TEAM CODE- TIMCCE-304

IN THE INTERNATIONAL COURT OF JUSTICE

PEACE PLACE, THE HAGUE

THE NETHERLANDS

3rd TILA ONLINE INTERNATIONAL MOOT COURT COMPETITION ON ENERGY

&

INTERNATIONAL LAWS 2020

THE CASE CONCERNING THE DISPUTES RELATING TO ACTIONS OF TILAWIN

UNITED STATES OF DGEM (APPLICANT)

V.

UNION OF TILAWIN (RESPONDENT)

MEMORIAL FOR THE RESPONDENT

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TABLE OF ABBREVIATIONS

P	Page Number
¶	Paragraph
BIT	Bilateral Investment Treaty
CEPA	Comprehensive Economic Partnership Agreement
UNCITRAL	United Nations Commission on International Trade Law
FET	Fair and Equitable Treatment
ICJ	International Court Of Justice
TPO	Targaryen Power Co. Ltd.
MFN	Most Favoured Nation
GEAC	Global Energy Arbitration Centre
NT	National Treatment
PCIJ	Permanent Court Of International Justice
UN	United Nation
VCLT	Vienna Convention On The Law of Treaties, 1969

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STATEMENT OF JURISDICTION

Tilawin humbly submits that the present Court lacks jurisdiction in the instant dispute concerningTilawin's actions. Dgem invoked the Court's jurisdiction under CEPA. However, the claims raised by Reynes do not have any reasonable connection and not violate any provison of the provisions of the agreement. Furthermore, Applicant can't espouse claims under the principle of diplomatic protection as there is no exhaustion of local remedy by Dgem.

STATEMENT OF FACTS

THE STATES AND THE CORPORATIONS

- Targaryen Power Co, Ltd. (hereinafter referred to as TPO), a leading supplier and power industry in the United States of Dgem (Applicant State), started its power business in April 2001. TPO was initiated in a separation from Dgem's electric power co. under Dgem Power Industry Restructuring Act and it takes up to 10% of generating capacity comprised of thermal and combined cycle. TPO is in the process of deregulation and privatization.
- White Walkers Gas Power Plant Ltd. operating 400 MW project in a district of Winterfell, Union of Tilawin (Respondent State).

BILATERAL RELATIONSHIP (TREATY AND CONVENTION)

- United States of Dgem and Union of Tilawin entered into a BIT in 1996. This treaty aims at providing appropriate protection to each other's investor in their respective states and to maintain a balance between investor's rights and government's obligations
- Apart from BIT Contract between TPO and White Walkers is governed by Comprehensive Economic Partnership Agreement (CEPA) was signed between Dgem and Tilawin in 2009, registered under article 102 of Charter of United Nations, 1945.

INVESTMESNT

- TPO has made an investment in Tilawin and owns a majority stake in White Walkers
- TPO has claimed in 2012 that Dgem investment decision was based on the legal and policy framework made by the Federal and Winterfell government, apart from entities such as the Directorate General of Hydrocarbons, power and petroleum ministries, Central Electricity Authority, Gas Authority of Dgem, Petroleum and Natural Gas Regulatory Board and standing parliamentary committee reports that painted a healthy picture of the Tilawin's natural gas

THE CONTRACT BETWEEN TPO AND WHITE WALKERS

- ***Contract between TPO and White Walkers includes an arbitration clause which states that every dispute arising between the parties will be resolved through arbitration.***

- BIT includes a provision in its treaty that each contracting party shall provide a fair and equitable treatment to the investors of other contracting party in its territory. Tilawin violated the provision by not allocating the gas to White Walkers.
- On 11th March 2020, WHO declared a pandemic caused due to Covid-19, about 1.5 million people were infected and 85,000 lost their lives by the 1st week of April 2020. The world economy had crippled due to the lockdown imposed across countries and Government clarification stated that this pandemic will be considered as 'Force Majeure' event by declaring 'Covid-19' as Natural Calamity.

THE DISPUTE

- The Gas supply has not been supplied since 10th April, 2020. TPO issued a notice seeking gas supply, neither Government replied nor the Gas supply made available to it.
- To protect and restore the interest of TPO, Govt. of Dgem tried to contact the Govt. of Tilawin to resolve the issue.
- Dgem's carbon-reduction program, power generation companies (Including TPO) are obligated to cut emissions by investing in renewable projects in the country and in carbon-neutralization projects in the developing nations.
- An arbitration notice has been issued by TPO against the Union of Tilawin and demanded $500 million in compensation. After the issuance of notice of arbitration, an inter-ministerial committee was set up by the Federal Govt. in Tilawin.
- The committee, in its report recommended for the allocation of fuel to the project. Since government of Tilawin could not reach to any consensus on project revival, TPO filed for international arbitration on 26th July.
- The notice of arbitration has been sent to the Prime Minister's Office and cabinet secretariat besides the ministries of finance, commerce, oil and gas and power.
- The notice stated that due to lack of gas allocation the plant's commissioning had been delayed, and that it could not participate in the government's scheme for stranded gas-based plants as Gas Authority of Tilawin did not complete its pipeline in time.
- Govt. of Tilawin wants the seat of arbitration to be Kings Landing, a south-east Asian country and resolve the dispute in the Global Energy Arbitration Centre (GEAC) based in Kings Landing, Tilawin.
- TPO is against the same, as Kings Landing is not mentioned in the gazette of Tilawin. Hence, to protect the interest of its company govt. of Dgemapproached the International Court of Justice to resolve the issue.

