

**TELDERS INTERNATIONAL LAW MOOT COURT
COMPETITION**

2018

The Plight of the Dandy Narwhals

(Alfania v. Barbarossa)

Written Memorial on behalf of *Barbarossa*

(Respondent)

Registration-Number:

6B

(a) Table of Contents

(a) Table of Contents ii

(b) List of Abbreviations..... iii

(c) List of Sources..... viii

(d) Statement of Relevant Facts..... xxix

(e) Issues xxxiii

(f) Summary of Arguments..... xxxvi

(g) Jurisdiction of the Court..... xxxix

(h) Argument..... 1

(i) Submissions 25

(j) Annex I

(b) List of Abbreviations

AC	Appeal Cases
Add.	Addendum
AES	Applied Energy Services
A.G.	Aktiengesellschaft
AJIL	American Journal of International Law
<i>Angels</i>	<i>Angels Tours</i>
Art./Arts	Article(s)
A.S.	Aktieselkab
BCLR	Boston College Law Review
BG	British Gas
BIT/BITs	Bilateral Investment Treaty(-ies)
C	Case
C.A.	Compañía anónima
cf.	Confer
ch.	Chapter
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CJIL	Chicago Journal of International Law
Co.	Company
CONF.	Conference
Corp.	Corporation
DALT	Draft Articles on the Law of Treaties
DARS	Draft Articles on the Responsibility of States for Internationally Wrongful Acts

DADP	Draft Articles on Diplomatic Protection
Doc.	Document
DRC	Democratic Republic of the Congo
EC	European Communities
ECJ	European Court of Justice
ECLI	European Case Law Identifier
Ed./Eds	Editor(s)
EEC	European Economic Community
ELSI	Elettronica Sicola S.p.A.
<i>et al.</i>	<i>et alii</i>
EU	European Union
f./ff.	And the following page(s)
FELR	Fordham Environmental Law Review
FILJ	Foreign Investment Law Journal
fn.	Footnote
FTA	Free Trade Agreement
GA	United Nations General Assembly
GATS	General Agreement on Trade in Services
GNI	Gross National Income
<i>Government</i>	<i>Government of Barbarossa</i>
<i>High Representative</i>	<i>High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States</i>
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment

	Disputes
i.e.	<i>Id est</i>
IIL	International Investment Law
ILC	International Law Commission
Inc.	Incorporated
ITLOS	International Tribunal for the Law of the Sea
J. ENVTL.	Journal for Environmental Law
JEQ	Journal of Environmental Quality
J. Transnat'l L. & Pol'y	Journal of Transnational Law and Policy
km	Kilometre
LDC	Least Developed Country
LG&E	Louisville Gas and Electric
LIEI	Legal Issues of Economic Integration
LJIL	Leiden Journal of International Law
LP	The Law and Practice of International Courts and Tribunals
L.P.	Limited Partnership
Ltd.	Limited
Mfg.	Manufacturing
<i>Minister of Environment</i>	<i>The Minister of Environment of Barbarossa</i>
MJIL	Michigan Journal of International Law
MPEPIL	Max Planck Encyclopedia of Public International Law
MPYUNL	Max Planck Yearbook of United Nations Law
Narwhal/Narwhals	Dandy Narwhal(s)
NGO	Nongovernmental Organisation

NILR	Netherlands International Law Review
No./Nos	Number(s)
NYIL	Netherlands Yearbook of International Law
p./pp.	Page(s)
para./paras	Paragraph(s)
PCIJ	Permanent Court of International Justice
Plc.	Public Limited Company
Protected Area	Lake Theth Protected Area
Res.	Resolution
<i>Rocacorba</i>	<i>Rocacorba Holidays</i>
S.A.	Sociedad Anónima
<i>Sacalm</i>	<i>Sacalm Holidays</i>
SCdB	Société Commerciale de Belgique
Ser.	Series
SOABI	Société Ouest Africaine des Bétons Industriels
S.p.A.	Società per azioni
TACK	Treaty of Amity, Commerce, and Kinship
UK	United Kingdom of Great Britain and Northern Ireland
UKHL	United Kingdom House of Lords
UKPC	Privy Council of the United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHRC	United Nations Commission of Human Rights

<i>UoB</i>	<i>University of Barbarossa</i>
U.S.	United States (of America)
v.	Versus
VCLT	Vienna Convention of the Law of Treaties
Vol./Vols	Volume(s)
WTO	World Trade Organisation

(c) List of Sources

I. Treaties

1. Multilateral Treaties

Convention on Certain Questions Relating to the Conflict of Nationality Law, adopted on 12 April 1930, entered into force on 1 July 1937, League of Nations Treaty Series No. I-4137, Vol. 179, pp. 89-114 (hereinafter cited as: Hague Convention on Nationality).

Charter of the United Nations, adopted on 26 June 1945, entered into force on 24 October 1945, United Nations Treaty Series No. I-XVI (hereinafter cited as: UN Charter).

Constitution of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), adopted by the UNESCO General Conference on 16 November 1945, in: Basic Texts, UNESCO, 2014, pp. 5-18 (hereinafter cited as: UNESCO Constitution).

Convention on the Settlement of Investment Disputes between States and Nationals of other States, adopted on 18 March 1965, entered into force on 14 October 1966, United Nations Treaty Series No. I-8359, Vol. 575, pp. 159-235 (hereinafter cited as: ICSID Convention).

International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, entered into force on 3 January 1976, United Nations Treaty Series No. I-14531, Vol. 993, pp. 3-106 (hereinafter cited as: International Covenant on Economic, Social and Cultural Rights).

International Covenant on Civil and Political Rights, adopted on 16 December 1966, entered into force on 23 March 1976, United Nations Treaty Series No. I-14668, Vol. 999, pp. 171-346 (hereinafter cited as: International Covenant on Civil and Political Rights).

Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force on 27 January 1980, United Nations Treaty Series No. I-18232, Vol. 1155, pp. 331-512 (hereinafter cited as: VCLT).

Convention concerning the Protection of the World Cultural and Natural Heritage, adopted on 16 November 1972, entered into force on 17 December 1975, United Nations Treaty Series No. I-15511, Vol. 1037, pp. 151-211 (hereinafter cited as: World Heritage Convention).

Convention on International Trade in Endangered Species of Wild Fauna and Flora, adopted on 3 March 1973, entered into force on 1 July 1975, United Nations Treaty Series No. I-14537, Vol. 993, pp. 243-417 (hereinafter cited as: CITES).

Convention on Biological Diversity, adopted on 5 June 1992, entered into force on 29 December 1993, United Nations Treaty Series No. I-30619, Vol. 1760, pp. 79-308 (hereinafter cited as: Convention on Biological Diversity).

General Agreement on the Trade in Services, Annex 1B to the Marrakesh Agreement establishing the World Trade Organisation, adopted on 15 April 1994, entered into force on 1 January 1995, United Nations Treaty Series No. I-31874, Vols 1867, 1868 (hereinafter cited as: GATS).

Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, adopted on 21 June 1997, Council of Europe, European Treaty Series No. 150 (hereinafter cited as: Convention on Civil Liability).

European Convention on Nationality, adopted on 6 November 1997, entered into force on 1 March 2000, Council of Europe, European Treaty Series No. 166 (hereinafter cited as: Convention on Nationality).

Convention for the Safeguarding of the Intangible Cultural Heritage, adopted by the UNESCO General Conference on 17 October 2003, entered into force on 20 April 2006, United Nations Treaty Series No. I-42671, Vol. 2368, pp. 3-94 (hereinafter cited as: Convention on Intangible Cultural Heritage).

Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted on 20 October 2005, entered into force on 18 March 2007, United Nations Treaty Series No. I-43977, Vol. 2440, pp. 311-438 (hereinafter cited as: Convention on Cultural Diversity).

2. Bilateral Investment Treaties

The Republic of Malta-The Republic of France BIT, Valetta, adopted on 11 August 1976, entered into force on 1 January 1978 (hereinafter cited in Annex as: Malta-France BIT, 1976).

UK-Belize BIT, Belmopan, adopted and entered into force on 30 April 1982 (hereinafter cited as: UK-Belize BIT, 1982).

U.S.-The Republic of Senegal BIT, Washington, adopted on 6 December 1983, entered into force on 25 October 1990 (hereinafter cited as: U.S.-Senegal BIT, 1983).

U.S.-The Republic of Tunisia BIT, Washington, adopted on 15 May 1990, entered into force on 7 February 1993 (hereinafter cited in Annex as: U.S.-Tunisia, 1990).

U.S.-The Democratic Socialist Republic of Sri Lanka BIT, Colombo, adopted on 20 September 1991, entered into force on 1 May 1993 (hereinafter cited in Annex as: U.S.-Sri Lanka, 1991).

Lithuania-Ukraine BIT, Vilnius, adopted on 8 February 1994, entered into force on 6 March 1995 (hereinafter cited in Annex as: Lithuania-Ukraine BIT, 1994).

U.S.-Ukraine BIT, Washington, adopted on 4 March 1994, entered into force on 16 November 1996 (hereinafter cited in Annex as: U.S.-Ukraine BIT, 1994).

U.S.-Trinidad and Tobago BIT, Washington, adopted on 26 September 1994, entered into force on 26 December 1996 (hereinafter cited in Annex as: U.S. Trinidad and Tobago BIT, 1994).

U.S.-The Republic of Honduras BIT, Denver, adopted on 1 July 1995, entered into force on 11 July 2001 (hereinafter cited as: U.S.-Honduras BIT, 1995).

Albania-Israel BIT, Jerusalem, adopted on 29 January 1996, entered into force on 18 February 1997 (hereinafter cited in Annex as: Albania-Israel BIT, 1996).

Albania-The Portuguese Republic BIT, Lisbon, adopted on 11 September 1998, entered into force on 10 June 2007 (hereinafter cited in Annex as: Albania-Portugal BIT, 1998).

The Republic of France-The United Mexican States BIT, Mexico City, adopted on 12 November 1998, entered into force on 12 October 2000 (hereinafter cited in Annex as: France-Mexico BIT, 1998).

The Russian Federation-Ukraine BIT, Moscow, adopted on 27 November 1998, entered into force on 27 January 2000 (hereinafter cited in Annex as: Russia-Ukraine BIT, 1998).

The Republic of Argentina-New Zealand BIT, Buenos Aires, adopted and entered into force on 27 August 1999 (hereinafter cited in Annex as: Argentina-New Zealand BIT, 1999).

The People’s Republic of China-Islamic Republic of Iran BIT, Beijing, adopted in June 2000, entered into force on 1 July 2005 (hereinafter cited as: China-Iran BIT, 2000).

The Republic of Turkey-The Federal Democratic Republic of Ethiopia BIT, Addis Ababa, adopted on 16 November 2000, entered into force on 10 March 2005 (hereinafter cited as: Turkey-Ethiopia BIT, 2000).

Bosnia and Herzegovina-Ukraine BIT, Sarajevo, adopted on 13. March 2002, entered into force on 22 January 2004 (hereinafter cited in Annex as: Bosnia and Herzegovina-Ukraine BIT, 2002).

The Federal Democratic Republic of Ethiopia-The Republic of France BIT, Paris, adopted on 23 June 2003, entered into force on 7 August 2004 (hereinafter cited in Annex as: Ethiopia-France BIT, 2003).

The Islamic Republic of Afghanistan-The Republic of Turkey BIT, Kabul, adopted on 10 July 2004, entered into force on 19 July 2005 (hereinafter cited in Annex as: Afghanistan-Turkey BIT, 2004).

The Federal Republic of Germany-The Islamic Republic of Afghanistan BIT, Berlin, adopted on 19 and 20 April 2005, entered into force on 12 October 2007 (hereinafter cited in Annex as: Germany Afghanistan BIT, 2005).

U.S.-The Oriental Republic of Uruguay BIT, Mar del Plata, adopted on 4 November 2005, entered into force on 1 November 2006 (hereinafter cited in Annex as: U.S.-Uruguay BIT, 2005).

Japan-The Republic of Peru BIT, Lima, adopted on 21 November 2008, entered into force on 10 December 2009 (hereinafter cited in Annex as: Japan-Peru BIT, 2009).

3. Free Trade Agreements

Canada-The Republic of Chile FTA, Santiago, adopted on 5 December 1996, entered into force on 5 July 1997 (hereinafter cited in Annex as: Canada-Chile FTA).

U.S.-The Republic of Chile FTA, Miami, adopted on 6 June 2003, entered into force on 1 January 2004 (hereinafter cited in Annex as: U.S.-Chile FTA).

II. Cases

1. ICJ/PCIJ Cases

a. Judgments/Advisory Opinions

Case concerning German Interests in Polish Upper Silesia, Federal Republic of Germany v. Poland, Judgment of 25 May 1926, PCIJ Series A., No. 7; pp. 5-83 (hereinafter cited as: *German Interests in Polish Upper Silesia*).

Case concerning the Factory at Chorzów (Claim for Indemnity), Federal Republic of Germany v. Poland, Judgment of 26 July 1927 (Jurisdiction), PCIJ Series A., No. 9, pp. 5-34 (hereinafter cited as: *Chorzów Factory*).

The Oscar Chinn Case, United Kingdom v. Belgium, Judgment of 12 December 1934, PCIJ Series A./B., No. 63, pp. 65-90 (hereinafter cited as: *Oscar Chinn*).

Société Commerciale de Belgique, Belgium v. Greece, Judgment of 15 June 1939, PCIJ Series A./B., No. 78, pp. 160-179 (hereinafter cited as: *SCdB*).

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), Advisory Opinion of 18 July 1950, ICJ Report 1950, No. 8, pp. 221-261 (hereinafter cited as: *Interpretation of Peace Treaties*).

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, ICJ Reports 1951, No. 12, pp. 15-30 (hereinafter cited as: *Reservations to the Convention on Genocide*).

Rights of Nationals of the United States of America in Morocco, France v. United States of America, Judgment of 27 August 1952, ICJ Reports 1952, No. 11, pp. 176-214 (hereinafter cited as: *Rights of U.S. Nationals in Morocco*).

Nottebohm Case (Second Phase), Liechtenstein v. Guatemala, Judgment of 6 April 1955, ICJ Reports 1955, No. 18, pp. 4-27 (hereinafter cited as: *Nottebohm*).

Barcelona Traction, Light and Power Company, Limited (Second Phase), Belgium v. Spain, Judgment of 5 February 1970, ICJ Reports 1970, No. 50, pp. 3-53 (hereinafter cited as: *Barcelona Traction*).

