Team Alias: Ferrari

International Center for Settlement of Investment Disputes

ICSID Case NO. ARB/22/151

Memorial for Respondent

Against :	**On Behalf of :**
Sutton Holdings	*Republic of Rheikia*
Claimant	**Respondent**

Foreign Direct Investment International

Arbitration Moot 2022

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LIST OF ABBREVIATIONS

¶	paragraph
¶¶	paragraphs
A-R BIT	Agreement Between the Kingdom of Athabasca and the Republic of Rhekia Concerning the Encouragement, Promotion and Protection of Investments
Athabasca	the Kingdom of Athabasca
BIT	Bilateral Investment Treaty
Braavos	The State Bank of Braavos
CCPA	Cannabis (Cultivation and Promotion) Act
CFA	Central African CFA franc
Claimant	Sutton Holdings Inc.
Counter-Memorial	Counter-Memorial on Jurisdiction
Daisy & Donald v. Rhekia	Mr. Donald and Ms. Daisy v. Republic of Rhekia
e.g.	*Exempli gratia* (for example)
ELR	Exhaustion of Local Remedies
ESI	Essential Security Interests
EWC	Extended War Clause
Facts	Statement of Uncontested Facts
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
GDP	Gross Domestic Production
i.e.	*id est* (that is)
IAC	International Armed Conflict
ibid	*ibidem* (in the same place)
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
IHL	International Humanitarian Law
IIL	International Investment Law
ILA	International Law Association
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
LOAC	Law of War and Armed Conflict
MST	Minimum Standard of Treatment
NIAC	Non-International Armed Conflict
NPM	Non-Precluded Measures
p.	page
PCA	the Permanent Court of Arbitration

PO3	Procedural Order No.3
pp.	pages
PWC	Plain War Clause
Respondent	The Republic of Rhekia
Respondent	the Republic of Rhekia
Response to Request	*Re: Sutton Holdings Inc. vs. The Republic of Rhekia (Request for Arbitration) - ICSID Case No. ARB/22/151*
Rhekia	the Republic of Rhekia
Shareholders	Mrs. Daisy and Mr. Donald
Sutton	Sutton Investments
the Previous Tribunal	the Tribunal in Mr. Donald and Ms. Daisy v. Republic of Rhekia
UNCITRAL	United Nations Commission on International Trade Law
USD	United States Dollar(s)
War clause	War Losses clause

STATEMENT OF FACTS

Facts Relating to the Parties		
Themes	**Parties**	**Facts**
Parties to The Dispute	Claimant: Sutton Holdings Inc	Claimant is a company incorporated under the laws of Athabasca, with 100% ownership in Sutton Investments, a locally incorporated entity under the laws of Rhekia which owns the cannabis plants, Freya and Odin, in Rhekia. Furthermore, Shareholders own the majority of the shares of Sutton Holdings (specifically 75% of all shares, of which 45% is owned by Daisy and 30% by Donald).
	Respondent: Rhekia	Respondent is a developing country. To foster its economy and promoting foreign investments, Rhekia joined the ICSID Convention in 2010 and entered into about 14 BITs, including a BIT with Athabasca in 2011.
Facts Relating to the Dispute		
Themes	**Time**	**Facts**
Investment in Rhekia	2010	Rhekia signed the ICSID Convention. (p.57, ¶6.)
	2010.09.17	CCPA was passed. (p.58, ¶13.)
	2010	The Rhekia government set up CRCI. (p.58, ¶15.)

	2011.03.10	Rhekia signed A-R BIT with Athabasca. (p.57, ¶6.)
	2012.06	Sutton Investment, was established according to CRCI. (p.59, ¶18.)
	Early 2014	Sutton Investment's production facilities including Odin and Freya became operational. (p.59, ¶19.)
Protests and Confrontation	2013.11	Well-funded conservative interest groups pooled their resources and initiated litigation proceedings by way of a representative action in the Rhekian courts. (p.59, ¶22.)
	Mid 2014	Individuals opposing cannabis legalization protested in the streets of major Rhekian cities of Stockhagen and Copenholm. (p.60, ¶26.)
		Months later, the scale of the protests increased dramatically to show support or disagreement to their elected leaders. (pp.60-61, ¶26.)
		Sutton Holdings' share prices started to decrease because of prolonged legal and political uncertainty. (p.61, ¶28.)
	2014.11.24	The Justice and Tradition Party directed their security forces to confront protestors in the streets. (p.61, ¶32.)
The Breakout of Civil Conflict	2015.03	The civil conflict breakout. (p.62, ¶33.)
	2015-2016	The retreat of the military caused large parts of the country becoming

		ungovernable, and descending into daily violence. Stockhagen and Copenholm were soon taken over by armed militia groups. (p.62, ¶¶33-34.)
		The militia takeover of Stockhagen and Copenholm had been ongoing for a large part of 2016. (p.62, ¶35.)
	2016.06.23 & 2016.06.27	As a catalyst for the civil war, the Sutton Plant including Freya and Odin were affected. It was not immediately clear who was responsible for this. (p.62, ¶37.)
Freya	2016.06	Freya, Sutton's plant located west north of Stockhagen, was attacked by a coordinated force of armed militia over the course of three days. (p.63, ¶38.)
		The security details employed by Sutton to protect Freya and Odin were quickly overwhelmed, surrendered, or simply abandoned their posts. (p.63, ¶38.)
		In response, Rhekia mobilized a few military units within 48 hours of the attack on Freya, and ordered them to relieve Sutton's facilities. (p.63, ¶39.)
		Rhekia's military moved west towards Freya from Stockhagen but was faced with strong military resistance and unable to break through the facility. (p.63, ¶39.)

Odin	Before 2015.03	Rhekia posted a large number of its most effective troops to Odin before the outbreak of the civil conflict. (p.63, ¶42.)
		Odin was slowly surrounded by armed militia groups and soon, the Rhekian soldiers found themselves surrounded and with dwindling supplies, especially food. (p.63, ¶42.)
	2016.08.27	The armed groups surrounding Odin attempted to seize a number of buildings on the outskirts of Odin. (p.64, ¶43.)
		After failing to defend a number of these buildings, the Rhekian soldiers took the decision to raze all of the buildings they could not easily defend and retreated further into the center of Odin. (p.64, ¶43.)
	2016.10	Rhekian soldiers were running desperately short of supplies in Odin. (p.64, ¶44.)
		The Rhekian soldiers were ordered to destroy all buildings capable of agricultural production in Odin for fear that the rebels would unduly prolong the war. (p.64, ¶44.)
Epilogue of The Conflict	2016.09	The claim brought by the Rhekian Citizens' Action for Rights and Freedoms had yet to be completely heard by the Rhekian Supreme Court. (p.64, ¶45.)

	2017.03	The Rhekian judiciary managed to establish a stable internet infrastructure for its transition into conducting virtual hearings. (p.65, ¶49.)
	2017.04	The Rhekian military and the militia groups had been worn down by the months of conflict, and their resources and morale had been stretched to the breaking point. (p.65, ¶51.)
	2017.05	The Rhekian Supreme Court rejected the constitutional challenge of Cannabis Act on the basis that there was insufficient evidence. (p.66, ¶54.)
		Mr. Eilert Flyen, previously a prominent militia commander running as an independent candidate, was proclaimed as the new President of Rhekia. (p.66, ¶55.)
	2017.07	Sutton Investment sought to take a loan from the State Bank of Braavos, as well as issue fresh equity. (p.65, ¶52.)
		Mr. Anthony Rokari announced an investigation carried with due processes of the law in order to find out the alleged links between Sutton investment and the militia. (p.65, ¶52.)
	2017.08	Sutton Investment's fresh equity offer was scheduled, where it was heavily undersubscribed. (p.66, ¶53.)

Daisy & Donald v. Rhekia	Early 2016	Shareholders initiated litigation against Rhekia in Rhekian courts. (p.66, ¶57.)
	2016.12	Shareholders lost on counts in Rhekian courts. (p.66, ¶58.)
	2017.01	Shareholders commenced arbitration proceedings against Rhekia. (p.66, ¶58.)
	2017.01.06	ICSID received Shareholders' request for arbitration. (p.66, ¶58.)
	2020.11.28	The Previous Tribunal issued an award. (p.66, ¶59.)
The Present Claim	2021.06	Claimant filed a claim under A-R BIT, with the application of the ICSID Convention. (p.67, ¶60.)

SUMMARY OF ARGUMENTS

Jurisdiction

1. ***Res Judicata*:** The Tribunal lacks jurisdiction because Claimant is barred from pursuing its claim by virtue of *res judicata*. Since Shareholders have already commenced an investment arbitration regarding the same subject matter based on the same core facts, the Tribunal should reject the present one. Moreover, Claimant's objection concerning Previous Tribunal's jurisdiction has no bearing on the application of *res judicata*. Therefore, *res judicata* is applicable and deprives the Tribunal of its jurisdiction.

2. **Exhaustion of Local Remedies:** The Tribunal lacks jurisdiction because Claimant has not submitted the dispute to any judicial body of Rhekia, thus failing to satisfy ELR. The wording "shall" and "a condition of consent" in Articles XII (2) and (3) of A-R BIT emphasize their mandatory and jurisdictional nature, and leaves no room for any exception. Notwithstanding the foregoing, even considering the so-called "futility exception", its threshold is not met. Therefore, Claimant's non-compliance with Articles XII (2) and (3) of the BIT suffices to defeat the Tribunal's jurisdiction.

Merits

3. **Full Protection and Security:** Respondent has not violated FPS. According to the principle of effectiveness, FPS only concerns the harm that is not attributed to a government, but to a third party. Besides, FPS only requires the state to exercise due diligence with reasonable actions, and the capacity of the state should also be considered. Rhekia has therefore fulfilled its FPS obligation by taking sufficient preventive measures and protecting the investments during the attack. Moreover, legal security is not concluded in FPS, and Rheika has actually provided stable judicial system and stable legal environment during the civil war.

4. **Compensation:** War clause (Article VI) and FPS clause (Article V) deal with the same subject, however, they lead to actual inconsistency. Therefore, Article VI operates as *lex specialis* on liability for compensation under war circumstances, and should be applied first. Article VI (1) only imposes a non-discrimination obligation of compensation on host states. When Respondent has not compensated any investor under similar conditions, the non-discrimination clause excludes liability for compensating Claimant. Meanwhile, Article VI (2) could not be applied, since the loss was not caused by requisition, but caused by combat action of government forces and was required by the necessity of the situation.

5. **Moral damages:** The Tribunal should not award moral damages to Claimant. Firstly, since the main claim is not established here, the relevant claim for moral damages also fails. Besides, a monetary compensation for moral damages is punitive, since moral damages are of no monetary value and could be repaired simply by a declaratory relief. *In casu*, Respondent bears no malice, which serves as a prerequisite for moral damages. Most importantly, Claimant has failed to meet the high threshold to claim for moral damages, namely egregious conduct, grave and substantial moral damages, as well as a causal link between them.

