

***CASE CONCERNING THE ALMONTAN SHRUBLAND
(FORIA V. COSTAT)***

1. The State of Costat (“Costat”) and the Democratic Republic of Foria (“Foria”) are neighbouring States which lie along the western shore of the Gulf of Almonta. The Almontan Shrubland – a large mangrove forest – stretches for 700 kilometres along the coast of the Gulf. Recognized by climate scientists as one of the world’s most important carbon “sinks,” the Almontan Shrubland also protects the low-lying coastal regions of Costat and Foria from the effects of storm flooding. Roughly 70% of the Almontan Shrubland lies within Costat, while the remaining 30% is in Foria.
2. Both Costat and Foria have been members of the United Nations since 1959. Beginning in the early 1970s, Foria developed a robust technology sector and is now classified by the World Bank as a high-income economy. It became party to the U.N. Framework Convention on Climate Change (“UNFCCC”) in 1992 and is listed in Annex I of that Convention.
3. From the mid-1980s onward, Costat underwent a long period of turmoil and economic depression. Successive Forian governments tried to provide development aid to Costat, but persistent instability limited the effectiveness of these efforts. The situation in Costat appeared to finally stabilize in June 2018 with the election of a government of national unity under President Sami Verlossen. As of 2018 Costat is classified by the World Bank as a lower-middle income economy. It acceded to the UNFCCC in 1999 and is a non-Annex I party.
4. Costat and Foria are each party to the United Nations Convention against Corruption (“UNCAC”). In 2015, the Costatian Senate adopted the Influence Peddling Act, criminalizing trading in influence. To define this crime, the Act copied *verbatim* the language contained in Article 18 of UNCAC. Under the Influence Peddling Act, any person convicted of trading in influence may be subject to two years in prison and the confiscation of assets deemed to have been illicitly acquired.
5. After taking office on 1 July 2018, President Verlossen announced his signature policy, which he termed the Rebuilding Costat Programme (“RCP”). The Programme involved a series of large-scale public works projects designed to stimulate Costat’s economy and improve its infrastructure.
6. President Verlossen’s election and the announcement of the RCP were welcomed by Foria, which had long been troubled by the instability that plagued its neighbour. On 22 July 2018, Forian Prime Minister Kay Green and President Verlossen met at a summit to “promote mutually beneficial intercourse between the two nations and establish a lasting spirit of friendship in the region.” These discussions led to the conclusion on 2 October 2018 of the Business, Environment and Amicable Relations (BEAR) Treaty, which includes provisions concerning cross-border investment, protection of the Almontan Shrubland, and the immunities of each State’s officials (see Annex 1).
7. By late October 2018, none of the RCP projects had advanced past the initial planning stages, with officials in Costat’s government blaming the lack of progress on financial problems. Reports circulated in the Forian press of renewed civil unrest in the Costatian countryside. Several prominent Forian political analysts, including former members of the Forian diplomatic corps, worried that President Verlossen’s government might collapse.
8. On 3 November 2018, Prime Minister Green called an unscheduled press conference which was broadcast live on several global television networks. She issued the following statement, which was later distributed in written form as a press release:

I reaffirm in the strongest terms my government's support for President Verlossen and his vision for his country. As a high-income economy and a leading power in the region, we are mindful of our responsibility to promote sustainable development, as embodied in such instruments as the U.N. Declaration on the Right to Development and the Rio Declaration on Environment and Development.

To this end, I am announcing Foria's intention to cover 30% of the budgeted costs for each of the 10 infrastructure projects forming part of the Rebuilding Costat Programme. It is our wish that these funds will help ensure the Programme's swift and successful conclusion. I will personally reach out to President Verlossen in order to arrange the modalities through which our funding will be supplied.

9. The following day, the office of President Verlossen welcomed "the Forian government's commitment to the Rebuilding Costat Programme," and looked forward to future collaboration between the two nations. President Verlossen expressed confidence that they would "be able to agree on any ancillary arrangements necessary to ensure that our partnership is a fruitful one."
10. On 11 December 2018, delegations headed by Forian Minister of the Economy Cameron Odnal and Costatian State Treasurer Liza Warenova met in Costat's capital of Olloras. There, they reached an agreement on the terms by which Foria would cover 30% of the costs of the first RCP project – the construction of a motorway. The funds at issue were transferred one week later. On 20 December 2018, Costat's government re-allocated certain of its own funds it had earmarked for the RCP to other government programs.
11. The conclusion of the BEAR Treaty led to a boom in business between Costat and Foria in which many Forian corporations sought to take part. One such company was the Forian Resources Administration Corporation ("FraCorp"), a medium-sized company specializing in the design and manufacture of machinery for use in the extraction of minerals. It operates primarily in Foria and in neighbouring counties in the region. Pursuant to Section 2 of the Forian Economy Act, the independent board chair of FraCorp is Foria's Minister of the Economy, who is charged with "overseeing the proper functioning of FraCorp and the efficacy of its activities." Section 2 also describes the Minister of the Economy as a "senior post" within the Forian government and charges the Minister with "representing and promoting Forian economic interests abroad."
12. In early January 2019, Costat's government initiated a public procurement process, seeking bids from companies interested in supplying heavy machinery to be used in various RCP projects. FraCorp was among several dozen companies, including major multinational construction firms, which sought to win the government contract. FraCorp's bid for supply of machinery was lower than most of its competitors, although not the lowest of all bidders. FraCorp's proposed timeline for the supply of the machinery was in line with the average of all proposals submitted. Shortly after all the bids were submitted, FraCorp won the contract to supply heavy machinery to Costat's government.
13. Owing to chronic electricity shortages in Costat's impoverished southern provinces along with colder-than-expected winter weather, President Verlossen's Cabinet determined that the construction of a hydroelectric dam should be prioritised as the next RCP project. On 8 January 2019, the President issued an executive order requiring that the construction of the dam be expedited. The text of the order cited the "emergency situation faced by Costatians living in the southern provinces" and the "inability of many families to properly heat their homes."

