRATION?

ARGUMENT OF THE CLAIMANT

The CLAIMANT submitted before the arbitral tribunal that the RESPONDENT is not investor for the purposes of investor state arbitration (**1.**), the CLAIMANT company is not an instrumentality of the state (**2.**), the source of right arises from the Contract and not the Bilateral Investment Treaty (**3.**) and that there has been a breach of a contractual right under the Oil Purchase Agreement and not treaty rights under the BIT (**4.**).

(1) THE RESPONDENT IS NOT INVESTOR FOR THE PURPOSES OF INVESTOR-STATE ARBITRATION

The CLAIMANT submitted that the RESPONDENT, Uralo India, which is a wholly owned subsidiary of Uralo Ltd is not an ***"investor"*** for the purposes of Investor State Arbitration and has not made ***"investments"*** for the purpose of attracting dispute resolution in accordance with investor state arbitration.

1.1.*The Respondent does not fulfil the Salini Test*

It is submitted by the CLAIMANT that the RESPONDENT does not fulfil the four prong test laid down in *Salini*[14]for determining the definition of ***"investment"*** which are as follows:

1. **A contribution of money or assets**: The only asset that has been spoken about is the authorised capital of 1000 crores for setting up of Uralo India, which in itself is a subsidiary of Uralo. The other assets spoken about synergy Ltd which is a joint venture agreement requiring equal contribution by both the parties.

[14] 4 Salini Costruttori S.p.A and Italstrade S.p.A v Kingdom of Morroco, ICSID Case No. ARB/OO/4, Decision on Jurisdiction, 23 July 2001 ("Salini").

2. **A certain duration of the economic operation**: the RESPONDENT company has been dealing with the CLAIMANT company since 2017 only which is still in its nascent stages, as opposed to the required long duration required for making substantial investments in the host state.
3. **An element of risk**: On the part of the investor, the natural risks and piracy that are part of toil supply agreement are foreseeable risks.
4. **A contribution to the host State's economic development**: Although oil and natural gas are major economic boosters, the present contract is not of the wavelength of providing significant economic contribution to the host state.

Furthermore, according to the correspondence between Mr. Nobov and Mr. Billimoria, it is evident that the RESPONDENT had offered a bank guarantee of 7 Million dollars, in response to which Mr Billimoria asked for the bank guarantee to be reduced to 5 Million dollars. However, this was only an offer and counter-offer made by both parties which was not ultimately take effect, therefore, the RESPONDENT cannot claim this as an investment made in the host state.

1.2.*There exists a commercial relationship between the parties*

The CLAIMANT submitted that the existence of a commercial relationship is essential for invoking proceedings under International Commercial Arbitration. According to the Supreme Court of India in the case of ***R.M. Investment and Trading Co. v. Boeing Co***[15]. ***"commercial"*** means anything that is opposite of the relationships relating to marriage, culture, social and political in nature. Furthermore, in the case of ***Comed Chemicals Limited v. C N Ramchand***,[16]the Supreme Court of India observed that the commercial nature of the contract was visible through the agreement for trade and business. Similarly, it was observed in ***Renusagar Power Co. Ltd vs General Electric Co,***[17] that commercial transactions lie at the core of commercial arbitration. In the present case, the main objective of the joint venture was to sell crude oil to the CLAIMANT company, undertake excavation in Indian waters to explore the possibility of excavation of crude oil in India. Furthermore, according to the terms of the

[15] R.M. Investment and Trading Co. v. Boeing Co, 1994 AIR 1136.

[16] (2008) 1 SCC 481.

[17] 1994 AIR 860.

contract, the profits made by sale of oil would be invested in the joint venture company to carry out oil exploration.

The CLAIMANT relied on ***United Mexican States v. Metalclad Corp***,[18] the Supreme Court Of Columbia observed that for the purposes of the Model Law, an arbitration proceeding under the North American Free Trade Agreement (NAFTA) between a private investor and a State party to the agreement was considered a commercial arbitration because the main connection between the investor and the receiving State concerned "**investments**".

The CLAIMANT submitted a commercial sale has taken place in this case and a mere commercial sale would not be accepted as investment for the purpose of entailing investment arbitration. In the present case, the CLAIMANT submitted that although the RESPONDENT claims that it is an investor-state arbitration, the major claims arising are directly in relation to the Oil Purchase Agreement and not the Bilateral Investment Treaty. The commercial nature of the contract entered between them makes it amenable to international commercial arbitration. Furthermore, according to the terms contained in the contract itself, the application of Principles of International Commercial Contract, which establishes a clear commercial relationship between the parties to the dispute.

Thus, the CLAIMANT submitted that that the Oil Purchase Agreement was a mere contract representing rights in personam between the parties and does not qualify as an investment as per the ***Douglas Test***.[19] Furthermore, contrary to the claims of the RESPONDENT the contract between them does not result in "significant economic development" of the country, which is the established threshold required for qualifying as an investment. Therefore, since the parties have a commercial contractual relationship between them , their rights are rights *in personam* and not rights *in rem*.

1.3. *The aim of the arbitration agreement between the parties was to resolve disputes through International Commercial Arbitration*

[18] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1.

[19] Zachary Douglas, The International Law of Investment Claims (CUP, 209) V, p. 161.

The CLAIMANT submitted that the case is a commercial one subject to International Commercial Arbitration before the SIAC and is not an investor-state dispute covered by the Russia-India BIT. According to Clause 13 of the Oil Purchase Agreement, the first mode of dispute resolution was discussion, failure of which within 20 business days leads to them jointly appointing an expert to whom the dispute would be referred to. In failure of all the options available, the final resort is the arbitration before the SIAC. Therefore, the parties have expressly agreed to refer their dispute to the SIAC. SIAC has been instrumental in dealing with international commercial arbitration cases which has made it a hub for the same. The intention behind choosing SIAC shows that the parties intended to resolve disputes through commercial arbitration.