ARGUMENTS

PART I: Jurisdiction

1. Respondent submits that the Tribunal has no jurisdiction over the present dispute, in light of the principle of *res judicata* **[I]** and ELR under A-R BIT **[II]**.

I. The Tribunal has no jurisdiction over the present dispute in light of *res judicata*

2. In its Request for Arbitration, Claimant not only omitted the fact that Shareholders have already brought the claim to ICSID and lost on all counts,[1] but also falsely counter-challenged the Previous Tribunal's jurisdiction to strangle *res judicata.*

3. Consequently, besides elaborating the applicability of *res judicata* as a general principle of international law **[A]** and the present and previous cases are substantially the same **[B]**, Respondent has to deal with the inconsequential matter that the Previous Tribunal had jurisdiction over *Donald & Daisy v. Rhekia* **[C]**. Therefore, Claimant's objection cannot bar the application of *res judicata.*

A. *Res judicata* is applicable as a general principle of international law

4. The consensus among tribunals[2] is that *res judicata* being a general principle of law, which can be applied in international judicial proceedings.[3] For instance, *Waste Management (II)* tribunal confirmed that "*res judicata is (...) a general principle of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice.*"[4]

[1] Response to Request, p.22, ¶13.
[2] RSM, ¶¶7.1.5-7.1.7; Waste Management (II), ¶39; Petrobart, ¶351.
[3] Bin Cheng, p.336.
[4] Waste Management(II), ¶39.

5. Therefore, *res judicata* can be applied here. Since the award of *Donald & Daisy v. Rhekia* is final and binding on the parties, Claimant cannot take a second bite and has no standing before the Tribunal.

B. The present case and *Donald & Daisy v. Rhekia* are substantially the same

6. Respondent submits that by applying the Triple-identity test of *res judicata*, the Tribunal would find that the present case is substantially the same as *Donald & Daisy v. Rhekia*.

7. *Mobil Investment (II)* tribunal[5] quoted an ICJ report[6] to articulate the two-fold purposes of *res judicata*. On the one hand, the stability of legal relations requires that litigation comes to an end ultimately. On the other hand, the interest of each party requires that an issue that has already been adjudicated be not argued again.

8. To that end, *res judicata* should be applied flexibly and extensively to inhibit the frustration of its intention by deliberately creating a nuance between multiple proceedings.[7]

9. Professors Christoph Schreuer and August Reinish emphasized that a too restrictive test of *res judicata* would leave it rarely applied.[8] This notion coincides with *Apotex (II)(2)* tribunal.[9]

10. Shorn of all the technical concerns and academic debate, the legal test of *res judicata* can be broken down into three elements: same parties (*persona*) **[1]**, same subject matter (*petitum*) **[2],** and the same cause of action (*causa petendi*) **[3]**.[10]

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[5] Mobil Investments (II), ¶189.
[6] ICJ Report, pp.90-91, ¶116.
[7] Apotex (I), ¶7.16; Christoph Schreuer and August Reinish, p.16, ¶45.
[8] Christoph Schreuer and August Reinish, p.16, ¶45.
[9] Apotex (II)(2), ¶7.16.
[10] TECO, ¶71.

1. The subject matters are identical

11. Subject matter refers to the relief sought.[11] When judging this identity, the Tribunal should look into the following two aspects: first, whether the reliefs are the same in the economic sense[12] **[i]** and second, whether the reliefs in the subsequent case can be litigated in the prior action[13] **[ii]**. The rationale behind these criteria is the avoidance of double recovery and the prohibition of abuse of rights.

i. The reliefs are same in the economic sense

12. *Orascom*[14] and *Pey Cassado*[15] tribunals looked beyond the semantic difference in the reliefs claimed and went on to assess the underlying economic similarity between the reliefs. They concluded that as long as the reliefs claimed are derived from the same alleged measures, and are to safeguard the same object, this identity is established.

13. *In casu*, although Shareholders were seeking compensation for reflective loss of their shares and Claimant is currently holding Rhekia liable for its physical loss and moral damage loss, all of their claims arose out of the civil war and are aimed at maintaining the commercial value of Sutton Group as a whole.

14. Considering their shared goal, it is arguable that the subject matters in the two proceedings are economically the same. The Tribunal should not allow the previous reflective loss claims to be re-introduced through the back door of physical loss and moral damage loss.

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[11] Caratube (II), ¶479.

[12] Orascom, ¶546; Pey Casado, ¶224.

[13] ILA Final Report on Res Judicata and Arbitration, ¶60.

[14] Orascom, ¶546.

[15] Pey Casado, ¶224.

ii. The reliefs here can be litigated in the prior action

15. In ILA Final Report on Res Judicata and Arbitration, having the panel comprehensively recognized the factors that may lure a party into claim-splitting, one of which being relational elements, it cautiously suggested that tribunals should also reject claims that could have been litigated in the prior action.[16]

16. Put it in our context, it is noteworthy that Shareholders' arbitration was finalized in 2020, almost three years later than the civil war ended and Rhekia initiated the investigation on Claimant.

17. Claimant might allege that the investigation on which it bases the moral damage claim happened after Shareholders' Request for Arbitration. However, the crystallization of these evidence took place before the finalization of Shareholders' claim. Thus, in light of Article 46 of ICSID Convention, the claims here should and could be included as incidental or additional claims.[17]

18. All the aforesaid, subject matters are identical.

2. The causes of action are identical

19. Respondent submits that the Tribunal should adopt the *RSM* tribunal approach and define cause of action as factual basis.[18] To be precise, this identity requires that the core facts giving rise to each action are related in time, space and origin.[19]

20. Claimant may instead argue the cause of action is the legal basis. However, Respondent has cogent reasons for the "factual basis" standpoint: to prevent Claimant from manipulating the procedure and bring *res judicata* into full play.

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[16] ILA Final Report, ¶63-65.
[17] ICSID Convention, Article 46.
[18] RSM, ¶¶19-24.
[19] *Ibid.*

21. *Apotex (II)*[20] and *RSM*[21] tribunals profoundly noted:

> "*If only an exactly identical relief sought (object) based on exactly the same legal arguments (grounds) in a second case would be precluded as a result of res judicata, then litigants could easily evade this by slightly modifying either the relief requested or the grounds.*"

22. Put it in our context, the causes of action in both proceedings are the same attacks on some cannabis plants during the same civil war. In the previous case, the diminished value of shares was ignited by the turbulent political climate[22] and further fueled by the destruction of Sutton Investment's cannabis plants[23]. In the case at hand, Claimant also based its claim on the destructed cannabis plants[24] and Rhekia's internal situation which is gradually turning against the legalization of cannabis[25].

23. Therefore, the identity of the cause of action is met.

3. The parties are identical

24. The majority shareholders are the company's same party when the former's claim is based on the damage the latter has suffered.

25. In *Ampal* case[26], there existed a similar shareholding structure and highly identical procedural history. The controlling shareholder, who owns around 60% of *Ampal*'s share, *Mr. Maiman,* and *Ampal* respectively litigated a claim through the same instrument *EMG* due to the same alleged measures, and the tribunal ruled that it is only fair to consider them as the same party. Since *Mr. Maiman*

[20] Apotex (II)(2), ¶7.16.
[21] RSM, ¶¶16-24.
[22] Respondent's Exhibit R2, p. 32, ¶6.
[23] *Ibid*, ¶3.
[24] Request for Arbitration, p.6, ¶24.
[25] *Ibid*, ¶23.
[26] Ampal, ¶¶267-268.

initiated arbitration first, *Ampal* tribunal rejected *Ampal*'s claim.

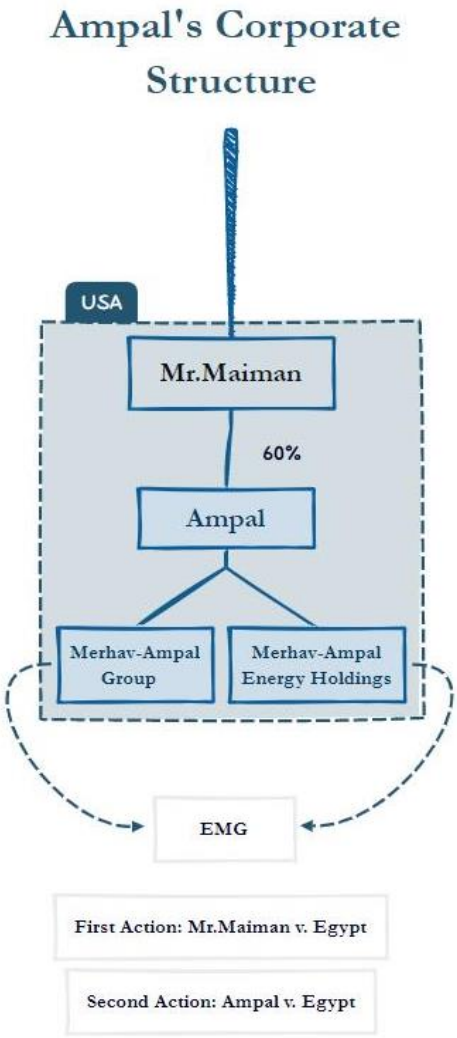

Figure 1: Ampal's Corporate Structure

26. Similarly, in our case at hand, Shareholders owning 75% of the shares have already litigated an arbitration through Sutton Investment, and Claimant is here to litigate another one through the same instrument. With so many similarities, there is no reason for the Tribunal to deviate from the practice of *Ampal* tribunal but to reject Claimant's claim.

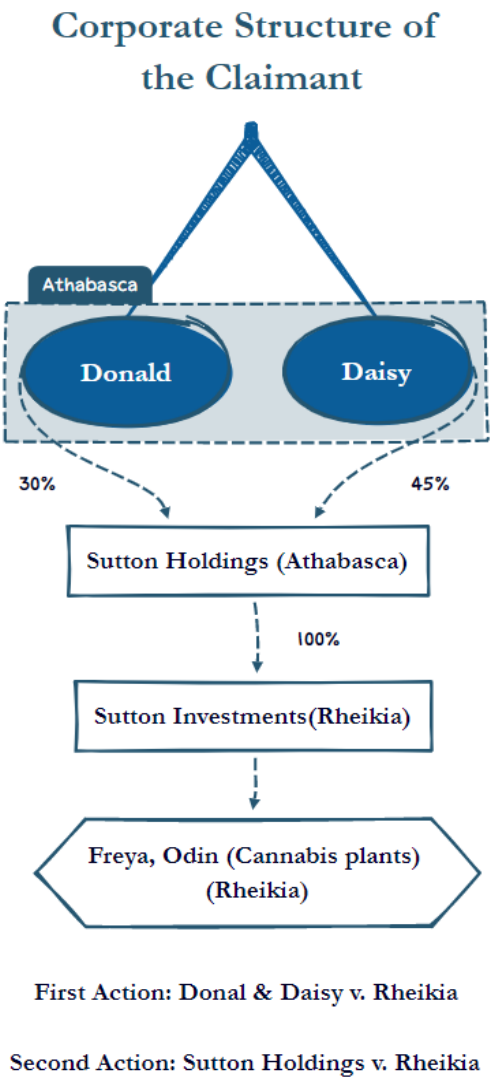

Figure 2: Claimant's Corporate Structure

27. Claimant is likely to build its reasoning upon *Eskosol* case, one of the very few cases where majority shareholders were considered different parties as the entity.[27] However, a more thorough reading of this case as well as a comparison with our instant case unveils its irrelevance.

