TIMCCE-206

TILA INTERNATIONAL MOOT COURT COMPETITION ON ENERGY (TIMCCE-II) 2019

INTERNATIONAL COURT OF JUSTICE

IN THE PROCEEDING BETWEEN

REPUBLIC OF KASANA …….……APPLICANT

V.

UNION OF IKRAR ……..…. RESPONDENT

MOST RESPECTFULLY SUBMITTED

AGENT APPEARING ON BEHALF OF THE RESPONDENT

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LIST OF ABBREVIATIONS

¶	Paragraph
§	Section
&	And
Art.	Article
CEPA	Comprehensive Economic Partnership Agreement
ERC	Electricity Regulatory Commission
GATT	General Agreement on Trade and Tariff
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Dispute
MFN	Most Favoured Nation
PPA	Power Purchase Agreement
Rep.	Report
RPO	Renewable Purchase Obligation
UNICTRAL	United Nation Commission on International Trade Law
v.	Versus
VCLT	Vienna Convention on the Law of Treaties

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STATEMENT OF JURISDICTION

The Republic of Kasana (Applicant) and Union of Ikrar (Respondent) humbly submits the present dispute before this Hon'ble International Court of Justice in pursuit of legal justice. The application is brought under Art. 36(1) of the ICJ Statute. All the parties at dispute have mutually agreed to invoke the jurisdiction of International court of Justice.

STATEMENT OF FACT

The material case is regarding the breach of the PPA, the MANAR and the CEPA between Union of Ikrar and Republic of Kasana. Kasana has approached the ICJ to seek compensation from Ikrar.

The PPA between Union of Ikrar and Republic of Kasana, representing TT power Ltd.

Union of IKRAR government and Republic of KASANA representing TT power Ltd. (A state owned company) inked a Power Purchase agreement (PPA) for the purchase of solar power to setup a project in district Halva, IKRAR. One of the term of agreement said that Ikrar government will supply water for the working of solar power generation to TT Power Company and also TT Power Company agreed to the terms of Ikrar government.

The MANAR Agreement

MANAR agreement was also signed between Ikrar government and TT power company that if the company does not establish its plant in Ikrar within six months then it will have to pay USD 400-million as a compensation for loss.

Alliance between TT Power Company and DK power Company

Meanwhile TT Power company formed alliance with DK power company (registered in IKRAR) to setup the solar plant in Ikrar. TT Power Company agreed to invest around 40% for the joint venture which summed up to USD 240 Million along with technical support to the project.

The project was divided into two phases: one was to invest the money and second was to setup the power plant) and was supposed to get completed by 2016, but it got delayed due to differences between the Joint Venture partners.

The Dispute

PPA was signed to fulfill Renewable purchase obligation (RPO) by following the transparent process of bidding. After the bidding was completed TT power Ltd. was awarded the project for 600 MW. In due course the electricity rates/tariff quoted in the above bids was substantially reduced in subsequent bids, raising the concern of electricity regulatory commission (ERC).

Keeping in view the interest of the Consumers the Electricity regulatory commission did not adopt the tariff quoted. The proposal was refereed back to IKRAR thrice for reduction of tariff keeping in the view the gap between the market price and solar tariff.

At the time of implementing the project Ikrar government did not supply water to TT Power Company Ganga Kishan River whose water was supposed to be supplied by Ikrar government to TT Power Company for working of solar power plant was in a dispute redressal between Ikrar government and Pamaiya government (Neighbor of IKRAR) dispute being Right to use waters of the Ganga Kishan River. Nearly four years after inking of the Treaty; KASANA approached International court of Justice to seek compensation from IKRAR.

DK Power Company started to work towards the project but the company had to suffer greater financial loss because of TT Power Company's inability to bring more funds as per the promise.

TT Power Company invested only USD 7.5 million and failed to invest adequate amount due to which the local company had to bear the total project cost of around USD 600 million. Meanwhile, the TT Power Company alleges breach of contract to start the project as per schedule.

The CEPA

Comprehensive economic Partnership Agreement (CEPA) was also signed between Union of Ikrar and Republic of Kasana on 7th August 2009. This agreement commits both countries to lower or eliminate import tariffs on a wide range of goods, over the next 20 years and expand opportunities for investments and exchanging services, Kasana is phasing out or reducing tariff on 90 percent of Ikrar goods over the next decade, while Ikrar will do so on 85 percent of Kasana goods.