(2) THE CLAIMANT COMPANY IS NOT AN INSTRUMENTALITY OF THE STATE

The CLAIMANT submitted that according to the claims of the RESPONDENT the CLAIMANT is state making it amenable to investor-state arbitration, however, the CLAIMANT submitted that that despite the CLAIMANT company being a wholly owned public sector enterprise, it does not represent the Government of India. This is evidenced through the ***White Industries***[20] case relied on by it wherein Coal India Limited which is a wholly owned subsidiary of Government of India was not attributed to India. This is further supplemented with the test under Article 8 of the ARSIWA.[21] According to Article 8 of ARSIWA, an act or an entity is considered to be a State, if it is done under the "*instructions, direction and control of the State.*"

The CLAIMANT submitted that it is not a functionary of the State as *First*, they are not bound under the control and supervision of the Government, in lieu of their status as an independent company. *Second*, the independence was a condition precedent to the appointment of Mr Billimoria as the CEO of AGPl and *Finally*, the company sources its profits from its own activities rather than relying on the investments and capital from the government. Moreover, the company does not carry out any sovereign activities, but only those activities that are commercially profitable.

---

[20] *White Industries* Australia Limited v. The Republic of India, Final Award. 30 Nov 2011.

[21] G.A. Res. 56/83, Resolution on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/RES/56/83 art. 8, (Jan. 28, 2002).

The CLAIMANT submitted that the key managerial and business related decisions taken by the Board of Directors of the CLAIMANT company under the leadership of Mr. Billimoria, Head of Business Operations and not Government of India, for the following reasons:

a) *First*, Despite the Claimant being a public sector undertaking, the CLAIMANT is not coerced or influenced to make decisions as per the wishes of the government of India. The CLAIMANT company does not represent the interests of the government of India. The aim of constitution of the CLAIMANT company by the government of India was only to represent its pure commercial interests.

b) *Secondly*, an official business plan was drawn up by Mr Billimoria to minimise government interference in the functioning of the CLAIMANT company, which was done with the knowledge by the government of India. Therefore, since 2015 the CLAIMANT company has been acting as a private company with profit motive even though it is still under the control of the Government of India.

c) *Thirdly*, the real business dealings between Uralo and AgPl was done by Mr Billimoria, which was downplayed by the local media to emphasise on the Indian delegation's high level meeting with Russian Ministers.

d) *Fourthly*, although a high-level meeting was conducted by the representatives from both states, the real agreement was conceived by AgPl under Mr Billimoria's control, who drew up a business plan for the shared joint venture namely Synergy Ltd. The contract for the joint venture agreement was also signed by Mr. Billimoria and not an employee of the government of India as Mr. R.S. Sarkar, Managing Director, AgPl (Former IAS, Government of India), was a witness to the same, who is a retired official and not serving the government any further.

(3) THE SOURCE OF RIGHT ARISES FROM THE CONTRACT AND NOT THE BILATERAL TREATY

The CLAIMANT submitted that that the present dispute arises as the rights of the CLAIMANT have been adversely affected by the acts of the RESPONDENT. The CLAIMANT has therefore the right to damages from the RESPONDENT as well as the right to expropriation, both of which are covered under the Oil Purchase Agreement. In the present case, the parties entered into an Oil Purchase Agreement which was breached by the RESPONDENT in this case. The agreement between the CLAIMANT and the RESPONDENT was to have a commercial relationship between them with the aim of conducting commercial transactions in relation to oil and natural gas with profit motive.

The contract for oil purchase includes an expropriation clause under Clause 10.2.5. which states that

> "E*xpropriation or forced acquisition of a building or site with the condition that failure of any machinery, vehicles, or other equipment (unless brought on by an incident of force majeure) or lack of cash shall not be deemed to be an event of force majeure.*"

This clause was mutually agreed upon by the parties and the actions taken by the CLAIMANT state was in pursuance of the same. This concludes that the right to claim damages and expropriate in lieu of the breach of contract is a remedy against the failure of the RESPONDENT to fulfil the terms of the contract. Therefore, the core essence of the dispute is grounded in the contract as the obligations entail the supply of oil to the CLAIMANT Company from the RESPONDENT. This eliminates the possibility of the BIT characterising the dispute at hand as the legal obligations are derived from the contract of supply.

(4) THERE HAS BEEN A BREACH OF A CONTRACTUAL RIGHT AND NOT TREATY RIGHTS UNDER THE BIT

The CLAIMANT argued that the RESPONDENT has clearly breached the Oil Purchase Contract and has relied on the defence of force majeure clause. First, the CLAIMANT submitted that as per the dispute at hand, there is no investor and nor has an investment been made. Second, in any event that the RESPONDENT is an investor, the BIT only offers a framework for investment in the country. However, in casu, neither does the BIT concern itself with the terms of the dispute and nor has the contract been derived from the BIT. Hence, the source of the right is purely contractual.

Furthermore, the CLAIMANT submitted that despite the presence of various alternatives such as going through the Cape of Good Hope to transport oil, the RESPONDENT company failed to rely on such alternatives and decided to completely stop selling the oil. According to the terms of the contract, the RESPONDENT is liable to pay a sum of 20 Million US Dollars for the same. The decision of the CLAIMANT state to expropriate the assets of the RESPONDENT was only a counter-measure taken as the RESPONDENT had already caused a fundamental breach of contract. This led to the CLAIMANT company suffering exponential losses and therefore, expropriation of the assets seemed to be the most viable option for the CLAIMANT.

The CLAIMANT submitted that the RESPONDENT has claimed that the right against expropriation guaranteed to it under Article 5 of the BIT has been violated, however, this decision is only an impending one as steps towards the same has not been taken yet. Further, even if the final decision is made it still reverts back to the contract between the CLAIMANT and the RESPONDENT and not the BIT. According to *A.G v. Arg. Republic*,[22] the tribunal observed that by just pointing out a breach of contract by the host State, an investor cannot show a violation of fair and equitable treatment or an expropriation.

Furthermore, the CLAIMANT submitted that the right lies in the host state to initiate expropriation measures. It is appropriate to refer to the seizing of property as being *"in the public interest"* when it is done in accordance with a policy meant to improve social fairness within the community.[23] The CLAIMANT submitted that although the RESPONDENT claims that adequate compensation ought to have been provided, however, the CLAIMANT submits that according to the ***Doctrine of Police Powers***, States are exempt from compensation obligations when they implement legitimate, non-discriminatory regulations in the course of their regular regulatory activities. In the present case, the dispute rests on the refusal of the RESPONDENT to supply oil to the CLAIMANT company due to rise in prices. The CLAIMANT agreed upon the 10 million dollar valuation offered by the RESPONDENT by providing 5 million upfront with a bank guarantee for the remainder amount. Therefore, the rights and obligations under the contract has been breached by the RESPONDENT.