Nuclear Tests Case, Australia v. France, Judgment of 20 December 1974, ICJ Reports 1974, No. 58, pp. 253-274 (hereinafter cited as: *Nuclear Tests*).

Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, Canada/United States of America, Judgment of 12 October 1984, ICJ Reports 1984, No. 67, pp. 246-352 (hereinafter cited as: *Maritime Boundary*).

Elektronika Sicula S.p.A. (ELSI), United States of America v. Italy, Judgment of 20 July 1989, ICJ Reports 1989, No. 76, pp. 15-82 (hereinafter cited as: *ELSI*).

Land, Island and Maritime Frontier Dispute, El Salvador/Honduras: Nicaragua intervening, Judgment of 11 September 1992, ICJ Reports 1992, No. 75, pp. 351-618 (hereinafter cited as: *Frontier Dispute*).

Case concerning the Territorial Dispute, Libyan Arab Jamahiriya/Chad, Judgment of 3 February 1994, ICJ Reports 1994, No. 83, pp. 6-41 (hereinafter cited as: *Territorial Dispute*).

Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Qatar v. Bahrain, Judgment of 15 February 1995, ICJ Reports 1995, No. 87, pp. 6-26 (hereinafter cited as: *Maritime Delimitation*).

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports 1996, No. 95, pp. 226-267 (hereinafter cited as: *Nuclear Weapons*).

Case concerning Oil Platforms, Islamic Republic of Iran v. United States of America, Preliminary Objection, Judgment of 12 December 1996, ICJ Reports 1996, No. 90, pp. 803-821 (hereinafter cited as: *Oil Platforms*).

Case concerning the Gabčíkovo-Nagymaros Project, Hungary/Slovakia, Judgment of 25 September 1997, ICJ Reports 1997, No. 92, pp. 7-84 (hereinafter cited as: *Gabčíkovo-Nagymaros Project*).

Kasikili/Sedudu Island, Botswana/Namibia, Judgment of 13 December 1999, ICJ Reports 1999, No. 98, pp. 1045-1109 (hereinafter cited as: *Kasikili/Sedudu Island*).

Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan, Indonesia/Malaysia, Judgment of 17 December 2002, ICJ Reports 2002, No. 102, pp. 625-686 (hereinafter cited as: *Sovereignty over Pulau Ligitan and Pulau Sipadan*).

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004, No. 131, pp. 136-203 (hereinafter cited as: *Palestinian Wall*).

Case concerning Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of the Congo, Preliminary Objections, Judgment of 24 May 2007, ICJ Reports 2007, No. 103, pp. 582-618 (hereinafter cited as: *Diallo Case*).

Certain Questions of Mutual Assistance in Criminal Matters, Djibouti v. France, Judgment of 4 June 2008, ICJ Reports 2008, No. 136, pp. 177-247 (hereinafter cited as: *Mutual Assistance in Criminal Matters*).

Case concerning Pulp Mills on the River Uruguay, The Argentine Republic v. The Oriental Republic of Uruguay, Judgment of 20 April 2010, ICJ Reports 2010, No. 135, pp. 14-107 (hereinafter cited as: *Pulp Mills*).

Whaling in the Antarctic, Australia v. Japan: New Zealand Intervening, Judgment of 31 March 2014, ICJ Reports 2014, No. 148, pp. 226-300 (hereinafter cited as: *Whaling in the Antarctic*).

b. Dissenting Opinions

South West Africa (Second Phase), Ethiopia and Liberia v. South Africa, Judgment of 18 July 1966, ICJ Reports 1966, Nos 46, 47, Dissenting Opinion of Judge Tanaka, Second Phase, ICJ Reports 1966, pp. 250-324 (hereinafter cited as: *South West Africa (Dissenting Opinion Tanaka)*).

c. Separate Opinions

Barcelona Traction, Light and Power Company, Limited, Belgium v. Spain, Separate Opinion of Judge Sir Gerald Fitzmaurice, ICJ Reports 1970, pp. 64-113 (hereinafter cited as: *Barcelona Traction (Separate Opinion Fitzmaurice)*).

Case Concerning the Gabčíkovo-Nagymaros Project, Hungary/Slovakia, Separate Opinion of Vice-President Weeramantry, ICJ Reports 1997, pp. 88-119 (hereinafter cited as: *Gabčíkovo-Nagymaros Project (Separate Opinion Weeramantry)*).

2. UN Human Rights Commission

S.B. v. New Zealand, UNHRC No. 475/1991, UN Doc. CCPR/C/50/D/475/1991, 31 March 1994, (hereinafter cited as: *S.B. v. New Zealand*, 1994).

3. Awards by other International Tribunals

a. ICSID

Amco Asia Corp. and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983 (hereinafter cited as: *Amco v. Indonesia*, 1983).

Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal, ICSID Case No. ARB/82/1, Decision on Jurisdiction, 1 August 1984 (hereinafter cited as: *SOABI v. Senegal*, 1984).

Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3, Award, 10 February 1999 (hereinafter cited as: *Goetz v. Burundi*, 1999).

Alex Genin, Eastern Credited Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, 25 June 2001 (hereinafter cited as: *Genin v. Estonia*, 2001).

Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001 (hereinafter cited as: *Salini v. Morocco*, 2001).

Autopista Concesionada De Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, (hereinafter cited as: *Autopista v. Venezuela*, 2001).

Marvin Roy Feldman Karpa v. The United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (hereinafter cited as: *Marvin Feldman v. Mexico*, 2002).

Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, 16 September 2003 (hereinafter cited as: *Generation Ukraine v. Ukraine*, 2003).

Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 (hereinafter cited as: *Tokios Tokelés v. Ukraine*, 2004).

Waste Management, Inc. v. The United Mexican States (“Number II”), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (hereinafter cited as: *Waste Management v. Mexico*, 2004).

Joy Mining Machinery v. The Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (hereinafter cited as: *Joy Mining v. Egypt*, 2004).

AES Corporation v. The Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005 (hereinafter cited as: *AES v. Argentina*, 2005).

CMS Gas Transmission Co. v. The Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005 (hereinafter cited as: *CMS v. Argentina*, 2005).

Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. The Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 (hereinafter cited as: *Bayindir v. Pakistan*, 2005).

LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (hereinafter cited as: *LG&E v. Argentina*, 2006).

Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Award, 17 January 2007 (hereinafter cited as: *Siemens v. Argentina*, 2007).

Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007 (hereinafter cited as: *Enron v. Argentina*, 2007).

Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007 (hereinafter cited as: *Sempra v. Argentina*, 2007).

Archer Daniels Midland Co. and Tate and Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007 (hereinafter cited as: *Archer Daniels v. Mexico*, 2007).

Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008 (hereinafter cited as: *Plama v. Bulgaria*, 2008).

Continental Casualty Co. v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008 (hereinafter cited as: *Continental v. Argentina*, 2008).

Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009 (hereinafter cited as: *Phoenix Action v. Czech Republic*, 2009).

Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Annulment Proceeding, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010 (hereinafter cited as: *Sempra v. Argentina*, Annulment, 2010).

Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010 (hereinafter cited as: *Enron v. Argentina*, Annulment, 2010).

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010 (hereinafter cited as: *Suez v. Argentina*, 2010).

Impregilo S.p.A. v. The Argentine Republic, ICSID Case No. ARB/07/17, Award, 21 June 2011 (hereinafter cited as: *Impregilo v. Argentina*, 2011).

El Paso Energy International Co. v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011 (hereinafter cited as: *El Paso v. Argentina*, 2011).

Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012 (hereinafter cited as: *Occidental v. Ecuador*, 2012).

Standard Chartered Bank v. The United Republic of Tanzania, ICSID Case No. ARB/10/12, Award, 2 November 2012 (hereinafter cited as: *Standard Chartered Bank v. Tanzania*, 2012).

b. Iran-U.S. Claims Tribunal

Amoco International Finance Corp. v. Islamic Republic of Iran, 15 Iran-U.S. Claims Tribunal Reports 189, Award of 14 July 1987 (hereinafter cited as: *Amoco v. Iran*, 1987).

Starrett Housing Corp. v. Iran, 4 Iran-U.S. Claims Tribunal Reports 122, Award of 14 August 1987, pp. 1-59 (hereinafter cited as: *Starrett Housing Corp. v. Iran*, 1987).

c. UNCITRAL

Pope & Talbot Inc. v. The Government of Canada, UNCITRAL, Interim Award, 26 June 2000 (hereinafter cited as: *Pope & Talbot v. Canada*, 2000).

Ronald S. Lauder v. The Czech Republic, UNCITRAL, Award, 3 September 2001 (hereinafter cited as: *Lauder v. Czech Republic*, 2001).

Methanex Corporation v. The United States of America, UNCITRAL, Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002 (hereinafter cited as: *Methanex v. U.S.*, 2002).

Gami Investments, Inc. v. The United Mexican States, UNCITRAL, Award, 15 November 2004 (hereinafter cited as: *Gami v. Mexico*, 2004).

Methanex Corporation v. The United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (hereinafter cited as: *Methanex v. U.S.*, 2005).

BG Group Plc. v. The Argentine Republic, UNCITRAL, Final Award, 24 December 2007 (hereinafter cited as: *BG v. Argentina*, 2007).

National Grid Plc. v. The Argentine Republic, UNCITRAL, Award, 3 November 2008 (hereinafter cited as: *National Grid v. Argentina*, 2008).

d. WTO Panels

EEC – Measures on Animal Feed Proteins, Report of the Panel adopted on 14 March 1978, L/4599 - 25S/49 (hereinafter cited as: *EEC-Animal Feed Proteins*, 1978).

Japan – Taxes on Alcoholic Beverages, Report of the Appellate Body on the 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (hereinafter cited as: *Japan-Alcoholic Beverages*, 1996).

European Communities – Regime for the Importation, Sale and Distribution of Bananas, Ecuador, Guatemala, Honduras, Mexico, United States of America v. European Communities, Report of the Panel on 22 May 1997, WT/DS27/R/ECU (hereinafter cited as: *EC-Bananas III*, 1997).

United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Panel on 15 May 1998, WT/DS58/R (hereinafter cited as: *U.S.-Shrimp*, 1998).

Korea – Taxes on Alcoholic Beverages, Report of the Appellate Body on 18 January 1999, WT/DS75/AB/R, WT/DS84/AB/R (hereinafter cited as: *Korea-Alcoholic Beverages*, 1999).

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Panel on 18 September 2000, WT/DS135/R (hereinafter cited as: *EC-Asbestos*, 2000).

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body on 5 April 2001, WT/DS135/AB/R (hereinafter cited as: *EC-Asbestos*, 2001).

United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the Panel on 10 November 2004, WT/DS285/R (hereinafter cited as: *U.S.-Antigua*, 2004).

United States – Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Report of the Panel on 15 September 2011, WT/DS381/R (hereinafter cited as: *U.S.-Tuna*, 2011).

China – Certain Measures Affecting Electronic Payment Services, Report of the Panel on 16 July 2012, WT/DS413/R (hereinafter cited as: *China-Electronic Payment*, 2012).

Argentina – Measures Relating to Trade in Goods and Services, Report of the Panel on 30 September 2015, WT/DS453/R (hereinafter cited as: *Argentina-Service Measures*, 2015).

Argentina – Measures Relating to Trade in Goods and Services, Report of the Appellate Body on 14 April 2016, WT/DS4353/AB/R (hereinafter cited as: *Argentina-Service Measures*, 2016).

e. International Tribunal for the Law of the Sea

Southern Bluefin Tuna Case, New Zealand v. Japan; Australia v. Japan, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, Nos 3& 4, pp. 280-301 (hereinafter cited as: *Southern Bluefin Tuna*, 1999).

f. International Arbitral Awards

Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals, 15. August 1893, United Nations Reports of International Arbitral Awards, Vol. XXVIII, pp. 263-276 (hereinafter cited as: *Pacific Sea Fur Seal Arbitration*, 1893).

Affaire Goldenberg, Germany v. Romania, Award of 27 September 1928, United Nations Reports of International Arbitral Awards, Vol. II, pp. 901-910 (hereinafter cited as: *Goldenberg Case*, 1928).

Award in the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, 24 May 2005, United Nations Reports of International Arbitral Awards, Vol. XXVII, pp. 35-125 (hereinafter cited as: *Iron Rhine*, 2005).

g. ECJ

Hoffmann-La Roche & Co. A.G. v. Commission of the European Communities, Judgment of the Court of 13 February 1979, Case 85/76, ECLI:EU:C:1979:36 (hereinafter cited as: *Hoffmann-La Roche v. Commission*, 1979).

4. National Jurisprudence

a. United Kingdom

Aron Salomon v. A. Salomon & Co. Ltd., 16. November 1896, UKHL 1, 1897 AC 22 (hereinafter cited as: *Salomon v. Salomon*, 1896).

b. United States

Cannon Mfg. Co. v. Cudahy Packing Co., U.S. Supreme Court, 2 March 1925, United States Reports, Vol. 267, Docket No. 255, pp. 333 ff. ((hereinafter cited as: *Cannon v. Cudahy Packing*, 1925).

III. Articles

Alexandrov, Stanimir, The “Baby Boom” of Treaty-based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as “Investors” under Investment Treaties, in: The Law and Practice of International Courts and Tribunals, Vol. 4, 2005, pp. 19-59 (hereinafter cited as: *Alexandrov*, LP, 2005).

Diebold, Nicolas F., Assessing Competition in International Economic Law: A Comparison of ‘Market Definition’ and ‘Comparability’, in: Legal Issues of Economic Integration, Vol. 38, 2011, pp. 115-141 (hereinafter cited as: *Diebold*, LIEI, 2011).

Dobos, Daniel, The Necessity of Precaution - The Future of Ecological Necessity and the Precautionary Principle, in: Fordham Environmental Law Review, Vol. 13, No. 2, 2002, pp. 375-408 (hereinafter cited as: *Dobos*, FELR, 2001).

Fitzmaurice, Malgosia, Necessity in International Environmental Law, in: Netherlands Yearbook of International Law, Vol. 41, 2010, pp. 159-192 (hereinafter cited as: *Fitzmaurice*, NYIL, 2010).

Francioni, Francesco, Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity, in: Michigan Journal of International Law, Vol. 25, 2004, pp. 1209-1228 (hereinafter cited as: *Francioni*, MJIL, 2004).

