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**STATEMENT OF JURISDICTION**

The State of Ratanka and the Federal Republic of Anghore have submitted this dispute to the International Court of Justice pursuant to a Special Agreement (*Compromis*). The Court's jurisdiction is invoked under Article 36(1) read with Article 40(1) of the Statute of the International Court of Justice, 1950.

**SYNOPSIS OF FACTS**

**I. THE BACKDROP**

The Federal Republic of Anghore (Anghore) attained independence from colonial rule on 21<sup>st</sup> November, 1977. It is a developing country with a parliamentary democracy. The commercial capital of Anghore is Stanford – Ridge located in the State of Chelski. Anghore is a country with a growing GDP and a burgeoning middle class with a growing disposable income.

**II. THE REGULATIONS**

Stanford – Ridge was known as the town of flourishing textile mills till the 1970s when there was a massive labour agitation combined with a loss of market share. By 1980 the mills were defunct and were taken over by the National Cotton Textile Corporation (NCTC), a statutory body under the management and control of the Government of Anghore.

In 1995 the Government of Chelski framed Regulation 101 in order to effectively utilize the mill lands. In 1997 the State Government of Chelski allowed other industries located in the same area as the textile mills to redevelop their lands for commercial use without making any surrender of land. The original Regulation 101 was in operation for 2 years without any significant development as only 5 privately owned mills opted for the scheme. The regulation was problematic because 50% of open land and land available after demolition had to be reserved for open space and low income housing. Further the Transferable Development Rights (TDRs) given for this land in the northern suburbs of Stanford – Ridge amounted to 71% of the market value of the land value in the location of the textile mills. Moreover the original Regulation 101(1)(a) was being circumvented by certain land owners by utilizing the balance building potential of the land without demolishing any structure, thereby making no surrender of the land. The Wagner Committee was appointed to suggest necessary changes. It submitted its proposal and the amended Regulation 101 came into force on 4<sup>th</sup> May, 2000.

Under the amended Regulation only vacant land (land open to the sky) was to be surrendered. All land on which structures existed/built upon was to be retained entirely by the land owners.

### **III. THE NEW FDI POLICY**

In 1992 Anghore liberalized its economy by allowing foreign direct investment (FDI) in certain key sectors. Till 1999 the real estate sector was on the negative list of the national FDI policy. A new policy regarding real estate was announced on 17<sup>th</sup> January, 2001 to improve development and infrastructure in urban centers like Stanford – Ridge. FDI up to 100% foreign ownership of equity in the real estate sector was permitted in corporations incorporated in Anghore. Further, all projects were to be approved by and had to follow the rules and norms of the concerned State Government. Further national treatment would be accorded to them on par with local developers.

Pursuant to this development Kavala Constructions, a leading company incorporated in the State of Ratanka (Ratanka), entered the Anghoran market and set up a subsidiary Kavala Anghore in which it owned 74% of the equity. Kavala Anghore entered into agreements with NCTC to develop 17 mills with a successful bid of US\$867 million. The remaining mills were to be developed by other investors. Approximately 60% of the price was financed by financial institutions. In November 2002 Kavala Anghore had procured construction permits for 5 mills, sanction for commencement of construction for 8 mills and had constructed 11 buildings.

### **IV. THE CHELSKI HIGH COURT DECISION**

In January 2003 there was torrential rainfall and floods causing widespread loss of life and property. An enquiry commission concluded that substantial loss was caused due to decaying infrastructure, lack of open spaces, destruction of the natural gradient of land, erosion of the top layer of soil and reduction of its absorption capacity.

On 13<sup>th</sup> March, 2003 a Non-Governmental Organization (NGO) filed a Public Interest Litigation (PIL) challenging the amended Regulation 101. The High Court of Chelski upheld the challenge and agreed with the interpretation that 50% of the entire mill land had to be given up for open spaces and low income housing. Open lands were interpreted to include lands after demolition of existing structures. The High Court observed that protection and preservation of the environment was a basic right of the citizens. The ruling was applicable to constructions that had already commenced under the amended regulation. The aspect of the ruling which stated that in areas where development had already occurred land was to be surrendered only if available was made applicable specifically to Kavala Anghore plots. The Supreme Court admitted the appeal filed by Kavala Anghore and others but refused to pass a stay order as the land surrendered by Kavala Anghore would be returned to it if the High Court judgment was set aside. The Supreme Court would take 3 years to dispose of the appeal.

**V. THIS COMPROMIS**

The State of Ratanka raised the issue in bilateral talks with Anghore after being approached by Kavala Constructions. The dispute could not be resolved diplomatically and Ratanka has submitted the dispute to the International Court of Justice under Article 36(1) of the ICJ Statute, invoking the Friendship, Commerce and Navigation Treaty (the treaty) signed by Ratanka and the Kingdom of Bangal which was the former sovereign that ruled over Anghore. Both countries are members of the UNO, the Vienna Convention on the Law of Treaties, the Rio Declaration on Environment and Development, Kyoto Protocol to the United Nations Framework Convention on Climate Change and The Vienna Convention on Succession of States with respect to Treaties, 1978 (VCS). The State of Ratanka has claimed US\$2.5 billion by way of reparation under international law. Therefore, this Court is seized of the matter in hand.

**SUMMARY OF ARGUMENTS**

**I. THE TREATY DOES NOT DEVOLVE UPON ANGHORE.**

1. Devolution of the treaty is against customary international law embodied in the clean slate doctrine and contained under Article 24 of the VCS.
2. Arguendo, state practice does not support a customary rule of international law, devolution of the treaty must be assessed by the jus cogens norm of self-determination and clearly contravenes the same.

**II. RATANKA LACKS THE *JUS STANDI* TO PRESENT THE CLAIM.**

1. The claim has been raised on the basis of diplomatic protection by Ratanka for an indirect injury to its national.
2. Ratanka cannot espouse a claim for its national who is a shareholder of the affected Anghorean company.

**III. ARGUENDO, THE TREATY DEVOLVES, RATANKA IS STILL NOT ENTITLED TO PRESENT THE CLAIM.**

1. The treaty has not been violated thus precluding a direct injury to Ratanka.
2. As argued above, Ratanka cannot exercise diplomatic protection for its national.

**IV. THE RULE OF EXHAUSTION OF LOCAL REMEDIES HAS NOT BEEN SATISFIED.**

1. The rule of exhaustion of local remedies applies to a case of diplomatic protection.
2. The available local remedies were effective and the time lag in the hearing of the appeal does not detract from this conclusion.
3. All available, effective local remedies were not exhausted since the highest appellate authority has not reviewed the matter nor have all claims been raised in domestic courts.
4. If the treaty devolves, the claimant has also not exhausted the remedy under Article 6(2).

**V. THE NATIONAL TREATMENT STANDARD HAS NOT BEEN VIOLATED.**

1. The obligation to afford national treatment does not exist independent of the treaty.

2. Arguendo, the national treatment standard is part of customary international law, it has not been violated since the local investors who have been treated more favourably than the foreign investor are not in like circumstances. In the event that they are deemed to be in like circumstances, the differential treatment is not based on their nationality.

**VI. ARGUENDO, THE TREATY DOES DEVOLVE, THE NATIONAL TREATMENT STANDARD IS STILL NOT VIOLATED.**

1. The treaty does not require foreign investors to be given the most favourable national treatment and there are domestic investors with whom Kavala Anghore has been treated on par. In addition, as argued above, the favoured domestic investors are not in like circumstances and, if so, the differential treatment is not grounded in their nationality.

**VII. ANGHORE HAS NOT ACTED IN BREACH OF THE PROVISIONS OF ART. 11 OF THE TREATY.**

1. States have the sovereign right to take measures for the protection of public health under international law, and the provisions of a treaty shall not limit the right to enact effective environment legislation in light of national priorities.
2. Additionally, states have the right to take measures to safeguard their essential interests against possible threats posed by the environment.