[22] A.G v. Arg. Republic ICSID Case No. ARB/02/8.

[23] Mark McLaughlin, Defining a State-Owned Enterprise in International Investment Agreements, ICSID Review, (2020), pp. 1–31.

ARGUMENT OF THE RESPONDENT

The RESPONDENT submitted that *First,* the present tribunal does not have jurisdiction regarding the rights under the BIT (**1**.) and second, in any event, even if the tribunal finds jurisdiction to arbitrate the claims under the contract, it cannot arbitrate the claims in relation to the BIT (**2**.).

(1) THE PRESENT TRIBUNAL DOES NOT HAVE JURISDICTION REGARDING THE RIGHTS UNDER THE BIT

The RESPONDENT began their argument by contesting the jurisdiction of the tribunal to hear claims relating to treaty rights violations. For this they relied on the interpretation of the dispute resolution clause under the Russia-India BIT. According to the RESPONDENT, an interpretation of the terms of the Russia-India BIT, the current dispute between the CLAIMANT and the RESPONDENT amounts to investor state dispute. According to the ISDS contained in the BIT, the resolution of disputes must be made through express or implied agreement to arbitrate the dispute. Furthermore, other modes such as mediation and conciliation are suggested before resorting to arbitration.

According to the RESPONDENT, any investor state dispute under the Russia-India BIT cannot be resolved through the rules of international commercial arbitration as the rights of the investors involved in question. This is mainly for two reasons:

1. *First*, the Oil Purchase Agreement is limited in nature as its scope is only regarding disputes in relation to the oil purchase agreement governed by principles of international commercial contract read with international commercial arbitration.
2. *Secondly,* as the BIT was entered upon by the CLAIMANT's state and RESPONDENT's state even prior to the oil purchase agreement and the main issue in question is regarding the expropriation of the RESPONDENT company, it automatically becomes immune to

the jurisdiction of SIAC as it is no longer a question of international commercial arbitration, but rather international investment arbitration.

The RESPONDENT submitted that as per Article 9 of the Russia-India BIT, there are two modes of resolution of dispute. First, the disputes involving the obligations under this Agreement between an Investor of either Contracting Party and the other Contracting Party are to be resolved amicably through the use of conciliation procedures under the *Conciliation Rules of the United Nations Commission on International Trade Law*, with the consent of the parties to the dispute and secondly, if the conciliation procedure does not resolve the dispute in six months, the parties are to adopt an Ad-hoc international arbitration tribunal established in accordance with UNCITRAL's Arbitration Rules may be used by the concerned investor to bring the issue. In accordance with the same, the RESPONDENT submits that the present tribunal lacks the jurisdiction to go into the claims of the parties and the intention of both the parties has always been to resolve the dispute through investor-state arbitration.

(2) THE RESPONDENT SUBMITTED THAT IN ANY EVENT, THE TRIBUNAL FINDS JURISDICTION TO ARBITRATE THE CLAIMS UNDER THE CONTRACT, IT CANNOT ARBITRATE THE CLAIMS IN RELATION TO THE BIT

The RESPONDENT submitted that in any event, the tribunal finds jurisdiction to arbitrate the claims under the contract, it cannot arbitrate the claims in relation to the BIT for the following reasons:

2.1. ***The respondent is an investor for the purposes of investor state arbitration***

The RESPONDENT submitted that the relationship between the CLAIMANT and the RESPONDENT is that of Investor-State relationship. According to Article 1 of the BIT, an investment means any form of asset invested, movable, immovable, shares, stocks, intellectual property, in the territory of the contracting state in accordance with the domestic laws of that state. An investor as per the definition under Article 2 means any person or entity who has citizenship of the state that is contracting with the other state.

According to the RESPONDENT, in the present case, Uralo, is a Russian company which has a wholly owned subsidiary namely Uralo India, in whom all the major investments are made. Uralo India deals with AgPl which is a wholly owned public sector undertaking under the government of India. The RESPONDENT fulfils the four prong test laid down in ***Salini*** for determining the definition of ***"investment"*** which are as follows:

1. **A contribution of money or assets**: This was done in the form of setting up of Uralo India with an authorised capital of Rupees 1000 Crores.
2. **A certain duration of the economic operation**: the RESPONDENT company has been dealing with the CLAIMANT company from 2017 and there were even plans for a joint venture through synergy ltd for further oil exploration in the country.
3. **An element of risk on the part of the investor**: which is by investing in the CLAIMANT country which has been associated with various risks in supplying oil to India and other occupational hazards in conducting business in the country, including unforeseen costs of transporting oil through the suez canal, which is often subject to natural and piracy risks.
4. **A contribution to the host State's economic development**: This is evidenced through the fact that Uralo India has been set up with the objective of enhancing the GDP of the country by meeting the ever increasing demand for natural gas for the country's population and to flourish the use of oil and natural gases in the country. It has also led to the contribution of technical know-how from the respondent to the CLAIMANT.

Furthermore, the RESPONDENT submitted that its obligation under the Oil Purchase Contract went much beyond the delivery and supply of oil and technical assistance such as supply of services, tools of equipment among others, which amounts to investment. According to the correspondence between Mr. Nobov and Mr. Billimoria, it is evident that the RESPONDENT had offered a bank guarantee of 7 Million dollars, in response to which Mr Billimoria asked for the bank guarantee to be reduced to 5 Million dollars. This shows that the RESPONDENT was willing to provide for the bank guarantee and negotiate the numbers relating to it, which makes providing bank guarantees amount to investment as per the established jurisprudence.

2.2. ***The Claimant is a state owned enterprise which makes it amenable to investor-state arbitration***

According to the RESPONDENT, the CLAIMANT is a state owned enterprise, for which they relied on the definition of state owned enterprise by the OECD. According to the *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015*, any corporate body that is recognised by national law as an enterprise and in which the State exercises ownership or control is considered an SOE. The State could exercise control either by holding the majority of the voting shares as the ultimate beneficial owner or by using other methods. The CLAIMANT is a state owned enterprise that is wholly owned by the Government of India and is the largest supplier of oil and natural gas resources in the country.