28. The primary reason that the tribunal in *Eskosol* deemed the shareholders with 80% of shares and the company (*Eskosol*) as different parties was the conflicting positions and interests between the company with its shareholders. In its prior action, the company requested the shareholders to add them as a third party but

[27] Eskosol, ¶263.

was rejected.[28]

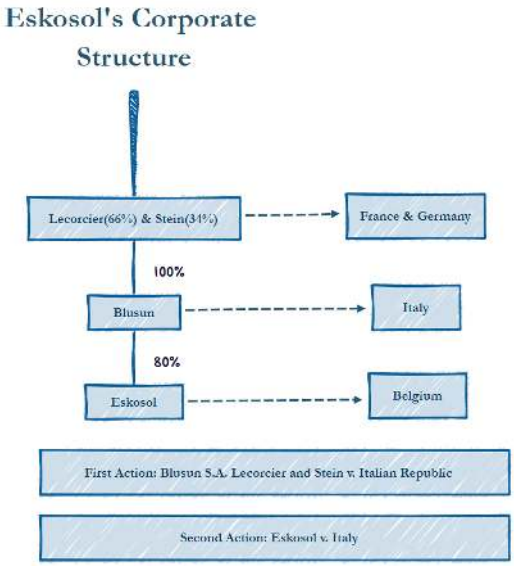

Figure 3: Eskosol's Corporate Structure

29. Nonetheless, the above-mentioned situations do not exist in our case, let alone the fact that it was not Shareholders who failed to represent all the shareholders' interests, but other minority shareholders who gave up pursuing reflective losses.[29] Claimant's selective reading of *Eskosol* case and our case leads them to present the Tribunal with fictive causality between "80% of shares" and "different parties" as well as distorted facts.

30. In conclusion, the prior case and the present one are substantially the same.

31. *Orascom* tribunal succinctly summarized that the claimant constitutes an abuse of rights by raising the same dispute repeatedly and the subsequent ones must be precluded by *res judicata*

> "*when (i) the group of companies of which the claimant was part was organized as a vertical chain; (ii) the entities in the vertical chain were under the control of the same shareholder; (iii) the measures*

[28] *Ibid*, ¶267.
[29] Respondent's Exhibit R2, p.33, ¶13.

complained of by the various entities in the chain were the same and (iv) the damage claimed by the various entities was, in its economic essence, the same."[30]

32. As illustrated above, Shareholders and Claimant are in the same vertical chain and both the subject matter and the causes of action are identical. All three identities met, Respondent submits that the previous case and the present one are the same, so the present case should be precluded by *res judicata* and Claimant has no standing before the Tribunal.

C. The Previous Tribunal had jurisdiction over *Donald & Daisy v. Rhekia*

33. Respondent notices that Claimant tries to bar the application of *res judicata* by arguing that the Previous Tribunal did not have jurisdiction because the shareholder reflective loss claim does not fall within the scope of A-R BIT.

34. However, this attempt is doomed to failure for two reasons. First, according to Articles 52 & 53 of ICSID Convention, Claimant is not allowed to challenge the jurisdiction of *Donald & Daisy v. Rhekia* **[1].** Second, even if the Tribunal considers the Previous Tribunal's jurisdiction, according to Articles 31-33 of VCLT, it would find that the Previous Tribunal was right to recognize its jurisdiction under the Rhekian version via treaty interpretation **[2]**.

1. Claimant is not allowed to challenge the jurisdiction of *Donald & Daisy v. Rhekia*

35. The ICSID system honors the finality and legality of its award.[31] Both Article 53 of the ICSID Convention[32] and Article XX of A-R BIT[33] and provide that an award is final and binding on the parties and shall not be subject to any appeal or

[30] Orascom, ¶¶539-546.
[31] ICSID Convention, Article 53.
[32] *Ibid*.
[33] A-R BIT, Article XX.

to any other remedy.

36. One of the limited remedies provided by the Convention is annulment. Article 52 sets clear procedural requirements for annulment proceedings:

> "*Either party may request annulment of an award by an application in writing addressed to the Secretary-General within 120 days.*"[34] *[Emphasis added.]*

37. In our case, no annulment proceeding has been initiated so far,[35] which is way beyond the stipulated time frame. Therefore, the previous award remains binding.

2. The Previous Tribunal was right to recognize its jurisdiction under the Rhekian version via treaty interpretation

38. Even if the Tribunal decides to reconsider the jurisdiction of *Donald & Daisy v. Rhekia* by comparing two versions of A-R BIT, it will realize that the Previous Tribunal was right to recognize its jurisdiction under the Rhekian version.

39. Article 33 of VCLT guides the interpretation of treaties authenticated in two or more languages and provides that the text is equally authoritative unless priority has been determined.[36] When differences emerge under such circumstances, interpreters should first refer to Article 31[37] **[i]** and if doing so leaves the meaning ambiguous or absurd, Article 32[38] comes into play **[ii]**. If the application of Articles 31 and 32 fails to reconcile the difference, then the interpreters, in light of Article 33(4),[39] should adopt the version which best reconciles the object and purpose of the treaty **[iii]**.

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[34] ICSID Convention, Article 52.
[35] PO3, p.90, ¶7.
[36] VCLT, Article 33(4).
[37] *Ibid*, Article 31.
[38] *Ibid*, Article 32.
[39] *Ibid*, Article 33(4).

40. Respondent will demonstrate how the interpretation rules lead to the antecedence of the Rhekian version.

i. Under Article 31 of VCLT, the difference in the meaning of Article XIII 2(b) between two versions of A-R BIT is not removed

41. Article 31 indicates that the starting point of treaty interpretation is to elucidate the meaning of the text[40] under three principles: in good faith, recourse to the ordinary meaning, and in the context of the treaty as well as in light of the object and purpose.[41]

42. From the contextual approach, *Nobel Energy* tribunal decided that "*failing any contrary wording, the BIT and the ICSID Convention encompass actions of indirect shareholders for their damages.*"[42]

43. In A-R BIT, Article XIII(7) only rules out minority shareholders' right to claim indirect loss, [43] indicating the parties' intention as permitting majority shareholder's right to claim for indirect losses. It's safe to say that the only reasonable way to interpret "it" is to allow reflective loss claims. Consequently, the discrepancy between "it" and "enterprise" cannot be removed, namely while the Rhekian version gives access to reflective loss claims, its English counterpart precludes such right.

[40] VCLT Commentary, p.580.
[41] *Ibid*.
[42] Noble Energy, ¶17.
[43] A-R BIT, Article XIII(7).

	English version of the BIT	Rhekian version of the BIT (Jointly Accepted Translation)
Article XIII(2)	(b) A Claimant, on behalf of an enterprise of the Respondent that is a juridical person that the Claimant owns or controls directly or indirectly, may submit to arbitration under this section a claim (i) … (ii) That ***the enterprise*** has incurred loss or damage by reason of, or arising out of, that breach.	(b) A Claimant, on behalf of an enterprise of the Respondent that is a juridical person that the Claimant owns or controls directly or indirectly, may submit to arbitration under this section a claim (i) … (ii) That ***it*** has incurred loss or damage by reason of, or arising out of, that breach.
Article XIII(7)	The Contracting Parties recognize that under this Article, minority non-controlling investors have standing to submit ***only a claim for direct loss*** or damage to their own legal interest as investors.	

Figure 4: Articles XIII(2) and XIII(7) of two versions of A-R BIT

44. Therefore, the difference in the meaning of Article XIII 2(b) between two versions of A-R BIT is not removed through the application of Article 31.

ii. Under Article 32 of VCLT, the difference in the meaning of Article XIII 2(b) between two versions of A-R BIT is still not removed

45. Claimant relies on Article 32 of VCLT and argues that the negotiations and drafting history of the A–R BIT favors the English version of A-R BIT because A-R BIT was negotiated by the parties in the English language.[44]

46. There is no doubt that pursuant to Article 32 of VCLT, the preparatory work of the treaty and the circumstances of its conclusion can be supplementary means of interpretation.[45]

47. However, Claimant is incorrect in its analysis because first, the negotiating language cannot decide the priority, and second, the history of A-R BIT conclusion confirms that the shareholder reflective loss claims are contained in the Rhekian version.

48. First, according to *Sehil* tribunal, the fact that English is the negotiating language does not confer to the English version any superiority or prevailing value.[46] Thus,

[44] Memorial on Jurisdiction, p.44, ¶7.
[45] VCLT, Article 32.
[46] Sehil, ¶221.

Claimant's submission itself that English is the negotiating language cannot lead to the conclusion that the English version should prevail.

49. Second, tribunals generally take into account the parties' respective practices in other investment treaties as a reflection of the parties' general standing towards a particular issue, as part of the circumstances of the conclusion of a treaty to confirm the interpretation of its provisions.[47] *Plama* tribunal also confirmed：

> "*It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into.*"[48]

50. *In casu*, it is corroborated by Respondent's Exhibit R3 that the shareholder reflective loss claims are contained in almost all of Rhekia's modern BITs.[49] And in its communications with Athabasca, Rhekia was always clear that the shareholder reflective loss claims should be contained in A-R BIT.[50] Thus, it is clear that the shareholder reflective loss claims are contained in the Rhekian version of A-R BIT.

51. Just the other way around, as is affirmed by Claimant's witness Bunkan Bagels, Article XIII of A-R BIT was essentially copy-pasted from Athabasca's Model BIT,[51] which possesses exactly the same wording and meaning as forestalling shareholder reflective loss claims.[52]

52. Therefore, the difference in meanings in the two versions of A-R BIT cannot be removed by Articles 31 and 32 of VCLT and as a result, Article 33(4) shall be applied.