**VIII. THE ACTIONS OF THE GOVERNMENT AMOUNT TO ONLY A REGULATION AND NOT AN EXPROPRIATION OF THE PROPERTY RIGHTS.**

1. The three factors that separate a regulation from a taking of property are (a) the degree of interference with property rights, (b) the purpose and context of the governmental measure, and (c) the degree of interference with the investor's investment backed expectations.

2. A governmental measure will only amount to an expropriation of property when it results in a complete destruction of investment rights. A mere diminution in the value of property, however severe, will not amount to a taking.
3. A governmental measure taken for the preservation of legitimate national interests, like the environment or public health, even if it interferes with property rights, will not amount to an expropriation.
4. A measure will destroy investment backed expectations if it negates the property owner's expected use of the investment rights. An investor's legitimate expectations do not extend to not expecting any measure taken in the interest of national welfare.

**IX. ARGUENDO, THE MEASURES AMOUNT TO A TAKING OF PROPERTY, THE EXPROPRIATION IS LAWFUL UNDER INTERNATIONAL LAW.**

1. The *doctrine of necessity* allows the use of precautionary measures to safeguard the natural environment, and precludes the wrongfulness of an action, especially when performance of the obligation will be harmful to national interests.
2. The measure was taken for the internal-well being of the state and preservation of the environment and public health. It cannot be hit by want of a public purpose.
3. The full compensation standard is not an inflexible rule, as also recognized by the treaty and states are required to pay compensation according to their laws and regulations, taking into account all the circumstances involved. Anghore has hence satisfied its commitments under international law.

**BODY OF ARGUMENTS**

**I. THE TREATY DOES NOT DEVOLVE UPON ANGHORE.**

[A] DEVOLUTION OF THE TREATY IS AGAINST CUSTOMARY RULES OF INTERNATIONAL LAW.

By virtue of Article 7 of the VCS, the Convention is not applicable retrospectively in the absence of an express agreement between the parties to that effect. However, the same article allows for the continued application of rules of succession existing independent of the convention, such as customary rules of international law.<sup>1</sup> In the present case, since Anghore's succession occurred in 1977<sup>2</sup> before the VCS came into force in 1996,<sup>3</sup> only those of its provisions which reflect customary international law, are applicable.

The clean slate doctrine is the only customary rule of international law that has developed from state practice in the area of succession to treaties.<sup>4</sup> In the drafting of the VCS, all

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<sup>1</sup> Vienna Convention on Succession of States in Respect of Treaties, 1978.

<sup>2</sup> *Compromis* para 1.

<sup>3</sup> See [untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty2.asp](http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty2.asp).

<sup>4</sup> The clean slate doctrine was adhered to by Greece and Finland **cited from** J.H.W. Verzijl, *International Law in Historical Perspective Part VII State Succession* (Utrecht: A.W. Sijthoff International Publishing Company B. V., 1974) at 172; Israel and Burkina Faso **cited from** A. M. Beato, "Newly Independent and Separating States' Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union", 9 *Am. J. Int'l L.*, 525 (1994); Ireland, Algeria, Baltic States **cited from** C. Emanuelli, "State Succession, Then and Now, With Special Reference to the Louisiana Purchase (1803)", 63 *La. L. Rev.*, 1277 (2003); Afghanistan **cited from** "Documents of the Twenty-sixth Session", *YBILC Vol. II Part One* (New York: United Nations Publication, 1974) at 212; Guyana, Mauritius and Barbados **cited from** Y. Makonnen, *International Law and the New States of Africa* (New York: UNESCO, 1983) at 223; Iraq, Burma, Ceylon, Ghana, Malaya, Nigeria, Cyprus and Sierra Leone, Tanganyika and Trinidad **cited from** A.P. Lester, "State Succession to Treaties in the Commonwealth", 12 *Int'l & Comp. L.Q.*, 475 (1963). The doctrine also received support from jurists including Y. Makonnen, Wilfred Jenks, S.P. Sinha, Lord McNair and Van Punhuys **cited from** Y. Makonnen, *International Law and the New States of Africa* (New York: UNESCO, 1983) at 163; M. Akehurst, *A Modern Introduction to International Law* (6<sup>th</sup> edn., New Delhi: Universal Book Stall, 1990) at 162; I. Brownlie, *Principles of Public International Law* (6<sup>th</sup> edn., Oxford: Oxford University Press, 2003) at 633. Additional support is found in the practice of International organizations, the UN depository and the US which all use the opting-in clause consistent with the clean slate doctrine **cited from** Y. Makonnen, *International Law and the New States of Africa* (New York: UNESCO, 1983) at 160). **See also** *Robert's Claim (Claim No. 30)*, *Ann. Dig. Pub. Int'l L.* 3 (1925-26), No. 166; Documents of the Twenty-sixth Session of the International Law Commission, *Y.Bk. Int'l L. Comm'n, Vol. II Part One* (New York: United Nations Publication, 1974) at 212; A.P. Lester, "State Succession to Treaties in the Commonwealth", 12 *Int'l & Comp. L.Q.*, 475 (1963); A. Cassese, *International Law* (2<sup>nd</sup> edn., Oxford: Oxford University Press, 2005) at 78; J. M. Jones, "State Succession in Matter of Treaties", 14 *Brit. Y.B. Int'l L.*, (1947)at 373; C.S. West, "State Succession and Relations with Federal States", 86 *Am. Soc'y Int'l L. Proc.* 1 (1992); Restatement (Third) of Foreign Relation Law of the United States, REST 3d FOREL s 210.

states, but Sweden, expressed support for the clean slate doctrine<sup>5</sup> which is contained in Article 24 of the Convention providing for succession to bilateral treaties by a newly independent state. Thus, Article 24 reflects customary international law and is applicable.

Article 24 lays down the rule that bilateral treaties do not devolve on successor states unless there is an express agreement with the other party to that effect or consent can be inferred from their conduct. An opting-out provision, which allows silence for a reasonably long period to amount to tacit consent, was rejected.<sup>6</sup> The said Article emphasizes on the consent of the successor state since it is often not in a position to play a part in the actual government of the metropolitan power.<sup>7</sup> This is exemplified by the present case in which the treaty was entered into by Bangal without the participation of Anghore.<sup>8</sup> Further, there is no reciprocal understanding after the attainment of independence, either express or implied, as required by Article 24. The silence of the Respondent State regarding the status of the treaty also cannot amount to implied consent to its continuance. Thus, the treaty cannot be considered as in being in force between Anghore and Ratanka by virtue of customary international law.

[B] ARGUENDO, STATE PRACTICE IS INCONSISTENT, DEVOLUTION OF THE TREATY IS VIOLATIVE OF THE *JUS COGENS* NORM OF SELF-DETERMINATION.

Succession to treaties by newly independent states must be in keeping with the *jus cogens* norm of self-determination.<sup>9</sup> Adherence to the peremptory norms of self-determination,

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<sup>5</sup> This was noted by the Special Rapporteur, Sir Francis Vallat, during the 26<sup>th</sup> Session of ILC **cited from** R.D. Kearney, "The Twenty-sixth Session of the International Law Commission", 69 *Am. J. Int'l L.*, 591 (1975).

<sup>6</sup> Documents of the Twenty-sixth Session of the International Law Commission, *supra* note 4 at 240.

<sup>7</sup> This was noted by Endre Ustor in presenting the Report of the 26<sup>th</sup> Session of the Law Commission to the General Assembly **cited from** R.D. Kearney, *supra* note 5. **See also** Documents of the Twenty-sixth Session of the International Law Commission, *supra* note 4 at 237.

<sup>8</sup> *Compromis* para 21.