Grabowski, Alex, The Definition of Investment and the ICSID Convention: A Defense of Salini, in: Chicago Journal of International Law, Vol. 15, No. 1, Article 13, 2014, pp. 287-309 (hereinafter cited as: *Grabowski*, CJIL, 2014).

Herz, John H., Expropriation of Foreign Property, in: American Journal of International Law, Vol. 35, No. 2, 1941, pp. 243-262 (hereinafter cited as: *Herz*, AJIL, 1941).

Hoelck Thjoernelund, Marie Christine, State of Necessity as an Exemption from State Responsibility for Investments, in: Max Planck Yearbook of United Nations Law, Vol. 13, 2009, pp. 421-479 (hereinafter cited as: *Hoelck Thjoernelund*, MPYUNL, 2009).

Johnson, Donald L./Ambrose, Stanley H./Bassett, Thomas J./Bowen, M. L./Crummey, Donald E./Isaacson, J. S./Johnson, Diana N./Lamb, P./Saul, Mahier/Winter-Nelson, Alex E., Meanings of Environmental Terms, in: Journal of Environmental Quality, Vol. 26, No. 3, 1997, pp. 581-589 (hereinafter cited as: *Johnson et al*, JEQ, 1997).

Lammers, Johan G, Case Analysis: The Gabčíkovo-Nagymaros Case Seen in Particular from the Perspective of the Law of International Watercourses and the Protection of the Environment, in: Leiden Journal of International Law, Vol. 11, Issue 2, 1998, pp. 287-320 (hereinafter cited as: *Lammers*, LJIL, 1998).

Maniruzzaman, Munir, Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview, in: Journal of Transnational Law & Policy, Vol. 8, Issue 1, 1998, pp. 57-77 (hereinafter cited as: *Maniruzzaman*, J. Transnat'l L. & Pol'y, 1998).

McIntyre, Owen/Mosedale, Thomas, The Precautionary Principle as a Norm of Customary International Law, in: Journal of Environmental Law, Vol. 9, Issue 2, 1997, pp. 221-224 (hereinafter cited as: *McIntyre/Mosedale*, J. ENVTL., 1997).

Ryngaert, Cedric, State Responsibility, Necessity and Human Rights, in: Netherlands Yearbook of International Law, Vol. 41, 2010, pp. 79-98 (hereinafter cited as: *Ryngaert*, NYIL, 2010).

Sik, Ko Swan, The Concept of Acquired Rights in International Law: A Survey, in: Netherlands International Law Review, Vol. 24, Issue 1-2, 1977, pp. 120-142 (hereinafter cited as: *Sik*, NILR, 1977).

Sinclair, Anthony C. The Substance of Nationality Requirements in Investment Treaty Arbitration, in: ICSID Review - Foreign Investment Law Journal, Vol. 20, Issue 2, 2005, pp. 357-388 (hereinafter cited as: *Sinclair*, FILJ, 2005).

Sloane, Robert, On the Use and Abuse of Necessity in the Law of State Responsibility, in: American Journal of International Law, Vol. 106, No. 3, 2012, pp. 447-508 (hereinafter cited as: *Sloane*, AJIL, 2012).

Sykes, Alan O., Economic “Necessity” in International Law, in: *American Journal of International Law*, Vol. 109, No. 2, 2015, pp. 296-323 (hereinafter cited as: *Sykes*, AJIL, 2015).

Tams, Christian J./Tzanakopoulos, Antonios, Barcelona Traction at 40: The ICJ as an Agent of Legal Development, in: *Leiden Journal of International Law*, Vol. 23, Issue 4, 2010, pp. 781-800 (hereinafter cited as: *Tams/Tzanakopoulos*, LJIL, 2010).

Utton, Albert E., Protective Measures and the “Torrey Canyon”, in: *Boston College Law Review*, Vol. 9, Issue 3, Article 4, 1968, pp. 613-632 (hereinafter cited as: *Utton*, BCLR, 1968).

IV. Monographs

Blumberg, Philipp I., *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality*, 1993, Oxford University Press, New York and others (hereinafter cited as: *Blumberg*, 1993).

Cheng, Bin, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, London, Steven & Sons (hereinafter cited as: *Cheng*, 1953).

Crawford, James, *Brownlie’s Principles of Public International Law*, 8th Edition, 2012, Oxford University Press, Oxford and others (hereinafter cited as: *Crawford*, 2012).

Diebold, Nicolas F., *Non-discrimination in International Trade in Service – ‘likeness’ in WTO/GATS*, 2010, Cambridge University Press, Cambridge (hereinafter cited as: *Diebold*, 2010).

Gardiner, Richard, *Treaty Interpretation*, 1st Edition, Reprinted 2011, Oxford University Press, Oxford and others (hereinafter cited as: *Gardiner*, 2011).

Grotius, Hugo, *De jure belli ac pacis libri tres in quibus jus naturae et gentium, item juris publici praecipua explicantur*, Editio nova com annotatis auctoris, 1625, *The Classics of International Law*, Carnegie Institution for Science, Washington (hereinafter cited as: *Grotius*, 1625).

Hershey, Amos S., *The Essentials of International Public Law and Organization*, 1929, Macmillan Publishers, New York (hereinafter cited as: *Hershey*, 1927).

Morton, Jeffrey S., *The International Law Commission of the United Nations*, 2000, University of South Carolina Press, Columbia, South Carolina (hereinafter cited as: *Morton*, 2000).

Vierdag, Egbert Willem, *The Concept of Discrimination in International Law: with Special Reference to Human Rights*, 1973, Martinus Nijhoff, The Hague (hereinafter cited as: *Vierdag*, 1973).

Weatherall, Thomas, *Jus Cogens*, 2015, Cambridge University Press, Cambridge (hereinafter cited as: *Weatherall*, 2015).

V. Collective Works

Bohoslavsky, Juan Pablo/Černič, Jernej Letnar (eds), *Making Sovereign Financing & Human Rights Work*; 2014, Hart Publishing, Oxford and Portland (hereinafter cited as: *Author*, in: *Sovereign Financing & Human Rights*).

Bungenberg, Marc/Griebel, Jörn/Hobe, Stephan/Reinisch, August (eds), *International Investment Law, A Handbook*, 2015, C.H. Beck/Hart/Nomos, Baden-Baden and others (hereinafter cited as: *Author*, in: *IIL, A Handbook*).

Garner, Bryan A./Garner, Karolyne H.C./McDaniel, Becky R./Jackson, Tiger/Newman, Jeff et al. (eds), *Black's Law Dictionary, Abridged 10th Edition*, 2015, Thomson Reuters, St. Paul (hereinafter cited as: *Black's Law Dictionary*).

Lowenfeld, Andreas F. (ed.), *International Economic Law*, 2nd Edition, 2008, Oxford University Press, New York (hereinafter cited as: *Author*, in: *International Economic Law*).

Schreuer, Christoph H., *The ICSID Convention: A Commentary*, 2009, Cambridge University Press, Cambridge and others (hereinafter cited as: *Author*, in: *ICSID, a commentary*).

Southwestern Legal Foundation and International and Comparative Law Center, *Rights and Duties of Private Investors Abroad, Symposium on the Rights and Duties of Foreigners in the Conduct of Industrial and Commercial Operations Abroad*, 1965, M. Bender, New York (hereinafter cited as: *Author*, in: *Rights and Duties of Private Investors Abroad*).

Stevenson, Angus (ed.), *The Oxford Dictionary of English*, 3rd Edition, 2010, Oxford University Press, Oxford (hereinafter cited as: *Oxford Dictionary*).

The Hague Academy of International Law (ed.), Collected Courses of The Hague Academy of International Law, Vol. 87, 1955, Brill/Nijhoff, Leiden/Boston (hereinafter cited as: *Author*, in: The Hague Academy, 1955).

The Hague Academy of International Law (ed.), Collected Courses of The Hague Academy of International Law, Vol. 176, 1982, Brill/Nijhoff, Leiden/Boston (hereinafter cited as: *Author*, in: The Hague Academy, 1982).

Tietje, Christian (ed.), Internationales Wirtschaftsrecht, 2nd Edition, 2015, De Gruyter, Berlin and Boston (hereinafter cited as: *Author*, in: Internationales Wirtschaftsrecht).

Wolfrum, Rüdiger, The Max Planck Encyclopedia of Public International Law, 2012, Vol. VIII, Oxford University Press, Oxford and others (hereinafter cited as: *Author*, in: MPEPIL, Vol., Subject).

VI. UN Documents

1. ILC

Fourth Report on State Responsibility, by Mr. Francisco. V. Garcia-Amador, Special Rapporteur, A/CN.4/119, Yearbook of the International Law Commission, 1959, Vol. II, pp. 1-35 (hereinafter cited as: *Garcia-Amador-Report*, 1959).

Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, 1966, Vol. II, pp. 187-274 (hereinafter cited as: ILC DALT with commentaries).

Addendum to the Eighth Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur - the internationally wrongful act of the State, source of international responsibility (part 1), A/CN.4/SER.A/1980/Add.1, Yearbook of the International Law Commission, reprinted in 1980, Vol. II, Part 1, pp. 13-86 (hereinafter cited as: *Ago-Report*, 1980).

Report of the International Law Commission to the General Assembly on the Work of its Thirty-Second Session, Yearbook of the International Law Commission, 1980, Vol. II, Part 2, pp. 1-174 (hereinafter cited as: ILC-Report on the Work of its 32nd Session, 1980).

Second Report on State Responsibility, by Mr. James Crawford, Special Rapporteur, A/CN-4/498, Yearbook of the International Law Commission, 1999, Vol. II, Part 1, pp. 3-100 (hereinafter cited as: *Crawford-Report*, 1999).

Report of the International Law Commission to the General Assembly on the Work of its Fifty-First Session, Yearbook of the International Law Commission, 1999, Vol. II, Part 2, pp. 1-176 (hereinafter cited as: ILC-Report on the Work of its 51st Session, 1999).

Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II, Part. 2, pp. 26-30 (hereinafter cited as: ILC DARS).

Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Yearbook of the International Law Commission, 2001, Vol. II, Part 2, pp. 30-143 (hereinafter cited as: ILC DARS with commentaries).

Fourth Report on Diplomatic Protection, by Mr. John Dugard, Special Rapporteur, A/CN.4/530 and Add. 1, Yearbook of the International Law Commission, 2003, Vol. II, Part 1, pp. 3-30 (hereinafter cited as: *Dugard-Report*, 2003).

Draft Articles on Diplomatic Protection, Official Records of the General Assembly, Sixty-First Session, Supplement No. 10, A/61/10, 2006, pp. 16-21 (hereinafter cited as: ILC DADP).

Draft Articles on Diplomatic Protection with Commentaries, Yearbook of the International Law Commission, 2006, Vol. II, Part 2, pp. 22-100 (hereinafter cited as: ILC DADP with commentaries).

2. GA Resolutions

Universal Declaration of Human Rights, GA Resolution 3/217 A, adopted on 10 December 1948 (hereinafter cited as: GA Res. Universal Declaration of Human Rights, 1948).

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Resolution 25/2625, adopted on 24 October 1970 (hereinafter cited as: GA Res. Friendly Relations Declaration, 1970).

Declaration on the Establishment of a New International Economic Order, GA Resolution 3201, adopted on 1 May 1974 (hereinafter cited as: GA Res. New International Economic Order, 1974).

Charter of Economic Rights and Duties of States, GA Resolution 3281, adopted on 12 December 1974 (hereinafter cited as: GA Res. Economic Rights and Duties of States, 1974).

World Charter for Nature, GA Resolution 37/7, adopted on 28 October 1982 (hereinafter cited as: GA Res. World Charter for Nature, 1982).

UN Declaration on the Right to Development, GA Resolution 41/128, adopted on 4 December 1986 (hereinafter cited as: GA Res. Declaration on the Right to Development, 1986).

Report of the World Commission on Environment and Development, GA Resolution 42/187, adopted on 11 December 1987 (hereinafter cited as: GA Res. Report of the World Commission on Environment and Development, 1987).

Human Rights and Cultural Diversity, GA Resolution 60/167, adopted on 16 December 2005 (hereinafter cited as: GA Res. Human Rights and Cultural Diversity, 2005).

UN Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295, adopted on 13 September 2007 (hereinafter cited as: GA Res. Declaration on the Rights of Indigenous Peoples, 2007).

3. UN Declarations

Declaration of the United Nations Conference on the Human Environment, adopted on 16 June 1972, in: Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14 (hereinafter cited as: UN Declaration on the Human Environment, 1972).

Rio Declaration on Environment and Development, adopted on 12 June 1992, in: Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26, Vol. I (hereinafter cited as: Rio Declaration on Environment and Development, 1992).

4. UNESCO

Declaration on the Responsibilities of the Present Generations Towards Future Generations, adopted on 12 November 1997, in: Records of the General Conference on its Twenty-Ninth Session, Vol. I, pp. 69-71 (hereinafter cited as: UNESCO Declaration on the Responsibilities Towards Future Generations, 1997).

Universal Declaration on Cultural Diversity, adopted on 2 November 2001, in: Records of the General Conference on its Thirty-First Session, Vol. 1, pp. 61-64 (hereinafter cited as: UNESCO Declaration on Cultural Diversity, 2001).

VII. CITES Documents

Criteria for Amendment of Appendices I and II, Ninth Meeting of the Conference of the Parties, Fort Lauderdale (United States of America), 1994, Conference 9.24 (hereinafter cited as: Fort Lauderdale Resolution, 1994).

VIII. WTO Documents

Report by the Working Party on Border Tax Adjustments, 20 November 1970, L/3464 (hereinafter cited as: Border Tax Adjustments Report, 1970).

(d) Statement of Relevant Facts

Barbarossa and *Alfania* are neighbouring states that have enjoyed good relations for hundreds of years. Both states are separated by a large lake, Lake Theth, which stretches for 58,000 km². Lake Theth lies entirely in *Barbarossa* and its shoreline marks the border between the two states for almost 1000 km. Both *Alfania* and *Barbarossa* are parties to the 1969 VCLT and the 1973 CITES, as well as members of the UN, the WTO with all of its Annexes and UNESCO.

In 1955, the two states concluded the Treaty of Amity, Commerce, and Kinship (TACK), which covers a wide range of matters related to commerce, diplomacy and defence. The preamble states that both states desire to emphasise the long friendly relations between their peoples and to reaffirm the high principles they committed to in the regulation of human affairs. They seek to encourage trade and investment that is mutually beneficial, as well as closer economic intercourse generally between their people. Art. II of the TACK formulates each state's obligation not to impose measures on the other party's natural as well as legal persons, which are discriminatory and impair that person's legally acquired rights.