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[47] İçkale, ¶4.
[48] Plama, ¶195.
[49] Respondent's Exhibit R3, p.52.
[50] Claimant's Exhibit C8, p.46.
[51] *Ibid.*
[52] *Ibid.*; PO3, p.90, ¶4.

iii. Under Article 33(4), the Rhekian version is more consistent with the object and purpose of the treaty

53. Confronted with an irreconcilable difference,[53] Article 33(4) of VCLT provides that "*the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.*"[54] Respondent will demonstrate that the Rhekian version is more consistent with the purpose of the treaty.

54. The tribunal in *BG Group* case adopted the broader version to enlarge the coverage of BIT in accordance with the shared aspiration expressed in the preamble.[55]

55. The preamble of A-R BIT provides that "*INTENDING to further create stable, equitable, favorable and transparent conditions for greater investment*".[56] Permitting shareholders' right to claim reconciles it better because according to *Urbaser* tribunal[57], taking shareholders' investments out of BIT's protection deprives their rights as investors and reduced the likelihood of a country's economic success. Rhekia repeatedly affirmed that the goal of A-R BIT is to let investors directly claim against the states.[58]

56. Since the Rhekian version better satisfies the purpose of the treaty, it shall take precedence, and thus the Previous Tribunal was right to recognize its jurisdiction under the Rhekian version. Having clarified this, the last barrier to the application of *res judicata* is removed.

II. The Tribunal has no jurisdiction over the present dispute, in light of the application of ELR under A-R BIT

[53] BG Group, ¶133.
[54] VCLT, Article 33(4).
[55] BG Group, ¶¶131-134.
[56] A-R BIT, Preamble.
[57] Urbaser, ¶¶244-250.
[58] Counter-Memorial, p.49, ¶6.

57. Article XII of A-R BIT imposes a requirement to initiate proceedings in Rhekia's domestic legal system before commencing arbitration proceedings.[59]

58. While Respondent stands firm with the belief that the manner in which Article XII is worded doesn't provide for any derogation under any circumstance, Claimant still contends that Article XII does not apply here because it would be futile for Claimant to comply with it.[60]

59. Respondent submits that Claimant's contention is untenable for two reasons. First, Articles XII(2) and XII(3) of A-R BIT prescribe ELR as a condition of consent to arbitration while Claimant did not comply with it **[A]**. Second, "futility exception" of ELR cannot be imported into A-R BIT **[B]**. Assuming the Tribunal decides to consider the application of the "futility exception", the standard of "futility exception" is not met **[C]**.

A. Claimant's non-compliance with Articles XII(2) of A-R BIT suffices to defeat jurisdiction

60. Since Article XII sets forth the mandatory **[1]** and jurisdictional **[2]** character of ELR, Claimant's non-compliance suffices to defeat jurisdiction.

1. The mandatory nature of Article XII(2)

61. The purpose of ELR is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law.[61]

62. When it is set in the treaty as a condition of consent for an ICSID arbitration, it cannot be satisfied by anything less than what it explicitly calls for: the submission of the investment dispute to the domestic courts for a period of 18

[59] Memorial on Jurisdiction, p.44, ¶11.
[60] Memorial on Jurisdiction, p.44, ¶12.
[61] Loewen, ¶156.

months or until a final decision is rendered, whichever is shorter.[62]

63. Pursuant to Article 26 of the ICSID：

> "*A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.*"[63]

64. It confirms that there is no general requirement to exhaust local remedies for a treaty claim to exist unless contracting states require such a condition for the commencement of an ICSID arbitration.[64] The absolute priority of this rule has been accepted by a series of tribunals.[65]

65. For instance, *Ambiente Ufficio* tribunal considered ELR as a binding precondition for access to international arbitration because the Argentina-Italy BIT sets this rule.[66] It has been reiterated by *Wintershall* tribunal where Article 10(2) of the Argentina-Germany BIT also sets this requirement.[67] Even further, past practices emphasized that the word "shall" in treaty terminology means that what is provided for is legally binding.[68]

66. Similarly, the clear wording of Article XII(2) of the A-R BIT leaves no ambiguity to the mandatory nature. Article XII(2) of A-R BIT states:

> "*Disputes concerning the interpretation and application of the terms of this Agreement and which have not been amicably settled shall not be referred to arbitration in accordance with Article XIII of this Agreement, unless 18 months have passed from the time that an*

[62] ICS, ¶¶250-251.
[63] ICSID Convention, Article 26.
[64] Georg, ¶889.
[65] *Ibid.*; Ambiente Ufficio, ¶589; Argentina-Germany BIT
[66] *Ibid.*
[67] Wintershall, ¶114.
[68] Louis, ¶¶88-89; Wintershall, ¶114; ICS, ¶247; Urbaser, ¶131.

investor submits the dispute to the judicial bodies of a Contracting Party."[69] *[Emphasis added.]*

67. *In casu*, at the time of submitting its Request for Arbitration, Claimant had not commenced any claim in the Rhekian courts.[70] It is clear as day that Claimant has failed to accord with Article XII(2).

2. The jurisdictional nature of Article XII(3)

68. Claimant's non-compliance directly deprives the Tribunal of its jurisdiction because Article XII(3) further stipulates:

"*Each Contracting Party requires that the exhaustion of local judicial remedies be a condition of its consent to arbitration under Article XIII of this Agreement*."[71]

69. Arbitral jurisdiction is based exclusively on consent.[72] When ELR is clearly set in A-R BIT, it constitutes an indispensable part to "consent" to arbitration which must be accepted by every investor.[73] Having failed to satisfy this, the Tribunal has no jurisdiction[74] because the consent to arbitrate is not established yet.[75]

70. Thus, in light of the mandatory and jurisdictional character of this rule, Claimant's non-compliance with Articles XII(2) and (3) of A-R BIT suffices to defeat jurisdiction.

B. "Futility exception" of ELR cannot be imported into A-R BIT

71. Claimant contends that it would be futile for it to exhaust local remedies, so

[69] A-R BIT, Article XII(2).
[70] Facts, p.60, ¶50.
[71] A-R BIT, Article XII(3).
[72] ICS, ¶255.
[73] Wintershall, ¶160.
[74] ICS, ¶255.
[75] Wintershall, ¶160.

Article XII could not be applied in this case.[76] Contrary to Claimant's contention, there is no room for "futility exception". First, Article XII is a *lex specialis* which precludes "futility exception" **[1]**. And second, "futility exception" does not exist where the BIT does not require a decision on the dispute made by local courts **[2]**.

1. Article XII of A-R BIT is a *lex specialis* which precludes "futility exception"

72. "Futility exception" invoked by Claimant originates from ELR on diplomatic protection in customary international law, which allows a party to circumvent the requirement where recourse to host states' remedies would be demonstrably futile.[77]

73. Claimant might warrant "futility exception" by resorting to Article 15 of ILC Draft Articles on Diplomatic Protection.[78] Nonetheless, "futility exception" cannot be imported to A-R BIT under the cover of customary international law pursuant to Article 17 of ILC Draft Articles on Diplomatic Protection:

> "*The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.*"[79]

74. Besides ILC Draft, several ICSID tribunals have also prohibited such stowaway:

75. In the words of *İçkale* tribunal, the requirement in the BIT specifically agreed by the contracting parties is "*not a reflection or incorporation of a rule of customary international law*", "*but rather a lex specialis*".[80] As a result, that tribunal confirmed that "futility exception" cannot be imported to the BIT because "*the*

[76] Memorial on Jurisdiction, p.44, ¶¶11-12.
[77] İçkale, ¶260.
[78] ILC Draft Articles on Diplomatic Protection, Article 17.
[79] *Ibid.*
[80] İçkale, ¶261.

BIT does not provide for any futility exception".[81]

76. It has also been restated by *Quasar de Valors* tribuna[82] that unless otherwise stated, futility exception cannot be implied from a silent BIT.

77. In A-R BIT, Article XII, as a *lex specialis*, does not provide for any derogation. Therefore, there is no room for "futility exception" and Article XII of A-R BIT cannot be bypassed by invoking the non-existing exception.

2. "Futility exception" cannot be applied when Article XII of A-R BIT does not require a decision of the dispute made by local courts

78. Claimant attempts to bypass Article XII by forging a "futility exception" and justifying its existence through treaty interpretation. However, its maneuver is bound to be defeated because precedents have pointed out that "futility exception" cannot be applied when the relevant BIT only requires a period of time after the submission of the dispute.

79. The special nature of 18-month litigation prerequisite has to be given solemn weight.[83] It falls between the mere "waiting period" and genuine "exhaustion of local remedies" given its content in light of the object and purpose.[84]

80. Under Article XII, the goal of ELR is twofold. On the one hand, it offers the host state an internal opportunity to fix its alleged wrongdoing and deter upcoming international obligations.[85] On the other hand, it guards against the forever delay of justice.[86]

81. For instance, *Wintershall* tribunal ruled that Wintershall's futility contention

[81] İçkale, ¶260.
[82] Quasar de Valors, ¶93.
[83] ICS, ¶248.
[84] *Ibid.*
[85] Loewen, ¶156.
[86] *Ibid*. 88.

could not generate futility exception because the BIT "*does not contemplate domestic courts deciding a case*", but only requires the dispute to be submitted to the courts of competent jurisdiction of the host state.[87] *ICS* tribunal agreed with *Wintershall* tribunal's reasoning and reached the same decision.[88] *ICS* and *Kilic* tribunals reasoned and ruled the same.[89]

82. *In casu*, Article XII(2) of A-R BIT only requires that "*18 months have passed from the time that an investor submits the dispute to the judicial bodies of a Contracting Party*". It does not state that the dispute should be genuinely decided by the local courts.

83. Therefore, there is no so-called "futility exception" and Claimant cannot escape from ELR.

C. Even if the Tribunal decides to consider the application of "futility exception", the standard of "futility exception" is not met

84. As illustrated above, there is no room for the application of "futility exception". Notwithstanding the foregoing, if the Tribunal still decides to consider the application of the "futility exception", Respondent submits that the standard of "futility exception" is not met for two reasons. First, the doctrine of "futility exception" faces a high threshold but Claimant fails to prove it **[1]**. Second, it would not be futile for Claimant to commence a claim before the Rhekian courts **[2]**.