<sup>9</sup> I. Brownlie, *supra* note 4 at 638, *Oppenheim's International Law-Vol. I* (Sir R. Jennings and Sir A. Watts ed., 9<sup>th</sup> edn., New York: Longman, 1996) at 211; Y. Makonnen, *supra* note 4 at 165; Judge Moreno Quintana in *Case Concerning Right of Passage over Indian Territory (Portugal v. India)*, 1960 *I.C.J.* 6. **See also** *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*

sovereign equality and permanent sovereignty of states over their natural resources, protects new states from imperial treaties that confer an economic advantage on another party or are part of a political settlement.<sup>10</sup>

Political treaties, such as friendship treaties, do not devolve upon independence, since they impinge on a new state's sovereign power.<sup>11</sup> In the present case, for Bangal to be able to grant such concessions to Ratanka, there must have existed between the two states a certain degree of understanding and amity. It would clearly be against the principle of self-determination to presume that Anghore, which is a newly independent state, distinct from Bangal, would also be on similar terms with Ratanka and willing to undertake like obligations when it has given no indication to that effect.

Further, where a treaty places economic burdens, there is a presumption of non-devolution.<sup>12</sup> In the present case, treaty provisions such as Article 4(1) containing the national treatment standard will be detrimental to Anghore's ability to protect its own industries, especially since it is a newly independent state with a developing economy.<sup>13</sup> Thus, by the application of the *jus cogens* norm of self-determination, the treaty does not devolve on Anghore.

## **II. RATANKA LACKS THE *JUS STANDI* TO PRESENT THE CLAIM.**

[A] THE CLAIM IS BEING MADE FOR AN INDIRECT INJURY ON THE BASIS OF DIPLOMATIC PROTECTION.

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*notwithstanding Security Council Resolution, 276 (1970), Advisory Opinion, 1971 I.C.J. 16; Western Sahara, Advisory Opinion, I.C.J. 1975; Case Concerning East Timor (Portugal v. Australia), 1995 I.C.J. 90; United Nations Charter available at <http://www.un.org/aboutun/charter/> (Last visited on 26<sup>th</sup> January, 2006).*

<sup>10</sup> *Id.* See also R.D. Kearney, "The Twenty-Sixth Session of the International Law Commission", 69 *Am. J. Int'l L.* 591 (1975).

<sup>11</sup> W.R. Slomanson, *Fundamental Perspectives on International Law* (Singapore: Thomas West, 2003) at 74; Y. Makonnen, *International Law and the New States of Africa* (New York: UNESCO, 1983) at 284. See also C. Emanuelli, *supra* note 4; R. Mushkat, "Hong Kong and Succession of Treaties", 46 *Int'l & Comp. L.Q.*, 181 (1997).

<sup>12</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 1996 *I.C.J.* 595. See also D.P. O'Connell, "State Succession and Problems of Treaty Interpretation", 58 *Am. J. Int'l L.*, 41 (1964).

<sup>13</sup> *Compromis* para 1.

When a state makes a claim on behalf of its national the injury is an indirect one.<sup>14</sup> If the international claim is not separable from the local one and they are identical in substance, the absence of direct injury is proved.<sup>15</sup> Further, in a case of direct injury, remedies such as an apology from the offending state are usually claimed. When only damages are asked for, it is more consistent with diplomatic protection.<sup>16</sup>

In the present case, Ratanka is claiming damages for the harm caused to its national Kavala Constructions. The only basis for the damages that have been claimed is the fact that the contractual rights of Kavala Anghore have been taken away by Regulation 101 as interpreted by the court. Precisely the same claim has been raised in the local court as well and the two are not distinguishable. There is, therefore, no possible direct injury to Ratanka. In addition, the only remedy that has been sought is in the form of damages. Thus, the claim is clearly one of diplomatic protection for an indirect injury.

[B] RATANKA CANNOT ESPOUSE A CLAIM ON THE BASIS OF DIPLOMATIC PROTECTION.

When a wrong is done to a company, only its rights are affected and not those of the shareholders.<sup>17</sup> Any remedy should be sought by the company itself within the domestic legal system in which it is incorporated.<sup>18</sup> As long as the company is in existence, the state of the shareholder cannot claim for damage to the company's assets.<sup>19</sup> The mere fact that

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<sup>14</sup> D.J. Harris, *Cases and Materials on International Law* (5<sup>th</sup> edn., London: Sweet & Maxwell, 1998) at 586; I. Brownlie, *supra* note 4 at 459; Oppenheim, *supra* note 9 at 512; R.Y. Jennings, "General Course in International Law", 121 *Recueil des Cours*, 323 (1967-II); *Interhandel (Switzerland v. United States of America)*, 1959 I.C.J. 6; *The Panevezys Saldustiskis Railway Case (Estonia v. Lithuania)*, (1939) *PCIJ Rep*, Series A/B, No. 76; *Mavrommattis Palestine Concessions case (Greece v. U.K.)*, (1924) *PCIJ Rep*, Series A, No. 2.

<sup>15</sup> *Case Concerning Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)*, 1989 I.C.J. 15.

<sup>16</sup> T. Meron, "The Incidence of the Rule of Exhaustion of Local Remedies", 35 *Brit. Y.B. Int'l L.*, 83 (1959).

<sup>17</sup> *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 1970 I.C.J. 3. See also P. L. Davies and D. D. Prentice, *Gower's Principles of Modern Company Law* (6th edn., London: Sweet and Maxwell, 1997) at 84; R. R. Pennington, *Company Law* (7th edn., London: Butterworths, 1995) at 39; S. W. Mason, D. French and C. L. Ryan, *Mayson, French and Ryan on Company Law* (Oxford: Oxford University Press, 2006) at 146.

<sup>18</sup> *Id.*

<sup>19</sup> D. J. Harris, *supra* note 14 at 606, A. Bagge, "Intervention on the Ground of Damage Caused to Nationals", 34 *Brit. Y.B. Int'l L.*, 162 (1958); Judges Morelli, Padilla Nervo and Ammoun in *Case Concerning the*

the affected company is the subsidiary of the foreign corporation, whose state is making the claim, does not confer a right of diplomatic protection.<sup>20</sup> To allow otherwise would be to defy the traditional rule that a state is never guilty of a breach of international law for injuring one of its own nationals.<sup>21</sup> In the present case, only the assets of Kavala Anghore, a national of Anghore have been affected. The company is still in existence and the shareholder, Kavala Construction, has no right to make a claim.

Furthermore, majority shareholding cannot solely determine the nationality of a company as its nationality would then continuously change with the transfer of shares leading to instability.<sup>22</sup> In the present case, Anghore's foreign policy itself makes incorporation in a local company a condition precedent to the entry of a foreign investor, thus recognizing incorporation as the test of nationality. Kavala Construction has entered into the Anghorean economy on this condition and has therefore agreed that its investment shall be represented by the corporate entity Kavala Anghore alone. Thus, Ratanka cannot exercise diplomatic protection on behalf of either Kavala Construction or Kavala Anghore.

**III. ARGUENDO, THE TREATY DEVOLVES, RATANKA IS STILL NOT ENTITLED TO PRESENT THE CLAIM.**

**[A] THERE IS NO DIRECT INJURY ARISING FROM A VIOLATION OF THE TREATY.**

Article 2 of the treaty states that all investments made by investors in the territory of the other Contracting Party are covered by the agreement. Under Article 1, the only investment

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*Barcelona Traction, Light and Power Company, Limited*, *supra* note 17; *The Ziat Ben Kiran claim*, 2 UNRIAA 729 (1924); *Baasch and Romer case (Netherlands v. Venezuela)*, 10 UNRIAA 723 (1903); *Deutsche Amerikanische Petroleum Gessellschaft Oil Tankers*, 2 UNRIAA 779 (1926); *The Kunhardt Claim*, 9 UNRIAA 171 (1903); *Delagoa Bay Railway Co. (G.B. and U.S. v. Portugal)*, 81 B.F.S.P. 669 (1893); *The El Triunfo Claim*, 6 Moore Dig. of Int'l L., 649 (1906). **See also** J. M. Jones, "Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies", 26 Brit. Y.B. Int'l L., 225 (1949); E.I. Nwogugu, "Legal Problems of Foreign Investments", 153 *Recueil des Cours*, 169 (1976-V).

<sup>20</sup> *Romano-Americana case*, 5 *Hackworth* 840 (1925).

<sup>21</sup> I. Brownlie, *supra* note 4 at 471; Oppenheim, *supra* note 9 at 513; D.P. O'Connell, *International Law Vol. II* (2<sup>nd</sup> edn., London: Stevens & Sons, 1970) at 1043.