The RESPONDENT further relied on the "***ownership, control and conduct***" test to prove that the CLAIMANT is a state owned enterprise representing the Government of India.

a. Ownership test

According to the ownership test, which is routinely applied by the ICSID Tribunal by relying on the Broches test, the ICSID tribunal has observed in several cases. In ***CSOB V Slovak Republic***,[24] ICSID Tribunal used the two-part Broches test, according to which a government-owned corporation is subject to the ICSID Convention if it is not both acting as the government's agent and performing essentially non-governmental duties. The Tribunal emphasised the significance of SOE activity's commercial nature in allowing jurisdiction. In the present case, the RESPONDENT submitted that the CLAIMANT company is performing essential non-governmental duties, it was created for the purpose of exploration of oil and natural gas in the country and entered in the oil purchase agreement with the RESPONDENT with profit making motive for sale of oil.

[24] Ceskoslovenska Obchodni Banka, AS v The Slovak Republic, ICSID Case No ARB/97/4, Decision on Jurisdiction (24 May 1999) para 251.

b. Control test

According to the case of ***Klockner v Cameroon***,[25] it was ruled that control over an enterprise is equivalent to having a majority of the shares, which may either be through direct or indirect control. Furthermore, in determining the control of a state over its enterprise the provisions under ***Article 8 of ARSIWA*** apply.

According to the interpretation of Article 8, an act is considered as an "act of the State" if it is done under the "***instructions, direction and control of the State***." In the present case, the RESPONDENT observed that the CLAIMANT Company amounts to a State as First, they are functionally part of the State as they are contractually bound under the control and supervision of the Government of India. Second, the government owns the shared up capital and multiple talks were undertaken by government officials to effectively designate it as a PSU. Finally, the Company is carrying out the sovereign function of oil exploration and discovery, which is traditionally reserved for the domain of a State.

1. *First,* the CLAIMANT company is financially owned by the government of India and represents the public interest of the people of the country.
2. *Secondly,* major decisions relating to the AgPl is vetted through the government of India. In the present case, before the Oil Purchase Agreement between the CLAIMANT and the RESPONDENT, there was a high level meeting between the Indian delegation led by the Indian prime minister and minister from the Russian government about possible contracts relating to oil and natural gas.
3. *Thirdly*, after the initial approval by the Government of India was a business plan drawn out by Mr. Billimoria, which shows that the key decisions are made by the government of India and Mr. Billimoria only acts on their behalf.
4. *Fourthly,* the executive team constituted in the CLAIMANT company consisted on three members appointed by the government of India, out of which two were directly appointed and another being a close associate of the government and the fourth member was appointed by Mr. Billimoria.

[25] Klo¨ckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Socie´te´ Camerounaise des Engrais, ICSID Case No ARB/81/2, Award (21 October 1983) para 149.

5. *Lastly*, the contract for the joint venture agreement was also signed by Mr. Billimoria acting on behalf of the government of India. Majority of the key managerial positions in AgPl are still held by government official such as one Mr. R.S. Sarkar, Managing Director, AgPl (Former IAS, Government of India).

c. Conduct test

According to the conduct test the major requirements are mainly profit making motive and commercial activity. The functioning of the CLAIMANT company is for purchase of oil and making profits to contribute to the economic growth of the country. The CLAIMANT being an SOE allows the state to be a part of investor-state arbitrations as the representing party, which is the CLAIMANT in the present case. In *BUCG v Yemen* and *CSOB v Slovakia,*[26] the ICSID Tribunal has observed that SOE are functionaries of state as they for the fulfilment of industrial strategy, the delivery of public services, the protection of fiscal revenues, or to meet the requirements of the domestic political economy. Thus, the RESPONDENT noted that the CLAIMANT is a state owned enterprise representing the government of India and not a mere agency of the state, which makes it amenable to investor-state arbitration.

2.3 The source of right arises from the Bilateral treaty and not the contract

The RESPONDENT submitted that the present dispute needs to be arbitrated under the BIT between Russia and India. The long standing bilateral relationship between the two states have allowed for frequent trade and commerce between them. The relationship between the CLAIMANT and the RESPONDENT is an extension of the same. The right against expropriation is a guaranteed right under article 5 of bilateral investment treaty between the two states. Accordingly, the traditional definition of expropriation means taking or removing the property from the contracting party. In *Metalclad*, the tribunal observed that expropriation includes

> "*...not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-*

[26] Beijing Urban Construction Group Co Ltd v Republic of Yemen, ICSID Case No ARB/14/30, Decision on Jurisdiction (31 May 2017).

expected economic benefit of property even if not necessarily to the obvious benefit of the host State."

1.4.*2.4 There has been a breach of the treaty right under the BIT and not a contractual right*

The RESPONDENT submitted that the question of expropriation is a core public law question. Emphasis was laid on the observations of Ms. Margaret Moses[27] who described that *"State action that has resulted in depreciating the value of the investments made or property of the investor is also treated as expropriation."* The RESPONDENT submitted that the reason for Uralo to withdraw all of its business operations from India was mainly due to the state's decision to expropriate all the assets at the oil reserves that equally belonged to Uralo India. According to the high level meeting that took place between the several ministries in the country, the oil reserve assets were to be expropriated.

The RESPONDENT submitted that a claim of ***"creeping expropriation"*** must be supported by evidence that the investment existed at a specific time and that subsequent State-contributed actions have diminished the investor's ownership rights to the investment to the point where they are in violation of the applicable international standard of expropriation protection, which was laid down by the tribunal in ***Generation Ukraine v. Ukraine***.[28]Accordingly, the RESPONDENT argued that the unilateral decision by the Indian government to expropriate the properties of the RESPONDENT, while also causing the breach of the oil purchase agreement, were a violation of the applicable standard of expropriation protection of the RESPONDENT.