MEASURES AT ISSUES

[1] WHETHER THE INTERNATIONAL COURT OF JUSTICE HAS THE JURISDICTION IN THE PRESENT MATTER?

[2] WHETHER THE SEAT OF ARBITRATION SHOULD LIE IN GLOBAL ENERGY ARBITRATION CENTRE (GEAC) BASED IN KINGS LANDING?

[3] **WHETHER THE 'FORCE MAJEURE' CLAUSE CAN BE INVOKED IN THE PRESENT CONTRACT?**

SUMMARY OF PLEADINGS

1. The Respondent humbly submits that in the present dispute no provision of CEPA and BIT is violated as a consequence of which the hon'ble court neither have Rationae Materiae nor have jurisdiction under Rationae Personae. In Arguendo, this Court cannot exercise its jurisdiction because Dgem can't claim Diplomatic Protection (*Diplomatic Espousal*) in the present case which is a pre-requisite of Rationae Personae, because Dgem have not exhausted the local remedy and the subject of the present case also didn't fall under Lex Generalis CEPA and also this court is not the appropriate forum the parties agreed upon under Lex Specialis BIT.
2. The Respondent humbly submits that the Govt. of Tilawain's wish to have the seat of arbitration as the King's Landing is a most suited and appropriate option in the absence of the Arbitrations clause. The original agreement has not mentioned the information about the seat of arbitration and in absence of any clause the agreement shall be governed by the BIT, CEPA and UNCITRAL Model. Moreover Tilawin have the right to select the seat of arbitration as GEAC based in King's Landing as per CEPA and BIT. Moreover, Tilawin have just decided the place where arbitration will be held but ultimately the law which will govern all the proceedings of arbitration will be governed by the Curial law i.e. UNCITRAL which is agreed by both the parties in CEPA and BIT as well is the applicable law for governing the arbitral proceedings.
   Therefore, GEAC based in King's Landing as the seat of Arbitration will only make the arbitral proceeding smooth and fair. The whole idea of making Kings Landings as the seat of arbitration is to make the arbitral proceedings feasible for both the nation.

3. The Respondent humbly submits before the Hon'ble Court that, in the present case the Force Majeure clause and event can not be invoked as there are provisions mentioned under CEPA and BIT which specifically mention about the Force Majeure Clause. Moreover, COVID 19 Pandemic was an act of God and therefore is an force majeure event as it qualifies every condition which is required to fulfill it. The trigger event for the force majeure was also mentioned under CEPA and BIT and there were no specific steps or approach available that can be taken to mitigate the Force Majeure Event.

LEGAL PLEADINGS

ISSUE 1

WHETHER THE INTERNATIONAL COURT OF JUSTICE HAS THE JURISDICTION IN THE PRESENT MATTER

[1.1] THIS HON'BLE COURT HAS NO JURISDICTION RATIONAE PERSONAE TO ADJUDICATE

The present case will not fall under the Contentious Jurisdiction of ICJ. In the Contentious Jurisdiction it is clearly stated that only state can be a party before ICJ[1]. Howbeit states are authorized and entitled to sponsor the disputes and claims of their Nationals by using "Diplomatic Protection" (*Diplomatic Espousal*)[2]. Dgem at its discretion can sponsor the claims of TPO but it needs to fulfill essential pre-requisites to lawfully avail Diplomatic Protection. There should be exhaustion of all Local Remedies[3] prima facie remedy should not merely notional or illusionary rather it should be effective in nature[4].

[1.1.1] DGEM CANNOT INVOKE DIPLOMATIC PROTECTION ON BEHALF OF TPO SINCE TPO HAS NOT EXHAUSTED LOCAL REMEDIES.

When a foreign national, natural and legal[5], has been purportedly wronged, all municipal remedies available to that foreign national within the local, host State must have been pursued before the foreign national's own State may intervene and bring international proceedings.[6]

[1] Article 34(1),Statute of the ICJ
[2] ILC, 1st report on Diplomatic Protection, UN Doc A/CN.4/506 (2000) at p.11.
[3] United Nations Conference On Trade And Development, DISPUTE SETTLEMENT, (2003), https://unctad.org/en/Docs/edmmisc232add19_en.pdf
[4] DADP, ILC, 1st report on Diplomatic Protection, UN Doc A/CN.4/506 (2000) at p.11., Article 15(a)

[5] DRAFT ARTICLES ON DIPLOMATIC PROTECTION (n 152) art 14, commentary 2.
[6] Interhandel Case (Switzerland v United States of America) (Preliminary Objections) [1959] ICJ Rep 6, 46; DADP, supra note 46, art 14.1 and DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, (2001) (A/56/10), art 44(b). http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

Therefore, a claim will not be admissible on the international plane unless the individual alien or corporation concerned has exhausted the legal remedies available to him in the state which is alleged to be the author of injury. As in *ELSI case*[7], the Court exhorted that the exhaustion of local remedies is an "important principle in customary international law". In *Interhandel Case*[8] also the court rejected the Switzerland's application on the ground that there was no exhaustion of local remedy. In the present case, neither Dgem nor the TPO have attempted to redress in the local Tilawin courts as they were obliged to before bringing this action. Therefore, the application is inadmissible.