CEPA has been registered under Article 102 of the United Nations Charter in 1945.

Ikrar government has imposed Anti-dumping duty of 25% which led to increase in cost of project.

All the countries present in the scenario have mutually agreed to invoke the jurisdiction of International court of Justice.

MEASURES AT ISSUE

1. **WHETHER THE PARTIES CAN CLAIM COMPENSATION? IF SO THEN AGAINST WHOM AND UPTO WHAT EXTENT.**
2. **WHETHER GANGA KISHAN RIVER DISPUTE IS JUSTIFIED FOR FAILURE OF JOINT VENTURE AGREEMENT BETWEEN UNION OF IKRAR AND REPUBLIC OF KASANA.**
3. **WHETHER THE ELECTRICITY REGULATORY COMMISSION IS JUSTIFIED IN REFUSAL TO ACCEPT THE PPA TARIFF WHICH IN TURN HAS LED TO FURTHER DELAY.**

SUMMARY OF PLEADINGS

1. WHETHER THE PARTIES CAN CLAIM COMPENSATION? IF YES, THEN AGAINST WHOM AND UPTO WHAT EXTENT?

It is humbly submitted before the Hon'ble court that in the present case Ikrar can claim compensation against Kasana as Kasana has breached the international obligations as it failed to set up the project within six months and also failed to invest the promised amount arising out of the Joint Venture. Also, MANAR Agreement will prevail over PPA according to the principle of *lex specialis*.

2. WHETHER THE GANGA-KISHAN RIVER DISPUTE IS JUSTIFIED FOR THE FAILURE OF THE JOINT-VENTURE AGREEMENT BETWEEN UNION OF IKRAR AND REPUBLIC OF KASANA

It is humbly submitted before the Hon'ble court that Ganga-Kishan River dispute is justified for the failure of the non-supply of water. The river whose water was supposed to be supplied for the working of the solar power plant was already undergoing a dispute of 'right to use water' which made it impossible to supply the water as it could hamper the interest of the third party.

3. WHETHER THE ELECTRICITY REGULATORY COMMISSION IS JUSTIFIED IN REFUSAL TO ACCEPT THE PPA TARIFF WHICH IN TURN HAS LED TO FURTHER DELAY.

It is submitted that ERC is not justified in refusal to accept the PPA tariff as the National Electricity Act imposes duty on ERC to accept the tariff if it has been decided by transparent bidding and also tariff cannot be altered frequently. The quoted tariff is also not against the international customary

principle of National treatment, MFN, and anti-dumping policy also the quoted tariff is not against the CEPA entered between Union of Ikrar and Republic of Kasana

LEGAL PLEADINGS

1. WHETHER THE PARTIES CAN CLAIM COMPENSATION? IF YES, THEN AGAINST WHOM AND UPTO WHAT EXTENT?

It is humbly submitted before the Hon'ble court that in the present case Ikrar can claim compensation against Kasana as Kasana has breached the international obligations (1.1). Kasana has violated customary law *(1.2).* And it characterises the act of Kasana done in an internationally wrongful manner (1.3). Also, as being *lex specialis* MANAR Agreement will prevail over PPA(1.4).

1.1 THAT KASANA HAS BREACHED THE INTERNATIONAL OBLIGATION.

It is contented that acts done by Kasana has breached the international obligation. *There is an internationally wrongful act of a State when conduct consisting of an action or omission*[1]*:*

(a) is attributable to the State under international law(1.1.1); and

(b) Constitutes a breach of an international obligation of the State (1.1.2).

1.1.1 .THAT THE CONDUCT OF KASANA IS ATTRIBUTABLE TO THE STATE OF IKRAR

It is submitted that the conduct of Kasana is Attributable to the state of Ikrar.

In the *Phosphates in Morocco* case. The Court explicitly linked the creation of international responsibility with the existence of an *"act being attributable to the State and described as contrary to the treaty rights of another State*".[2]

Similarly in the *Dickson Car Wheel Company* case, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is "*that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard*".[3]

[1] Article 2 of Draft articles on Responsibility of States for Internationally Wrongful Acts.
[2] *Id.*
[3] Dickson Car Wheel Company (U.S.A.) v. United Mexican States, UNRIAA, vol. IV (Sales No. 1951.V.1), pg. 669, at ¶. 678 (1931).