Furthermore, the RESPONDENT relied on ***CME v. the Czech Republic***wherein the CLAIMANT, CME, bought a joint venture media company in the Czech Republic and claimed, among other things, that the national Media Council had violated the host country's commitment not to deprive the investor of their investment. The Tribunal determined that there had been an expropriation because "the Media Council's actions and omissions...caused the destruction of

[27] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (2nd ed. 2012)

[28] ; Generation Ukraine, Inc v Ukraine, ICSID Case No ARB/00/9, Award, 16 September 2013

the joint venture's operations, leaving the joint venture as a company with assets, but without business. Furthermore, there were no discussions whatsoever about providing any form of compensation to the RESPONDENT when the internationally established Hull standard of ***"full, prompt and adequate compensation"*** or other equivalent measures are to be provided after conducting such expropriation.[29]

Furthermore, the RESPONDENT submitted that substantial deprivation would occur due to the expropriation of assets of the RESPONDENT company. This was observed in ***CMS v. Argentina***, [30]the indirect expropriation claim related to Argentina's suspension of a gas transportation tariff adjustment mechanism that applied to a company in which the CLAIMANT had an investment. According to the Tribunal, determining whether the enjoyment of the property has been properly neutralised is the crucial question. In recent instances when indirect expropriation has been argued, a number of tribunals have used the criteria of considerable deprivation. The main rationale behind the tribunals decision was that the CLAIMANT had all control over its day-to-day operations without the interference of the government and could have avoided this situation, however, it is to be noted that in this case there is a joint venture between the two parties which includes joint stakes and decision making in all matters. Therefore, it is submitted that the acts of AgPl caused substantial as well as considerable deprivation of property, thus amounting to expropriation.

[29] International Challenges in Investment Arbitration Edited by Mesut Akbaba and Giancarlo Capurro p 228.

[30] CMS GAS TRANSMISSION COMPANY V. THE REPUBLIC OF ARGENTINA, ICSID CASE NO. ARB/01/8

TRIBUNAL'S ANALYSIS OF THE ISSUE OF WHETHER THIS IS A CASE OF FORCE MAJEURE AND FUNDAMENTAL BREACH OF CONTRACT

The tribunal has perused the arguments on both sides of the dispute on the issue on whether the impediment invokes Force Majeure and if there exists a fundamental breach of contract. The CLAIMANT has submitted that the RESPONDENT has fundamentally breached the contract through the non-supply of oil and thereby cannot invoke the defence of Force Majeure for an act caused by them. Meanwhile, the RESPONDENT has submitted that they were barred from supplying the oil to the CLAIMANT as they had refused to cover the freight costs, whereby they had to claim Force Majeure as a defence. The RESPONDENT also submitted that there exists no fundamental breach of contract in light of the Force Majeure claim.

The tribunal, upon hearing the arguments, will provide its decision of the first issue in two parts. ***First***, the tribunal will evaluate if the RESPONDENT claim of Force Majeure stands ***followed*** by evaluating if the CLAIMANT has suffered from a fundamental breach of contract.

Proceeding to the ***first part***, the tribunal will rely on the Force Majeure provision of the contract to examine if the RESPONDENT claim stands. The contract defines Force Majeure as an "*event of Force Majeure means any circumstance not within the reasonable control of the Party affected as (i) such circumstance, despite the exercise of reasonable diligence and observing good utility practice, cannot be, or be caused to be, prevented, avoided or removed by such party, and (ii) such circumstance materially and adversely affects the ability of the party to perform its obligations under this Agreement or makes the performance of the contract extremely burdensome, and such Party has taken all reasonable precautions, due care and reasonable alternative measures in order to avoid the effect of such event on the party's ability to perform its obligations under this Agreement and to mitigate the consequences thereof.*"

The tribunal will break down the issue into the following limbs. ***First***, it shall examine whether the impediment was within the Reasonable Control of the RESPONDENT. ***Second***, whether the parties had exercised reasonable diligence to address the issue and ***Finally***, whether such alleged change in circumstance adversely affects the RESPONDENT.

Regarding the first limb, the tribunal is of the opinion that the Cape of Good Hope offers a valid and accessible alternative for the supply of oil. Multiple ships have undertaken the journey through the Cape of Good Hope, especially since the Suez Canal is notorious for its delays and traffic. The RESPONDENT is obligated under Section 4 of the "***Oil Supply Agreement***" to guarantee supply of oil to AGPl.

The tribunal reached this conclusion on the basis of two grounds. ***First***, The RESPONDENT had a duty to ensure that the oil was supplied to the CLAIMANT Company. The contract does not mention that delivery must be guaranteed only through the Suez Canal. This concludes that the RESPONDENT could have utilised the Cape of Good Hope to ensure the supply of oil. Although the RESPONDENT submitted that the journey through the alternative route would not be commercially viable, the tribunal awards that the ability to perform the task was not impossible. The tribunal is sympathetic to the fact that the Suez Canal was blocked, but through a practical evaluation of shipping routes, the RESPONDENT did have the ability to supply the goods to the CLAIMANT even though the Suez Canal was blocked.

Second, the Tribunal concurs with the CLAIMANT submission that increased costs are not sufficient grounds to claim frustration, especially when the task is not rendered impossible. For the tribunal to consider the circumstances surrounding the increase in freight costs, the tribunal finds merit in the RESPONDENT increased quote of 10 Million Dollars as the route is significantly longer. However, the CLAIMANT was willing to match the quote, by offering half the amount with a bank guarantee. This indicates that the Claimant was in a position to furnish the increased costs and offered the necessary security for the same. Moreover, as per the English Case of ***Carapanayoti & Co. Ltd. v. E. T. Green. Ltd***., the change in shipping route was not a fundamental change in circumstance of the contract, as the intention to supply continued to be valid.[31] This is because the entire contract cannot be terminated or rendered impossible to perform, especially due to higher costs. Hence, the RESPONDENT was in control to ensure that Section 4 of the Agreement was complied with.

Proceeding to the ***second*** limb concerning the exercise of reasonable diligence by the RESPONDENT, the tribunal considered whether the impediment was foreseeable by the parties

[31] [1959] 1 Q.B. 131

when entering into the contract. Although the Tribunal concurs with the RESPONDENT that the situation of a malfunction in the middle of a canal is rare, the Tribunal believes that reasonable diligence was not exercised sufficiently by the RESPONDENT.

The shipping industry is characterised by uncertainty and high amounts of risk where the party may suffer any forms of loss. This is evidenced by the Agreement of Oil Supply contract where the parties had introduced provisions in case of non-performance. However, the Tribunal finds merit in the CLAIMANT submission that the RESPONDENT should have been aware of risk in supply. This includes and extends to a range of factors such as increased cost of shipping due to fuel surges, ship breakdown issues as well as delays in the busiest shipping routes of the world. All these factors would drive up the cost of shipping. The Tribunal concludes that the RESPONDENT did not fulfil their obligation to the best efforts, especially as they had a reasonable ability to ensure the supply of goods. Moreover, a Party may not be discharged from its obligations solely on the ground that the costs have increased, especially when this is a factor that a reasonable businessman should have foreseen. This is justified by the fact that the CEO of the v company is vastly experienced in this field.