[A] EXCEPTIONS TO LOCAL REMEDIES RULE DO NOT APPLY

The local remedies do not need to be exhausted where "there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress"[9]. Local remedies may involve executive bodies that are capable of delivering a binding decision[10]. More specifically, the exhaustion of local remedies rule entails that all factual and legal disputes must have been brought in front of the municipal legal system, as to allow the host State to exercise justice in its own, ordinary way.[11] In present case, Dgem cannot maintain that no local remedies are reasonably available at Tilawin as Dgem never approached under municipal laws of Tilawin to settle the present dispute.[12]

[1.2] THIS HON'BLE COURT HAS NO JURISDICTION UNDER DOCTRINE OF *FORUM PROROFATUM* TO ADJUDICATE THE DISPUTE

The Doctrine of Forum Prorogatum states that the consent of the state can be expressed in an informal and implied manner even after the case has been brought before ICJ[13]. Under Forum Prorogatum a party to a dispute i.e. state which haven't ratified the jurisdiction of court under any treaty or agreement may give their consent to the court's jurisdiction after the dispute is being brought before the court. As in the *Mavrommatis case*[14] the Court regarded it as immaterial

[7] Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989, p. 15
[8] Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 6 (Mar. 21)
[9] CRAWFORD, THERE ARE A NUMBER OF WELL-ESTABLISHED EXCEPTIONS TO THE EXHAUSTION RULE and "Article 15 of [the] Draft Articles on Diplomatic Protection lists them."
[10] http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf
[11] Finnish Ships Arbitration (Finland v United Kingdom), Reports of International Arbitral Awards, (1934) 3 VOLUME III pp. 1479-1550.
[12] Moot Proposition
[13] https://unctad.org/en/docs/edmmisc232add19_en.pdf
[14] Mavrommatis case (1924), PCIJ Series A, No. 2, p. 34

that the ratification of the Treaty of Lausanne (on the basis of which Greece, in part, invoked the Court's jurisdiction) took place after the initiation of the proceedings.

In the present case Dgem can not avail the jurisdiction under the Doctrine of Forum Prorogatum as to avail jurisdiction under this doctrine, the consent of both the disputing parties i.e. states, is compulsorily needed either implied or expressed but Tilawin in the present dispute neither gave it consent in form of implied consent as it was done in the case of *Rights of Minorities of Upper Silesia*[15] where the court inferred the implied consent and nor in the form of expressed consent as it was in the *Corfu Channel Case*[16].

Henceforth in the absence of any implied or expressed consent from Tilawin, Dgem cannot avail the jurisdiction of this hon'ble court under the Doctrine of Forum Prorogatum.

[1.3] THIS COURT HAS NO JURISDICTION RATIONAE MATERIAE TO ADJUDICATE THE PRESENT DISPUTE

Dgem invoked the compromissory clause under TCTC in order to establish the Court's jurisdiction. However, compromissory clauses must always be seen in connection with the substantive provisions of the treaty concerned.[17] Therefore, ICJ must ascertain[18] whether Dgem's claims fall within the provisions of CEPA and whether, as a consequence, the dispute is one which the Court has jurisdiction rationae materiae to entertain.[19]

[1.3.1] CHARACTERIZATION OF THE PRESENT DISPUTE

The present dispute is related to the losses incurred to TPO and indirectly to Dgem, due to which an International Arbitration has been initiated by Dgem and now the dispute is in front of ICJ. In the present case there is no abuse of rights by Tilawin prima facie no clause or provision of CEPA and BIT which are binding the contract between TPO and White Walkers are violated.

[1.3.2] THERE IS NO REAL DISPUTE UNDER CEPA

CEPA which is Lex Generalis agreement binding the contract between TPO and White Walkers[20] and is registered under Article 102[21] will only give the jurisdiction to this the hon'ble

[15] Rights of Minorities in Upper Silesia (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15 (Apr. 26)
[16] Corfu Channel, U.K. v. Albania, Judgment, 1949 I.C.J. 4 (Apr. 9)
[17] CHRISTIAN TOMUSCHAT, THE STATUE OF THE INTERNATIONAL COURT OF JUSTICE (2nd ed. 2012).
[18] Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I. C.J. Reports 1998, p. 432 ,at 450
[19] Oil Platforms(Iran/USA), Preliminary Objections, 1996 I.C.J. 803 (Dec. 12), P.16
[20] Moot Proposition

court if there is violation of any of its provisions [A]. However, Respondents submit that the subject matter of this dispute does not fall under CEPA and none of provisions of CEPA is being violated.

[A.] NO PROVISIONS OF CEPA IS VIOLATED

In present dispute Tilawin didn't violate any provision of CEPA. The fact that TPO was not allocated the gas (fuel) by Tilawin after 10th April is not arbitrary and unjust rather is a practical and tangible approach by the government of Tilawin[22]. On 11th March 2020, a global pandemic was been declared by WHO due to COVID-19, many lives were affected and world economy crippled due to this pandemic. In the light of this pandemic the government of Tilawin had issued a governmental clarification which states that COVID 19 is a "force majeure event". [23]
But, Article 10.16(1)[24] have provisions for health, safety and environmental measures which clearly states "*Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure consistent with this Agreement that is in the public interest, such as measures to meet health, safety or environmental concerns".* Also Article 10.18[25] which mentions the exceptions of this agreement i.e. CEPA, Article 10.18(b)[26] states that a state cannot be construed under this agreement to take any action which is necessary for the protection of health and life of human and plant (environment). Therefore the action of Tilawin was done under the ambit of Article 10.16 and 10.18(b) for the sole purpose of protection of health and life as a result of which Tilawin hasn't violated any provisions of CEPA.
Henceforth, this court has no jurisdiction rationae materiae under CEPA to adjudicate the present dispute.