1. "Futility exception" faces a high threshold but Claimant fails to prove it

85. Respondent submits that first, the burden of proof is on Claimant to show that it

[87] Wintershall, ¶196.
[88] ICS, ¶249.
[89] Kılıç, ¶8.1.7.

would be futile to submit the claim to local courts **[i]**, and second, the threshold of "futility exception" is high and it is not met **[ii]**.

i. The burden of proof is on Claimant

86. In the words of *Alemanni*[90] and *ST-AD*[91] tribunals, as the claimant is advancing a justifying excuse for not having submitted the dispute to any local remedies, the claimant carries the burden of establishing to the tribunal's satisfaction the facts on which they base their justification.[92]

87. This approach is also taken by *Kiliç* tribunal. It emphasized that the onus was not on respondent to prove the availability and efficacy of its court systems to manage related disputes, but on the claimant to show, on sufficient evidence, that such recourse is unavailable.[93]

88. Thus, Claimant bears the burden to give strong evidence to prove that it would be futile for it to submit the dispute to the local courts in Rhekia.

ii. "Futility exception" faces a particularly high threshold of proof

89. Several authorities emphasized the high threshold of the "futility exception".[94] For instance, in *Apotex(II)*, the tribunal articulated that whether "futility exception" can be vindicated depends on "*the unavailability of relief*" by the judicial authority, not on measuring "*the likelihood that the judicial authority would have granted the desired relief*".[95]

90. Additionally, in *Kiliç*, the claimant's evidence, which was third-party studies and reports, was considered insufficient to prove the futility, and more "*probative*

[90] Alemanni, ¶313.
[91] ST-AD, ¶366.
[92] *Ibid*. 95.
[93] Kılıç, ¶8.1.15.
[94] Apotex (II)(2), ¶279; Louis, ¶98; Urbaser, ¶131.
[95] Apotex (II)(1), ¶276.

evidence that goes to the specificity of the issue in dispute" is needed.[96]

91. More importantly, *İçkale* tribunal pointed out that there is no room for any claim arising out of the alleged inadequacy of the local legal system where there has been no attempt to submit the dispute to local courts and no legal process in the first place.[97]

92. Thus, it is not enough to make generalized allegations about the insufficiency of a state's legal system.[98] Claimant not only needs to demonstrate that it has made efforts to comply with ELR[99] but also needs to provide more probative evidence to prove the unavailability of local remedies.[100]

93. *In casu*, Claimant is trying to find an excuse for not having submitted the dispute to any local remedies[101], so the burden of proof is on Claimant. However, Claimant demonstrates no attempt to submit the dispute to local courts and Respondent has not received notice of any other action initiated by investors in the Cannabis industry in Rhekia.[102] And Claimant provides no strong evidence supporting that the local remedies are unavailable.

94. Without any precedent, any attempt to submit the dispute to local courts nor sufficient evidence, Claimant's futility contention is only an assumption. Thus, Claimant fails to prove the unavailability of relief, and the threshold of "futility exception" is not met.

2. It would not be futile for Claimant to commence a claim before the Rhekian courts

[96] Kılıç, ¶8.1.10.
[97] İçkale, ¶260.
[98] Kılıç, ¶8.1.10.
[99] *Ibid*, ¶8.18.
[100] *Ibid*. 102.
[101] Memorial on Jurisdiction, p.44, ¶12.
[102] PO3, p.90, ¶7.

95. As mentioned above, there is no room for "futility exception" and even if there is, the burden of proof is not on Respondent. However, Respondent is willing to take a step further to prove that it would not be futile for Claimant to submit the claim to the Rhekian courts.

96. Respondent noticed that Claimant freed itself from recourse to domestic courts by alleging that Rhekian's judiciary is incapable of coming up with a meaningful and timely conclusion.[103] However, the fact says otherwise.

97. Regarding judicial efficiency, with a stable online hearing system[104] and expedited procedures,[105] the average time to render an award in 2021 was only 12 months.[106] Back in 2016, even without the online infrastructure, Shareholders' claim was finalized within less than 12 months.[107]

98. Regarding judicial justice, in May 2017, the Supreme Court of Rhekia rejected the constitutional challenge of CCPA because there was insufficient evidence suggesting that the legalization of cannabis has infringed public health and safety, public order and public morality,[108] indicating CCPA remains valid and the court was not biased against the industry.

99. Claimant might cling to this event and argue that the judicial review put its interest at stake and frustrate its attempt to justice. However, were it so desperate for justice, it would be difficult to understand why it waited for 4 years before initiating an arbitration.[109]

100. Therefore, without evidence proving futility and with facts on the contrary,

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[103] Memorial on Jurisdiction, p.40, ¶¶11-12.
[104] Facts, p.65, ¶48.
[105] PO3, p.90, ¶9.
[106] *Ibid.*
[107] Respondent's Exhibit R2, p.30.
[108] Facts, p.66, ¶54.
[109] Request for Arbitration, p.1.

Claimant has no reason to claim that Rhekia's judiciary would disappoint it.

101. Consequently, Claimant's non-compliance with Article XII of A-R BIT defeats the Tribunal's jurisdiction.

PART II: Merits

III. Respondent did not violate its obligation to provide FPS to Claimant's investments contained within Article V

102. In this issue, Claimant contends that Respondent violated the obligation to provide FPS because Sutton's cannabis production plants Freya and Odin were not successfully protected by Respondent.[110] This is not true since Rhekia provided the highest level of protection that Rhekia was able to, given the circumstances, to Claimant's work sites, which were located in remote locations.[111]

103. The obligation to provide FPS was fulfilled by Respondent because of three reasons. First, Respondent shall not be held responsible for the damages directly caused by its military under FPS **[A]**. Second, Respondent has fulfilled its FPS obligation in protecting against the harm caused by the militia in Odin and Freya **[B]**. Third, Claimant was unable to establish a breach of FPS concerning legal security **[C]**.

A. Respondent shall not be held responsible for the damages directly caused by its military under FPS

104. Pursuant to Article V of A-R BIT:

"*The concepts of 'fair and equitable treatment' and 'full protection*

[110] Request for Arbitration, p.7, ¶26.
[111] Response to Request, p.24, ¶21.

and security' do not require treatment in addition to or beyond that which is required by the international law minimum standard of treatment of aliens."[112]

105. This indicates that FPS clause owns a customary character.[113] Therefore, in order to determine whether FPS obligation is achieved, the Tribunal should examine the concept in a customary background. Respondent submits that under the standard of customary international law, FPS only concerns the harm conducted by third parties and does not extend beyond physical security **[1]**. Moreover, FPS obligation has been achieved since Respondent has taken reasonable measures to protect Claimant's investments **[2]**.

1. FPS only regulates the host state's omission, rather than action

106. Respondent argues that it shall not be held responsible for the damages directly caused by its military. According to *El Paso*, FPS only concerns the harm that is not attributed to a government, but a third party.[114] The principle behind this is that FPS standard is no more than the traditional obligation to protect aliens under international customary law.[115]

107. In the case of *Mobil*, the arbitrators agreed with the third-party approach, as developed in *El Paso*. In this vein, they held that FPS embodies the customary protection obligation of the law of aliens.[116] Accordingly, the tribunal stated that FPS has a "residual" character and is applicable where 'the acts challenged can only be attributed to a third party. A residual character here means that actions taken by the government should be assessed under other articles.[117]

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[112] A-R BIT, Article V.
[113] Martins Paparinskis, p.65, ¶103.
[114] El Paso, ¶522.
[115] *Ibid*, ¶523.
[116] Mobil, ¶999.
[117] Mobil, ¶1004.

108. Claimant may use some scholars' ideas to contend that the approach taken by the *El Paso* tribunal, which is followed by numerous tribunals, is too narrow and will lead to the state's monopoly of force.[118] However, the argument is untenable.

109. First, the restriction of FPS to private violence has no effect of turning the standard into a tool for the protection of the host state's monopoly on the use of force,[119] because this interpretation advanced in *El Paso* and similar awards did not change the character of Respondent and Claimant.[120] Neither is the host state turned into the beneficiary of protection nor does its "monopoly of force" become the object of protection.

110. Second, Claimant seems to assume that limiting FPS to private violence leaves investments unprotected from public violence.[121] However, to say that some conduct falls outside the scope of a specific international obligation is not to say that such conduct is not internationally wrongful. In cases involving public damages inflicted by state organs, tribunals tend to focus on other standards of investment protection, such as FET or protection against expropriation.[122]

2. Moreover, extending the scope of FPS to state organs will lead to overlap with other articles

111. The *Oxus Gold* tribunal states that extending FPS to protection against state actions would lead to overlap with other BIT standards thus violating the principle of effectiveness.[123] The principle of effectiveness is a cardinal rule in the interpretation of treaties that every clause of a treaty is to be interpreted as meaningful rather than meaningless.[124]

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[118] Kenneth Vandevelde, ¶252.
[119] *Ibid.*
[120] El Paso, ¶522.
[121] *Ibid.122*
[122] I.P. Busta, ¶365.
[123] Oxus Gold, ¶354.
[124] *Ibid.* ¶356.

112. In *Oxus Gold* tribunal's view, in cases involving conduct that is directly attributable to state agents, other standards of investment protection, such as FET, come into play.[125] The tribunal recognized, however, that specific treaty clauses could deviate from the general standard's scope of application.[126] The tribunal consistently found that, along with the opinion proposed by the *El Paso* tribunal, FPS only provides protection against acts of third parties, as opposed to acts that are directly attributable to the host state.

113. *In casu*, to give a meaningful interpretation to FPS clause, the destruction of Odin by the state organs should be addressed by using the EWC in Article VI, which addresses the actions of the state organs under war circumstances.

B. Respondent has fulfilled its FPS obligation in protecting against the harm caused by the militia groups

114. As mentioned earlier, Article V does not require treatment in addition to the one required by the international law MST of aliens.[127] As long as Respondent satisfied the minimum standard required by international customary law, the obligation is achieved.

115. Then, the examination of whether Respondent achieved FPS can be broken down into two steps. The first step is to determine which kind of standard of treatment for aliens is covered under international customary law **[1]**. And the second step is an evaluation of Respondent's overall performance under that standard **[2]**.

1. A modified objective standard should be adopted in order to evaluate whether Respondent's actions meet the standard in Article V

116. It is agreed by multiple tribunals such as *AAPL(I)* tribunal that the minimum

[125] *Ibid.* ¶353.
[126] *Ibid.* ¶353.
[127] A-R BIT, Article V.

standard required by FPS does not impose strict liability on States, but requires the state to exercise due diligence.[128] This means that the host State is not required "to prevent every injury" but must exercise reasonable care and take reasonable actions within its power to prevent injury of the investor.[129]

117. When determining whether there has been due diligence, the capacity of the state including the level of development and stability shall be considered.[130] It is not reasonable to ask a man of muscle and a skinny man to carry the same weight. This approach first taken in the *Pantechniki* tribunal was soon followed by multiple tribunals, such as the *Ampal* tribunal, agreeing that the adequacy of the State's response should be assessed in the light of the scale of the disorder and the extent of its resources.[131]

118. In this context, Respondent submits that it has provided the highest level of protection within its capacity under the particular situation. *In casu*, the Tribunal should take the limited resources in Rheikia,[132] the large scale of the conflict,[133] and the locality of the cannabis plants[134] into consideration when determining whether Respondent meets the standard.