Finally, the Tribunal will proceed to examine the final limb, whether there has been a fundamental change in circumstance. The Tribunal believes that commercial contracts must be evaluated in light of commercial developments and factors that would influence the contract. The question before the tribunal is whether the supply through the Cape of Good Hope fundamentally alters the structure of the contract. If the RESPONDENT supplies through the Cape of Good Hope, it neither affects the provisions of the contract, or places an unreasonable burden on the RESPONDENT to carry out a fundamentally different task. The increase in freight costs are a valid concern, which offers the parties sufficient scope to address the issue. However, this does not displace the right of the CLAIMANT from receiving the freight, as they were entitled to the same.

At this juncture, the tribunal concludes the first part of the award by holding that the RESPONDENT cannot claim the defence of Force Majeure as they did not undertake the necessary measures to address the impediment despite the presence of valid alternatives and rejected the performance of their obligations on the ground of increased costs, that the CLAIMANT Company was willing to furnish.

Proceeding to the ***Second*** part concerning the fundamental breach of contract, the Tribunal will address it under the following limbs. ***First***, whether the supply of oil was fundamental to the contract and ***Second***, whether the injury suffered by the CLAIMANT is sufficient to render it as a material breach.

Addressing the ***First*** Limb, a breach is considered to be fundamental if a party does not fulfill their obligations under a contract. This obligation is required to form the "root" or "basis" of the contract. In regards to this, the Tribunal finds merit in the CLAIMANT submissions where the entire contract is contingent on the supply of oil. This will be enumerated in the following manner:

1. The supply of oil largely motivated the CLAIMANT to enter into a contract with the Respondent. It formed the essence of the contract under Section 4, and in the absence of the supply clause, the CLAIMANT would have identified alternative players, as evidenced by its submission.
2. The supply of oil commercially motivated the company to sign the agreement. The discovery and exploration was subsidiary in nature and was contingent on the supply of oil.
3. The Joint Venture formed between the two companies would only function through the proceeds received by the CLAIMANT. The proceeds were realised through the sale of oil, for which the supply was vital. In the absence of the supply, both the CLAIMANT Company and the Joint Venture would not be able to undertake their tasks.

Hence, given that the RESPONDENT breached the contract by refusing to supply the oil despite the presence of alternative means and payment methods, the breach is material. Proceeding to the ***Second*** limb, the gravity of the breach by failure to supply has been enumerated by the tribunal already. Since sufficient losses would be faced by the CLAIMANT Company as well as halting the functions of the Joint Venture Company due to lack of capital, the breach is substantial enough to impact the claimant adversely. Therefore, in line with the decision of ***Leduc v. Ward***, where the Court had extended fundamental breach on the basis of the two limbs, the Tribunal finds merit in the CLAIMANT submissions. Hence, the RESPONDENT is liable for fundamental breach of the contract.

TRIBUNAL'S ANALYSIS OF THE ISSUE OF WHETHER THE PRESENT DISPUTE IS INTERNATIONAL COMMERCIAL ARBITRATION OR INVESTOR-STATE ARBITRATION

Before the tribunal goes into the intricacies of the dispute before us, it is important to first determine if we contain the necessary jurisdiction to hear the present dispute. The CLAIMANT has brought this case before us and does not contest to the jurisdiction of the tribunal, however, the RESPONDENT contends the jurisdiction on the grounds that the tribunal cannot hear the claims relating to breach of treaty rights under the Russia-India BIT. Since the jurisdictional issue is directly connected to the substantive issue, the tribunal relies on the principle on *Kompetenz-Kompetenz,*[32] according to which the tribunal should rule that it has jurisdiction to hear the instant dispute. In order to do so, it becomes necessary to hear the arguments put forth by both the parties.

The tribunal has perused the arguments on both sides of the dispute on the issue of whether the current dispute amounts to International Commercial Arbitration or Investor State Arbitration. The CLAIMANT has submitted that the present dispute arises out of the breach of the contractual obligations under the Oil Purchase Agreement, amenable to the jurisdiction of the SIAC, however, according to the RESPONDENT, the present tribunal does not possess the jurisdiction to go into the claims in relation to the BIT. The RESPONDENT argued that it is an "***investor***" in India, and has made significant investments for the purposes of the BIT, thereby, being eligible to invoke the dispute resolution clause under the BIT alone. However, the CLAIMANT has submitted that the RESPONDENT company is not an investor and has not made investments for the purpose of entailing the jurisdiction of International Investment Arbitration.

In light of the same, it is pertinent for the tribunal to go through the present discourse in two limbs: *First*, to examine whether the CLAIMANT is a "***state***" for the purposes of Investor State Dispute and *Second*, to examine if the RESPONDENT is an "***investor***" for the purposes of the Investor State Dispute.

[32] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, (2nd Ed. 2014) at 852; Golden Ocean Group Ltd v. Humpuss Intermoda Transportasi TBK Ltd & Anr [2013] EWHC 1240 (Comm).

1) **Examining whether AgPL is *"state"***

With respect to the first limb, the tribunal first seeks to understand the definition of the term ***"state"***. The classical definition of state provided by the ***Montevideo Convention of 1933***[33] defined state as having four essential criteria: defined territory, permanent population, government and capacity to engage in international relations. However, this rigid definition of state has been relatively expanded to incorporate the various functioning of the State, ranging from commercial to non-governmental activities.

The CLAIMANT has submitted that AgPl, which is a wholly owned Public Sector Undertaking, is not "***state"*** for the purposes of Investor State Arbitration. This has been established by relying on Article 8 of the ***ARSIWA***.[34] Similarly, the RESPONDENT too has relied on Article 8 of ***ARSIWA*** to show that the AgPl is "***state***" and have also proved the satisfaction of the ***"control, ownership and conduct test."***

The tribunal is therefore tasked to examine if AgPl is state for the purposes of Article 8 of ***ARSIWA***, making it amenable to Investor-State Arbitration. According to Article 8 of the ***ARSIWA***

> *"The conduct of a person or a group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. "*

The standard required to be met under Article 8 of the ***ARSIWA*** is such that the conduct of an entity or person is attributable only to the State only if it "*directed or controlled the specific operation and the conduct complained of was an integral part of the operation*." The ICJ in *Military and Paramilitary Activities in and against Nicaragua*[35]observed

---

[33] MONTEVIDEO CONVENTION ON THE RIGHTS AND DUTIES OF STATES

[34] G.A. Res. 56/83, Resolution on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/RES/56/83 art. 8, (Jan. 28, 2002).