After being classified as an LDC for most of the twentieth century, *Barbarossa* achieved developing country status in 1998 as the tourism industry started to expand in both states. In 2012, the tourism industry constituted 60% of *Alfania's* and 75% of *Barbarossa's* economy.

The tourism market was dominated by the *Alfanian* firm *Rocacorba Holidays* and the *Barbarossan* firm *Angels Tours*, which collectively held 95% of the market share. Both corporations entered into an agreement to offer holiday packages that include transport, accommodation and sightseeing tours in both states. While *Angels* owned and operated the most popular hotels in both states, *Rocacorba* invested in boats moored on the shores of Lake Theth for the purpose of all-inclusive holiday packages.

On 1 January 2009, *Barbarossa* announced tax incentives for firms operating within its jurisdiction and which are incorporated under *Barbarossan* domestic law. In order to profit from

these tax incentives, *Rocacorba* incorporated a local subsidiary under *Barbarossan* domestic law, *Sacalm Holidays*, which had its registered offices in *Barbarossa*. *Sacalm* owned, managed and operated its boats moored on the shores of Lake Theth in *Barbarossan* territory and also offered the popular trip to see the Dandy Narwhals in their breeding ground.

The Narwhal is a unique aquatic mammal with a pink neck. It is sacred to the *Barbarossan* people and closely intertwined with their culture. A number of indigenous tribes venerate the Narwhals as the messenger of the gods. Official holidays, customs and rituals revolve around their annual migration from the depths of Lake Theth to their breeding ground in the middle of the lake. The Narwhals have been listed in Appendix I of the CITES as they have been threatened with extinction since 1992. In the light of their great importance to *Barbarossan* cultural heritage, *Barbarossa* has always pledged to ensure the Narwhals' continued survival. In particular, numerous Ministers of Environment, during their respective terms, highlighted this endeavour and the Narwhals' paramount importance to *Barbarossa*.

On 14 October 2014, the *Government of Barbarossa* raised concerns regarding the declining population of the Narwhals, which was in close correlation to the sharp drop in the number of visitors from 100,000 in 2012 to 10,000 in 2014. Due to this rapid decline in visitors, the *Barbarossan* economy suffered and moved into recession. The poverty rate increased by over 140% from 5% to 12% and infrastructure fell into disrepair. As a reaction to these developments, the *High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing Countries* stated that as a result of *Barbarossa's* depleted income, the population was now vulnerable to famine. In addition, a severe drought occurred in the region, which wiped out 90% of *Barbarossa's* agricultural crops. As the *High Representative* specified, the only hope for *Barbarossa's* continued economic development was the tourism industry regaining momentum in the near future.

In order to understand the cause of the decline of the Narwhals, the *Government of Barbarossa* contracted the *University of Barbarossa*, a private institution, to perform a scientific analysis concerning the declining Narwhal population. The resulting *UoB* report from January 2016 stated that the chemical emitted by *Sacalm's* catamarans, *cafea calida*, was responsible for the decline in the Narwhal population and that there was a direct correlation between the decrease in the Narwhal population and the increase in trips to the breeding ground with *Sacalm's* catamaran trips emitting *cafea calida* into the breeding ground's ecosystem. According to the *UoB* report, *cafea calida*, which is only emitted by *Sacalm's* vessels, is highly toxic to the Narwhals and would have led to the complete extinction of the Narwhals within two years if emissions had continued at the current rate. In addition, the danger posed by *cafea calida* was apparent as it was, at the time, restricted in its use in three states and completely banned in three other states for environmental reasons.

The *Government of Barbarossa* held public hearings on a possible prohibition of vessels emitting *cafea calida* from the Narwhal's breeding ground and invited the public, environmental NGOs, as well as the *Association of Barbarossan Tourism Firms* to submit comments and statements on the issue. All of the organisations and members of the community who took part in these consultations showed overwhelming support for the establishment of the Lake Theth Protected Area, prohibiting vessels emitting *cafea calida* not from the whole lake but from the breeding ground. Following the public hearings and the scientific report, on 1 September 2016 *Barbarossa* established the Protected Area. The *Barbarossan Minister of Environment* publicly stated that the Protected Area was the only way to protect the Narwhals from immediate danger and that all that was necessary would be done to protect *Barbarossa's* economy, environment and citizens.

As a result, the Narwhals started to recover. One year later, their number had risen to 450, displaying the Protected Area's high degree of efficiency. Though this rise was encouraging,

the *Government* still deemed the Protected Area necessary in order to protect the Narwhals' long-term future. Sightings were becoming increasingly common but tourist numbers had not yet recovered.

Barbarossan firms experienced a surge in custom and the economy started to recover. On 25 March 2017, about three years after the slump in tourist numbers following *Barbarossa* first raising awareness of the Narwhals' plight, *Sacalm* announced that it would cease operations. Its mother company *Rocacorba* recorded losses. *Sacalm*, which had continued offering catamaran trips, attributed its loss of business to the establishment of the Protected Area. The *Alfanian Minister of Commerce* then accused *Barbarossa* of breaching the TACK by establishing the Protected Area in the form of a tweet stressing the job losses and suffering of the *Alfanian* firm *Rocacorba* and its subsidiary *Sacalm*.

In order to settle the dispute between *Alfania* and *Barbarossa*, both states concluded a special agreement on 31 August 2017 to submit the following questions to the ICJ:

- i) Does Article II of the TACK apply to measures imposed on *Sacalm Holidays*, an enterprise that is incorporated in *Barbarossa*?
- ii) Has *Barbarossa*, by establishing the Protected Area, breached Article II of the TACK?
- iii) Can *Barbarossa*'s conduct be justified by necessity?

(e) Issues

Alfania respectfully asks the honourable Court to decide the following questions:

A. Is Art. II TACK applicable to measures imposed on *Sacalm*?I. Is *Sacalm* a legal person of the other state?

1. Does Art. II TACK require *Sacalm* to be incorporated in *Alfania* to be applicable?
2. Does *Sacalm* have *Barbarossan* nationality by way of customary international law?
 - a. Is customary international law applicable to defining criteria establishing nationality?
 - b. Is *Sacalm* incorporated in *Barbarossa* and does it have a permanent and close connection to *Barbarossa*?
3. Does *Rocacorba*'s shareholding position establish *Alfanian* nationality?
 - a. Does control establish nationality with respect to Art. II TACK?
 - b. Is *Sacalm* controlled by *Rocacorba*?

II. Does Art. II TACK protect *Sacalm* as *Rocacorba*'s investment in *Barbarossa*?

1. Is investment protected under Art. II TACK?
2. Does the separate legal entity *Sacalm* constitute a protected investment?

B. Did *Barbarossa* comply with Art. II TACK by establishing the Protected Area?

I. Does the Protected Area constitute a discriminatory measure under Art. II TACK?

1. Is *Sacalm* comparable to the *Barbarossan* tourist voyage firms?
2. Was *Sacalm* in fact treated equally to *Barbarossan* tourist voyage firms?
3. Did *Barbarossa* act without the required discriminatory intent?
 - a. Are the objectives *Barbarossa* is pursuing legitimate?
 - b. Did *Barbarossa* have discriminatory motives?

II. Have *Rocacorba's* or even *Sacalm's* legally acquired rights and interests been impaired?

1. Do *Sacalm* and *Rocacorba's* legally acquired rights and interests refer to property only?
2. Does the Protected Area comply with *Rocacorba* and *Sacalm's* property rights and interests?
 - a. Did *Barbarossa* indirectly expropriate *Sacalm* of its boats?
 - b. Did *Barbarossa* impair *Sacalm's* economic interests in its business?
 - c. Did *Barbarossa* impair *Rocacorba's* investment in its subsidiary?

C. Can *Barbarossa's* conduct be justified by necessity?

I. Does necessity constitute customary international law?

II. Does *Barbarossa* meet the requirements of necessity?

1. Does *Barbarossa* protect its essential interests?
 - a. Does *Barbarossa's* economic survival constitute an essential interest?
 - b. Does preserving the environment constitute an essential interest?
 - c. Does protecting basic human rights' interests constitute an essential interest?
2. Were *Barbarossa's* essential interests threatened by a grave and imminent peril?
 - a. Was *Barbarossa's* economy threatened by a grave and imminent peril?
 - b. Was the Narwhal species threatened by a grave and imminent peril?
 - c. Were the *Barbarossan* population's human rights threatened by a grave and imminent peril?
3. Was the establishment of the Protected Area the only way for *Barbarossa* to safeguard its interests?

4. Has any essential interest of *Alfania* or the international community been seriously impaired?
5. Is *Barbarossa*'s plea of necessity precluded?
6. Does the establishment of the Protected Area constitute a temporary measure?

(f) Summary of Arguments

A. Art. II TACK is not applicable to measures imposed on Sacalm.

I. *Sacalm* is not a legal person of the other state as it has *Barbarossan* nationality.

1. Art. II TACK requires *Sacalm* to be incorporated in *Alfania* to be applicable.

2. *Sacalm* has *Barbarossan* nationality by way of customary international law.

a. In defining the criteria establishing nationality, customary international law is applicable.

b. *Sacalm* is incorporated in and has a permanent and close connection to *Barbarossa*.

3. *Rocacorba*'s shareholding position does not establish *Alfanian* nationality.

a. Control does not establish nationality with respect to Art. II TACK.

b. Even if control was held to be sufficient, *Sacalm* is not controlled by *Rocacorba*.

II. Art. II TACK does not protect *Sacalm* as *Rocacorba*'s investment in *Barbarossa*.

1. Investment is not protected under Art. II TACK.

2. The separate legal entity *Sacalm* does not constitute a protected investment.

B. *Barbarossa* complied with Art. II TACK by establishing the Protected Area.

I. The Protected Area does not constitute a discriminatory measure under Art. II TACK.

1. *Sacalm* is not comparable to the *Barbarossan* tourist voyage firms.

2. *Sacalm* was in fact treated equally to *Barbarossan* tourist voyage firms.

3. *Barbarossa* acted without the required discriminatory intent.

a. The objectives *Barbarossa* is pursuing are legitimate.

b. *Barbarossa* did not have discriminatory motives.

II. No legally acquired rights and interests of *Rocacorba* or *Sacalm* have been impaired.

1. *Sacalm's* and *Rocacorba's* legally acquired rights and interests refer to property only.
2. The Protected Area complies with *Rocacorba* and *Sacalm's* property rights and interests.
 - a. *Barbarossa* did not indirectly expropriate *Sacalm* of its boats.
 - b. *Barbarossa* did not impair *Sacalm's* economic interests in its business.
 - c. *Barbarossa* did not impair *Rocacorba's* investment in its subsidiary.

C. *Barbarossa's* conduct can be justified by necessity.

I. Necessity constitutes customary international law.

II. *Barbarossa* meets the requirements of necessity.

1. *Barbarossa* protects its essential interests.
 - a. *Barbarossa's* economic survival constitutes an essential interest.
 - b. Preserving the environment constitutes an essential interest.
 - c. Protecting basic human rights' interests constitutes an essential interest.
2. *Barbarossa's* essential interests were threatened by a grave and imminent peril.
 - a. *Barbarossa's* economy was threatened by a grave and imminent peril.
 - b. The Narwhal species was threatened by a grave and imminent peril.
 - c. The *Barbarossan* population's human rights were threatened by a grave and imminent peril.
3. Establishing the Protected Area was the only way for *Barbarossa* to safeguard its interests.
4. No essential interest of *Alfania* or the international community was seriously impaired.

5. *Barbarossa's* plea of necessity is not precluded.
6. The establishment of the Protected Area constitutes a temporary measure.

(g) Jurisdiction of the Court

Both *Alfania* and *Barbarossa* are parties to the UN Charter without reservation. Both parties referred the case to the Court by way of a special agreement¹ on 31 August 2017. Therefore, they recognise the jurisdiction of the Court according to Art. 36 (1) of the ICJ Statute.

¹ As both parties submitted the proceedings to the Court in the form of a special agreement, there is no formal Applicant or Respondent State. Having regard to the position of *Alfania*, which accused *Barbarossa* of unlawful conduct by breaching the TACK, *Alfania* is to be treated as the Applicant and *Barbarossa* as the Respondent to comply with Art. 8, section 2.1 of the International Rules of Procedure of the Telders Organising Office (cf. clarification 60).

(h) Argument

A. Art. II TACK is not applicable to measures imposed on Sacalm

Art. II TACK is applicable only if the measures imposed by *Barbarossa* on *Sacalm* affect a “legal person of the other party”.¹ Art. II TACK does not protect *Sacalm* either as a *Barbarossan* legal person (I.) or as *Rocacorba*’s investment in *Barbarossa* (II.).

I. *Sacalm* is not a legal person of the other state as it has *Barbarossan* nationality

To be applicable, Art. II TACK requires *Sacalm* to have *Alfanian* nationality. *Sacalm* is a *Barbarossan* legal person as the criterion of incorporation is decisive when determining its nationality according to the parties’ domestic law (1.) and, in any case, customary international law (2.). Moreover, *Rocacorba*’s shareholder position does not establish nationality (3.).

1. Art. II TACK requires *Sacalm* to be incorporated in *Alfania* to be applicable

The TACK does not define the phrase “legal persons of [*Alfania*]”. Pursuant to a general rule of international law, terms are interpreted based on their ordinary meaning in their context. This rule, as codified in Art. 31 (1) VCLT, constituted custom when the TACK was ratified in 1955.²

The phrase refers to nationality as nationality establishes the link between a person and a state.³ Nationality is governed by the law of the state.⁴ Both *Alfania* and *Barbarossa* determine

¹ As provided for by Art. II TACK.

² Regardless of its non-retroactivity (Art. 4 VCLT): cf. *Oscar Chinn*, pp. 86 f.; *Interpretation of Peace Treaties*, p. 76; *Rights of U.S. Nationals in Morocco*, p. 197; *Maritime Delimitation*, para. 33; *Oil Platforms*, para. 23; *Reservations to the Convention on Genocide*, pp. 23 f.; *Territorial Dispute*, paras 44 ff.; *Kasikili/Sedudu Island*, para. 18; *Sovereignty over Pulau Ligitan and Pulau Sipadan*, para. 37.