119. To begin with, the conflict that took place in Rheikia is recognized by the international legal community as a NIAC and this was widely agreed upon within the international legal community.[135] This reveals that the civil conflict was on a large scale. Moreover, the military forces in Rheikia were unable to protect its cities and large parts of the country became ungovernable and descended into daily violence. The cities of Stockhagen and Copenholm, which are the most

[128] AAPL(I), ¶85(b); Wena Hotels, ¶84.
[129] Natural Energy, ¶¶570-574.
[130] Pantechniki, ¶7.
[131] Ampal, ¶244.
[132] Response to Request, ¶7.
[133] Facts, p.62, ¶32.
[134] *Ibid*, p.55, ¶3.
[135] *Ibid*, p.62, ¶33.

important were soon taken over by armed militia groups.[136] This indicates that Respondent lacks military resources to deal with the situation. Last but definitely not least, Freya is located in a very remote area where the military resource is even more scarce and Odin was situated in a mountainous area.[137]

120. Notwithstanding the fact that the resources were limited, the civil conflict was on large scale and the plants were located in a remote area. Respondent has achieved its obligation by sending military forces to protect both of the plants in Odin and Freya.

2. Respondent has achieved its obligation in protecting both of the cannabis plants owned by Claimant

Figure 5: Topographic map of Rhekia

121. *In casu*, Sutton had two plants, Odin and Freya. In order to protect Claimant's investment, Respondent sent military forces within its capacity to both sites.[138] Respondent acted quickly in response to the attack on Freya **[i]**. Meanwhile,

[136] *Ibid*, p.62, ¶34.
[137] *Ibid*, p.64, ¶42.
[138] Facts, p.59, ¶19.

making sufficient preventive measures to protect the investment in Odin **[ii]**.

i. Respondent has achieved the obligation to protect the investment in Freya

122. To protect the investment in Freya, Respondent made sufficient reactions to protect the investment during the attack. Rhekia mobilized a few military units within 48 hours of the attack on Freya and ordered them to relieve Sutton's facilities.[139] The immediate response to the attack on Claimant's investment under the difficult situation cannot be denied.

123. Claimant may argue that there are not any preventive measures before the actual attack. However, at the particular time point of 2014, the time when Claimant raised their concerns, there was no direct evidence showing that there were possible attacks on the investment. Meanwhile, the concerns proposed by Claimant have been thoroughly and seriously examined by experts and the government.[140]

124. Another argument raised by Claimant is that the number of soldiers that were sent to Freya is not enough, they believed that there were only 10 men with no equipment.[141] Respondent submits that this is just another statement that is as fragile as potato chips. For reference, according to the United States and other official military websites, a single military unit is generally constituted of 10 to 36 men.[142] Though the definition of a military unit in Rhekia may be different, the actual number of a few military units with no doubt goes beyond the number of 10 men. Therefore, Claimant's submission is nothing but an exaggeration.

ii. Respondent has achieved the obligation to protect the investment

[139] *Ibid*, p.63, ¶39.
[140] Respondent's Exhibit R1, p.29, ¶9.
[141] Claimant's Exhibit C4, p.15, ¶6.
[142] United States and other official military websites.

in Odin

125. As to Odin, sufficient preventive measures are made in Odin before the potential harm. Considering Odin's weaker military, Rhekia has already posted a large number of its most effective troops to Odin.[143] This is another piece of evidence that the due diligence obligation required by FPS is achieved.

C. Claimant was unable to establish a breach of FPS concerning legal security

126. Since Claimant has submitted that legal security should be taken into consideration, Respondent will respond to this argument in the following two points. Firstly, the extension of FPS standard to legal security will leads to an overlap with other treaties and contradict the third-party principle, therefore it should not be permitted **[1]**. And secondly, even if legal security is included, Respondent has already protected legal security to all its investors **[2]**.

1. Legal security is not contained within FPS clause

127. According to *Crystallex*, extending FPS to legal protection would result in an overlap with other treaty standards, notably FET, which was contradictory to the principle of effectiveness.[144]

128. A second reason against including legal security in the scope of FPS standard lies in the fact that changes in the legal system are events which that, in most cases, originate entirely in the active exercise of the government.[145] As mentioned earlier, the customary FPS standard refers to the host state's omissions. Therefore, legal security is not within the scope of FPS.

[143] Facts, p.64, ¶42.
[144] Crystallex, ¶634.
[145] Lucas Bastin, ¶¶59-89.

2. Nevertheless, even if legal protection was contained in FPS clause, Respondent has achieved its obligation

129. According to *AES*, FPS does not protect against a state's right to regulate in a way that may negatively affect a claimant's investment.[146] *In casu*, the investigation viewed as discrimination by Claimant was actually a regulatory measure for public policy concerning the cause of the civil war,[147] since it was carried out in accordance with due process of law.[148] Therefore, the investigation does not constitute a breach of FPS under legal security.

130. Rhekia provided a stable judicial system and a stable legal environment during the civil war. During war times, Rhekia's judiciary continued to process all matters, including both commercial and criminal cases during the civil war. As of January 2021, the average time for a case to be heard at first instance was 12 months.[149]

IV. War clause (Article VI) precludes Claimant from receiving compensation

131. War clause in the BIT includes a non-discrimination clause and an EWC. Article VI(1) of the BIT (also called the non-discrimination clause) establishes the Most-Favored-Nation Treatment and National Treatment, with regards to compensation for losses occurred in armed conflicts and similar factual circumstances.[150] As to Article VI(2) of the BIT (also called EWC), it also relates to war or to other armed conflict, revolution, or similar events. It goes beyond non-discrimination and provides for an absolute standard of restitution or compensation.[151]

132. Claimant may claim for compensation for Respondent's alleged failure to provide

[146] AES, ¶13.3.2.
[147] Facts, p.66, ¶52.
[148] *Ibid.*
[149] PO3, p.90, ¶9.
[150] Sebastián Mantilla Blanco, p.602.
[151] Christoph Schreuer, p.13.

FPS to the Sutton investments. However, Respondent submits that War clause precludes Claimant from receiving compensation for three reasons. First, Article VI of the BIT operates as *lex specialis*, which should be applied in the current issue concerning compensation under war circumstances **[A]**. Second, compensating investors for their losses on a non-discriminatory basis is the major premise and no obligation arises for Respondent in this instance **[B]**. Third, Article VI(2) also precludes Claimant from receiving compensation since the requirement for compensation under war circumstances is not met **[C]**.

A. Article VI of the BIT operates as *lex specialis*, which should be applied in the current issue

133. The principle of *lex specialis* is that *lex specialis derogat legi generali*.[152] It determines which rule prevails over another.[153] According to the commentary of Article 55 of ARSIWA, two elements should be satisfied for applying the *lex specialis* principle: the same subject matter and actual inconsistency.[154] Respondent submits that FPS clause and War clause deal with the same subject matter **[1]**, and that there is some actual inconsistency between FPS clause and War clause **[2]**.

1. The FPS clause and War clause deal with the same subject matter

134. For the first element, the same subject matter here refers to the liability for compensation of host states.

135. The FPS clause stipulates a general obligation to exercise due diligence to protect foreign investments,[155] so it only incurs general liability for compensation rather

[152] ARSIWA, Article 55.
[153] Nancie Prud'homme, p.367.
[154] ARSIWA, Article 55.
[155] AAPL(I), p.579.

than specific ones according to Article 36 of ARSIWA.[156]

136. Then turning to Article VI, the dissenting opinion of case *AAPL(I)* held that War clause prescribes specific rules governing the responsibility of a host state.

137. To explain further, the non-discrimination clause

> "*restates the general customary international law principle that excludes liability for compensation where investments suffer losses owing to war or other armed conflict, revolution, state of national emergency, revolt or insurgency, and such loss cannot be attributed to the host States or its agents.*"[157]

138. As to EWC, it mandates restitution or adequate compensation in the situations defined in the non-discrimination clause, where the host state's forces requisite alien property or destroy it and the destruction is not caused in combat action or required by the necessity of the situation.[158]

139. Therefore, both FPS clause and the two paragraphs of War clause deal with the liability for compensation. While FPS clause incurs general liability for compensation, War clause only gives rise to the liability for compensation under specific situations stated in Article VI(2) and could only be applied with war or any other armed conflict.[159]

140. Therefore, the requirement of the same subject matter is met.

2. There is some actual inconsistency between FPS clause and War clause

[156] ARSIWA, Article 36.
[157] AAPL(I), p.580.
[158] *Ibid*.
[159] LESI v. Algeria, ¶¶174-175.

141. As to the second element, Respondent submits that the breach of FPS will incur the liability of the host state. However, as aforementioned, Article VI(1) confirms the general rule of non-responsibility where investments suffer losses owing to the war.[160] Article VI(2) defines narrowly circumscribed exceptions to this general rule.[161] Since the exceptions in Article VI(2) is not satisfied here, which would be further proved below, Article VI(2) should not be considered during the comparison between FPS clause and War clause. Respondent submits that the actual inconsistency lies between FPS clause and Article VI(1).

142. *In casu*, Respondent would bear the liability for compensation when violating FPS clause, and would not be burdened with the liability for compensation under War clause. Therefore, the actual inconsistency requirement is satisfied.

143. Based on the foregoing, War clause constitutes *lex specialis* and displaces the more-general FPS clause.[162] The same opinion could also be found in case *LESI*.[163]

B. Compensating investors for their losses on a non-discriminatory basis is the major premise and no obligation arises for Respondent in this circumstance

144. Article VI(1) restates customary international law that a host State is not liable for losses or damage sustained by a foreigner due to war, armed conflict or other civil disturbances.[164] Article VI(1) imposes a non-discrimination obligation of compensation to host states and does not create substantive rights to restitution or compensation beyond the non-discrimination standard, which depends on measures taken by the host state in relation to these investors.[165] Therefore, it can

[160] AAPL(I), p.580.
[161] *Ibid*, pp.580, 589.
[162] Sebastián Mantilla Blanco, p.603.
[163] LESI, ¶¶174-175.
[164] AAPL(I), p.589.
[165] Christoph Schreuer, p.12; AAPL(II), ¶¶65-67; LG&E, ¶¶ 243-244; Enron, ¶320.

only be invoked when Respondent has taken measures to compensate its own investors or investors from third countries whose situation is similar to Claimant.

145. *In casu*, Respondent has not compensated any investor under similar conditions.[166] Therefore, Claimant should not get compensation.

C. Article VI(2) also precludes Claimant from receiving compensation since the requirement for compensation under war circumstances is not met

146. Article VI(2), also called EWC only deals with harms caused by state organs.[167] Therefore, the destruction of Odin was the only fact within the scope. According to case *AAPL(II)*, EWC should only be applicable in case with cumulative existence of the stated factors.[168]

147. According to Article VI(2), Claimant could receive compensation in the cumulative existence of the three factors. However, Respondent submits that all of the factors could not be satisfied. First, the loss of Odin does not result from requisition by Rhekian forces **[1]**. Second, the destruction of property in Odin was caused by combat action **[2]**. Third, the destruction of property in Odin was required by the necessity of the situation **[3]**.