[1.3.3] THERE IS NO REAL DISPUTE UNDER BIT

BIT is Lex Specialis treaty binding the contract between TPO and White Walkers[27]. In the present matter there is no jurisdiction in ICJ as per BIT as none of the provision of BIT was been violated [A] and Requirements under Article 8[28] are not meet. [B]

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[21] https://www.un.org/en/charter-united-nations/index.html
[22] Moot Proposition
[23] Id.
[24] https://commerce.gov.in/writereaddata/trade/INDIA%20KOREA%20CEPA%202009.pdf
[25] Id.
[26] Id.
[27] Supra Note 24
[28] https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1568/download

[A.] THE SUBJECT MATTER OF THE DISPUTE DOES NOT ARISE UNDER BIT.

Dgem claimed that Tilawin's measures are against the promotion and protection of Investment clause and the principle of MFN and NT, violating Article 2[29] and 3[30] of BIT respectively. These articles require parties to accord non-discriminatory measures to all investments made by investors of other party. Further, each party must accord with respect to their investor's full protection and security. However, Tailwind's actions are non-discriminatory since the stopping of the gas allocation and the non-completion of the pipeline by GAT was done in the light ongoing pandemic, in good faith and public interest. Article 10[31] of BIT clearly states that

"*The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions or take action in accordance with its laws normally and reasonably applied in good faith, on a non-discriminatory basis and to the extent necessary, for the prevention of the spread of diseases and pests in animals or plants*".

Therefore, in the present dispute the action taken by the government of Tilawin was in compliance with Article 10(2)[32] in good faith in order the stop the spread or escalation of the disease also both the Articles, 2 and Article 3 taken in isolation cannot confer the jurisdiction of this court as it was stated in *Oil Platforms, (Iran/USA)* case[33].

As a result of which none of the provisions had been violated by Tilawin and the subject matter of the dispute doesn't fall under BIT.

[B.] REQUIREMENTS UNDER ARTICLE 8 OF BIT ARE NOT MET

Article 8[34] is residual in nature. It is subject to settlement of dispute by peaceful means. Dgem and Tilawin have agreed to settle dispute through agreed means under Article 8[35]. [i] Dgem failed to exhaust the available dispute settlement measures under BIT. [ii] Furthermore, ICJ does not have jurisdiction under the agreed means of BIT. [iii]

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[29] Article 2, BIT https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1568/download
[30] Article 3, BIT
[31] Article 10, BIT
[32] Article 10(2), BIT
[33] Oil Platforms(Iran/USA), Preliminary Objections, 1996 I.C.J. 803 (Dec. 12), P.16
[34] Article 8, BIT
[35] Id.

[i.] BIT CONSTITUTES AGREED MEANS FOR SETTLEMENT OF DISPUTES.

BIT refers to the application of domestic remedies clause and subjects the dispute settlement to arbitration, embodied under Art.8[36] and Art.9[37], Therefore providing the agreed means for peaceful settlement of the disputes concerning the interpretation and application of BIT.

[ii.] BIT REQUIRES SETTLEMENT OF DISPUTES THROUGH ITS DOMESTIC REMEDIES PROCEDURE.

Article 8[38] of BIT asserts that firstly parties must try to amicably settle the dispute through negotiations [Article 8.1(a)][39] or recourse to any other local remedy available under the laws of the country where investment has been made [Article 8.1(b)][40]. If the parties fail to settle the dispute under Article 8(1)[41] within the period of 6 months then with the consent of both the parties the dispute should be submitted for resolution in accordance with the law of the Contracting Party which has admitted investment to that Contracting Party's competent judicial authority. [Article 8.2][42] In the present case the party has neither exhausted the 6 month time period allocated for the dispute settlement and nor has exhausted the local remedy as they didn't submit its claim before the relevant domestic courts or administrative bodies of the Defending Party for the purpose of pursuing domestic remedies. Henceforth Dgem didn't exhaust the local remedies in accordance which is a pre-requisite under Article 8 of BIT before referring the dispute to international arbitration.

[III.] BIT BARS THE JURISDICTION OF ICJ.

[36] Id.
[37] Article 9, BIT
[38] SupraNote 36
[39] Id.
[40] Id.
[41] Id.
[42] Id.

Jurisdictional clauses must on no account be interpreted in such a way as to exceed the intention of States that subscribed to it[43]. BIT requires parties to submit dispute to arbitration after the investor meets the conditions of domestic remedies[44]. Moreover, the arbitration clause under BIT excludes this court's jurisdiction.

[1.4] APPLICATION OF LEX SPECIALIS WILL NOT ENTAIL THE JURISDICTION OF THIS COURT.