[35] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27).

"while the United States was held responsible for its own support for the contras, only in certain individual instances were the acts of the contras themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State."

Further, in the Genocide case, the ICJ observed that[36]

"*In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the 'corporate veil' is a mere device or a vehicle for fraud or evasion. The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the de facto seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property."*

Therefore, it is clear from this test that the organisational structure of the company as well as consultation as observed in the ***White Industries Case***[37] is not a necessity to determine direct control over the entity. Thus, what is important for AgPl to be established as a state is a ***"general control as well as a specific control"*** over the incidents preceding and following the breach of the oil purchase contract.

The tribunal does not find a direct and specific control by India in the matters concerning AgPl for the following reasons:

[36] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. and Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26).

[37] *White Industries* Australia Limited v. The Republic of India, Final Award. 30 Nov 2011.

1. *First*, there is no evidence to support the fact that there was Daily ***"monitoring"*** of the functioning of AgPl and its key managerial decisions were not taken by the Government of India.
2. *Secondly,* AgPl's contract with Uralo India was not advised or directed by the Government of India. Furthermore, the Government of India did not give instructions regarding how to carry out or perform the Contract it had with the RESPONDENT. All the initiations in relation to the contract was made by Mr. Zal Billimoria, the CEO of the CLAIMANT company and the high level meetings alleged by the RESPONDENT were only for the sake of formality. The signing of the contract and all key decisions were made by Zal Billimoria alone such as performance, implementation and execution and completion of the contract and even the negotiations in relation to the bank guarantee was initiated by the CLAIMANT company without any notices from the government.
3. *Thirdly,* although the Government of India made appointments to the Board, there is no information whatsoever as to the employment of all the employees, its manner and nature.
4. *Lastly,* the Government of India had no connection whatsoever with the Joint Venture Agreement entered into by the parties and had no role to play in the setting up of Synergy Ltd. The invocation of the dispute resolution clause was also done by the CLAIMANT without any interference from the government.

Although the incident of the meeting that took place between AgPl and Indian Government over taking over the oil reserves due to the breach of contract was made with an interference of the government, this was only as the public interest of the country was involved that the government had to finally step in. A balance of probabilities leads this tribunal to the decision that the functioning of the CLAIMANT company is independent of the control and supervision of the Government of India. Therefore, the tribunal finds that AgPl is not a state as there is a lack of testimonial and documentary evidence pointing out to the direct control by the state.

2) Examining whether Uralo India is an *"investor"* and made *"investments"* in India

The tribunal now proceeds to the second limb by first determining the meaning of the term ***"investment"***. According to Article 1 of the BIT, an ***"investment"*** is defined as *"every kind of asset, including Intellectual property rights. Invested by an investor of one Contracting Party in the territory of the State of the other Contracting Party in accordance with the laws of the State of that Contracting Party, in particular:*

a. movable and Immovable property, as well as related rights in rem;

b. shares, stock and any other form of participation in a company, enterprise, corporation, firm, association or other legal entity;

c. claims based on rights to money or to any performance under contract having a financial value."

According to the Textual Rule of treaty interpretation, the plain and ordinary meaning of the treaty must be adopted in all circumstances. In ***Costa Rica v. Nicaragua***,[38] it was observed that terms of a treaty must be ordinarily interpreted in light of the meaning associated with it at the time of entering into the treaty. Going by the plain meaning of the terms of the treaty under Article 1 of the BIT, the following is observed by the tribunal:

1. In the present case, Uralo India was set up with an authorised capital of Rupees 1000 Crores only for the purpose of facilitating and strengthening the joint venture agreement to set up Synergy Ltd. Uralo India, is a wholly owned subsidiary of Uralo, which is registered within the territory of India under the Indian Companies Act, 2013 with management office in Mumbai, Maharashtra. According to the Oil Purchase Agreement, the profits earned by Uralo India would be invested in Synergy Ltd, the joint venture between AgPl and Uralo India. This amounts to an investment of movable and immovable property.
2. With regard to participation in the company, or other legal entities, it is observed that Uralo India participated along with the CLAIMANT company AgPl for the purpose of their contractual agreement for purchase of oil. This was furthered with their commitments to the joint venture company, with 49-51% shareholding by AgPl and Uralo India respectively.
3. The existence of the Oil Purchase Agreement clearly establishes that there are claims to performance of the contract which has an enormous financial value attached to it.

[38] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Request for the Indication of Provisional Measures, 2011 I.C.J. Rep. 6 (Mar. 8)

The Oil Purchase Agreement requires the sale of oil by the RESPONDENT company to the CLAIMANT for money and all the profits made in lieu are invested in synergy ltd.

Therefore, going by the plain and ordinary meaning of Article 1 of the BIT, it is clear that the RESPONDENT's investments amount to ***"investment"*** under Article 1 of the BIT. The parties have relied on the ***Salini test*** which is a generally accepted method to determine ***"investments"*** for the purposes of ICSID Tribunals, however, this tribunal not being an ICSID tribunal rejects the submissions made in relation to this test. Therefore, the tribunal concludes that rights arising out of the Oil Purchase Agreement amounts to investment for the purposes of the Russia-India BIT.

The second sub-issue that is argued by both parties is in relation to the **"source of their rights".** According to the CLAIMANT, the source of its rights arise under the contract and hence, since it is rights in personam, it must be settled through commercial arbitration. In lieu of this, the CLAIMANT has established in detail the commercial relationship that exists between the two parties, and the main issue for consideration being fundamental breach of the contract and invocation of force majeure, which makes it eligible for commercial arbitration. The RESPONDENT on the other hand has argued extensively that the source of its rights arise from the treaty and not the contract. In lieu of this the RESPONDENT has placed reliance on the violation of its right against expropriation, which could only be initiated as a measure under the BIT and not the contract. Although the RESPONDENT has claimed this has violated its right in rem, it has not established in specific as to how the rights *in rem* have been violated.