<sup>22</sup> I. Seidl-Hohenveldern, "General Course on Public International Law", 198 *Recueil des Cours*, 11 (1986-III).

that has been made by the Ratankan investor, Kavala Constructions, is in the form of shares in Kavala Anghore. As proved below, there has been no damage to the shares of Kavala Anghore. Thus, the treaty does not provide Ratanka with the *jus standi* to present the claim.

**[B] RATANKA CANNOT EXERCISE THE RIGHT OF DIPLOMATIC PROTECTION.**

As proved above, the claim is being made on the basis of diplomatic protection. However, Ratanka cannot present a claim on behalf of either Kavala Construction or Kavala Anghore as also shown above.

**IV. THE RULE OF EXHAUSTION OF LOCAL REMEDIES HAS NOT BEEN SATISFIED.**

**[A] THE RULE OF EXHAUSTION OF LOCAL REMEDIES IS APPLICABLE TO A CLAIM FOR AN INDIRECT INJURY.**

The rule of exhaustion of local remedies is a part of customary international law<sup>23</sup> and cannot be excluded except by an express provision in the treaty.<sup>24</sup> It applies where a state provides diplomatic protection for an indirect breach of international law.<sup>25</sup> The rule is also said to be applicable to a contract between a non-resident alien and the state.<sup>26</sup> In the present case, the rule has not been expressly excluded by the treaty. As already proved, the claim is for an indirect injury. Further, a contract has been entered into between the State Government of Chelski and foreign investors from Ratanka.<sup>27</sup> Thus, the rule of exhaustion of local remedies is applicable.

**[B] THE LOCAL REMEDIES AVAILABLE WERE EFFECTIVE.**

In the present case, there is no dispute as to the existence of local remedies and their accessibility. Any unreasonable delay is to be interpreted strictly in favour of the state in

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<sup>23</sup> *Case Concerning ELSI*, *supra* note 15.

<sup>24</sup> *Case Concerning ELSI*, *supra* note 15.

<sup>25</sup> *Interhandel*, *supra* note 14; *Case Concerning ELSI*, *supra* 15; I. Brownlie, *supra* note 4 at 472; B.H. Oxman and V. Bantz, "The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea), ITLOS Case No. 2" 94 Am. J. Int'l L. 140 (2000);

<sup>26</sup> T. Meron, *supra* note 16.

<sup>27</sup> *Compromis*, para 13.

which the dispute arose.<sup>28</sup> A period of two to three years for an appeal is merely transitory and part of the routine.<sup>29</sup> Even after nine years, the remedy is still effective and must be exhausted.<sup>30</sup> Hence, in the present case, the fact that the appeal would be heard three years later does not render the remedy an ineffective one.

[C] THE AVAILABLE LOCAL REMEDIES WERE NOT EXHAUSTED.

Local remedies are not exhausted till the losing party has given all the tribunals up to the highest appellate authority the chance to review the decision of the lowest court.<sup>31</sup> Moreover, all the claims raised at the international level must be brought forward in the domestic legal system<sup>32</sup> to allow the offending state its sovereign right to do justice in its own way.<sup>33</sup> Unless this is done, it is not established that the state has committed a wrongful act and is willing to leave it unrighted<sup>34</sup> and the claim will lack foundation.<sup>35</sup> In the present case, even though Kavala Anghore has gone before the highest court to demand the staying of the interim order, the Supreme Court has not yet had a chance to review the decision of the Chelski High Court. Further, all the claims, such as the national treatment issue, were

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<sup>28</sup> F.V. Garcia – Amador et. al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (New York: Oceana Publications Inc., 1974) at 74.

<sup>29</sup> *Liselotte Hauer v. Land Rhineland-Pfanz*, 1979 ECR 3727 (ECJ). See also *Interhandel*, supra note 14.

<sup>30</sup> *Interhandel*, supra note 14.

<sup>31</sup> D.P. O’Connell, supra note 12 at 1053; Oppenheim, supra note 9 at 524; A. Bagge, supra note 19; *Interhandel*, supra note 14; A. McNair, *International Law Opinions Vol. II* (Cambridge: Cambridge University Press, 1996) at 314; *Ambatielos Case (Greece v. United Kingdom)*, 1953 I.C.J. 10. See also *Case Concerning the Barcelona Traction, Light and Power Company, Limited* supra note 17; I. Nwogugu, supra note 19; E. Jimenez de Arechaga, “General Course in Public International Law”, 159 *Recueil des Cours* 1 (1978-I); F.V. Garcia-Amador, supra note 28 at 74.

<sup>32</sup> D.R. Mummery, “The Content of the Duty to Exhaust Local Judicial Remedies”, 58 *Am. J. Int’l L.*, 389 (1964); *Case Concerning ELSI*, supra note 15; A. Bagge, supra note 19; *Finnish Ships Arbitration* 3 RIAA 1497 (1937); *Ambatielos Arbitration* 23 *ILR* 306 (1956); E. Jimenez de Arechaga, supra note 31.

<sup>33</sup> J.E.S. Fawcett, “The Exhaustion of Local Remedies: Substance or Procedure?”, 80 *Brit. Y.B. Int’l L.*, 452 (1954); H. W. Briggs, “The Local Remedies Rule: A Drafting Suggestion”, 50 *Am. J. Int’l L.* 921 (1956); I. Nwogugu, supra note 19; E. Jimenez de Arechaga, supra note 31. See also *The Loewen Group Inc., and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3 (2003); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2 (2002).

<sup>34</sup> *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, supra note 17; D.P. O’Connell, supra note 21 at 947; Brownlie, supra note 4 at 473; H. W. Briggs, *id* ; J.E.S. Fawcett, *id*; E. Jimenez de Arechaga, supra note 31.

<sup>35</sup> A. Bagge, supra note 19; *Interhandel*, supra note 14; H.W. Briggs, supra note 33; Article 44, International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongfully Acts, 2001, UN GAOR No A/56/83.

not brought before even the High Court of Chelski. Therefore, local remedies have not been exhausted.

[D] IF THE TREATY DEVOLVES, RATANKA HAS ALSO NOT EXHAUSTED THE REMEDY PROVIDED UNDER IT.

Article 6(2) of the treaty states that the investor can have his claim reviewed by a judicial or other independent authority of the other contracting party in accordance with the principles laid down in Article 6(1). The claimant has made no attempt to avail of this remedy and has thus failed to exhaust all available local remedies.

**V. THE NATIONAL TREATMENT STANDARD HAS NOT BEEN VIOLATED.**

[A] THERE IS NO OBLIGATION TO ENSURE NATIONAL TREATMENT INDEPENDENT OF THE TREATY.

In the present case, the treaty does not devolve on Anghore. Since the national treatment standard is not a part of customary international law<sup>36</sup>, its violation cannot be alleged.

[B] ARGUENDO, THE NATIONAL TREATMENT STANDARD IS A PART OF CUSTOMARY INTERNATIONAL LAW, IT HAS NOT BEEN VIOLATED.

*[i] The Investments of Domestic Investors were not in Like Circumstances as Regards Kavala Anghore.*

For the purposes of determining the national treatment standard, the foreign investor may be compared only to those local investors who are in like circumstances.<sup>37</sup> If there is an

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<sup>36</sup> *Alex Genin, Eastern Credit Limited Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2 (2001); *Asian Agricultural Products Ltd. v. The Republic of Sri Lanka*, ICSID Case No. ARB/87/3 (1990); H. Mosler, “The International Society as a Legal Community”, 140 *Recueil des Cours*, 1 (1974-IV). See also D. A. Gantz, “Potential Conflicts Between Investor Rights and Environmental Regulation under NAFTA’s Chapter 11”, 33 *Geo. Wash. Int’l L. Rev.*, 651 (2001); B. Legum, “The Investor of Investor-state Arbitration Under NAFTA”, 43 *Harv. Int’l L.J.*, 531 (2002).