The principle that special law derogates from general law suggests that Among agreements which are equal, that should be given preference which is most specific and approaches most nearly to the subject in hand[45], for special provisions are ordinarily more effective than those that are general[46]. As held by Iran-United States Claims Tribunal[47] that it is a well-recognized and universal principle of interpretation that a special provision overrides a general provision. The Tribunal here invoked lex specialis so as to argue that "the terms of the Claims Settlement Declaration are so detailed and so clear that they must necessarily prevail over the purported intentions of the parties, whatever they could have been".[48]

Thus, lex specialis is a general principle of law[49] recognized by both the parties in the present case extending to the procedural provisions of the lex specialis, including those relating to the settlement of disputes[50]. ***In the present case BIT is lex specialis. Hence, this Court has no jurisdiction under lex specialis BIT.***

[1.4.1] CEPA IS LEX SPECIALIS.

BIT is one of the treaties apart from CEPA which is binding the contract between TPO and White Walkers. BIT being a preferential economic and investment related agreement prima facie a pact related to liberalize and facilitate investment, establish a cooperative and conducive investment framework and establish transparent rules related to investment improving the

[43] Phosphates in Morocco Case (Italy v. Fr.), 1938 June 14 I.C.J Ser.A/B, No.74, at P.23-24
[44] BIT
[45] PAPINIAN, Dig. 48, 19, 41 and Dig. 50, 17,80; THE DIGEST OF JUSTINIAN vol. IV,(Philadelphia: University of Pennsylvania Press, 1985) Latin text ed. by T. Mommsen and P. Kruger); Lord A.D. McNair, THE LAW OF TREATIES (Oxford: Clarendon Press, 1961) 2nd edit, ¶393-399.
[46] HUGO GROTIUS, DE JURE BELLI AC PACIS. LIBRI TRES, Edited by JAMES BROWN SCOTT, THE CLASSICS OF INTERNATIONAL LAW (Oxford: Clarendon Press, 1925) Book II, Chap. XVI, Sect. XXIX, P.428.
[47] Iran-United States Claims Tribunal Reports, Case No. A/2, Iran v.US, C.T.R. vol. 1, 1981-1982, p.104.
[48] Id.
[49] Jurisdiction of European Commission of the Danube between Galatz and Braila, Advisory Opinion, 1927 P.C.I.J. Ser. B, No. 14, at 23 (Dec. 8); De Jong, Baljet and Van Den Brink v. The Netherlands, Eur. Ct. H.R. Ser. A No.77 (1984).
[50] Mavromattis Palestine Concessions (Greece v. Gr. Brit.), 1924 P.C.I.J. Ser. A, No.2, at 11 (Aug. 30), at 30-31

efficiency of investment between both the parties i.e. Dgem and Tilawin. BIT covers all the aspect of investments including the provisions for dispute settlement mechanism.

Thus, BIT approaches most nearly to the subject in hand and regulates the matter more effectively than CEPA. Furthermore, special rules are better able to take account of particular circumstances and the need to comply with them is felt more acutely than is the case with general rules[51]. Moreover, BIT being a special law governing the concerns of both the parties i.e. states provides for better access to what the parties have willed.[52]

Henceforth BIT is lex specialis and will be more binding than lex generalis i.e. CEPA and in the present case lex specialis BIT requires parties to submit dispute to arbitration after the investor meets the conditions of domestic remedies. Moreover, the arbitration clause under BIT excludes this court's jurisdiction.

[1.4.2] APPLICATION OF LEX GENERALIS DOES NOT EXCLUDE THE APPLICATION OF BIT.

BIT has greater clarity and definiteness and is thus felt more binding than CEPA which may stay in the background and be applied alongside. CEPA is a general regime while BIT deals specifically with the main theme of the issues in the present dispute. As held by Iran-US Claims Tribunal in the *Amoco International Finance Corporation v. Iran*[53], that a lex specialis in the relations between the two countries, the Treaty supersedes the lex generalis, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provision."[54] Therefore, the more general rule, CEPA remains in the background providing interpretative direction to the special one.

As in the recent *Oil Platforms case*[55], the general law concerning the use of force was applied to give meaning to a wide standard of "necessity" in the relevant lex specialis, the 1955 Treaty of Amity between Iran and the United States. It was not that a particularly important lex generalis

[51] PIERRE MARIE DUPUY, L'UNITÉ DE L'ORDRE JURIDIQUE INTERNATIONALE. COURS GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC, RECUEIL DES COURS, vol. 297 (2002), ¶ 428-9.

[52] JOOST PAUWELYN, CONFLICT OF NORMS ,p. 388; NANCY KONTOU, THE TERMINATION OF TREATIES IN LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW (Oxford: Clarendon Press, 1994) p. 142.

[53] Amoco International Finance Corporation v. Iran, Iran-US. C.T.R., vol. 15 1987-II, p.222

[54] Id.

[55] Oil Platforms, SupraNote 35

would have set aside lex specialis but that the latter received its meaning from the former.[56] Moreover, the specific treaty BIT would be read and understood within the confines or against the background of the general standard treaty CEPA, typically as an elaboration, updating or a technical specification of the latter[57]; the specific and the general point, as it were, in the same direction.

CEPA which is lex generalis gives this court the jurisdiction as it's registered under Article 102 of UN Charter only if there is violation of any of its provisions. However, from all the above arguments it can be drawn out that the subject matter of this dispute does not fall under CEPA and none of provisions of CEPA is being violated. Therefore Dgem have no jurisdiction in ICJ under lex generalis CEPA.