1. The loss in Odin does not result from requisition by Rhekian forces

148. Requisition is a formal authoritative demand in belligerent occupation for the temporary or permanent use of movable or immovable property or services, in return for compensation.[169]

149. *In casu*, the Rhekia troops were billeted in the work camp accommodations.[170] However, the destruction of Odin happened several months later, and the purpose

[166] Response to Request, p.24, ¶22.
[167] Christoph Schreuer, p.12.
[168] AAPL(II), ¶57.
[169] Ira Ryk-Lakhman, p.147.
[170] Facts, p.63, ¶42.

was to prevent the rebel groups from producing food.[171] Therefore, the loss was not caused by requisition, but inevitably caused by the destruction for military needs.

150. Therefore, the causal link between requisition and loss of Odin was not satisfied.

2. The destruction of property in Odin was caused in combat action

151. According to case *AAPL(II)*, the term combat action shall be understood under prevailing circumstances commonly and fairly.[172] During civil war, combat action also includes retreating and sporadic surprise attacks.[173] Hence, combat action undertaken against insurgents could be extended to vast areas in which the hit and run operations, as well as the governmental counter-insurgency activities could take place.[174]

152. *In casu*, during the civil war, a number of buildings near and around Odin were ransacked. Failing to protect the buildings from rebel groups, Rhekia troops retreated into the center of Odin. However, the rebel groups were still pushing forwards, and were also engaged at the time of the attack on Odin.[175]

153. Therefore, the losses were caused by combat action.

3. The destruction of property in Odin was required by the necessity of the situation

154. To interpret the treaty, Article 31 (3)(c) of the VCLT stated that "*any relevant rules of international law applicable in the relations between the parties*" shall be taken into account.[176] Pursuant to it, the term "*the necessity of the situation*"

[171] *Ibid*
[172] AAPL(II), ¶61.
[173] *Ibid*.
[174] *Ibid*.
[175] PO3, p.91, ¶10.
[176] VCLT, Article 31(3)(c)

in Article VI(2) of the BIT shall be interpreted and determined under the international humanitarian law since both Athabasca and Rhekia are contracting parties to the the Geneva Conventions system and the Hague Conventions system.[177] And according to international humanitarian law, the attack on military objectives was permitted as long as the principle of distinction and proportionality are met.

155. *In casu*, Respondent submits that both the principle of distinction **[i]** and the principle of proportionality **[ii]** have been satisfied.

i. The principle of distinction was satisfied

156. Regarding the principle of distinction, Odin was a military objective, defined as objects which

> "*by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction (…) in the circumstances (…) offers a definite military advantage*".[178]

157. *In casu*, Odin was a large plant capable of food production[179] and the militias' pushing toward Odin was slower for concerns of an insufficient supply of food[180]. Therefore, Odin would effectively contribute to the militia for food supply if it had not been destroyed, and the destruction before the upcoming seizure did create a definite military advantage for the Rhekian military by cutting the supplies for the future.

ii. The principle of proportionality was satisfied

158. Claimant may contend that the buildings not especially used for food production

[177] PO3, p.90, ¶2.
[178] Henckaerts & Beck, p.29.
[179] Facts, p.64, ¶42.
[180] *Ibid*, p.64, ¶43.

were not military objectives and should not be damaged. However, Respondent submits that regarding the principle of proportionality, this requirement does not prohibit attacks on non-military targets as long as the incidental damage is not excessive in relation to the military advantage anticipated.[181]

159. *In casu*, the destruction of buildings other than buildings for food production was inevitable and negligible. After the destruction of the 9,800 m^2 area mainly used for agricultural areas,[182] the militias would suffer from food shortage and would be easier to defeat. Since the vast majority of Odin was agricultural areas, it is inevitable to destruct other areas such as accommodation areas because they took up only a small part of the whole Odin. The incidental damage to accommodations was not excessive to the military advantages anticipated. Therefore, the principle of proportionality was satisfied.

160. Based on the foregoing, the destruction to Odin has satisfied the factors in Article VI(2). Therefore, the Tribunal could not award compensation to Claimant based on Article VI(2).

161. All in all, the two paragraphs of War clause preclude Claimant from receiving compensation.

V. Claimant is not entitled to compensation for moral damages

162. Claimant may contend that the rumors in media reports and the investigation are attributable to Rhekia government, which lead to the rejection of the loan from Braavos and the loss in the stock market, and hence claim for moral damage. However, Respondent submits that the Tribunal should not award compensation for moral damages for three reasons. First, the claim for moral damages cannot be established because the main claim fails **[A]**. Moreover, a claim for moral

[181] Henckaerts & Beck, p.46.
[182] Facts, p.59, ¶19.

damages by Claimant should be rejected for its attempt to obtain punitive damages, which is prohibited under Article XX(5) of the BIT **[B]**. Third, even if Respondent has violated the BIT and moral damages are not punitive damages, moral damages still cannot be established in this case for failing to satisfy the precondition and the threshold **[C]**.

A. The claim for moral damages cannot be established because the main claim fails

163. If the main claim fails, there can be no claim for moral damages.[183] According to cases *SGS*[184] and *Aven*[185], any damage or compensation is based on the breach of obligations under BIT.

164. The main claim here refers to issue 3, that is, the breach of FPS. However, as aforementioned, Rhekia did not violate the obligation of FPS. Thus, the relevant moral damage is ill-founded.

165. Moreover, even if FPS is breached, the claim for moral damage still fails because FPS clause didn't cover the breach which gives rise to reputational loss. Here, Claimant may contend that the moral damage is caused mainly by the investigation[186] and rumors that Sutton was involved in militia troops[187]. However, these are not included in the scope of FPS obligation. Instead, the stability of the business environment and legal security are characteristic of FET, while FPS primarily seeks to protect the inve stment from physical harm.[188] Since the rumors and the legal investigation definitely do not belong to physical harm, the breach of FPS would not bring about moral damage.

[183] Inna Uchkunova, p.382.
[184] SGS, ¶150.
[185] Aven, ¶688.
[186] Facts, p.65, ¶52.
[187] *Ibid*, p.61, ¶30.
[188] Nartnirun Junngam, p.77.

166. Therefore, the claim for relevant moral damage failed due to the failure of the main claim.

B. A claim for moral damages by Claimant should be rejected for its attempt to obtain punitive damages, which are prohibited under Article XX (5) of the BIT

167. Respondent submits that the award of punitive damages is not recognized in international investment law, and also violated the BIT **[1]**. Moreover, a claim for moral damage is an attempt to obtain punitive damages **[2]**.

1. The award of punitive damages is not recognized in international investment law, and violated the BIT

168. Punitive damages refer to the "payment of damages in addition to actual (compensatory) damages when the defendant acted with recklessness, malice, deceit, or other reprehensible conduct.[189]

169. The concept is not recognized under international law. As explained by ARSIWA Commentaries:

> "*The function of compensation is to address the actual losses incurred as a result of the internationally wrongful act (…) It is not concerned to punish the responsible Stat.*"[190]

170. Investor-state arbitral tribunals have also refused to award punitive damages.[191] The reason is that punitive damages are incompatible with the idea of "*reparation*"[192] and are "*not compensatory in nature*"[193].

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[189] Stephan Wittich, p.667; Patrick Dumberry, p.275.
[190] ARSIWA commentaries, Article 36, Commentary 4, p.99.
[191] Patrick Dumberry, p.276.
[192] CMS, ¶404.
[193] Siag, ¶¶544-545.

171. *In casu*, punitive damages are explicitly banned in the BIT. Article XX (5) of the BIT expressly stipulates that "*a tribunal may not award punitive damages*."[194]

2. A claim for moral damage is an attempt to obtain punitive damages

172. Respondent submits that a separate claim for pecuniary compensation for moral damages is punitive for two reasons. First, a simple declaration of illegality is enough to redress moral damage **[i]**. Second, even if pecuniary compensation is not punitive, the monetary compensation for material damage is enough to make up small moral injuries **[ii]**.

i. A simple declaration of illegality is enough to redress moral damages

173. Respondent admits that moral damage could exist, and also should be repaired.[195] However, moral damage does not deserve monetary compensation, because it would have been repaired in a non-pecuniary way, that is, a declaration of illegality.[196] The same opinion also appeared in case *Biwater* and case *Arif*.

174. In case *Biwater*, there's no material damage caused by Tanzania. In this situation, the tribunal held that moral damage alone is of no monetary value, a declaratory relief could repair it appropriately.[197] Therefore, where there's a nominal breach to reputation, a mere declaration of illegality could suffice to provide appropriate redress.[198]

175. Further, the tribunal in case *Arif* opinioned as follows:

> "*A pecuniary premium for compensation (...) in addition to the compensation of economic damages, would have an enormous impact*

[194] BIT, Article XX(5).
[195] ARSIWA, Article 31.
[196] Conway Blake, p.403; Juan Pablo Moyano García, p.26.
[197] Biwater, ¶807.
[198] Conway Blake, p.403; Juan Pablo Moyano García, p.12; Siag, ¶545.

on the system of contractual and tortious relations. It would systematically create financial advantages for the victim which go beyond the traditional concept of compensation." [199]

176. Therefore, the pecuniary compensation accords the injured party an extra amount in addition to the actual loss, thus punishing Respondent in breach, which shares the nature of punitive damages.

177. In addition, Claimant may also refer to case *Desert Line*[200] and case *Benvenuti*[201] and argue that arbitral tribunals could award monetary compensation for moral damages. However, the only two cases could not construe an acceptable standard of principle for awarding pecuniary compensation in exceptional circumstances.[202] Instead, even if the moral damage was claimed in extreme cases, awarding a separate pecuniary compensation for moral damage is still punitive.

178. In case *Desert Line*[203] and case *Benvenuti*[204], the tribunals awarded only a little of the amount that Claimant originally requested. The award of case *Benvenuti & Bonfant* reads as follows, "*the Tribunal deems it equitable to award it the amount of CFA5,000,000 for moral damage.*" Therefore, the monetary compensation for moral damage was decided *ex aequo et bono* and could only be a symbolic amount. The reason behind was explained by *Cementownia* tribunal that a symbolic compensation for moral damages *"may indeed aim at indicating a condemnation.*"[205] This further proved Respondent's submission that pecuniary compensation for moral damage is actually intended to punish the host states.