³ Art. 2 (a) Convention on Nationality; cf. *Nottebohm*, p. 13, para. 1; “of” indicates origin: Oxford Dictionary, p. 1230; a dictionary, *inter alia*, defines a term’s ordinary meaning: cf. *Marvin Feldman v. Mexico*, 2002, para. 96; *Gardiner*, 2011, p. 166.

⁴ Art. 3 Convention on Nationality; Art. 1 Hague Convention on Nationality; *Barcelona Traction*, paras 39 ff.; *Barcelona Traction (Separate Opinion Fitzmaurice)*, para. 6.

a company's nationality by virtue of its incorporation.⁵ However, *Sacalm* is not incorporated in *Alfania* but in *Barbarossa*.⁶ Consequently, *Sacalm* has *Barbarossan* nationality.

2. *Sacalm* has *Barbarossan* nationality by way of customary international law

Even if this Court held the parties' national law not to determine nationality, customary international law rules would be applicable (a.), according to which *Sacalm* has *Barbarossan* nationality due to its incorporation and permanent and close connection to *Barbarossa* (b.).

a. In defining the criteria establishing nationality, customary international law is applicable

Pursuant to Art. 31 (3) (c) VCLT, while interpreting international treaty provisions, like the phrase "legal person of the other Party" in Art. II TACK, any relevant rules of international law, such as those constituting custom,⁷ need to be taken into account.⁸ Thus, the customary international law rules determining nationality can be relied on for the purpose of the TACK.

b. *Sacalm* is incorporated in and has a permanent and close connection to *Barbarossa*

Customary international law dictates that the formal criteria of incorporation and registered offices,⁹ and a substantive but not imperative¹⁰ criterion of a permanent and close connection,

⁵ Clarifications 50, 57.

⁶ Case, para. 8.

⁷ *Gardiner*, 2011, p. 261.

⁸ Regardless of its non-retroactivity (Art. 4 VCLT), the rule in Art. 31 (3) (c) VCLT is applicable to the TACK as it reflects customary international law: *Oil Platforms*, para. 41; *Kasikili/Sedudu Island*, para. 18; *Mutual Assistance in Criminal Matters*, para. 112.

⁹ *Barcelona Traction*, para. 70; Art. 9 ILC DADP reflecting the *Barcelona Traction* judgment; see Annex for state practice; *Amco v. Indonesia*, 1983, para. 14; *SOABI v. Senegal*, 1984, para. 29; *Autopista v. Venezuela*, 2001, para. 107; *Tokios Tokelés v. Ukraine*, 2004, para. 42; *Alexandrov*, LP, 2005, p. 36; *Sinclair*, FIJL, 2005, p. 367; *Crawford*, 2012, p. 528.

¹⁰ *Barcelona Traction*, para. 70; Art 9 ILC DADP; *Diallo Case*, para. 41 by *argumentum e contrario*: the ICJ did not challenge Mr. Diallo's nationality under the genuine link criterion. Although he had lived in the DRC for 32 years, he was held to be Guinean.

determine nationality.¹¹ *Sacalm* meets these criteria. It is incorporated in *Barbarossa* and has registered offices there.¹² It has a substantive, direct connection to *Barbarossa*. It has always operated its whole business there and never in *Alfania*. Its boats sail on Lake Theth, *Barbarossan* territory, depart from the *Barbarossan* shore and its seat of management is located in *Barbarossa*.¹³ Thus, *Sacalm* also has *Barbarossan* nationality under customary international law.

3. Rocacorba's shareholding position does not establish Alfania nationality

Control does not establish nationality (a.). Even if this Court held that it did, *Rocacorba's* nationality would have no influence on *Sacalm's* as *Rocacorba* does not control *Sacalm* (b.).

a. Control does not establish nationality with respect to Art. II TACK

The controlling entity has no impact on a firm's nationality. The control criterion is not recognised under customary international law.¹⁴ It is applied only as an exception,¹⁵ and subsequent to an explicit agreement.¹⁶ *Alfania* and *Barbarossa* did not choose the control criterion for their national legal orders or Art. II TACK. Moreover, Art. XXVIII (m) GATS must not be considered, let alone adopted verbatim, solely due to both states' WTO membership. The provision explicitly restrains its scope to the GATS. It is not a relevant rule under Art. 31 (3) (c) VCLT.¹⁷

¹¹ *Nottebohm*, p. 23; *Barcelona Traction*, para. 71; *Tams/Tzanakopoulos*, LJIL, 2010, p. 798; the genuine link requirement is applicable to juridical persons: *Crawford*, 2012, p. 527.

¹² Case, para. 8; clarification 34.

¹³ Case, paras 1, 8, 11; clarifications 2, 9, 15, 16, 28, 34.

¹⁴ *Dugard-Report*, 2003, para. 38; cf. *Perkams*, in: IIL, A Handbook, paras 19 f.

¹⁵ Treaty provisions referring to control as *lex specialis*: *Barcelona Traction*, para. 90; Art. 25 (2) (b) ICSID Convention defining control as the exception; ILC DADP with commentaries, Art. 9, para. 4; *Dugard-Report*, 2003, paras 6, 38.

¹⁶ *Tokios Tokelés v. Ukraine*, 2004, para. 50 referring to *CMS v. Argentina*, 2005, para. 51; cf. *Autopista v. Venezuela*, 2001, para. 119.

¹⁷ Cf. *Gardiner*, 2011, p. 275 on international treaty provisions.

Thus, control does not shape the TACK's interpretation of nationality. Even if this Court held it to do so, control alone would never establish nationality. According to the rule in Art. 9 of the ILC's DADP, the requirements of foreign control, a foreign seat of management and no substantial business activities in the state of incorporation must be met cumulatively.¹⁸ However, *Sacalm's* seat of management is located in *Barbarossa* and all of its business is operated there.¹⁹ Consequently, the control criterion is of no relevance when determining nationality under the TACK.

b. Even if control was held to be sufficient, *Sacalm* is not controlled by *Rocacorba*

Rocacorba lacks the requisite degree of influence. *Sacalm* is a separate legal entity and must be treated as such, specifically concerning its nationality as a subsidiary established abroad.²⁰ Such independence grants the subsidiary, not its parent, rights, which it alone can protect.²¹ *Sacalm* owns, operates and most importantly manages its boats independently.²² This depicts that *Rocacorba* has no control over *Sacalm's* management, regardless of its shareholder position. The shareholder's nationality is irrelevant.²³ Thus, *Sacalm* has *Barbarossan* nationality.

II. Art. II TACK does not protect *Sacalm* as *Rocacorba's* investment in *Barbarossa*

Art. II TACK does not protect investments (1.). Even if it did, *Sacalm* would not qualify as such and measures imposed on *Sacalm* are thus not measures imposed on *Rocacorba* (2.).

¹⁸ ILC DADP with commentaries, Art. 9, para. 5.

¹⁹ Case, paras 1, 8, 11, clarifications 2, 9, 15, 16, 28, 34.

²⁰ Case, para. 8; on subsidiaries' separate legal identity as a principle of law: *Salomon v. Salomon*, 1896, p. 51; *Cannon v. Cudahy Packing*, 1925, p. 337; specifically as a foreign firm: cf. *Blumberg*, 1993, p. 171.

²¹ *Barcelona Traction*, para. 40; *Diallo Case*, para. 61.

²² Case, para. 8; clarification 2.

²³ *SOABI v. Senegal*, 1984, para. 29; *Standard Chartered Bank v. Tanzania*, 2012, para. 230 in which ownership of shares was not held to indicate control.

1. Investment is not protected under Art. II TACK

Art. II TACK explicitly protects natural and legal persons only. As this phrase is unambiguous,²⁴ interpreting it to also include investments would be unlawful.²⁵ The TACK regulates matters related to commerce, diplomacy and defence and also its title “Treaty of Amity, Commerce and Kinship” does not suggest any link to investment protection.²⁶ The general phrase “to encourage”, and not to protect, investment is mentioned only once and only among other vague pledges in the preamble, which may be considered in interpretation but is not legally binding.²⁷ Thus, investment and subsequently investors are not protected under Art. II TACK.

2. The separate legal entity *Sacalm* does not constitute a protected investment

Even if investment was protected under Art. II TACK, *Sacalm* would not fall thereunder. In developing countries like *Barbarossa*, the term “investment” is construed narrowly.²⁸ *Sacalm* does not meet the narrow criteria, as set out by the ICSID tribunals,²⁹ i.e. assumption of risk, substantial commitment and significant contribution to the host state’s development. *Rocacorba* does not assume any significant risk that it is not already bearing as *Sacalm* engages in the exact same business activities in the exact same location in *Barbarossa* as *Rocacorba* did.³⁰ It does

²⁴ Black’s Law Dictionary, p. 967.

²⁵ ILC DALT with commentaries, Art. 28, paras 2, 6 on the primacy of the text.

²⁶ Case, para. 2.

²⁷ Case, para. 3; *Oil Platforms*, para. 52, on too general wording not being capable of generating rights and obligations; *Mbengue*, in: MPEPIL, Vol. VIII, Preamble, para. 11.

²⁸ Cf. *Reinisch*, in: Internationales Wirtschaftsrecht, § 8, para. 32.

²⁹ Drawing on the “*Salini*-test” developed in *Salini v. Morocco*, 2001, para. 52; *Joy Mining v. Egypt*, 2004, paras 41 ff.; *AES v. Argentina*, 2005, para. 88; *Bayindir v. Pakistan*, 2005, paras 130 ff.; *Schreuer*, in: ICSID, a commentary, paras 140 ff.

³⁰ Case, compare paras 7 and 8; clarifications 1, 51, 66.

not contribute to *Barbarossa's* long-term development either, as it eradicates its natural resources and economic foundation, the Narwhals. Even if this Court adopted a broad definition, Art. II TACK would not protect *Sacalm*. It solely protects investment made in good faith.³¹ Investment must be interpreted in the light of the objective of the TACK,³² only encouraging mutually beneficial investment.³³ The well-established concept of good faith³⁴ requires the assessment of reasonably predictable effects of an investment.³⁵ *Sacalm's* detrimental effect on the environment was apparent. Its boats emitted vast quantities of *cafea calida*, the toxicity of which was widely known through its prohibition in other states.³⁶ *Sacalm* neither contributed to *Barbarossa's* development, nor was it intended to do so as its sole motive was the beneficial tax treatment.³⁷ Thus, *Sacalm* does not fall under the protection of the TACK.

In conclusion, Art. II TACK is not applicable because *Sacalm*, as a *Barbarossan* legal person or as *Rocacorba's* investment in *Barbarossa*, is not protected under Art. II TACK.

B. *Barbarossa* complied with Art. II TACK by establishing the Protected Area

Even if this Court was to find that Art. II is applicable to measures imposed on *Sacalm*, it would not be breached. The establishment of the Protected Area neither constitutes a discriminatory

³¹ As required by several panels in order to ensure protection against abuse: *Phoenix Action v. Czech Republic*, 2009, para. 100; *Grabowski*, CJIL, 2014, p. 300.

³² As a rule of customary international law codified in Arts 31, 32 VCLT: cf. fn. 2; cf. *Oil Platforms*, para. 28.

³³ Case, para. 3.

³⁴ Arts 18, 26, 31 VCLT; Art. 2 (2) UN Charter; GA Res. Friendly Relations Declaration, 1970; *Nuclear Tests*, para. 46; *Maritime Boundary*, para. 87; *Palestinian Wall*, para. 94.

³⁵ *Amco v. Indonesia*, 1983, para. 14; *Phoenix Action v. Czech Republic*, 2009, para. 108.

³⁶ Case, para 15; clarification 3.

³⁷ Case, para. 8.

measure (I.), nor does it impair *Sacalm* or *Rocacorba*'s legally acquired rights and interests (II.) under Art. II TACK.

I. The Protected Area does not constitute a discriminatory measure under Art. II TACK

As Art. II TACK does not qualify discriminatory measures, their scope and substance are subject to interpretation. The general rule, as codified in Art. 31 VCLT, allows for the customary principle of non-discrimination to be considered.³⁸ The latter defines discrimination as the differential treatment of comparable objects.³⁹ *Sacalm* and the *Barbarossan* tourist voyage firms are not comparable market participants (1.). Even if this Court held the opposite, *Barbarossa* would have treated them equally (2.) and lacked the required discriminatory intent (3.).

1. *Sacalm* is not comparable to the *Barbarossan* tourist voyage firms

Suitable groups for comparison are similar service suppliers that provide similar services,⁴⁰ are subject to equal circumstances⁴¹ and in a directly competitive relationship.⁴² Such determinations are made case by case, adapting the criteria to the context.⁴³ First, similar services have

³⁸ See fn. 2; rule as codified in Arts 31 (1), (3) (c) VCLT.

³⁹ *EC-Asbestos*, 2001, para. 100; *South West Africa (Dissenting Opinion Tanaka)*, p. 305; *Vierdag*, 1973, p. 61; *Maniruzzaman*, J. Transnat'l L. & Pol'y, 1998, p. 5.

⁴⁰ "Likeness" of services in Arts II (1), XVII GATS; *China-Electronic Payment*, 2012, para. 7.705; *Argentina-Service Measures*, 2015, para 7.161; *Argentina-Service Measures*, 2016, paras 6.29, 6.4; cf. *EC-Bananas III*, 1997, para. 7.322;

⁴¹ *Occidental v. Ecuador*, 2012, para. 173; the concept of comparable circumstances in: Art. 3 (1) UK-Belize BIT, 1982; Art. II (2) U.S.-Senegal BIT, 1983; Art. II (1) U.S.-Honduras BIT, 1995; Art. 4 (1) China-Iran BIT, 2000; Art. 3 (1) Turkey-Ethiopia, 2000.

⁴² *EEC-Animal Feed Proteins*, 1978, para. 4.3; *Korea-Alcoholic Beverages*, 1999, para. 114; *Diebold*, LIEI, 2011, p. 119.