[1.4.3] PRESENT DISPUTE IS A MATTER OF PARALLELISM OF TREATIES UNDER INTERNATIONAL LAW

It is a common place of International law and State practice for more than one treaty to bear upon a particular dispute[58]. There is frequently parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes[59]. The doctrine of treaty parallelism addresses precisely two things; firstly, to coordinate the reading of particular instrument; Secondly, to see them in mutually supportive light. BIT complements CEPA by providing for specific trade, investment and dispute settlement subjects and both instruments are mutually supportive in encouraging trade between both the countries[60]. As held in Southern Bluefin Tuna Case[61], the UNCLOS and Fisheries treaties were cordially used.

Even if CEPA completely covered all relevant obligations it would not supersede them, there would simply be a parallelism of obligations which is usual in international practice.

Therefore, dispute between Dgem and Tilawin over the present issue is consistent with both

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[56] EMMANUEL JOUANNET, LE JUGE INTERNATIONAL FACE AUC PROBLÈMES DE L'INCOHERENCE ET D'INSTABILITÉ DE DROIT INTERNATIONAL. QUELQUES REFLEXIONS À PROPOS DE L'ARRÊT, CIJ du 6.11.2003, RGDIP vol. 108 (2004),p. 933, 936.

[57] JAN B. MUS, CONFLICTS BETWEEN TREATIES IN INTERNATIONAL LAW, Netherlands International Law Review, vol. XLV (1998) pp. 214-217, p. 218; SIR GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 1951-4: TREATY INTERPRETATION AND OTHER TREATY POINTS, BYBIL, vol. 33 (1957) p. 236

[58] JOOST PAUWELYN, supra note 10 ,p. 388; NANCY KONTOU, supra note 10, (Oxford: Clarendon Press, 1994) p. 142

[59] Southern Bluefin Tuna Case, ITLOS CASE NO. 3-4, at β182, ¶52, β40

[60] Convention of Biological Diversity, MARINE AND COASTAL BIODIVERSITY: REVIEW, FURTHER ELABORATION AND REFINEMENT OF THE PROGRAMME OF WORK, UNEP, https://www.cbd.int/doc/meetings/sbstta/sbstta-08/information/sbstta-08-inf-03-rev1-en.pdf

[61] Southern Bluefin Tuna Case, ITLOS Case no. 3&4

BIT and CEPA, however, CEPA will only apply to extent that its provisions are compatible with BIT.

ISSUE 2

WHETHER THE SEAT OF ARBITRATION SHOULD LIE IN GLOBAL ENERGY ARBITRATION CENTRE (GEAC) BASED IN KINGS LANDING?

[2.1]GEAC BASED IN KINGS LANDING IS NEUTRAL, APPROACHABLE AND FAIR SEAT OF ARBITRATION

It is only obvious to assume that parties are to choose a place of arbitration at any time preceding the commencement of arbitration, if they do not, they may leave it to be made on their behalf by an arbitral institution or by the tribunal itself. After having made the choice, the next question that begs to be interrogated is as to where the arbitration is to be held. For this, though no answer could be given in express, unequivocal terms and be regarded as universally applicable, yet, the nationality of the parties must be taken into account. The general trend in the international scenario shows the proclivity of parties to favor a country that is "neutral", that is to say, the countries of which either of the parties is not natural citizens of the place of business is a preponderant factor just as well since the over-riding consideration for parties very often is the need to cut down as far as possible on the expense and inconvenience of travelling[62]. Political factors are crucial as well, though the only subordinate. The question as to whether any restrictions are likely to be imposed on the entry of parties, their advisers and witnesses are relevant in this regard. The practical suitability of a particular place for an international arbitration depends to a sizeable extent on whether there is a satisfactory infrastructure to accommodate the parties. Notwithstanding such flights of fancy, the primordial consideration is usually the legal environment[63]. The same sort of a consideration is made under the given problem where the neutral party i.e. Kings Landing should be the seat of arbitration because it is neutral and approachable to both the parties. Moreover Dgem fails to specifically state the reason of denying the place of arbitration on above mentioned legal grounds rather the only ground they stated is that the GEAC is not mentioned in the gazette of Tilawin[64].

[62] https://www.coursehero.com/file/p78959r/power-on-the-arbitral-tribunal-to-adopt-either-adversarial-or-inquisitorial/
[63] Id.
[64] Moot Proposition

Also, The UNCITRAL Model Law on International Commercial Arbitration, 1985[65] is the governing law and it clearly the appropriate authority as per BIT and CEPA also that is competent to perform these functions. Since, UNCITRAL Model will be referred for the proceedings as well dispute settlement procedures , Therefore both the parties are free to choose the arbitrators and all the other procedure will be as per the curial law i.e. UNCITRAL.
GEAC based in King's Landing is just the seat of arbitration.

In ***Braes of Doune v Alfred McAlpine***[66] there was a potential conflict between the law of the arbitration agreement and the law of the seat, the court persuaded that reference to the 'seat' ***was merely a designation of the place where the arbitration was to be held***, where all other references showed that the curial law will be obeyed.

Similarly, in the present case, GEAC based in King's Landing is merely the place here the arbitration is to be held as per Tilawin and ultimately the law which will govern the whole proceedings of Arbitration will be as per the curial law which is UNCITRAL. Therefore, it will only make the arbitral proceeding smooth and fair. The whole idea of making Kings Landings as the seat of arbitration is to make the arbitral proceedings feasible for both the nation.