14. A suitable location for the dam was identified by Costatian civil engineers, who recommended a point along the Nahash River in the middle of the Almontan Shrubland. This location was selected largely due to its proximity to the provinces most in need of electricity.
15. On 13 February 2019, President Verlossen ordered that a “Preliminary Feasibility Study and Environmental Assessment” be carried out regarding the proposed dam. The study was conducted by a team of scientists from the National Technical University of Costat (“NTUC”) whose mandate was to identify any potential difficulties associated with constructing a dam on the proposed site, as well as to assess any harmful effects the dam’s construction might have on the Almontan Shrubland.
16. The NTUC team’s 10 March 2019 report indicated that it would be necessary to clear a portion of the mangrove forest up to 50 square kilometres in size. Additionally, the Nahash River would need to be diverted from its natural course for a period of time, potentially causing additional portions of the Almontan Shrubland to be damaged by flooding, though the extent of this damage was uncertain. Despite these findings, the NTUC report explained that, since the proposed construction site was over 80 kilometres away from Costat’s border with Foria, there was minimal chance that construction of the proposed dam would lead to any harm to Forian territory. The NTUC team did not include in its report any discussion of the effect the proposed dam might have on the Almontan Shrubland’s ability to function as a “sink” for carbon dioxide and other greenhouse gases.
17. One week later, on 17 March 2019, the Costatian government ordered engineering crews to begin clearing the portion of the Almontan Shrubland where the Nahash River Dam was to be built. On 20 March 2019, State Treasurer Warenova contacted Minister Odnal to discuss Foria’s financial contribution to the project. Upon learning that the project would involve clearing portions of the Almontan Shrubland, Minister Odnal immediately reported the matter to Prime Minister Green.
18. In a letter to President Verlossen dated 4 April 2019, Prime Minister Green expressed her government’s “profound concern” regarding the potential effects of the Nahash River Dam project on the Almontan Shrubland. In particular, she stated:

Forian scientists from our Ministry of Health and Environment have identified several deficiencies in the report prepared by the NTUC team, including that the report does not examine the effects the proposed Dam could have on the concentration of greenhouse gases in the atmosphere. We urge your government to postpone further work on the project until a full environmental impact study can be carried out.
19. President Verlossen responded via a letter dated 9 April 2019, stating that:

Unfortunately, we cannot agree to postpone construction on the Nahash River Dam, the prompt completion of which is vital to the well-being of our most vulnerable citizens. It is our government’s position that the NTUC Report satisfactorily indicates that there is no risk of harm to Foria. Any impact on greenhouse gases is speculative, and not clearly linked to any harm to Forian territory.
20. Details regarding the Nahash River Dam project soon began to leak and were picked up by the press in Costat, Foria, and internationally. Numerous environmental NGOs, including Greenpeace and Earthjustice, strongly criticized the Costatian government for its plans to clear part of the Almontan Shrubland. Facing public outcry over her government’s support for the RCP, Prime Minister Green issued a press release on 26 April 2019 announcing that:

Effective immediately, Foria will discontinue monetary support of the Rebuilding Costat Programme. As an environmentally conscious nation with vulnerable low-lying coastal regions, we are acutely aware of the need to combat climate change. We cannot support a program that damages a key natural resource like the Almontan Shrubland.