⁴³ *Japan-Alcoholic Beverages*, 1996, pp. 20, 21; *EC-Asbestos*, 2001, paras 92, 101; *China-Electronic Payment*, 2012, paras 7.701, 7.705; *Argentina-Service Measures*, 2016, para. 6.26.

similar characteristics,⁴⁴ taking into consideration the boats' properties.⁴⁵ *Sacalm* offers one-day return trips on large-capacity, high-speed catamarans, while all the other *Barbarossan* tourist voyage firms offer three-day trips on smaller boats to the breeding grounds.⁴⁶ In this context, the services are not comparable as *Sacalm*'s catamarans run on *cafeá calida*, threatening the Narwhals' health.⁴⁷ Second, services are not similar if their features have an impact on their market position and consumer taste and habits.⁴⁸ The fact that tourists prefer *Sacalm*'s one-day voyages, as is evident through their predominant use, confirms that the trip's duration is a relevant difference from the consumer's perspective.⁴⁹ Moreover, *Sacalm* and the other tourist voyage firms are not in a competitive relationship. For them and their services to be similar, actual competition with equal competitive opportunities is required,⁵⁰ not just some sort of competition on the market.⁵¹ *Sacalm* owns a significant majority (95%) of the market share.⁵² Due to its dominance, it cannot be considered to be effectively competing with the other tourist

⁴⁴ *EC-Asbestos*, 2001, para. 91; *Argentina-Service Measures*, 2016, para. 6.21.

⁴⁵ *China-Electronic Payment*, 2012, para. 7.699; cf. *U.S.-Antigua*, 2004, para. 3.161 in which physical properties were not excluded for the analysis of services.

⁴⁶ Case, para. 11.

⁴⁷ Cf. *EC-Asbestos*, 2001, paras 113, 116.

⁴⁸ Border Tax Adjustments Report, 1970, para. 18; *EC-Asbestos*, 2001, paras 114, 117; *U.S.-Antigua*, 2004, paras 3.165, 3.166; *Argentina-Service Measures*, 2015, paras 7.173, 7.179; *Argentina-Service Measures*, 2016, para. 6.6; relating to products: *EC-Asbestos*, 2000, para. 8.112.

⁴⁹ *U.S.-Antigua*, 2004, para. 3.163 by *argumentum e contrario*.

⁵⁰ *China-Electronic Payment*, 2012, paras 7.700, 7.702; *Argentina-Service Measures*, 2015, para. 7.159; *Argentina-Service Measures*, 2016, para. 6.3.

⁵¹ *Argentina-Service Measures*, 2016, para. 6.26.

⁵² Case, para. 11.

voyage firms.⁵³ Thus, *Sacalm* and the *Barbarossan* tourist voyage firms are not comparable.

2. *Sacalm* was in fact treated equally to *Barbarossan* tourist voyage firms

Even if the firms were held to be comparable, *Sacalm* would not be discriminated against, being treated equally. Treatment is equal if rights and duties are imposed on all similarly.⁵⁴ The ban on vessels emitting *cafea calida* is a neutral measure as it applies to all tourist voyage firms, including *Sacalm* without distinction and it does not limit market access.⁵⁵ The measure did not disadvantage *Sacalm* as all firms had to comply with the ban, regardless of their nationality.⁵⁶ The fact that only *Sacalm* navigated vessels powered by *cafea calida* does not carry any weight in assessing whether a discrimination occurred. A *de facto* effect does not turn a measure that does not differentiate between the affected subjects,⁵⁷ like the Protected Area, into discrimination. Moreover, the effect on *Sacalm*'s business does not stem from the ban but is rather the result of *Sacalm*'s own choice not to adapt to new circumstances,⁵⁸ i.e. the decline in tourist numbers and the prohibition of *cafea calida*. In this context, potential adaptation costs, for instance in the form of acquiring boats that are not detrimental to the environment, do not imply a disadvantage to the affected company *per se*.⁵⁹ Thus, *Sacalm* was treated equally.

⁵³ Cf. *Hoffmann-La Roche v. Commission*, 1979, para. 38.

⁵⁴ Regarding unequal treatment: *Vierdag*, 1973, p. 44; cf. *South West Africa (Dissenting Opinion Tanaka)*, p. 304.

⁵⁵ Case, para. 17.

⁵⁶ Cf. *U.S.-Tuna*, 2011, paras 7.305, 7.311.

⁵⁷ *Amoco v. Iran*, 1987, para. 142; *Lauder v. Czech Republic*, 2001, para. 257; cf. *S.B. v. New Zealand*, 1994, para. 6.2 in which the UNHRC held a law not to be discriminatory as it did not differentiate between New Zealand nationals and non-nationals.

⁵⁸ Cf. *U.S.-Tuna*, 2011, para. 7.334 in which Mexican fisheries' refusal to adapt to U.S. law was held to be the real reason for their resulting disadvantage on the U.S. market.

⁵⁹ Cf. *U.S.-Tuna*, 2011, para. 7.342.

Accordingly, the alleged investor *Rocacorba* was not treated unequally. Discriminating a foreign investor requires treating him differently to investors in a similar situation, i.e. treating the investments unequally.⁶⁰ Hence, *Barbarossa* did not discriminate against *Sacalm* or *Rocacorba*. Consequently, the Protected Area does not constitute a discriminatory measure.

3. *Barbarossa* acted without the required discriminatory intent

Even if this Court held that a *de facto* effect can result in unequal treatment, this would not denote the discriminatory nature of such treatment. It is considered discriminatory only if the state acted with discriminatory intent.⁶¹ *Barbarossa* acted without such intent as it pursues legitimate objectives (a.) and does not base its measures on discriminatory reasoning (b.).⁶²

a. The objectives *Barbarossa* is pursuing are legitimate

Customary international law acknowledges the legitimacy of the protection of natural resources, the environment, economy and cultural heritage.⁶³ The protection of wildlife is widely recognised and even endorsed by the international community.⁶⁴ The pursuit of multiple goals when establishing a policy is also recognised as legitimate.⁶⁵ Protecting the Narwhals contributes to

⁶⁰ *Goetz v. Burundi*, 1999, para. 121; *Lauder v. Czech Republic*, 2001, para. 257; *Siemens v. Argentina*, 2007, paras 316, 321; *Plama v. Bulgaria*, 2008, para. 184.

⁶¹ *ELSI*, para. 122; *Genin v. Estonia*, 2001, para. 369; *Lauder v. Czech Republic*, 2001, para. 231; *Methanex v. U.S.*, 2005, part IV, ch. B, para. 12; *LG&E v. Argentina*, 2006, para. 146.

⁶² *Gami v. Mexico*, 2004, para. 114; *Enron v. Argentina*, 2007, para. 282; *Sempra v. Argentina*, 2007, para. 319.

⁶³ Art. XIV (b) GATS regards the protection of humans, animals or plant life or health as legitimate objectives; Art. 4 World Heritage Convention; Arts 4 (d), (e), (g) GA Res. New International Economic Order, 1974; Art. 2 (2) GA Res. Economic Rights and Duties of States, 1974; cf. preamble to the CITES.

⁶⁴ Principles 2, 4 UN Declaration on the Human Environment, 1972; I. General Principles, GA Res. World Charter for Nature, 1982; Arts 5, 6 UNESCO Declaration on the Responsibilities Towards Future Generations, 1997; cf. Convention on Biological Diversity.

⁶⁵ *Whaling in the Antarctic*, para. 97.

each of these objectives: They are part of the environment,⁶⁶ and play a vital role in the culture and economic development of *Barbarossa*.⁶⁷ Developing countries enjoy privileges in that their threshold of legitimacy is lower due to their particular situation.⁶⁸ The LDC *Barbarossa*, therefore, established the Protected Area for legitimate reasons.

b. *Barbarossa* did not have discriminatory motives

In any case *Barbarossa* acted without discriminatory intent. First, the *Minister of Environment* directly referring to *Sacalm* once⁶⁹ does not display any alleged discriminatory intention of the *Government of Barbarossa*. Individual government officials' aims carry no weight in the objective assessment of intent. The key factor is the "predominant purpose".⁷⁰ Even if her personal target was *Sacalm*, this could not be attributed to the entire government and negate the overall neutrality of the Protected Area.⁷¹ Second, a measure cannot intentionally target foreign firms or investments and also have a negative effect on national firms.⁷² The Protected Area also damaged the *Barbarossan* firm *Angels*. As *Sacalm* did not operate boats entering the breeding ground, *Rocacorba* could no longer fulfil a part of its sightseeing obligations under the agreement with *Angels* about holiday packages.⁷³ As a result, *Angels* could not profit from the

⁶⁶ Cf. *Southern Bluefin Tuna*, 1999, para. 70; *Iron-Rhine Arbitration*, 2005, para. 58; Art. 2 (10) Convention on Civil Liability; Principles 2, 4 of the UN Declaration on the Human Environment, 1972; *Johnson et al*, JEQ, 1997, pp. 581 ff.

⁶⁷ Case, paras 9, 10, 12, 13, 14, 20.

⁶⁸ Art. 2 (3) International Covenant on Economic, Social and Cultural Rights; Art. XII GATS; GA Res. New International Economic Order, 1974.

⁶⁹ Case, para. 17.

⁷⁰ Cf. *Methanex v. U.S.*, 2002, para. 158.

⁷¹ Cf. *Methanex v. U.S.*, 2002, para. 158; *Whaling in the Antarctic*, para. 97.

⁷² *Diebold*, 2010, p. 90.

⁷³ Case, paras 7, 8; clarification 51.

agreement. Thus, *Barbarossa* could not have intended to target *Sacalm* or *Rocacorba* and in doing so damage its dominant domestic firm. In conclusion, the Protected Area does not constitute a discriminatory measure.

II. No legally acquired rights and interests of *Rocacorba* or *Sacalm* have been impaired

Even if the Court held the Protected Area to be discriminatory, it would not impair the legally acquired rights and interests of *Rocacorba* or *Sacalm*. Art. II TACK must be construed narrowly so as to protect property rights and interests only (1.). *Barbarossa* respected these property rights and interests, and investment interests, if they were to be held to be legally acquired (2.).

1. *Sacalm*'s and *Rocacorba*'s legally acquired rights and interests refer to property only

The scope of legally acquired rights and interests is not defined in Art. II TACK. Still, these rights and interests must be acquired by law according to the wording itself ("legally acquired") and their common meaning in international legal practice.⁷⁴ In international law the concept of acquired rights,⁷⁵ but no general definition, is recognised.⁷⁶ The only rights recognised as legally acquired are proprietary rights.⁷⁷ *Sacalm*'s rights in its catamarans are the only relevant protected rights. *Rocacorba*'s property rights do not extend to its subsidiary.⁷⁸ Also, legally acquired interests relate to their corresponding rights. Otherwise the qualification would be

⁷⁴ Cf. *Garcia-Amador-Report*, 1959, paras 30 ff.; *Lalive*, in: *Rights and Duties of Private Investors Abroad*, pp. 150 f.

⁷⁵ *German Interests in Polish Upper Silesia*, p. 42; *Chorzów Factory*, pp. 27 f.; *Oscar Chinn*, p. 88; *Frontier Dispute*, para. 66; *Goldenberg Case*, 1928, p. 909; *Lowenfeld*, in: *International Economic Law*, p. 470.

⁷⁶ *Garcia-Amador-Report*, 1959, para. 30; *Lalive*, in: *Rights and Duties of Private Investors Abroad*, p. 151; *Sik*, NILR, 1977, p. 120.

⁷⁷ *Lalive*, in: *Rights and Duties of Private Investors Abroad*, p. 187; *Garcia-Amador-Report*, 1959, paras 31 ff.

⁷⁸ The subsidiary does not include property cf. *ELSI*, para. 106 in which the Court held that the concept of "property" extending to the company was not clearly recognised.

meaningless facilitating the largest margin of interpretation. This narrows the scope of protection. Notably, *Sacalm's* business interests and *Rocacorba's* investor, as well as shareholder, interests are not protected: a company's original business position⁷⁹ and future profits⁸⁰ are not legally acquired interests but rather economic circumstances subject to inevitable change.⁸¹ Thus, Art. II TACK does not protect *Rocacorba's* loss and *Sacalm's* eventual cessation of business.⁸²

2. The Protected Area complies with *Rocacorba* and *Sacalm's* property rights and interests

The measure does not impair any firm's rights or interests. *Barbarossa* respected *Sacalm's* property in its boats (a.). *Barbarossa* would have also respected the economic interests of both *Sacalm* and *Rocacorba* (b.), as well as the latter's investor and shareholder interests (c.).

a. *Barbarossa* did not indirectly expropriate *Sacalm* of its boats

Effective deprivation of property, i.e. indirect expropriation, requires the loss of effective control over the use and disposition of the property.⁸³ *Sacalm's* vessels, however, can still operate transport services and other sightseeing tours across Lake Theth.⁸⁴ The restriction from a single part of Lake Theth⁸⁵ does not affect their value. In any case, *Sacalm* can dispose of the boats. *Sacalm* was not expropriated of its boats. Thus, its property rights were not impaired.

⁷⁹ *Lalive*, in: Rights and Duties of Private Investors Abroad, p. 188; *Herz*, AJIL, 1941, p. 246.

⁸⁰ *Oscar Chinn*, p. 88; *Starrett Housing Corp. v. Iran*, 1987, p. 54; *Garcia-Amador-Report*, 1959, para. 37.

⁸¹ *Oscar Chinn*, p. 88.

⁸² Case, para. 19.

⁸³ *Waste Management v. Mexico*, 2004, para. 159; *Archer Daniels v. Mexico*, 2007, para. 242; *El Paso v. Argentina*, 2011, para. 245; *Higgins*, in: The Hague Academy, 1982, p. 351.

⁸⁴ Case, paras 5, 9: the phrase "the most popular trip" implies that *Sacalm* offers multiple tours.

⁸⁵ Case para. 17.

b. *Barbarossa* did not impair *Sacalm*'s economic interests in its business

Sacalm's interest in its ongoing business was not impaired. On the contrary, *Barbarossa* created the conditions to make *Sacalm*'s business profitable again. By way of repopulating Lake Theth with Narwhals and thus incentivising tourists, *Barbarossa* sustains the crumbling economic foundation of *Sacalm*'s most popular trip to the breeding ground.⁸⁶ Thus, the Protected Area did not impair *Rocacorba* or *Sacalm*'s business interests but works in favour of furthering them.

c. *Barbarossa* did not impair *Rocacorba*'s investment in its subsidiary

Rocacorba's investment in *Sacalm* was not expropriated. Expropriation requires almost complete devaluation of the investment or permanent, severe deprivation of investor rights.⁸⁷ A mere fall in the investment's value, through the loss of benefits, expectations or profits does not suffice.⁸⁸ The Protected Area only prevented *Sacalm* from operating its catamaran trips to the breeding ground, not its other trips, or trips to the breeding ground with other boats.⁸⁹ The possible loss caused therewith does not suffice as it is the dropping tourist numbers that seriously damaged *Sacalm*'s value.⁹⁰ The decisive expropriation criterion is, rather, loss of control over the investment.⁹¹ *Barbarossa* did not interfere with *Rocacorba*'s alleged control over *Sacalm*.