It has been observed by the tribunal in a myriad of cases, contractual obligations and rights have seen to form a part of the investment. However, a breach of the Contract is not a necessary precondition for this Tribunal to find that CLAIMANT has violated its Treaty obligations; these are independent inquiries. What the RESPONDENT must establish is one or more violations by CLAIMANT of its Treaty obligations. This is substantiated by the findings of the tribunal in ***Vivendi v. Argentina***,[39] wherein the tribunal found the standard for differentiating the claims from a contract and the claims from a treaty. According to the decision of the tribunal in

[39] Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3

Vivendi v. Argentina,[40] a tribunal may examine contract matters in determining whether there has been a treaty breach

> *"at least to the extent necessary to determine whether there had been a breach of the substantive standards of the BIT; it is one thing to exercise contractual jurisdiction and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law."*

The tribunal, in applying the established proposition of law, finds that the expropriation initiated by the CLAIMANT state is within its contractual obligation. It has been listed by the CLAIMANT itself and agreed by the RESPONDENT in the oil purchase agreement that expropriation is an issue to be decided by the arbitral tribunal.

According to the established precedents in ***Duke Energy Electroquil Partners and Electroquil SA v. Republic of Ecuador***[41] and ***Impregilo v. Pakistan***,[42] a breach of a contract does not necessarily mean a breach of treaty. In the present case, the act of the CLAIMANT in moving ahead with expropriating the assets of the RESPONDENT, is within the scope of their contractual rights and does not affect its right in rem in the country. Moreover, contrary to the erroneous claims of the RESPONDENT which states that adequate compensation was not provided, it is observed that the discussions for expropriation are under consideration and Uralo withdrawing its business from India was an act of retaliation, which shows that the terms of compensation and other relevant matters have not been brought into discussion between the parties, for which the arbitral tribunal would need peruse separately.

3) Findings of the Tribunal in Issue 2

The tribunal has therefore in detail examined both the limbs it set out to examine. The tribunal finds that the present dispute is indeed a case of International Commercial Arbitration.

[40] Id.

[41] Duke Energy Electroquil Partners and Electroquil SA v. Republic of Ecuador, (ICSID Case No. ARB/04/19) Award of 18 August 2008.

[42] Impregilo SpA v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3), Decision on Jurisdiction of 22 April 2005

According to the *UNCITRAL Model Law on International Commercial Arbitration*,[43] an International Arbitration is one where the parties to the arbitration agreement have their place of business in different states or parties' principal places of business are each located in one of the following locations outside of the State which is in relation to the arbitration agreement or where the substantial obligations are to be performed or the arbitration agreement's subject matter relates to multiple nations, as the parties have expressly agreed.

In the explanation provided for the term commercial, the *UNCITRAL Model Law* states that commercial means relationships arising out of *"commercial nature, whether contractual or not".* The explanation proceeds to include the various types of commercial activities such as trade, construction, factoring, leasing, insurance, and joint ventures among others. The supply and purchase of oil, amounts to one such commercial activity. The roots of international commercial arbitration lies in Lex Mercatoria, which means the commercial law revolving around commercial relationships between merchants.[44] In ***Citibank N.A. v. TLC Marketing PLC & Anr***.,[45] the supreme court of India observed that commercial contracts must be given effect rather than invalidating it.

The CLAIMANT company although is a state owned enterprise, is not an instrumentality of the state and is independent of its control, thereby not bringing it under the purview of the state. Although the RESPONDENT is an investor for the purposes of investor-state arbitration, the case here is in relation to the breach of the contractual terms and not the rights laid out in the treaty.

Although expropriation is an issue of right in rem, it is to be noted in the context of contractual rights it can be brought under the purview of resolution of commercial disputes. For this the tribunal relies on the case of ***Phillips Petroleum Co v Iran***[46] wherein the ICC held that expropriation by or attributable to a state of the property of an alien gives rise under international law to liability, and this is so whether the property is tangible or intangible, such

[43] United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration, U.N. Doc. A/40/17 (1985).

[44] Gary B. Born, The Law Governing the International Arbitration Agreements, 24 SAcLJ 814 (2013).

[45] Citibank N.A. v. TLC Marketing PLC & Anr (2008) 1 SCC 481.

[46] 16 Yearbook Commercial Arbitration 75 (1989), Award, 12 June 1989

as the contract rights involved in the present case. Further, in ***Saipem***,[47] the tribunal observed that residual contract rights arising from the investment, as crystallised in the ICC Award, were an investment within the BIT's definition and were also capable of expropriation. Therefore, an action of expropriation shall not render the dispute an investor-state dispute and is amenable to the jurisdiction of International Commercial Arbitration.

[47] ICSID Case No. ARB/OS/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 at 133

3. CONCLUSION

~ CONCLUSION FOR ISSUE 1 ~

The tribunal finds that there has been a fundamental breach of contract. The situation was such that the RESPONDENT could have opted for multiple ways to perform the contract, instead chose not to perform it while alternative were present before it. This constitutes a fundamental breach of contract. Furthermore, the defence of *force majeure* cannot be availed by the RESPONDENT as the blocking of Suez canal was a foreseeable event and the RESPONDENT ought to have made arrangements for bypassing the same.

~ CONCLUSION FOR ISSUE 2 ~

The tribunal finds that although the RESPONDENT fulfils the criteria for ***"investor"*** and ***"investments"*** which are prerequisites for an investor-state arbitration, the claims of the RESPONDENT arise out of the breach of contractual rights and there is no violation of the treaty rights. Furthermore, the tribunal also finds that the CLAIMANT is not state as per the interpretation of Article 8 of ***ARSIWA***.

4. AWARD

For the reasons stated above, the Arbitral Tribunal decides as follows:

1. There exists a fundamental breach of contract and the RESPONDENT cannot claim the defence of *force majeure.*
2. The present case is to be resolved through international commercial arbitration and not investor state arbitration.

Sd/-	Sd/-	Sd/-
Mr. Wang Lee	Mr. Jhingalia	Mr. Miller
(Arbitrator 1)	**(Arbitrator 2)**	**(Arbitrator 3)**
(Presiding Arbitrator)		

Place of Arbitration: Singapore

Date on which the Award was passed: 20-11-2022

Date on which the Award was dispatched to the parties: 20-11-2022