21. President Verlossen protested this decision the same day, claiming that Foria was “announcing its intention to violate binding international commitments that it undertook when it announced its support for the program last year.” The President noted that Foria’s “sudden change of heart” would likely hinder Costat’s ability to provide for the well-being of its people. Nevertheless, he expressed his government’s commitment to carry on with the Nahash River Dam project.
22. In May 2019 an investigative exposé was published in Costat’s leading newspaper, the *Olloras Gazette*. The story, entitled “*Forian Company Exploits Connections to Win Public Tender*,” detailed alleged corruption on the part of Forian Minister of the Economy Cameron Odnal in his capacity as Chair of FraCorp. According to the piece, investigators uncovered private communications between Minister Odnal and an individual named Luis Nozena. While Nozena had substantial experience working as a lobbyist in Costat, his work was primarily on behalf of technology companies, and he had no experience in the fields of construction and public works. In his communications with Minister Odnal, he emphasized his knowledge of the inner workings of Costat’s government and the “key players” involved in the public procurement process. The exposé further explained that Mr. Nozena was a childhood friend of several Costatian government officials involved in the public procurement process, though it was unclear if Minister Odnal was aware of this.
23. According to the *Olloras Gazette*, Minister Odnal offered Nozena the position of Consultant with FraCorp, along with an “initial payment” of € 150,000, only two days after the start of the public procurement process. The author opined that this “must explain why FraCorp, a company normally concerned with extraction of minerals, received the government contract to supply machinery for a wide range of public works projects only two weeks after all of the bids had been submitted, even though larger, more qualified multinational companies were in the running.” Finally, the piece speculated that criminal charges might be brought against Minister Odnal but noted that it was uncertain whether Costatian Courts could exercise jurisdiction over a Forian government official.
24. On 15 May 2019, Costat’s Minister of Justice Cecilia Lowe announced the opening of a formal investigation into both Luis Nozena and Minister Cameron Odnal for violations of the Influence Peddling Act and suggested that future investigations may look into potential bribery. The next day, FraCorp issued a press release addressing the matter. While it did not deny that Minister Odnal had entered into a business relationship with Mr. Nozena, the company affirmed that:

Mr. Nozena was hired purely to provide advice to FraCorp on the proper way of dealing with Costat’s authorities and navigating the often-complex public procurement process. Moreover, the claims that FraCorp was improperly awarded the contract to supply machinery for the RCP are baseless. FraCorp’s bid was among the lowest for the project, and FraCorp has a history of working in Costat and in the region.
25. On 28 May 2019, Costat’s Ministry of Justice formally charged Minister Odnal with violating the Influence Peddling Act. In a *Note Verbale* delivered to the Ministry the same day, the Forian Embassy in Olloras protested that the criminal investigation and charges against Minister Odnal “ignore immunities to which Minister Odnal is entitled under the BEAR Treaty and international law.”

26. On 30 May 2019, the Costatian government rescinded the contract it had awarded to FraCorp in January and stated that it would not honour its commitment to make payments for machinery already designed and prepared for delivery. In a brief statement to the press, President Verlossen explained his government's view that "the contract with FraCorp is null and void as it was only obtained through flagrant acts of corruption. The BEAR Treaty does not protect such acts."
27. FraCorp, in turn, responded by sending a letter of protest to President Verlossen, complaining of what it called "the hasty, unproven and politically motivated charges against Minister Odnal," and argued that "in any event, the rescission of the contract without prior notice or due process violates FraCorp's rights under the BEAR Treaty, in particular the prohibition on unlawful expropriation."
28. Realizing that the dispute between the two States was at risk of getting out of control, President Verlossen and Prime Minister Green held face-to-face talks in Olloras on 5 June 2019. They agreed to submit the issues dividing them to the International Court of Justice via a Special Agreement. The case was so submitted on 8 August 2019. Pursuant to the Special Agreement, the Parties "request the Court to decide the following issues:
 - a. Whether Foria undertook a binding legal obligation to supply 30% of the funding for each project of the Rebuilding Costat Programme, and, if so, whether that obligation remains in force;
 - b. Whether Costat's actions related to the building of the Nahash River Dam violate the BEAR Treaty and the UNFCCC;
 - c. Whether the criminal proceedings initiated against Minister Cameron Odnal violate immunities to which he is entitled under international law;
 - d. Whether, by rescinding the contract awarded to FraCorp, Costat has violated the BEAR Treaty's provision on expropriation."
29. Neither Party has raised any question of the Court's jurisdiction or the admissibility of any claims.

Annex 1
Business, Environment and Amicable Relations (BEAR) Treaty
2 October 2018
(Excerpts)

Article 1

There shall be enduring peace and friendship between Costat and Foria.

[...]

Chapter II: Investment

Article 4

1. This chapter shall apply to investments made in accordance with the applicable law of the host Party.
2. The term “investment” shall mean any kind of asset, including but not limited to movable and immovable property, claims to money or to any performance having economic value, or business concessions conferred by law under contract.

Article 5

1. Investments of either Party shall not be expropriated except for public purpose and with appropriate compensation.

[...]

Chapter III: Environmental Protection

Article 12

1. Both Parties shall, taking into account their respective capacities and development priorities, apply the precautionary principle with respect to activities in the Almontan Shrubland.
2. Where a Party seeks to engage in any activity within the Almontan Shrubland that entails a significant risk of transboundary harm, that Party shall notify and consult with the other Party and shall conduct an environmental impact assessment (EIA) in accordance with applicable international standards.

[...]

Chapter IV: Immunities

Article 25

1. State officials of each Party shall enjoy immunity from civil and criminal jurisdiction within the territory of the other Party to the extent required under customary international law.