⁸⁶ Case, paras 9, 12 which establish a link between the number of tourists and Narwhals.

⁸⁷ *Generation Ukraine v. Ukraine*, 2003, para. 20.32; *LG&E v. Argentina*, 2006, para. 200; *Archer Daniels v. Mexico*, 2007, para. 240.

⁸⁸ *Pope & Talbot v. Canada*, 2000, paras 101, 102; *Waste Management v. Mexico*, 2004, para. 159; *LG&E v. Argentina*, 2006, para.191; *BG v. Argentina*, 2007, para. 268; *El Paso v. Argentina*, 2011, para. 249; *Kriebaum*, in IIL, A Handbook, p. 993 which provides that measures reducing an investment's profitability, but not taking it from the investor, are not to be considered expropriatory.

⁸⁹ Case, paras 5, 9, 17.

⁹⁰ Case, para. 12; cf. *ELSI*, para. 135 dismissing the case as the U.S. could not prove any substantial value *ELSI* had before the mayor's actions or a negative effect on the shareholders.

⁹¹ *Waste Management v. Mexico*, 2004, para. 159; *Archer Daniels v. Mexico*, 2007, para. 241; *El Paso v. Argentina*, 2011, para. 245.

Thus, neither *Rocacorba*'s rights nor its interests in the investment were disregarded.

In conclusion, *Barbarossa* did not breach Art. II TACK by establishing the Protected Area as the measure is neither discriminatory, nor impairs any legally acquired rights and interests.

C. *Barbarossa*'s conduct can be justified by necessity

Even if this Court held that *Barbarossa* breached Art. II TACK and committed an internationally wrongful act, state necessity would justify its conduct. *Barbarossa* can invoke necessity, a rule of customary international law (I.) as its environmental, economic and humanitarian crisis meets the requirements of the state of necessity (II.).

I. Necessity constitutes customary international law

The state of necessity constitutes a rule of customary international law.⁹² It includes economic necessity,⁹³ environmental necessity⁹⁴ and considers the humanitarian situation as a state's primary obligation is to protect its citizens.⁹⁵ The rule and its application by courts was shaped by its codification in Art. 25 ILC DARS in 2001.⁹⁶ *Barbarossa* can thus refer to the

⁹² *Gabčíkovo-Nagymaros Project*, para. 51; *Palestinian Wall*, para. 140; ILC DARS with commentaries, Art. 25, para. 1; *Grotius*, 1625, book I, ch. I, para. XII, clause 3; *Hershey*, 1927, p. 231; *Cheng*, 1953, pp. 69-77; *Schwarzenberger*, in: The Hague Academy, 1955, pp. 352 f.; *Lammers*, LJIL, 1998, p. 299; *Ago-Report*, 1980, paras 5, 7, 23.

⁹³ *CMS v. Argentina*, 2005, para. 214; *LG&E v. Argentina*, 2006, paras 226 ff.; *Enron v. Argentina*, 2007, para. 339; *Sempre v. Argentina*, 2007, paras 322, 374; *Continental v. Argentina*, 2008, para. 173; *Sempre v. Argentina*, Annulment, 2010, para. 168; *Enron v. Argentina*, Annulment, 2010, para. 359; *Suez v. Argentina*, 2010, paras 236 ff; *Impregilo v. Argentina*, 2011, paras 75 ff.; *El Paso v. Argentina*, 2011, paras 203 ff.; *BG v. Argentina*, 2007, paras 408 ff.; *National Grid v. Argentina*, 2008, para. 78; *Reinisch/Binder*, in: *Sovereign Financing & Human Rights*, p. 117; *Ago-Report*, 1980, para. 2.

⁹⁴ *Gabčíkovo-Nagymaros Project*, para. 51; *Utton*, BCLR, 1968, p. 623 on the Torrey Canyon incident; *Ago-Report*, 1980, para. 2.

⁹⁵ *Sloane*, AJIL, 2012, p. 463.

⁹⁶ Although not an international convention in terms of Art. 38 (1) (a), the ILC DARS represent international custom in terms of Art. 38 (1) (b) ICJ Statute: *Morton*, 2000, pp. 1-5.

elements of necessity as formulated in Art. 25 ILC DARS when pleading necessity in 2017.

II. *Barbarossa* meets the requirements of necessity

International law requires the act in question to be the only way to safeguard an essential interest against a grave and imminent peril without seriously impairing another state's essential interest.⁹⁷ The Protected Area is justified meeting all of the following required elements of necessity (1.-5.).

1. *Barbarossa* protects its essential interests

As publicly declared by its *Minister of the Environment*,⁹⁸ *Barbarossa* seeks to protect its economy (a.), its environment (b.) and its citizens' human rights (c.).

a. *Barbarossa*'s economic survival constitutes an essential interest

Protecting the economy from a severe crisis is recognised as an essential interest in the context of necessity.⁹⁹ The state's economic survival, not its very existence, needs to be endangered.¹⁰⁰ *Barbarossa*'s economic survival is at stake due to a recession which does amount to an economic crisis against the backdrop of general economic vulnerability as an LDC and increased dependence on tourism, accounting for 75% of *Barbarossa*'s economy in 2012.¹⁰¹ Such dire economic conditions threaten public order¹⁰² and accordingly a state's essential security

⁹⁷ Art. 25 ILC DARS; *Gabčíkovo-Nagymaros Project*, para. 51; *Palestinian Wall*, para. 140; *CMS v. Argentina*, 2005, para. 330; *Sempra v. Argentina*, 2007, para. 355; *Enron v. Argentina*, 2007, para. 313.

⁹⁸ Case, para. 17.

⁹⁹ *SCdB*, pp. 177 f. in which Greece's financial situation was held in principle to justify its actions; *LG&E v. Argentina*, 2006, para. 251; *Continental v. Argentina*, 2008, para. 178; ILC-Report on the Work of its 32nd Session, 1980, p. 37, paras 10 ff.

¹⁰⁰ *LG&E v. Argentina*, 2006, para. 251; *Ago-Report*, 1980, para. 2.

¹⁰¹ Case, paras 4, 6, 13.

¹⁰² Cf. Arts XIV, XIV bis GATS.

interests.¹⁰³ Safeguarding the economy by protecting the Narwhals and thus restoring the tourism industry, the foundation of *Barbarossa's* economic welfare since 2012,¹⁰⁴ constitutes the essential interest required by necessity.

b. Preserving the environment constitutes an essential interest

Safeguarding the ecological balance and the environment constitutes an essential interest.¹⁰⁵ The term “environment” includes wildlife.¹⁰⁶ Preserving the Narwhals as part of the environment is thus an essential interest. Equally their last remaining habitat worldwide,¹⁰⁷ Lake Theth, needs to be protected as natural heritage.¹⁰⁸ It is an essential interest not just of *Barbarossa*, but of all states,¹⁰⁹ as well as of mankind.¹¹⁰ Environmental matters transcend the bilateralism of international law and are global concerns.¹¹¹ Thus, saving the Narwhals from extinction is an

¹⁰³ *Sykes*, AJIL, 2015, p. 317; cf. *LG&E v. Argentina*, 2006, paras 226-261; *Continental v. Argentina*, 2008, para. 178.

¹⁰⁴ Case, paras 6, 13.

¹⁰⁵ *Gabčíkovo-Nagymaros Project*, para. 53; *Ago-Report*, 1980, p. 27, para. 33.

¹⁰⁶ *Southern Bluefin Tuna*, 1999, para. 70, which holds that the protection of living resources in the marine environment is part of protecting that environment itself; *Iron Rhine*, 2005, para. 58; Art. 2 (10) Convention on Civil Liability; Principles 2, 4 of the UN Declaration on the Human Environment, 1972; *Johnson et al*, JEQ, 1997, pp. 581 ff.

¹⁰⁷ Case, para. 10.

¹⁰⁸ Cf. Arts 2, 5 (d) World Heritage Convention.

¹⁰⁹ *Ago-Report*, 1980, p. 27, para. 33.

¹¹⁰ *Nuclear Weapons*, para. 29; *Gabčíkovo-Nagymaros Project*, para. 53; *Pulp Mills*, para. 193; *Pacific Sea Fur Seal Arbitration*, 1893, in which the U.S. argued that a State imposing protective measures is a trustee for the benefit of mankind as the hunted seals are the common property of mankind (cited in: *Fitzmaurice*, NYIL, 2010, p. 165).

¹¹¹ *Gabčíkovo-Nagymaros Project (Separate Opinion Weeramantry)*, p. 118; Proclamation 2 UN Declaration on the Human Environment, 1972; Principle 7 Rio Declaration on Environment and Development, 1992.

obligation *Barbarossa* owes *erga omnes*.¹¹² Consequently, safeguarding the Narwhals is an essential interest not just of *Barbarossa* but also of the entire international community.

c. Protecting basic human rights' interests constitutes an essential interest

Safeguarding human rights is a fundamental interest of the international community and as such is imbued with great legitimacy.¹¹³ The economic and ecological crisis correlates with human rights infringements such as the human right to development,¹¹⁴ health or life.¹¹⁵ Protecting the population from famine is recognised as an essential interest with regard to necessity.¹¹⁶ *Barbarossa's* people suffer from increasing poverty and impending famine.¹¹⁷ No treaty clause, except those constituting or recognising *jus cogens*, could prevail over these basic human rights.¹¹⁸ Otherwise the treaty itself would infringe human rights and violate general international law. Furthermore, international human rights law protects the people's right to take part in cultural life,¹¹⁹ and to have their cultural heritage respected based on the concept of human

¹¹² Cf. *Barcelona Traction*, para. 33; *Dobos*, FELR, 2001 p. 408 citing *Gabčíkovo-Nagymaros Project*, para. 53; *Weatherall*, 2015, p. 259.

¹¹³ *Barcelona Traction*, paras 33 f.; Arts 55 (c), 56 UN Charter; Art. I (1) UNESCO Constitution; GA Res. Universal Declaration of Human Rights, 1948; *Ryngaert*, NYIL, 2010, pp. 81, 92.

¹¹⁴ Cf. GA Res. Declaration on the Right to Development, 1986; GA Res. Declaration on the Rights of Indigenous Peoples, 2007; Rio Declaration on Environment and Development, 1992.

¹¹⁵ *Gabčíkovo-Nagymaros Project (Separate Opinion Weeramantry)*, p. 91.

¹¹⁶ *Ryngaert*, NYIL, 2010, p. 93 citing the *Neptune Case* of 1797.

¹¹⁷ Case, paras 13, 14.

¹¹⁸ *CMS v. Argentina*, 2005, para. 114; *National Grid v. Argentina*, 2008; para. 245, *Suez v. Argentina*, 2010, paras 236 ff.

¹¹⁹ Art. 15 (1) (a) International Covenant on Economic, Social and Cultural Rights; Art. 27 GA Res. Universal Declaration of Human Rights, 1948; GA Res. Human Rights and Cultural Diversity, 2005, para. 3.

dignity.¹²⁰ The Narwhals are vital to the culture of *Barbarossa*'s people who have, *inter alia*, rituals and customs revolving around them.¹²¹ They are, hence, part of their intangible cultural heritage and cultural expression, which must be protected by all means necessary.¹²² They are, also, part of several indigenous tribes' religions and are thereby intertwined with their religious rights and freedoms.¹²³ Protecting this cultural heritage is a shared interest of the entire international community.¹²⁴ By way of their UNESCO membership,¹²⁵ *Alfania* and *Barbarossa* recognise this essential interest and *Barbarossa*'s primary responsibility in protecting it on its territory.¹²⁶ As a result, safeguarding the population's basic and cultural human rights is an essential interest.

2. *Barbarossa*'s essential interests were threatened by a grave and imminent peril

The collapse of the economy (a.), the irreversible annihilation of the Narwhal species (b.) and the death of a great part of the human population by way of starvation (c.) were grave and imminent perils threatening *Barbarossa*'s essential interests.

¹²⁰ Art. 22 GA Res. Universal Declaration of Human Rights, 1948; Art. 4 UNESCO Declaration on Cultural Diversity, 2001; *Francioni*, MJIL, 2004, p. 1212.

¹²¹ Case, para. 9.

¹²² Arts 2 (1), (2) (c), 11 (a) Convention on Intangible Cultural Heritage, which pledges all states to take the necessary measures to safeguard intangible cultural heritage; Arts 4 (3), 6 Convention on Cultural Diversity.

¹²³ Case, para. 9; for people's freedom of religion and right to manifest their religion cf. Art. 18 GA Res. Universal Declaration of Human Rights, 1948; Art. 18 (1) International Covenant on Civil and Political Rights.

¹²⁴ Cf. *Francioni*, MJIL, 2004, p. 1220; *Weatherall*, 2015, p. 263; GA Res. Human Rights and Cultural Diversity, 2005, para. 1.

¹²⁵ Clarification 5.

¹²⁶ Cf. Art. 4 World Heritage Convention.

a. *Barbarossa*'s economy was threatened by a grave and imminent peril

Barbarossa's landlocked economy, that had been vulnerable for the majority of the last century, with scant infrastructure, insufficient human capital, low GNI and barely sufficient agriculture, did not dispose of the resources to avert an economic collapse.¹²⁷ The fact that *Barbarossa*'s economy had not yet completely collapsed and the state had not yet been reclassified to a LDC does not mean that the peril was not imminent. The imminence requirement is met when the peril, however far off, is certain or inevitable.¹²⁸ Economic collapse was inevitable for as long as the tourism industry, the pillar of *Barbarossa*'s one-dimensional economy, was suffering.¹²⁹ Therefore, the continuing economic regression constitutes a grave and imminent peril.

b. The Narwhal species was threatened by a grave and imminent peril

The Narwhal species was threatened with extinction within two years if continuously exposed to *cafea calida*. Before their significant decline, the Narwhals were already classified as a “species threatened with extinction” under CITES Appendix I, which *Alfania* recognised through its ratification thereof.¹³⁰ Extinction is considered a grave peril in the context of necessity, constituting irreversible damage.¹³¹ The imminence requirement is met as the *UoB*'s report scientifically established the Narwhals' extinction in the foreseeable future.¹³² Even if the Court held the *UoB*'s report to be inconclusive or unreliable, the imminence and gravity requirements

¹²⁷ Case, paras 1, 4, 14.