<sup>37</sup> *Pope and Talbot v. Government of Canada*, 41 *ILM* 1347 (2002); *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3 (1999); The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts, DAF/IME(2000)20; “US Interpretation of Core NAFTA Investment Standards”, 95 *Am. J. Int’l L.*, 881 (2001), World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment, 31 *I.L.M.* 1363 (1992); A.F.M.

identical domestically owned counterpart, no other domestic investor can be considered for the purposes of comparison.<sup>38</sup>

In the present case, the identical domestic counterparts of Kavala Anghore were the local investors who had a stake in the remaining textile mill lands under the amended regulation and not those who had invested in the other industries or who circumvented the unamended regulation. All those under the amended regulation have received the same treatment. Thus, the more favourable treatment given to other local investors cannot be used for the purposes of determining the national standard of treatment.

[ii] Arguendo, the Discrimination was not on the Basis of Nationality.

For the national treatment standard to be violated, the discriminatory treatment must have been solely based on the nationality of the investors.<sup>39</sup> There must exist no other rational nexus between the discriminatory measure and the objective of the offending state.<sup>40</sup> However, if such measure was not itself intentionally discriminatory<sup>41</sup> and was plausibly connected with a legitimate goal of policy, the state is not liable.<sup>42</sup> In this case, the differential schemes applied equally to domestic and foreign investors. In fact, domestic investors were also adversely affected by the High Court's ruling.<sup>43</sup> The differential

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Maniruzzaman, "Expropriation of Alien Property and the Principle of Non – Discrimination in International Law of Foreign Investment: An Overview", 8 *J. Transnat'l L. & Pol'y*, 57 (1998). **See also** Brief of Amicus Curiae, International Institute for Sustainable Development, (9<sup>th</sup> March, 2004); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd. et al.*, 494 F. Supp. 1263 (1980).

<sup>38</sup> *Methanex Corporation v. United States of America*, available at <http://www.naftalaw.org> (last visited January 8<sup>th</sup>, 2005).

<sup>39</sup> *Id.* **See also** *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1 (2002); *Pope and Talbot Case*, *supra* note 37; A.F.M. Maniruzzaman, *supra* note 38. **See also** *The Oscar Chinn Case*, PCIJ, Ser.A./B. No. 63 (1934); "US Interpretation of Core NAFTA Investment Standards", *supra* note 38; World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment, *supra* note 37; UNCTAD: National Treatment, UNCTAD/ITE/IIT/11 (Vol. IV) (New York: United Nations, 1999).

<sup>40</sup> *Pope and Talbot Case*, *supra* note 37; *S. D. Myers Inc. v. Canada*, 121 *ILR* 7 (2002); *Marvin Feldman Case*, *id.* **See also** A.F.M. Maniruzzaman, *supra* note 37.

<sup>41</sup> *Case Concerning ELSI*, *supra* note 15; *Alex Genin Case*, *supra* note 36; I. Brownlie, *supra* note 4 at 541.

<sup>42</sup> *Gami Investments, Inc. v. The Government of the United Mexican States*, 44 *I.L.M.* 545 (2005); A.F.M. Maniruzzaman, *supra* note 37; WTO Working Group on the Interaction Between Trade and Competition Policy, "The Fundamental Principles of National Treatment, Most-Favoured-Nation Treatment and Transparency", WT/WGTCP/W/114 (1999).

<sup>43</sup> *Compromis*, para 18.

treatment is grounded in a policy decision of the state based on conditions peculiar to the textile mills and not on the nationality of the investor. Thus, the national treatment standard has not been violated

**VI. ARGUENDO, THE TREATY DOES DEVOLVE, THE NATIONAL TREATMENT STANDARD IS STILL NOT VIOLATED.**

Article 4(1) of the treaty merely stipulates that treatment accorded to Ratankan investments shall not be less favourable than that accorded to Anghore's own investments. It is notable that the treaty does not state that the foreign investor must be treated on par with the *most favoured* local investor. Such an omission means that if there are *any* local investors being treated in the same manner as the foreign investor, there is no violation of the national treatment standard, despite the fact that other domestic investors are receiving better treatment.<sup>44</sup> In the instant case, the High Court's decision was equally applicable to other local investors who acquired contractual rights under the amended regulation and Kavala Anghore is, therefore, being treated on par with local investors.

Further, as shown above, the local investors that Kavala Anghore is sought to be compared to are not in like circumstances. Even if they are deemed to be, the differential treatment is not based on nationality. Thus, the national treatment standard has not been violated.

**VII. ANGHORE HAS NOT ACTED IN BREACH OF THE PROVISIONS OF ART. 11 OF THE TREATY.**

[A] STATES HAVE A SOVEREIGN RIGHT TO TAKE STEPS FOR THE PROTECTION OF PUBLIC HEALTH UNDER INTERNATIONAL LAW.

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<sup>44</sup> *Methanex Corporation Case*, *supra* note 38; *Marvin Feldman Case*, *supra* note 39; *Pope and Talbot Case*, *supra* note 37.

[i] *The Declaration of Permanent Sovereignty over Natural Resources* empowers states to use their resources in the interest of the well being of the people<sup>45</sup>. Far reaching interference with private property, even of aliens, is a legitimate sovereign power in connection with matters such as public health and planning of urban and rural development.<sup>46</sup> The provisions of a treaty shall not be construed so as to prevent a state from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that investment activity in its territory is carried out in a manner sensitive to environmental concerns.<sup>47</sup> *The Rio Declaration* enunciates the principle that states *must* conduct effective environmental legislation, which must reflect the environment and development circumstances to which they apply.<sup>48</sup> The legitimate right of aliens to property does not extend to giving them *immunity* from all actions that a state might take for the preservation of its environment and public health, even if they cause a diminution in the value of property. The existence of a commitment by the government does not extinguish the government's legitimate authority to change or to enact new laws.<sup>49</sup>

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<sup>45</sup> UN Resolution on Permanent Sovereignty Over Natural Resources, G.A Res 1803 (XVII), U.N. GAOR, 17<sup>th</sup> Sess., <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/193/11/PDF/NR019311.pdf?OpenElement> (accessed on Jan 22, 2006).

<sup>46</sup> *Oppenheim's International Law-Vol. II*, (Sir Robert Jennings ed., 9<sup>th</sup> edn., Essex: Longman Group UK Ltd., 1992) at 912; **See generally** M. Sornarajah, *The International Law on Foreign Investment*, (2<sup>nd</sup> edn., Cambridge: Cambridge University Press, 2004).

<sup>47</sup> **See** Article 1114(1) of the NAFTA agreement. Every party must take steps to ensure that the investment activities in its territory are carried out in a manner sensitive to environment concerns.

<sup>48</sup> Principle 11, Rio Declaration on Environment and Development, 1992. **See** R. Bilder, "The Settlement of Disputes in the Field of the International Law on the Environment", 144 *Receuil des Cours*, 139 (1975-I). The author noted that the "changing knowledge and emergence of new problems may necessitate the implementation of provisions that enable the state to secure environmental management and protection of public health through the enactment of environment legislation." **Refer** UN Resolution on Development and Environment, G.A. Res. 2849 (XXVI), U.N. GAOR, 26<sup>th</sup> Sess., <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/328/65/IMG/NR032865.pdf?OpenElement> (accessed on Jan 21, 2006). The Resolution stated that "every country has the right to formulate, in accordance with its own particular situation and in full enjoyment of its natural sovereignty, its own national policies on the human environment" **See also** Report of the World Summit on Sustainable Development, United Nations, New York (2002). The Action Plan observes that "*i*. Slum clearance is a critical and essential component of the global requirement of sustainable development of natural resources and the preservation of the environment and conditions of living; Sustainable development requires the empowerment of people living in poverty by increasing access to land, water and health; It also mandates adequate shelter and healthcare for the urban poor."

<sup>49</sup> *Kate v. Italy*, 19 *EHR*R 368 (1995).

[ii] *Arguendo*, the treaty devolves, Article 11(3) of the Treaty states that the provisions of the agreement shall not *in any way* limit the legal right of either contracting party to apply prohibitions or restrictions of any kind or take action directed towards the protection of public health.