As per one of the terms of the MANAR Agreement which was signed between Ikrar Government and TT Power Company, that if the Company does not establish its plant in Ikrar within 6 months then it will have to pay USD 400 Million compensation for loss[4].

Also, TT Power Company had agreed to invest around 40% for the joint-venture which summed up to USD 240 Million along with technical support to the project.[5]

But, TT Power Company invested only USD 7.5 Million and failed to invest adequate amount due to which the local company had to bear the total project cost of around USD 600 Million.[6]

1.1.2 THAT THE CONDUCT OF KASANA CONSTITUES A BREACH OF INTERNATIONAL OBLIGATION

The second condition for the existence of an internationally wrongful act of the State is that the conduct is attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations.

In its judgment on jurisdiction in the *Factory at Chorzów* case, PCIJ used the words "breach of an engagement".[7]

ICJ referred explicitly to these words in the *Reparation for Injuries* case.[8] The arbitral tribunal in the *"Rainbow Warrior"* affair referred to "any violation by a State of any obligation".[9] In practice, terms such as "non-execution of international obligations", "acts incompatible with international obligations", "violation of an international obligation" or "breach of an engagement" are also used.[10]

In the present case there is a "breach of an engagement" by Kasana as the engagement was to set up the project in Ikrar within 6 months and invest 40% in the joint venture but it failed to comply with these engagements. Hence, Ikrar can claim compensation upto the extent it had to bear for

[4] ¶ 2, Moot proposition.
[5] ¶ 3, Moot proposition.
[6] ¶ 9, Moot proposition
[7] Factory at Chorzów, Jurisdiction, Judgment No. 8, P.C.I.J., Series A, No. 9, pg. 21 (1927).
[8] Reparation for Injuries, I.C.J. Rep. 174 (1949).
[9] New Zealand v. France, France-New Zealand Arbitration Tribunal, 82 I.L.R. 500 (1990).
[10] Conference for the Codification of International Law, held at The Hague in 1930, the term "any failure ... to carry out the international obligations of the State" was adopted (see *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3, art. 1).

the losses i.e., USD 400 million as per the MANAR Agreement and 240 million dollars as per the joint venture which amounts to USD 640 million.

1.2. THAT KASANA HAS VIOLATED THE CUSTOMARY LAW

It is submitted that Kasana has violated the customary law of:

1. *Pacta sunt servanda*
2. *Trans-boundary harm*

1.2.1 THAT KASANA HAS VIOLATED THE PRINCIPLE OF PACTA SUNT SERVANDA

It is submitted that Kasana has violated the principle of '*pacta sunt servanda'*.

"*Every treaty in force is binding upon the parties to it and must be performed by them in good faith".*[11]

One of the crucial general principle of international law is that of *pacta sunt servanda, or the idea that international agreements are binding. The law of treaties rest inexorably upon this principle since the whole concept of binding international agreements can only rest upon the presupposition that such instruments are commonly accepted as possessing that quality."*[12]

Trust and confidence are inherent in international cooperation[13].

In the present case as per the MANAR Agreement Kasana will set up the solar power project within 6 months. Ikrar trusted that Kasana will abide by the terms of MANAR Agreement. But, the Kasana failed to do so. And thus, '*pacta sunt servanda*' was breached by the Kasana.

1.2.2 THAT KASANA HAS CAUSED TRANS-BOUNDARY HARM

It is submitted that the states are under an obligation not to cause harm to the environment of other states, or to the area beyond national jurisdiction. The essence of this obligation is often referred as no-harm rule or the prohibition of trans-boundary environmental harm. It is also an obligation

[11] Art. 26, Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969.
[12] Vol I MC NAIR, BROWNLIE PRINCIPLES, LAW OF TREATIE, 591, chapter 30. See also article 26 of the Vienna Convention on the Law of Treaties, 1969, and AMCO v. Republic of Indonesia 89 ILR, 366.
[13] MALCOLM N. SHAW, INTERNATIONAL LAW, 105, Cambridge university press, 6th Ed.

on states not to permit activities within their territories which would violate the rights of other states.