179. Therefore, a simple declaration of illegality is enough to redress moral damage.

[199] Arif, ¶592.
[200] Desert Line, ¶¶284, 290.
[201] Benvenuti & Bonfant, ¶¶4.95, 4.96.
[202] Conway Blake, p.403; Juan Pablo Moyano García, p.15; Siag, ¶545.
[203] Desert Line, ¶¶284, 290.
[204] Benvenuti & Bonfant, ¶¶4.95, 4.96.
[205] Cementownia, ¶171.

The claim for monetary compensation for moral damage shares the character with punitive damages.

ii. Even if pecuniary compensation for moral damage is not punitive, the monetary compensation for material damage is enough to make up small moral injuries

180. According to case *Lemire*, the moral aspects of injuries can be compensated through compensation for material damages.[206]

181. In assessing moral damages, there are actually no absolute rules or exact methods to quatify damages[207] and this amount is at the entire discretion of the arbitral tribunals.[208] Under customary international law, there is a quantification method called fair market value,[209] which includes goodwill and other financial detriments as factors when assessing material damage.[210] Thus, the concern for reputation loss has already been reflected in the effects of the award for material damage.[211]

182. *In casu*, the prerequisite, malice, for awarding compensation for moral damage, the loss of stock market as well as the rejection of loan from Braavos[212], if existed, could be covered by the compensation for breach of FPS.

183. Therefore, a separate pecuniary compensation for moral damage could not be awarded because it is punitive.

C. Even if Respondent has violated the BIT and moral damages are not punitive damages, moral damages still cannot be established in this case

[206] Lemire, ¶ 344.
[207] Conway Blake, p.401; Juan Pablo Moyano García, p.26.
[208] Desert Line, ¶297.
[209] ARSIWA commentaries, Article 36, commentary 22, p.102.
[210] Juan Pablo Moyano García, p.497; Borzu Sabahi, p.137.
[211] Swisslion, ¶350.
[212] Facts, p.66, ¶53.

184. Respondent submits that Claimant has failed to satisfy the prerequisite, malice, for a claim for moral damages **[1]** and that Claimant has failed to meet the high threshold set by arbitral tribunals to justify an award for moral damages **[2]**.

1. Claimant has failed to satisfy the prerequisite, malice, for a claim for moral damages

185. Malice is a prerequisite for moral damage. The tribunal *Desert Line* used malice as an element to justify the liability of the host state to repair the moral damage[213], while *Inmaris Perestroika* tribunal did not award compensation for moral damage due to lack of malice of the host state[214].

186. Actually, the element of "*egregious conduct*", which is required in many investor-state arbitral tribunals in extreme cases[215], also includes the nature of malice[216], which further proves that malice is a precondition for moral damages.

187. "Malice" in this context exists where the defendant intentionally engaged in a harmful act without legal justification.[217]

188. *In casu*, Rhekia launched an investigation towards individuals suspected of involvement in paramilitary groups.[218] However, the purpose of investigation is not to spoil Sutton's reputation intentionally, but to maintain domestic order and clarify the rumors.[219] Besides, the investigation was launched in accordance with the due processes of the law,[220] not "*without legal justification*".

189. Therefore, moral damage could not be established in this case for lack of malice.

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213 Desert Line, ¶290.
214 Inmaris Perestroika, ¶428.
215 Siag, ¶¶544-545.
216 Stephen Jagusch, p.54.
217 Viking Forest, ¶21.
218 Facts, p.65, ¶5.
219 Response to Request, p.21, ¶5.
220 Facts, p.65, ¶52.

2. Claimant has failed to meet the high threshold set by arbitral tribunals to justify an award for moral damages

190. The tribunal in case *Desert Line* introduced the "*exceptional circumstances*"[221] requirement of the moral damages, which is also called "*gravity test*". According to case *Lemire,* the gravity test is constituted of egregious conduct, grave and substantial moral damage, and a causal link between them.[222]

191. In this regard, Respondent submits that the three elements of gravity test were not satisfied. First, Claimant has failed to prove the egregious conduct of Respondent **[i]**. Moreover, Claimant has failed to meet the gravity standard of moral damage **[ii]**. Third, Claimant's exhibits have failed to provide sufficient evidence of direct causal link **[iii]**.

i. Claimant has failed to prove the egregious conduct of Respondent

192. To prove the egregious conduct of Rhekia government, there are two steps. First, the alleged conduct belongs to state action. And second, the alleged conduct is egregious.

193. For the first question, Article 4 of ARSIWA stated as follows:

> "*The conduct of any State organ shall be considered an act of that State under international law…An organ includes any person or entity which has that status in accordance with the internal law of the State.*"[223]

194. As to the "*person or entity which has the status*", it is explained in the commentaries to Article 2 that states can act only by and through their agents and

[221] Desert Line, ¶289.
[222] Lemire, ¶333.
[223] ARSIWA, Article 4.

representatives.[224]

195. *In casu*, both media report in Exhibit C5[225] and the whistle-blower's twitter in Exhibit C6[226] are out of the range of State Organs, meaning that the information provided does not belong to state actions and is imputable to Rhekia.

196. For the second question, the tribunal in case *Lemire* stipulates that Claimant must show the presence of egregious conduct in the form of "*ill-treatment*" which "*contravenes the norms according to which civilized nations are expected to act*".[227]

197. *In casu*, as to Mr. Rokari's behavior in C5, he declined to meet with Sutton representatives and thus could be included in the conduct of State organ.[228] However, the standard of gravity could not be met since Rhekia "*can't be seen taking a side*" and should prioritize "*the third innocent investors*".[229] The reason why Mr. Rokari reacted this way is that the war rose from contradiction on cannabis industry lawfulness,[230] and the Sutton Plants in many ways proved to be a catalyst for the war.[231] Despite the factors listed above, troops were still arranged to offer help within 48 hours.[232] Therefore, the gravity of egregious conduct could not be established.

198. Claimant may also refer to "*videos that were published of Rhekian leaders publicly calling the cannabis industry nefarious*", and their conduct of alleging "*their involvement in instigating and funding the civil conflict*".[233] The public comment could be regarded as state action, however, Claimant did not hand in

[224] ARSIWA commentaries, Article 2, commentary 5, p.35.
[225] Claimant's Exhibit C5, p.16, ¶7.
[226] Claimant's Exhibit C6, p.17.
[227] Stephen Jagusch, p.61; Lemire, ¶333.
[228] Claimant's Exhibit C5, p.16, ¶6.
[229] *Ibid*.
[230] Facts, p.59, ¶¶26-27.
[231] *Ibid*, p.62, ¶37.
[232] *Ibid*, p.63, ¶39.
[233] *Ibid,* p.63, ¶41.

corresponding exhibits, thus failing to provide sufficient evidence. Besides, there are multiple companies investing in the Rhekia cannabis industry[234] and there is no evidence showing that Rhekia government particularly refers to Sutton investment. Therefore, the standard of egregious conduct was not reached.

199. As for the investigation, it has also failed to satisfy the egregious standard. The tribunal in case *Rompetrol* "*declined to find that the criminal investigations were per se illegal*".[235] A conduct in legal could not be egregious at the same time. The investigation does not belong to "*ill-treatment*".

200. Therefore, the first element of egregious conduct is not satisfied.

ii. Claimant's exhibits failed to provide sufficient evidence of moral harm and the alleged moral damages did not meet the standard of being substantial or grave

201. As to moral damage, relevant cases generally refer it to injury to feelings and loss of reputation.

202. For injury to feelings, moral damage may be awarded only to an individual. Corporations can only claim for losses in income or profits but not for feelings, because "*a company cannot be injured in its feelings, it can only be injured in its pocket*".[236]

203. *In casu*, Claimant may contend that the employees suffer from mental injuries such as fears or anxiety. However, as aforementioned, the moral injuries of the employees do not belong to moral damages of the corporation. The company would not suffer for losses in its income since general employees are replaceable and the pain of the employees would not affect the operation of the investment.

[234] *Ibid*, p.58, ¶16.
[235] Rompetrol, ¶286.
[236] Stephen Jagusch, p.56-57.

204. For reputation and credit loss, the main question is to determine whether the loss inflicted is grave, as well as whether there's sufficient evidence to prove it. The tribunal in case *Lemire* refused the moral damage because "*the injury suffered cannot be compared to that caused by armed threats, by (…) deaths or by other similar situations in which Tribunals in the past have awarded moral damages*".[237] That is the specific standard of "*grave"* moral harm.

205. Claimant may also refer to the investigation launched by Rhekia government[238] and argue that the stock market and bank credit were severely damaged due to the investigation. However, the injury of Sutton's reputation, if exist, does not come from situations as severe as war and could not satisfy the gravity standard listed above.

206. Therefore, moral damage, the second element of the test, is not established.

iii. Claimant's exhibits have failed to provide sufficient evidence of direct causal link

207. Regarding the causality, the tribunal in case *Lemire* agrees that the causal relationship between damages and unlawful conduct should be proved sufficiently close, that is, not "too remote".[239] In this regard, reference may be made to losses "*attributable to the wrongful act as a proximate cause*".[240] Also, according to case *Lemire*, the proximity of causal link can be established if the connection between the act and the loss is both clear and unbroken, which means the Tribunal has to decide whether the loss was caused by Respondent's conducts, or caused by other factors.[241]

208. However, *in casu*, the investigation did not necessarily lead to the loss of loan to

[237] Lemire, ¶339.
[238] Request for Arbitration, p.6, ¶24.
[239] Lemire, ¶155.
[240] ARSIWA Commentaries, Article 31, Commentary 10, p.92.
[241] Lemire, ¶169; Swisslion, ¶¶348-349.

Claimant. The State Bank of Braavos conducted "*a thorough examination of the circumstances of Sutton's investment in Rheika*".[242] There were other influencing factors such as the unstable political climate and the diverging attitudes to cannabis industry of Rheikan people[243] which were taken into consideration by the Braavos and the stock market. Therefore, Sutton may have suffered from reputation loss, but it is not related to state wrongful act, but a result of other factors. Thus, there was no direct causal link between the investigation and the result.

209. Since all the three elements of the gravity test cannot be satisfied, Respondent submits that Claimant is not entitled to moral damages.

[242] Claimant's Exhibit C7, p.18, ¶2.
[243] Facts, p.59, ¶¶20-36.

PRAYER FOR RELIEF

Claimant respectfully requests the Tribunal to:

[1]. **DECLINE** its jurisdiction over the present dispute, in light of Respondent's claim of the application of the *res judicata* rule;

[2]. **DECLINE** its jurisdiction over the present dispute in light of the application of the exhaustion of local remedies rule under the treaty in question;

[3]. **FIND** that Respondent has not violated FPS standard under Article V of the BIT;

[4]. **DECIDE** that of Article VI of the BIT precludes Claimant from receiving compensation;

[5]. **REJECT** Claimant's moral damages claim.

On behalf of Respondent

Team Ferrari

BACK COVER