[iii] Protection of public health is recognized as a fundamental obligation under international law<sup>50</sup>, and the *fundamental human rights to life and health*<sup>51</sup> cannot be ensured without a sound environment, predicated upon environmental policies reflecting current priorities. The restoration of the soil<sup>52</sup>, and land use policies aimed at restoring damages to the structure of the soil<sup>53</sup> are also important for the preservation of public health and the environment, essential for sustainable development.<sup>54</sup>

[B] THE MEASURES WERE TAKEN TO PREVENT THE POSSIBILITY OF FUTURE DAMAGE TO ANGHORE'S ESSENTIAL INTERESTS.

States have a right to take measures, in light of new knowledge regarding the carrying capacity of *natural systems*, which alter land use planning to integrate environmental and developmental concerns.<sup>55</sup> A threat to the essential interests of the state, including the preservation of the environment, and the prevention of a foreseeable threat to the people

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<sup>50</sup> Principle 1, Rio Declaration on Environment and Development, 1992. **Refer** Principle 1, Stockholm Declaration, 1972. **See also** Principle 4, Rio Declaration on Environment and Development, 1992. Environmental Protection should be considered an integral part of the process of sustainable development and must not be considered in isolation from it.

<sup>51</sup> Article 3, Universal Declaration on Human Rights, 1948. **See also** Article 25, Universal Declaration on Human Rights, 1948. The right to health and well being has been substantiated in this Article.

<sup>52</sup> Recommendation 92(8), European Soil Protection Policy, 1992.

<sup>53</sup> Article 7(2), the ASEAN Agreement (1986). **See generally** Chapter 14, Agenda 21, UN Conference on Environmental Development, 1992.

<sup>54</sup> Report of the World Summit on Sustainable Development, *supra* note 48.

<sup>55</sup> Chapter 10 of Agenda 21. **See also** United Nations Framework Convention on Climate Change, 1992. The Convention states that “environmental planning will be most effective only if constantly re-evaluated in light of new findings in scientific and technical areas.”

from the same, based on currently available evidence might *necessitate* the taking of an action.<sup>56</sup>

A significant cause of the disaster was the erosion of the top layer of the earth and soil, which reduced the absorption capacity of the land, precipitating the disaster.<sup>57</sup> The destruction due to the reduced carrying capacity of the environment was exacerbated by the fact that 34% of the population in the city lived in deplorable conditions in slums<sup>58</sup>, with minimal resistance against the fury of nature. Thus the disaster changed the environmental standards which applied, and the protection of the people against future damage became inextricably linked to the improvement of living conditions. The aforementioned factors thus necessitated a regulation of the mill lands, with a view to safeguarding the interests of the populace, especially in light of the fact that they occupied 750 acres in the heart of the city<sup>59</sup>, which was faced with an acute shortage of available, open land.<sup>60</sup> Considering the aforementioned reasons, the Treaty requirements to honour contractual obligations cannot limit the sovereign right of Anghore to enact effective environment legislation in light of the changed conditions. Hence, the actions of Anghore do not amount to a violation of Article 11 of the treaty.

**VIII. THE ACTIONS OF THE GOVERNMENT AMOUNT TO ONLY A REGULATION AND NOT AN EXPROPRIATION OF THE PROPERTY RIGHTS.**

The distinction between a regulation and an expropriation of property is determined by the application of three guidelines, which have widespread acceptance in international law. The

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<sup>56</sup> *Case Concerning the Gabčíkovo- Nagymaros Project (Hungary v. Slovakia)*, 1997 ICJ Rep 7 at 40. See also Article 25, International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts, 2001, UN GAOR No A/56/83.

<sup>57</sup> *Compromis* para 10.

<sup>58</sup> *Compromis* para 7.

<sup>59</sup> *Compromis* para 8.

<sup>60</sup> *Compromis* para 7. Stanford-Ridge is surrounded by sea on three sides and this forms a critical geographical constraint on the development and environmental protection of the city.

guidelines are *i. The degree of interference with the property rights.*<sup>61</sup> *ii. The purpose and context of the governmental measure,*<sup>62</sup> and *iii. The degree of interference with investment backed expectations.*<sup>63</sup>

[A] ONLY A DESTRUCTION OF PROPERTY RIGHTS AND NOT A DIMINUTION IN THEIR VALUE WILL WARRANT THE INFERENCE OF A TAKING UNDER INTERNATIONAL LAW.

The actions of the government which cause a mere diminution in the value of the property will not amount to an expropriation of property<sup>64</sup>, and a claim will only arise when the effect of the measures is to deny the owner of all productive uses of the property or result in complete deprivation of all rights associated with the investment.<sup>65</sup> When a certain degree of rights are left in the possession of the owner, even though the profitability of the enterprise might be reduced, there will not arise a compensable expropriation of property,<sup>66</sup> and the legitimate government action will only amount to a taking if the rights are *rendered so useless* that they must be deemed to have been expropriated.<sup>67</sup> It is clear that the actions

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<sup>61</sup> *Handyside v. United Kingdom*, 58 ILR 150 (1976); *Poiss v. Austria*, 10 EHRR 231 (1988); *Matos e Silva, Lda v. Portugal*, 24 EHRR 573 (1997). **See** *Starrett Housing v. Islamic Republic of Iran*, 4 Iran-U.S. C.T.R. 122 (1983) at 154. **See also** *Sea Land Service v. Islamic Republic of Iran*, 6 Iran-U.S.C.T.R. 149 (1984). **See also** *Pope and Talbot v. Canada*, *supra* note 37; *Marvin Feldman v. United Mexican States*, *supra* note 39; *Revere Copper and Brass Inc. v. Overseas Private Investment Corporation*, 56 ILM 258; *Czech Republic v. CME (Netherlands)*, 42 ILM 915 (2003).

<sup>62</sup> D.J. Harris et. al., *Law of the European Convention on Human Rights* (London: Butterworths, 1995) at 535; *James v. United Kingdom*, 8 EHRR 123 (1986). **Refer** Article 1, European Convention on Human Rights, 1950; Restatement (Third) of Foreign Relation Law of the United States, REST 3d FOREL s 712. **See** *Too v. Great Modesto Insurance Associates*, 23 Iran-U.S.C.T.R. 378 (1991). **See also** *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)00/2 (2003).

<sup>63</sup> *Oscar Chinn Case*, *supra* note 39. **See also** *Starrett Housing Case*, *supra* note 61; *Tecnicas Medioambientales Tecmed S.A. Case*, *id*; *Marvin Feldman Case*, *supra* note 39.

<sup>64</sup> *Handyside v. United Kingdom*, *supra* note 61; *Poiss v. Austria*, *supra* note 61; *Matos e Silva, Lda v. Portugal*, *supra* note 61.

<sup>65</sup> *Tippetts, Abbet, Mc Carthy, Stratton v. TAMS-AFFA*, 6 Iran-U.S.C.T.R. 219 (1985). **See** *R v. Tener*, [1985] 1 S.C.R. 533 at 540, 17 D.L.R. (4th) at 563. Canadian jurisprudence has defined the right differently, and have held that the presumption of a taking will arise only when there has been a complete and total destruction of the use and enjoyment of the property and all rights connected with it. **See also** *Haas v. City and Council of San Francisco*, 239 U.S. 394. American jurisprudence has held that a mere diminution in the value of property, however serious will not amount to a taking of property under international law.

<sup>66</sup> *Metalclad Corp. v. Mexico*, 40 ILM 55; *Ethyl Corp. v. Canada*, 38 ILM 708 (1999). **See** *Pope and Talbot v. Canada*, *supra* note 37; *Kate v. Italy*, 19 EHRR 368 (1995); *Sporrong & Lonroth Case*, 68 ILR 86 (1982). **See also** *Tecnicas Medioambientales Tecmed S.A. Case*, *supra* note 62.