"*The state of origin shall take all appropriate measures to prevent significant trans boundary harm or at any event to minimize the risk thereof."*[14]

The ICJ confirmed the customary nature of this principle in 1949 in *Corfu Channel*[15] case when referring to a state's obligation to not knowingly allow its territory to be used for acts contrary for the rights of other states. The failure to set up the project and invest in the joint venture by Kasana is a wrongful act on their part and it breaches the international responsibility that it owed towards Ikrar.

In *Chorzow Factory* case, the ICJ declared that "damage to the environment and consequent impairment or loss of the ability of environment to provide goods and services is compensable under international law."[16]

In the Costa Rican v. Nicaragua[17], the ICJ awarded compensatory damages to Costa Rica for internationally wrongful activities of Nicaragua.

1.3. THAT THE STATE RESPONSIBILITY ON THE PART OF KASANA WAS BREACHED

It is contented that Kasana has breached the state responsibility it owed towards Ikrar.

"Every internationally wrongful act of a State entails the international responsibility of that State".[18]

In the *Phosphates in Morocco* case, PCIJ affirmed that when a State commits an internationally wrongful act against another State international responsibility is established "immediately as

[14] Art. 3 of Draft Articles on Prevention of Trans boundary Harm from Hazardous Activities, 2001.
[15] Corfu Channel Case, UK v. Albania ICJ, Rep. 4, 1949.
[16] *Supra note* 7.
[17] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), pg.285 ,Order of 18 July 2017, I.C.J. Reports 2017.
[18] Art. 1 of Draft articles on Responsibility of States for Internationally Wrongful Acts.

between the two States"[19]. ICJ has applied the principle on several occasions, for example in the *Corfu Channel* case,[20] in the *Military and Paramilitary Activities in and against Nicaragua* case[21] That every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized, both before and since article 1 was first formulated by the Commission.

The international legal relation was breached by Kasana that makes them liable to pay compensation up to the extent till which Ikrar suffered loss.

Thus the term "international responsibility" in article 1 covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrong doing State and one injured State or whether they extend also to other.

1.4. THAT AS BEING THE PRINCIPLE OF *LEX SPECIALIS* MANAR AGREEMENT WILL PREVAIL OVER PPA

It is submitted that the well-established principle of *Lex specialis* provides that, where two treaties apply to the same subject-matter conflict, priority should be given to the more specific treaty.[22]This principle, which is a general principle of law recognized by all legal systems[23], also extends to the procedural provisions of the *Lex specialis*, including those relating to the settlement of disputes.[24]*Lex specialis* applies to a treaty's dispute settlement provisions as well as its substantive content.[25]

In the *Mavrommatis case* the PCIJ while analysing relationships between two instruments, the 1922 Mandate and the 1923 Protocol XII of the Treaty of Lausanne, and their impact on the jurisdiction of the Court has found that "in cases of doubt, the Protocol, being a special and more recent agreement, should prevail".[26]

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[19] Phosphates in Morocco, Judgment, P.C.I.J., Series A/B,No. 74, p. 10 (1938).
[20] Corfu Channel, Merits, Judgment, I.C.J. Reports, pg. 4, at ¶. 23 (1939).
[21] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports, pg. 14, at para. 142, ¶. 283, and pg. 149, ¶. 292 (1986).
[22] Silvia Borelli, *The Misuse Of General Principles Of Law: Lexspecialis And The Relationship Between International Human Rights Law And The Laws Of Armed Conflict*, 46 Ius Gentium 265, 266 (2015).
[23] Jurisdiction of European Commission of the Danube between Galatz and Braila, Advisory Opinion, P.C.I.J. Ser. B, No. 14, at 23, (Dec. 8, 1927); De Jong,,Baljet and Van Den Brink v. The Netherlands, Eur. Ct. H.R. Ser. A No. 77 (1984).
[24] Mavromattis Palestine Concessions (Greece v. Gr.Brit.), P.C.I.J. Ser. A, No.2, at 30-31 (1924).
[25] Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan), Arbitral Tribunal 1, 3 (2000).
[26] Mavromattis Palestine Concessions , *supra note* 20.