[2.2] THE SEAT OF ARBITRATION SHOULD LIE IN GEAC BASED IN KINGS LANDING AS PER UNCITRAL

In the present case UNCITRAL[67] is the governing law i.e. curial law for the arbitration proceedings. In the absence of any clause regarding the seat of arbitration in the contract the question of choosing the seat of Arbitration will dealt with the provisions mentioned in UNCITRAL.
Article 20[68] states that the seat of Arbitration will be decided at the time of dispute by keeping the following factors in the mind

i) having regard to the circumstances of the case
ii) including the convenience of the parties
iii) meet at any place it considers appropriate for consultation among its members
iv) For hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

[65] https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration#:~:text=adopted%20in%202006-,UNCITRAL%20Model%20Law%20on%20International%20Commercial%20Arbitration%20(1985)%2C%20with,needs%20of%20international%20commercial%20arbitration
[66] *Braes of Doune v Alfred McAlpine* [2008] EWHC 426
[67] UNCITRAL Model Law on International Commercial Arbitration, 1985,SupraNote 3
[68] Article 20, UNCITRAL Model Law on International Commercial Arbitration, 1985,SupraNote 3

The above-stated ingredients have to be established to decide the Seat of the Arbitration at the time of dispute or when the seat of Arbitration is not decided while coming into the agreement but the Applicant has failed to establish the reasons that caused inconvenience in keeping Kings Landing the seat of Arbitration.

Article 18[69] of the UNCITRAL states that

"*Equal treatment of parties, the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."*

The said provision is ensured by the procedure of the selection of the Arbitrator given under the governing law i.e. UNCITRAL. Also, the seat of Arbitration ensures that the neutrality and equal representation of the parties. In this case where the seat is arbitration is suggested to be the Kings Landing because of its independent and unbiased character.

[2.3] TILAWIN HAS THE RIGHT TO CHOOSE THE SEAT OF ARBITRATION

In the absence any specific clause about the seat/place of arbitration the lex specialis treaty governing the contract between TPO and White Walkers i.e. BIT would also be looked upon apart from the curial law i.e. UNCITRAL in case of any dispute.

[A] TILAWIN CAN CHOOSE THE SEAT OF ARBITRATION AS PER LEX SPECIALIS BIT

BIT is the governing treaty of the contract between TPO and White Walkers, the various provisions of BIT including Article 8(1) (b)[70] and Article 10(1)[71] states that the law which will govern the agreement in case of any dispute will be of the place where the investment had been made i.e. Tilawin.

Article 8 of BIT provides as the settlement of Investment Disputes between a contracting party and an investor of the other Contracting Party which aims to provide the alternative remedy for any dispute among them. Article 8 in its sub-clause 1 (b)[72] says-

> *"through recourse to any other local remedy, save that provided under paragraph 2 of this Article, available under the laws and regulations of the Contracting Party* ***in the territory of which the investment has been made."***

ARTICLE 10(1) of BIT states that

[69] Article 18, UNCITRAL Model Law on International Commercial Arbitration, 1985,SupraNote 3
[70] Article 8(1)(b), BIT
[71] Article 10(1), BIT
[72] The Bilateral Investment Treaty

"*All investments shall be consistent with this Agreement and be in accordance with the laws in force in the territory of the Contracting Party in which such investments are made"*

In the case of *Sulamerica CIA Nacional De Seguros SA and others v Enesa Engenharia SA and others*[73] the Court of Appeal laid down the guidance that the choice of seat of the arbitration "*is to be determined by undertaking a three-stage enquiry into*

(i) *express choice,*

(ii) *implied choice and*

(iii) *Closest and most real connection.*

Applying the same guidelines in the present case the express and implied choice is not there in the contract for the seat of arbitration but considering the third guideline issued by the court of appeal i.e. seat of arbitration as per the closest and most real connection of the issue with the place.

The question before the English Commercial Court in *Habas Sinai vs VSC*[74] arose that in a dispute where neither the substantive law nor the governing law was specified, the closest connection test to conclude that the law of the seat would be the law applicable to the arbitration agreement.

In the present case Article 8(1) (b) and Article 10(1) states the dispute has the closest connection with the Tilawin and the applicable laws as per lex specialis BIT is of Tilawin. Henceforth Tilawin has the right to choose the seat of Arbitration as a result of which GEAC based in King's Landing is appropriate seat of arbitration.

[73] *Sulamerica CIA Nacional De Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638

[74] Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi v VSC Steel Co Ltd [2013] EWHC 4071 (Comm.)

ISSUE 3

WHETHER THE 'FORCE MAJEURE' CLAUSE CAN BE INVOKED IN THE PRESENT CONTRACT?

[3.1] WHETHER THERE IS A FORCE MAJEURE EVENT IN THE PRESENT CASE

The Principal of Force Majeure provides relief to the defaulting party for non-performance of acts stands contrary to English law doctrine of frustration wherein termination of the contract is the consequences of non-performance of contractual obligation. It is relevant to mention here that the doctrine of frustration of contract due to impossibility is given a place in the U.K. Contract Law.

The 'test' for an event to qualify as a 'force majeure' event must meet the following three conditions:

i) The parties cannot reasonably foresee and control the occurrence of the event.
ii) The event or circumstance occurs after the formation of the contract and obligations under the contract have been prevented, impeded or hindered.
iii) The event was beyond the control of the parties and they have taken all reasonable steps to seek to avoid or mitigate the event or its consequences.