<sup>67</sup> *Starrett Housing Corp. Case.*, *supra* note 61. **See** G.H. Aldrich, "What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Tribunal", 88 *Am. J. Int'l L.* 585 (1994). The author notes

of Anghore have only caused a diminution in the value of investment<sup>68</sup> made by Kavala Anghore, and have not extinguished the rights held by the company.

Hence, it does not amount to an expropriation of the investment made by the company.

[B] A GOVERNMENTAL ACTION WHICH IS FOR THE PURPOSE OF PROTECTING THE ENVIRONMENT AND PUBLIC HEALTH DOES NOT AMOUNT TO AN EXPROPRIATION OF PROPERTY.

A state is not liable under international law for a measure that it takes in the exercise of its bona fide police powers.<sup>69</sup> A regulation that prohibits or regulates the right of the owner to use or manage his property, in the interest of the preservation of the environment and public health, cannot be held to amount to a compensable taking of the property.<sup>70</sup> The government may take specific measures that regulate the use of land to control the use of natural resources and promote the well balanced development and improvement of the living conditions of the urban population<sup>71</sup>, or prevent certain economic activities in certain areas, in the public interest. The protection and preservation of the environment is prima facie a legitimate aim of the government, and a diminution in the value of the property caused as a

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that “if liability were to arise from the commonly accepted police powers of the state, it would limit the accepted right of the government to pursue general welfare or a recognized social purpose”. **See also** *Foremost Tehran v. Islamic Republic of Iran*, 10 *Iran-U.S.C.T.R.* 228 (1986) at 251-52. “The effect of a measure that amounts to a taking of property is to do away with any interest in the right to property”. **See also** *S.D. Myers Inc. Case, supra* note 40. The tribunal observed that “regulation of property is a lesser interference with the use and enjoyment of property, than an expropriation which extinguishes any right held by the owner in the property”

<sup>68</sup> *Compromis* para 10.

<sup>69</sup> *Hazra Engineering Corporation v. Islamic Republic of Iran*, 1 *Iran-U.S.C.T.R.* 499 (1982) at 504-05. **See also** *Tecnicas Medioambientales Tecmed S.A. Case supra* note 62.

<sup>70</sup> *Goldblatt v. Town of Hemstead*, 369 U.S. 590. **See** *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) at 262. A governmental regulation that places restrictions on buildings to prevent an unnecessary conversion of open space and the other consequences of urban sprawl cannot be considered to be a taking of property. **See also** *Hartel Holdings v. City of Calgary*, [1997] 1 F.C. 128. The government may take measures, in the pursuance of a legitimate state interest, that may reduce or restrict the land use or the development of land, without having to pay compensation for the same.

<sup>71</sup> Article 27, Chapter 1, Title 1, Constitution of Mexico. Every nation has the right to regulate the use of natural resources to enable the well balanced development of the country and ensure higher standards of living for the urban population. **See** Canada’s Model BIT, <http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf> (accessed on Jan 21, 2006). A measure taken by the government that though they interfere with the rights of the investor, are motivated by concerns of legitimate safety, environment and public health will not under international law amount to an expropriation of property.

result will not cross the threshold for a regulation to be classified as a taking under international law.<sup>72</sup> The governmental measure will only amount to an expropriation of property when the action is motivated with a decidedly mala fide intent such as the protection of the domestic industry to the detriment of the investor.<sup>73</sup>

The measures taken by Anghore were predicated on the need to increase the area available for open spaces and low-income housing, in light of the constraints on the land resources in Anghore.<sup>74</sup> The low quality of life<sup>75</sup> and the vulnerability of the slum-dwellers thus formed the basis for the actions taken. Such measures, in light of the above, cannot amount to an expropriation under international law.

[C] THE MEASURES TAKEN BY THE GOVERNMENT DO NOT INTERFERE WITH INVESTMENT BACKED EXPECTATIONS TO THE DEGREE NECESSARY FOR A CLAIM FOR A TAKING TO ARISE UNDER INTERNATIONAL LAW.

The interference with the investor's legitimate investment backed expectations will only transform into a taking of the property when the actions of the government alter the owner's contemplated use of his property.<sup>76</sup> A taking will only arise when the government action effectively deprives the owner of the expected use of his investment. It cannot be expected that the government's environment policies will be frozen, especially in light of large-scale

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<sup>72</sup> *Pine Valley Developments v. Ireland*, 14 EHRR 319 (1992). See R. Dolzer, "Indirect Expropriation of Alien Property", 1 *ICSID Rev.-Foreign Inv. L.J.* 41 (1986). See also *Oscar Chinn Case*, supra note 39. It was held that the actions of the government, when prompted by the existence of certain conditions will justify the imposition of even severe, though not complete restrictions on the use of property without making the government liable for the same. See also UN Resolution on the Conference on Environment and Development, G.A. Res. 44/228, UN GAOR, 44<sup>th</sup> Sess., <http://www.un.org/documents/ga/res/44/a44r228.htm> (accessed on Jan 22, 2006). The Resolution declared that every state had the duty to halt and reverse the adverse effects of environmental degradation and the measures taken by the state to effectuate a legitimate public purpose cannot amount to an expropriation of the alien's property.

<sup>73</sup> *SD Myers Inc. Case*, supra note 40.

<sup>74</sup> *Compromis* para 7. Anghore was surrounded by sea and thus despite having a large and burgeoning population, could not expand.

<sup>75</sup> *Compromis* para 7. The living conditions in Stanford-Ridge were *squalid, unhygienic and deplorable*.

<sup>76</sup> *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) at 136; *Goldblatt v. Town of Hemstead*, 369 U.S. 590; *Kate v. Italy* (1995) 19 EHRR 368. See also *Starrett Housing Case*, supra note 61.

development projects, and changing environmental requirements and standards.<sup>77</sup> The provisions of a Friendship, Commerce and Navigation treaty are not insurance to the investor against all possible future risks.<sup>78</sup> Every investor must expect that his rights over property will be affected by measures taken by the government in the public interest.<sup>79</sup> The measures taken by Anghore did not alter Kavala Anghore's contemplated use of the property, and Kavala was given property rights in northern suburbs of Stanford-Ridge in place of the rights held in central Stanford-Ridge. Though there was a diminution in the value of the investment, the provision of property development rights in respect of those surrendered thus did not negate Kavala Anghore's expected use of the property.

Clearly, the measures do not amount to an expropriation of Kavala Anghore's property.

**IX. ARGUENDO, THE MEASURES AMOUNT TO A TAKING OF PROPERTY, THE EXPROPRIATION IS LAWFUL UNDER INTERNATIONAL LAW.**

[A] THE DOCTRINE OF NECESSITY PRECLUDES THE FINDING OF AN ILLEGALITY.

The taking of precautionary measures on an immediate provisional basis to safeguard the natural environment precludes the wrongfulness of a taking<sup>80</sup>, and no wrongfulness will be found if the observance of an international commitment will cause harm to the state.<sup>81</sup> A

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<sup>77</sup> Petersmann, in Meihard Hilf and Petersmann (1993) *also Lucas v. South Carolina Coastal Council*, at 290.

<sup>78</sup> *Case Concerning ELSI*, *supra* note 15; **See also** *Marvin Feldman Case*, *supra* note 39. Governments often change their laws and regulations in response to changing conditions. These measures taken by the government may make an investment less profitable or even uneconomic to continue. **See also** *Starrett Housing Case*, *supra* note 61. The investment may often be disturbed by strikes, lockouts, or other political and economic disturbances. Investors have to accept the risks associated with these factors in the process of investment, and the fact that the risks materialized will not prove that there was a taking of the investors property by the government. **See** *The Neer Claim*, 4 *UNRIAA* 60 (1926). This case decided by the United States-Mexico claims commission held that for the claim for the breach of the investor obligations to arise, the conduct complained off must amount to an outrage or insufficiency so far short of the international man would recognize the insufficiency. **See also** Article 1114(1), the NAFTA agreement. The actions of the government must be so arbitrary, unfair, idiosyncratic, coloured by racial or sectional prejudices or grossly unfair.