PPA for the purchase of solar power Inter alia to set up a project in district Halva, IKRAR.[27]Whereas MANAR Agreement specifically states that if the company does not establish its plant in Ikrar within 6 months, then it will have to pay USD 400 million compensation for loss.[28] Thus in this case special rule prevails over general rule (*lexspecialis derogate legi generali*).[29]

2. WHETHER THE GANGA-KISHAN RIVER DISPUTE IS JUSTIFIED FOR THE FAILURE OF THE JOINT-VENTURE AGREEMENT BETWEEN UNION OF IKRAR AND REPUBLIC OF KASANA

It is humbly submitted before the Hon'ble court that Ganga-Kishan River dispute is justified for the failure of the non-supply of water (2.1). Also, the failure in the investment as per the promise is attributable to Kasana (2.2)

2.1 THAT THE GANGA-KISHAN RIVER DISPUTE IS JUSTIFIED FOR THE FAILURE OF THE NON-SUPPLY OF WATER

It is submitted that the Ganga-Kishan River Dispute is justified for the failure of supply of water to the TT Power Company.

"*Except for domestic use, non-consumptive use, Pakistan shall be under an obligation to let flow, and shall not permit any interference with, the waters of The Sutlej Main, and The Ravi Main. In the reaches where these rivers flow in Pakistan and have not yet finally crossed into Pakistan."*[30]

India's understanding of the "proceed at your own risk" principle first outlined in the *Great Belt* case[31] before the International Court of Justice, providing that in respect of provisional measures a "State engaged in works that may violate the rights of another State can proceed only at its own risk;"[32]

[27] ¶ 1, Moot proposition.
[28] ¶ 2, Moot proposition.
[29] PETER MALAN CZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 57 (7th Ed. 1997).
[30] Art. II of provisions regarding Eastern Rivers, Indus Waters Treaty, 1960.
[31] Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports. 12, 1991.
[32] Award in the Arbitration regarding the Indus Waters Kishenganga between Pakistan and India, 20 December 2013, volume XXXI pp.1-358, United Nations.

The solar power generation requires water as a non-consumptive use for the working of it's all solar power technologies that uses a modest amount of water (approximately 20 gallons per megawatt hour, or gal/MWh) for cleaning solar collection and reflection surfaces like mirrors, heliostats, and photovoltaic (PV) panels. For comparison, a typical family uses about 20,000 gallons of water each year, more than the amount of water needed per MW of photovoltaic generation capacity.[33]

"The question of consumptive uses is being approached on the basis of fixing a quantum of use to be specified in the treaty."[34]

In all thermal power plants, whether fossil, nuclear, or concentrating solar, heat is used to boil water into steam, which runs a steam turbine to generate electricity. The exhaust steam from the generator must be cooled prior to being heated again and turned back into steam.[35]

The Nevada Solar One parabolic trough plant consumes 850 gallons of water per MWh on a 360-acre site near Las Vegas, or about 300,000 gallons per acre per year.[36]

Hence it is observed from this scientific understanding that such quantity of water was not justified as for the generation of 600 MW of electricity generation approximately 1200000 gallons of water would be required. Thus, if the waters from the river of Ganga-Kishan river would have been supplied, it would have violated the rights of another state and in this case the rights of Pamaiya Government.

2.2 THAT THE FAILURE IN THE INVESTMENT AS PER THE PROMISE IS ATTRIBUTABLE TO KASANA

It is humbly submitted before the Hon'ble Court that the TT Power Company had agreed to invest around 40% of the joint-venture which summed up to USD 240 Million along with technical support to the project[37]. But, Kasana had invested only 7.5 million dollars and failed to invest the adequate amount due to which the local company of Ikrar had to bear the total project cost of around USD 600 million.

[33] Water Use Management | SEIA", *SEIA*, 2019. [Online]. Available: https://www.seia.org/initiatives/water-use-management. [Accessed: 12- Sep- 2019].
[34] Pakistan's Memorial, referring to Article IV of the Heads of Agreement, 15 September, 1959 (Annex PK-10), Arrangements concerning Western River, supra 32
[35] *Id.*
[36] Cwatershedalliance.com, 2019. [Online]. Available: https://cwatershedalliance.com/pdf/SolarDoc06.pdf. [Accessed: 14- Sep- 2019].
[37] ¶ 3, Moot proposition.