¹²⁸ *Gabčíkovo-Nagymaros Project*, para. 54.

¹²⁹ Case, para. 14.

¹³⁰ Case paras 10, 15.

¹³¹ Cf. *Gabčíkovo-Nagymaros Project*, para. 140 stating that “vigilance and prevention are required on account of the often *irreversible* character of damage to the environment” (emphasis added).

¹³² Case, para. 15; cf. *Gabčíkovo-Nagymaros Project*, para. 54.

would still be met. The well-recognised precautionary principle¹³³ justifies the Protected Area. Falling short of absolute certainty must not hinder imposing measures based on necessity.¹³⁴ *Barbarossa* was not required to provide scientific proof of the Narwhals' extinction within two years.¹³⁵ Consequently, the extinction constitutes a grave and imminent peril.

c. The *Barbarossan* population's human rights were threatened by a grave and imminent peril

With 10% of the crops left due to the regional drought, no food reserves as agriculture has barely been covering needs, a 12% poverty rate and low GNI per capita, the large majority of the population was at risk of starvation, as the *High Representative* recognised.¹³⁶ Moreover, the Narwhals' extinction was a grave and imminent threat to their traditional cultural customs. In conclusion, *Barbarossa's* essential interests were threatened by a grave and imminent peril.

3. Establishing the Protected Area was the only way for *Barbarossa* to safeguard its interests

The only way¹³⁷ for *Barbarossa* to safeguard the Narwhals and thus its essential interests, was to establish the Protected Area. A measure is the only way to safeguard an essential interest when no possible alternative action would reasonably lead to the same result.¹³⁸ The main cause of the Narwhals' decline is the highly toxic chemical *cafea calida* as scientifically established

¹³³ Principle 15 Rio Declaration on Environment and Development, 1992; *McIntyre/Mosedale*, J. ENVTL., 1997, p. 221; *Dobos*, FELR, 2001, pp. 385, 390.

¹³⁴ *Southern Bluefin Tuna*, 1999, para. 80; Principle 15 Rio Declaration on Environment and Development, 1992; Fort Lauderdale Resolution, 1994, in which the CITES parties agreed to preserve species regardless of scientific uncertainty by virtue of the precautionary approach; ILC DARS with commentaries, Art. 25, para. 16; *Crawford-Report*, 1999, para. 291; cf. *Gabčíkovo-Nagymaros Project (Separate Opinion Weeramantry)*, p. 113.

¹³⁵ Cf. ILC-Report on the Work of its 51st Session, 1999, para. 377.

¹³⁶ Case, paras 4, 14.

¹³⁷ Art. 25 (1) (a) ILC DARS.

¹³⁸ ILC DARS with commentaries, Art. 25, para. 15; *Hoelck Thjoernelund*, MPYUNL, 2009, p. 426.

and as is, *inter alia*, evident from the correlation between the Narwhals' decline and the surge in the catamarans' trips'.¹³⁹ Lake Theth is the only Narwhal breeding ground in the world.¹⁴⁰ Banning the lethal chemical from the breeding ground is indispensable to protecting the Narwhals from the danger stemming from it. Thus, it was the only way to safeguard *Barbarossa's* interests.

4. No essential interest of *Alfania* or the international community was seriously impaired

In the context of necessity, no essential interest of either *Alfania* or the international community must be seriously impaired.¹⁴¹ Even if *Alfania's* general interest in *pacta sunt servanda*¹⁴² was held by this Court to be essential, it would not be seriously impaired. Conflicting considerations are not seriously impaired when they are outweighed by the protected interests.¹⁴³ This requirement, referred to as the "balancing requirement",¹⁴⁴ dictates that the protected interests must exceed the sacrificed interests in value.¹⁴⁵ The interests *Barbarossa* is protecting are its economy, its citizens' basic and cultural human rights and the mythical Narwhals, which are at the heart of *Barbarossan* culture.¹⁴⁶ In contrast, the sacrificed interest is a potential violation of a

¹³⁹ Case, para. 15.

¹⁴⁰ Case, paras 9, 10.

¹⁴¹ Art. 25 (1) (b) ILC DARS.

¹⁴² *Nuclear Tests*, para. 46; Art. 26 VCLT as well as the preamble to the VCLT stating that the *pacta sunt servanda* principle is universally recognised.

¹⁴³ ILC DARS with commentaries, Art. 25, para. 17; *Hoelck Thjoernelund*, MPYUNL, 2009, p. 438.

¹⁴⁴ Even though this requirement is not explicitly mentioned in Art. 25 ILC DARS, it has existed since the time of Grotius: *Dobos*, FELR, 2001, p. 383.

¹⁴⁵ *Dobos*, FELR, 2001, p. 383; *Sykes*, AJIL, 2015, p. 289.

¹⁴⁶ See C. II. 1. b., c.

treaty obligation protecting individual rights, namely Art. II TACK protecting property rights. As a global concern,¹⁴⁷ preserving the Narwhals must prevail. The prevention of serious pollution is valued higher than subjective economic rights.¹⁴⁸ The value of *Barbarossa's* interests in the conservation of a species must take into account considerations pertaining to the concept of sustainable development.¹⁴⁹ Environmental protection not only benefits the current generation but future generations as well, which is why *Barbarossa* needs to exercise caution regarding the protection of the Narwhal species in order to conserve the future generations' right to an undamaged environment.¹⁵⁰ Moreover, *Alfania* also has an essential environmental interest in protecting the Narwhals.¹⁵¹ Through its ratification of the CITES,¹⁵² *Alfania* recognises the convention's purpose stated in the preamble, to protect wild fauna for this and the generations to come,¹⁵³ and the ensuing responsibility of states.¹⁵⁴ Both states explicitly intend to preserve the

¹⁴⁷ See C. II. 1. b.

¹⁴⁸ *Fitzmaurice*, NYIL, 2010, p. 168, citing the *Torrey Canyon* incident in which it was contested that preventing pollution outweighs a ship owner's subjective rights.

¹⁴⁹ This principle reflects "development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs", GA Res. Report of the World Commission on Environment and Development, 1987; on their consideration when balancing interests: *Gabčíkovo-Nagymaros Project (Separate Opinion Weeramantry)*, p. 88; *Dobos*, FELR, 2001, p. 405.

¹⁵⁰ Cf. *Dobos*, FELR, 2001, p. 405; Principle 2 UN Declaration on the Human Environment, 1972; Principle 3 Rio Declaration on Environment and Development, 1992; Preamble to the CITES.

¹⁵¹ C. II. 1. b., c.

¹⁵² Case, para. 22.

¹⁵³ *U.S.-Shrimp*, 1998, para. 120 in which the U.S. argues that the "CITES undoubtedly had advanced the cause of sea turtle conservation"; Fort Lauderdale Resolution, 1994, in which the CITES parties stated that they would act in the best interests of the preservation of a species.

¹⁵⁴ Preamble to the CITES.

Narwhals and thus *Barbarossa* acts in favour of *Alfania's* interests. Consequently, *Barbarossa's* essential interests outweigh *Alfania's* sacrificed economic interests in general and in the case at hand. *Alfania's* general interest in *pacta sunt servanda* is not seriously impaired.

5. *Barbarossa's* plea of necessity is not precluded

None of the three possibilities excluding the plea of necessity, as per Arts 25 (2), 26 DARS, are applicable. No peremptory norm of general international law¹⁵⁵ is affected. There are no non-derogation clauses in the TACK. *Barbarossa* did not contribute to its state of necessity. Such a contribution must be substantial and not merely incidental or peripheral.¹⁵⁶ *Barbarossa* in no way advanced the Narwhals' decline. Therefore, *Barbarossa* did not contribute to their consequential plight.¹⁵⁷ Moreover, investing more of the extra revenue in human capital and infrastructure might have enhanced a long-term recovery of the economy but would not have averted or mitigated the imminent crisis caused by the sharp and rapid drop in tourist numbers. *Barbarossa's* policies to strengthen its economy, the joint tourism campaign and the implementation of its economic development plan in 2009 proved successful.¹⁵⁸ Even if more had been spent on education and infrastructure, *Barbarossa's* economy would still have largely relied on tourism and hence been vulnerable to falling tourist numbers. *Barbarossa* thus did not contribute to its situation of necessity resulting from the Narwhals' decline and the ensuing drop in tourism and national income. Consequently, *Barbarossa* is not precluded from pleading necessity, in particular as *Barbarossa* did not contribute to its state of necessity.

¹⁵⁵ Art. 53 VCLT: "a norm accepted and recognized by the international community of states".

¹⁵⁶ ILC DARS with commentaries, Art. 25, para. 20.

¹⁵⁷ Case, para. 12.

¹⁵⁸ Case, paras 5, 8.

6. The establishment of the Protected Area constitutes a temporary measure

A measure justified by necessity can be upheld as long as the state of necessity still exists.¹⁵⁹

The temporary character of the Protected Area is evident as *Barbarossa* constructed the Protected Area to be valid until the Narwhals are no longer threatened by extinction. This threat was re-evaluated by *Barbarossa* in 2017. It determined that the increased number of Narwhals was not sufficient to guarantee their long-term future.¹⁶⁰ As the measure is of a temporary nature and the state of necessity is still ongoing, *Barbarossa* can thus plead necessity.

In conclusion, *Barbarossa* found itself in one of the exceptional situations required for the invocation of necessity. It meets the requirements stated in Art. 25 ILC DARS, which constitute custom. Thus, its conduct is justified due to its environmental, economic and humanitarian state of necessity.

(i) Submissions

Barbarossa requests the ICJ to adjudge and declare that:

- A. Art. II of the TACK does not apply to the measures imposed on *Sacalm*.
- B. *Barbarossa* complied with Art. II of the TACK by establishing the Protected Area.
- C. *Barbarossa*'s conduct can be justified by necessity.

¹⁵⁹ *Gabčíkovo-Nagymaros Project*, para. 101; *CMS v. Argentina*, 2005, para. 382; Art. 27 (a) ILC DARS; *Fitzmaurice*, NYIL, 2010, p. 166.

¹⁶⁰ Case, para. 20.

(j) Annex

Annex: BITs and FTAs referring to incorporation under national law as the decisive factor determining nationality

Malta-France BIT, 1976

Art 1 (3): The term “company” means any body corporate set up in the territory of either Contracting Party in accordance with the latter's law and having its registered office there.

U.S.-Tunisia BIT, 1990

Art. 1 (1) (c): “company of a Party” means any kind of corporation, company, association, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned; [...].

U.S.-Sri Lanka BIT, 1991

Art. 1 (1) (b): “company” of a Party means any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled; [...].

Lithuania-Ukraine BIT, 1994

Art. 1 (2) (a): in respect of the Republic of Lithuania:

- natural persons who are nationals of the Republic of Lithuania according to Lithuanian laws; any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations;

(b) in respect of Ukraine:

natural person who are nationals of the Ukraine according to Ukrainian laws;

- any entity established in the territory of the Ukraine in conformity with its laws and regulations; [...].

U.S.-Ukraine BIT, 1994

Art. 1 (1) (b): “company” of a Party means any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled; [...].

U.S.-Trinidad and Tobago BIT, 1994

Art. 1: “Company of a Party” is defined as a company constituted or organized under the laws of that Party.

Albania-Israel BIT, 1996

Art. 1 (3): any legal person that is incorporated or constituted under the law of the State [...].

Canada-Chile FTA, 1996

Art. B-01: **enterprise of a Party** means an enterprise constituted or organized under the law of a Party.

Albania-Portugal BIT, 1998

Art. 1 (3) (b): Legal persons, including corporations, commercial companies or other companies or associations, which have a main office in the territory of either Contracting Party and are incorporated or constituted in accordance with the law of that Contracting Party.

France-Mexico BIT, 1998

Art. 1 (2) (b) any legal person constituted in the territory of one Contracting Party in accordance with the legislation of that Party and having its head office in the territory of that Party [...].

Russia-Ukraine BIT, 1998

Art. 1 (2) (b): any legal entity, set up or instituted in conformity with the legislation prevailing on the territory of the given Contracting Party [...].

Argentina-New Zealand BIT, 1999

Art. 1 (1): “investor” means:

(a) any natural person who is a national or permanent resident of a Contracting Party in accordance with its laws; and

(b) any company, partnership, firm, corporation, business association or body, or other legally recognised entity incorporated, established, registered, constituted, or otherwise duly organised in accordance with the laws in force in a Contracting Party and having its head office located in the territory of that Contracting Party.

Bosnia and Herzegovina-Ukraine BIT, 2002

Art. 2 (a): In respect of Bosnia and Herzegovina:

(ii) Legal person established in accordance with the laws in force in Bosnia and Herzegovina, which has its registered seat, central management or main place of business in the territory of Bosnia and Herzegovina.

b) In respect of Ukraine:

(ii) Any entity established in accordance with and recognised as a legal person by the law of Ukraine, such as corporations, firms, associations, foundations or any similar organisation having the right to conduct economic activities in accordance with the law of Ukraine.

U.S.-Chile FTA, 2003

Art. 2 (1): enterprise of a Party means an enterprise constituted or organized under the law of a Party; [...].

Ethiopia-France BIT, 2003

Art. 1 (3): The term “company” means any legal person constituted on the territory of one Contracting Party in accordance with the legislation of that Party [...].

Afghanistan-Turkey BIT, 2004

Art. 1 (1) (b): corporations, firms or business associations incorporated or constituted under the law in force of either of the Parties and having their headquarters in the territory of that Party.

Germany-Afghanistan BIT, 2005

Art. 1 (3) (a): in respect of the Federal Republic of Germany:

any juridical person as well as any commercial or other company or, association with or without legal personality having its seat in the territory of the Federal Republic of Germany, [...].

(b): in respect of the Islamic Republic of Afghanistan:

any juridical person as well as any commercial or other company or association with or without legal personality having Its seat in the territory of the Islamic Republic of Afghanistan, [...].

U.S.-Uruguay BIT, 2005

Art. 1: “investor of a Party” means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship.

Japan-Peru BIT, 2009

Art. 1 (4): The term “an enterprise of a Contracting Party” means any legal person or any other entity duly constituted or organised under the applicable laws and regulations of that Contracting Party, [...].