<sup>79</sup> *Kate v. Italy*, 19 *EHRR* 368 (1995). All rights are located in the social environment and the restrictions placed on the rights is a necessary exercise of the governmental power in the common good. **See** *Goldblatt v. Town of Hemstead*, 369 U.S. 590.

<sup>80</sup> Article 36, International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts, 2001, UN GAOR No. A/56/83. **See also** *Russian Fur Seals Case*, 86 *British and Foreign State Papers* 220.

<sup>81</sup> *Russian Indemnity Case*, 11 *UNRIAA* 431 (1912) at 443.

state's action to preserve its environment could also be based on a measure of uncertainty about the future, but if established on reasonably available evidence, will render a taking lawful.<sup>82</sup> As demonstrated, the regulation of Kavala Anghore's investment was clearly in light of the need to protect the natural environment of Stanford-Ridge and to guard against the possibility of future threats to the life and property of the residents of Stanford-Ridge. Hence, the measures are lawful.

[B] ARGUENDO, THE DOCTRINE OF NECESSITY DOES NOT APPLY, THE TAKING IS NOT HIT BY THE WANT OF A PUBLIC PURPOSE.

The burden of proof to show that an action under international law was not motivated by a public purpose rests on the defendant.<sup>83</sup> States are given a wide margin of appreciation under international law, and an action of the state is only challengeable when the state action is motivated by factors other than a concern for the internal well being of the state.<sup>84</sup> This has been held to include, among other situations, those where the taking was purely motivated by *amusement and private profit*<sup>85</sup>, manifestly without reasonable foundation<sup>86</sup>, purely motivated by *extraneous political reasons*<sup>87</sup>, such as political retaliation, or motivated *solely* by an intention to avoid contractual obligations of the state.<sup>88</sup> The protection of the environment and human health are legitimate interests of the state, and the

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<sup>82</sup> Article 25, International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts, 2001, UN GAOR No. A/56/83. See *Case Concerning Gabčíkovo-Nagymaros Project supra* note 56 at para. 51. See also Principle 15, Rio Declaration on Environment and Development, 1992. The principle states that uncertainty need not prevent an action that is essential for the state for the safeguarding of its environment.

<sup>83</sup> *Libyan American Oil Company (LIAMCO) v. Libya*, 20 ILM 1 (1981). See M. Sornarajah, *The International Law on Foreign Investment* (2<sup>nd</sup> edn., Cambridge: Cambridge University Press, 2004).

<sup>84</sup> *Id.*

<sup>85</sup> *Walter Fletcher Smith v. The Compania Urbanizadora del Parque y Playa de Marianao (Cuba v. U.S.)*, 2 UNRIAA 913 (1930) at 917. See also American Law Institute's *Restatement of Foreign Relations Law*, 13 ILM 767 (1974) at 771.

<sup>86</sup> *James v. United Kingdom*, 8 EHRR 123 (1986).

<sup>87</sup> *BP Award* (1977) 53 ILR 296 at 317.

<sup>88</sup> *Amoco International Finance Corporation v. Islamic Republic Of Iran*, 15 Iran-U.S.C.T.R. 189 (1987). The tribunal held that the taking of property would be lawful even if the purpose which motivated them were the pursuit of the main economic objectives of the state.

protection of and safeguarding these *fundamental human rights* is recognized as a positive obligation of the state.<sup>89</sup> As demonstrated, the measures taken by Anghore were *purely motivated* by concern for the internal well-being of the state. The measures were clearly not motivated by *purely political* reasons and were for the furtherance of legitimate *socio-economic and welfare* goals of the state.

They were hence clearly in the public interest of Anghore.

[C] THE COMPENSATION PAID WAS IN CONFORMITY WITH THE REQUIREMENTS OF THE TREATY AND INTERNATIONAL LAW.

[i] The payment of compensation extends to the duty to pay appropriate compensation taking into account all the circumstances and in accordance with the laws and regulations of the state.<sup>90</sup> The standard of compensation to be conformity with the requirements of international law need not be the payment of full compensation for the expropriation<sup>91</sup>, due to the *necessity* of taking into consideration not only the interest of the owner of the property, but also the community of the nationalizing state.<sup>92</sup> The compensation payable by a state welcoming foreign investment should amount to a level of compensation that does not render the investment *worthless* economically and states are empowered to take

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<sup>89</sup> Principle 1, Rio Declaration on Environment and Development, 1992. The principle states that *every human being is entitled to a healthy and productive life in harmony with nature.*

<sup>90</sup> Article 2(2)(c), Charter of Economic Rights and Duties of States, G.A. Res. 3281(XXIX), 29<sup>th</sup> Sess., <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/738/83/IMG/NR073883.pdf?OpenElement> (accessed on Jan 22, 2006).

<sup>91</sup> *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, 1969 I.C.J. 3. **See also** *Fredrica Lincoln Riahi v. The Government of the Islamic Republic of Iran*, 28 Iran-U.S.C.T.R. 176 (1992). The payment of full compensation is not a mandatory obligation under international law and in any event, all the pertinent circumstances of the case must be taken into account.

<sup>92</sup> Decision of Mahamassani in *Libyan American Oil Co. (LIAMCO) v. Libya, James v. United Kingdom*, *supra* note 62; *Sporrong & Lonroth Case*, *supra* note 66; R. Higgins, “The Taking of Property by the State: Recent Developments in International Law”, 176 *Recueil des Cours*, 259 (1982-III) at 355-375, Brownlie, *supra* note 4 at 513–514. **See also** *INA Corporation v. Islamic Republic of Iran*, 8 Iran-U.S.C.T.R 373 (1985); *American International Group v. Islamic Republic of Iran*, 4 Iran-U.S.C.T.R. 96 (1983). In both these cases it was held that the *fair market value standard of compensation* must be discounted taking into account all the relevant circumstances.; **Refer** Article 1, Protocol 1, European Convention on Human Rights, 1950. **See** *Lithgow v. United Kingdom*, 8 EHRR 329 (1986). This case held that the standard of compensation under international law *need not* amount to an obligation to pay full compensation for the value of the expropriated property. **See also** *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964).

measures to revise the provisions of a contract due to extraordinary circumstances, which would justify payment of damages less than that prescribed by the *full market value standard*.<sup>93</sup>

[ii] *Arguendo*, the Treaty devolves, Article 6 clearly states that the provisions of para.1 *shall be applied to the extent* necessary to ensure fair and equitable compensation to the investor. The Treaty thus reiterates the flexibility of the standard of compensation required under international law, and clearly implies that all the circumstances must be taken into account in determining the amount of compensation payable.

The standard of compensation provided for by Anghore clearly meets the requirements of the law laid down above. The extraordinary necessity created due to the floods and the need to improve the quality of life in Stanford-Ridge, and to safeguard the interests of the public, especially those of the weaker sections of the Stanford-Ridge, in light of the above, must be taken into consideration.

Anghore has hence satisfied all the requirements relating to the payment of compensation as mandated by the treaty and international law.

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<sup>93</sup> *Libyan American Oil Company (LIAMCO) Case*, *supra* note 83 at 206-207. **See** *American Independent Oil Company(Aminoil) v. Kuwait*, 66 *ILR* 518 (1984) para 146. The tribunal held that the principle of looking into all the relevant circumstances in a particular case necessarily involved a study of the motivations of the government in carrying out the governmental action. The determination of the cause behind the governmental action is a significant factor in the determination of the amount of compensation under international law.

**CONCLUSION**

Wherefore in the light of the questions presented, arguments advanced and authorities cited, this court may be pleased to adjudge and declare that –

1. The FCN Treaty does not devolve on the Respondent State;
2. The Applicant does not have the *jus standi* to approach this Court;
3. The Applicant has not exhausted all local remedies before approaching this Court;
4. The Respondent is not liable for breach of the National Treatment Standard;
5. The Respondent has not breached Article 11 of the FCN Treaty;
6. The Respondent has not expropriated the property of Kavala Anghore;
7. The Respondent is not liable to pay any reparations to the Applicant.

**All of which is respectfully submitted**

**Agents for the Respondent.**