This indeed led to a breach of ICJ referred explicitly to these words in the *Reparation for Injuries* case.[38] The arbitral tribunal in the *"Rainbow Warrior"* affair referred to "any violation by a State of any obligation".[39] In practice, terms such as "non-execution of international obligations", "acts incompatible with international obligations", "violation of an international obligation" or "breach of an engagement" are also used.[40]

In the present case there is a "breach of an engagement" by Kasana as the international obligation was to invest the adequate amount of money and thus it is '*res ipso loquitor'* on the side of Kasana. One of the crucial general principle of international law is that of pacta sunt servenda, or the idea that international agreements are binding. *The law of treaties rest inexorably upon this principle since the whole concept of binding international agreements can only rest upon the presupposition that such instruments are commonly accepted as possessing that quality."*[41]

Trust and confidence are inherent in international cooperation[42].

Ikrar had entrusted on TT Power Co. that it would abide by the agreement which it had made with the TT Power Co. and had already started to work towards the project acquiring all sorts of clearances and approvals. Hence the TT Power Co. is not justified for the failure of joint-venture agreement.

"States have legal responsibilities both towards other states and individuals according to different sources of international law."[43]

In the present case Kasana has breached its legal responsibility that it owed towards Ikrar for the failure in investment of the adequate amount as per the promise.

[38] Reparation for Injuries, I.C.J. Rep. 174 (1949).
[39] New Zealand v. France, France-New Zealand Arbitration Tribunal, 82 I.L.R. 500 (1990).
[40] Conference for the Codification of International Law, held at The Hague in 1930, the term "any failure ... to carry out the international obligations of the State" was adopted (see *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3, Art. 1).
[41] MALCOLM N. SHAW, INTERNATIONAL LAW pg. 105, Cambridge university press, 6th Ed.
[42] ICJ Reports, pg 253, 267:57 ILR C, 398,412, 1974.
[43] Legal.un.org, 2019. [Online]. Available: http://legal.un.org/avl/pdf/ls/Greenwood_outline.pdf. [Accessed: 13- Sep- 2019].

3. WHETHER THE ELECTRICITY REGULATORY COMMISSION IS JUSTIFIED IN REFUSAL TO ACCEPT THE PPA TARIFF WHICH IN TURN HAS LED TO FURTHER DELAY.

It is humbly submitted that the Electricity Regulatory Commission is not justified in refusal to accept the PPA tariff as (3.1)it was decided as per the Municipal law of the land. (3.2) Tariff determined was in consonance with the International customary principal and (3.3) was in accordance with the CEPA.

3.1 THAT THE TARIFF WAS DECIDED IN ACCORDANCE WITH THE MUNICIPAL LAW OF THE LAND

It is humbly submitted that the tariff decided was not in violation of the Municipal law of the land of Ikrar. Tariff determined cannot be refused by the ERC as per Electricity Act, 2003 and National Tariff Policy. The Kasana is liable to follow the Municipal law of the Ikrar.[44]

3.1.1 THAT THE DUTY TO ADOPT TARIFF DETERMINED BY TRANSPARENT BIDDING

It is humbly submitted that the Electricity Regulatory Commission is not justified in refusing the PPA tariff as the ERC is under the duty to adopt the tariff as the tariff has been determined by transparent process of bidding.[45]

3.1.2 THAT THE TARIFF CANNOT BE AMENDED FREQUENTLY

It is humbly submitted that the tariff cannot be amended more than ones in any financial year except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.[46]

In this case the tariff has been reduced subsequently and also the Ikrar was proposed thrice to reduce the tariff.[47]

[44] Art. 6, Responsibility of States for Internationally Wrongful Act, 2001.
[45] §63,The Electricity Act, 2003.
[46] § 62(4), The Electricity Act, 2003.
[47] ¶ 6, Moot Proposition.

3.1.3 THAT THE TARIFF QUOTED IN PPA IS IN ACCORDANCE WITH NATIONAL TARIFF POLICY

It is humbly submitted that the tariff quoted is in accordance with National Tariff Policy. The central government has the power to formulate tariff policy.[48] They can also revise and review the tariff policy.[49]

The Central government having power to decide the tariff rate, the refusal to accept the tariff by ERC is not justified.

3.2 THAT THE INTERNATIONAL CUSTOMARY PRINCIPLE HAS NOT BEEN VIOLATED

It is humbly submitted that the by the PPA quoted tariff the international customary principle of National treatment, Most Favoured Nation treatment and anti-dumping policy has not been violated.

3.2.1 THAT THERE IS NO VIOLATION OF NATIONAL TREATMENT PRINCIPLE

It is humbly submitted that there is no violation of National Treatment principle.[50] National treatment is the essential treatment standard that States grant to ensure equal competitive opportunities behind the border of the host State to foreign products, requires that once imported, foreign products are given at least as favorable a treatment as "like" domestic products.[51]

The determination of "likeness" entails a case-by-case analysis of the physical characteristics of products, consumer tastes and perceptions, products, and uses, and customs classification.[52] Size, dominant position etc. may discriminate foreign product from local product, merely being in the same sector may not be sufficient to show that the national product and the foreign product are in like circumstances.[53] Further, the principle of National Treatment does not apply to laws,

[48] § 3(1),The Electricity Act, 2003.
[49] § 3(3),The Electricity Act, 2003.
[50] Art. III, GATT, 1994.
[51] Henrik Horn, *National Treatment In The GATT*, Ifn Working Paper No. 657,2006, pg. 2 (27 January, 2006).
[52] Appellate Body Report, Japan – Taxes On Alcoholic Beverages, At 20, WTO Doc. Wt/Ds8/Ab/R.
[53] United Parcel Service of America Inc. v. Government of Canada, ICSID Case No.UNCT/02/1, 2007.

regulations, or requirements governing the procurement by governmental agencies of products purchased for governmental purposes.[54]

Therefore it is submitted that there is no violation of National Treatment Principle.

3.2.2 THAT THE MOST FAVOURED NATION CLAUSE IS NOT VIOLATED

The MFN[55] treatment clause requires that the host State does not discriminate – de jure or de facto on the basis of nationality. The MFN treatment provision is a relative standard.[56] In this case the fact is silent about any discrimination made on the ground of nationality among the nations.

It is also submitted that the general exception to GATT provides that MFN principle is not applicable on any commodity undertaken in pursuance of obligations under any intergovernmental commodity agreement.[57] Therefore, it is submitted that MFN principle is not violated.

3.2.3 THAT THE POLICY OF ANTI-DUMPING IS NOT VIOLATED

Once parties enter into contractual obligations voluntarily they are bound by the terms and conditions of the contract.[58] After the date of entry into force of CEPA Agreement, any articles relating to antidumping disciplines may be added if both parties so agree.[59]

The imposition of the anti-dumping duty was with the consent of both the parties as per the agreement, therefore there is no violation of anti-dumping policy.

3.3 THAT THERE IS NO VIOLATION OF CEPA

The CEPA provides that, neither party shall adopt or maintain any non-tariff measures on the importation of any goods of the other Party or on the exportation of any goods destined for the territory of the other party except in accordance with its rights and obligations under the WTO Agreement or in accordance with other provisions of the Agreement.[60]

[54] ¶ 8(a), Art. III, GATT, 1994.
[55] Art. I, GATT, 1994.
[56] United Nations Conference On Trade And Development, UNCTAD, Most-Favoured Nation Treatment 2010 (New York and Geneva, 2010) available from https://unctad.org/en/Docs/diaeia20101_en.pdf, at 23.
[57] ¶ (h), Art. XX, GATT, 1994.
[58] A.P. TRANSCO v. Sai Renewable Power (2011) 11 SCC 34.
[59] ¶ (e), Article 2.13, CEPA, 2009.
[60] Art. 2.6, CEPA, 2009.

The National Treatment, MFN and Anti-dumping principle is not violated by the quoted tariff.

Also,

Therefore, it is humbly submitted that ERC was not justified in refusing to accept the quoted tariff.

PRAYER

In the light of the issues raised, arguments advanced and authorities cited, the Agent for the Respondent humbly prays before this Hon'ble International Court of Justice to kindly adjudge and declare:

1. That Union of Ikrar can claim compensation from Republic of Kasana.
2. That Ganga-Kishan river dispute is justified for the failure of non-supply of water which led to the delay in implementation of the project.
3. ERC is not justified in refusal of PPA quoted tariff.

And pass any other appropriate order as the tribunal may deem fit.

And for this act of Kindness, the Applicant as in duty bound, shall forever pray.

Respectfully Submitted

Sd/-

Agent for Respondent