The North Dakota Supreme Court found just such a situation in *City of Harwood v. City of Reiles Acres*[75], The court recognized the frustration of purpose doctrine in North Dakota and explained that a "Frustration of purpose occurs when after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made.

Frustration applies where a change of circumstances renders performance of a contract different from the obligations that were originally undertaken at the time of entering into a contract. Such a change must result from an outside event and parties do not have a control on the event. Where frustration applies, the parties are excused from all further performance and are not liable for damages for non-performance.

Contractual Remedies to Force Majeure Clauses –:

1) If parties enter into a contract purpose and an event occurs that undercuts that purpose, a party may ask for frustration unless it is not done by the party itself.

[75] No. 20140089.

2) Contracts contain an implied condition that performance shall be excused when performance has been rendered impossible by the intervention of unforeseen, accidental, and uncontrollable superior occurrences and are beyond the control of parties.
3) an event must have occurred that makes performance impracticable, and the contract must have been based on the assumption that such an event would not occur.

The law in England was extremely rigid. A contract had to be performed, notwithstanding the fact that it had become impossible of performance, owing to some unforeseen event, after it was made, which was not the fault of either of the parties to the contract. The court opined[76] that if some unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust.

The requirements to constitute a force majeure event are in essence, similar across different jurisdictions. These elements are

i) Externality—the event must not have been caused by the party seeking invocation,
ii) Foreseability—it could not be foreseen or prevented, and
iii) Impossibility—it renders the performance of a contractual obligation impossible at all or for a certain time.

Inclusion of these clauses in a contract, excuse a party.

In the case of Gujarat State Petroleum Corporation Limited and ors. v Yemen[77] , the question arose before the court, on what basis occurrence of 'force majeure' events could excuse a party from performing its contractual obligations? The court opined that the force majeure clause required a causal nexus between the event and the non-performance. The relationship where non-performance of act is the cause of the event.

In the case of Satyabrat Ghose v. Mugneeram Bangur[78] it was laid down that:

It is not necessary that the force majeure event to be considered its performance should be literally impossible, even if the performance or the obligation to perform becomes difficult in practical view point of the parties then that will also be a force majeure event. Inferring from the above mentioned case Force Majeure clause can be invoked in the present case.

[76] Taylor vs. Caldwell, (1861-73) All ER Rep 24
[77] , ICC Case No 19299/MCP, IIC 840 (2015), 10th July 2015, International Chamber of Commerce; International Court of Arbitration
[78] 1954 AIR 44 : 1954 SCR 310

[3.1.1] THERE IS FORCE MAJEURE CLAUSE AS PER CEPA

The BIT between the parties has also been governed by the Comprehensive Economic Partnership Agreement (CEPA) since 2009 and clause 1 Article 10.16 of CEPA[79] states that no party can be prevented to take any measure in relation to the public interest or meeting health concerns. Such issues have been kept in mind and the respondent has therefore stopped the service in order to make sure that no harm is being caused by any way.

As mentioned in article 10.18 clause (b) of CEPA[80], that it is necessary to protect Human, Animal, or Plant life or the environment.

> Herein, referring to the facts, Government of Union of Tilawin has stopped supplying the gas only after the issuance of notice from the government. The performance of act became impossible due to the lockdown and crippled world economy and the lives of people are at the stake.

Also, in Fyffes Group Ltd v Reefer Express Lines Pty Ltd [81], the court opined that that the non-performance must be due to circumstances that are beyond the control of the party to enforce the force majeure. Referring to the facts, the respondents are unable to make any delivery due to the lockdown across the countries and this was an unforeseen situation for which the parties were not ready.

[3.1.2]THERE IS FORCE MAJEURE CLAUSE AS PER BIT

The United States of Dgem had entered into a Bilateral Investment Treaty (BIT) with the Union of Tilawin. According to clause 2 of Article 10 of BIT[82], no contracting party can be prohibited from taking any action in order to prevent the spread of disease and other health issues. Here, relating to the facts, the respondent state has acted in good faith so as the disease from which world is suffering should not spread.

Presently, the outbreak of the pandemic is killing people at a very fast pace, and the restriction on supply by the respondent is purely based on this as the protection of lives has to be given priority. Therefore, the clause of force majeure is applicable in the contract.

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[79] ARTICLE 10.16, CEPA
[80] Article 10.18, CEPA
[81] 1996, 2 Lloyd's Rep p. 171 at para, 196.
[82] ARTICLE 10, BIT.

A successful claim of force majeure must fulfill five conditions: [83]

1. There must be an unforeseen event or an irresistible force;
2. The event or force must be beyond the control of the state;
3. The event must make it 'materially' impossible to perform an obligation;
4. The state must not have contributed to the situation; and

The state must not have assumed the risk of the situation occurring.

[A] COVID 19 PANDEMIC IS AN ACT OF GOD

Event of Force Majeure can be classified into two categories-:

1) Political Force Majeure, which deals with changes in the political or legal environments
2) Non-Political Force Majeure (or natural force majeure), which deal with physical risks that might impact a business or a project.

These different categories often provide different remedies, an extension of the time for completion and relief from termination (for cases of natural force majeure).Many contracts include provisions which mentions peculiar list of Force Majeure Event, such as "pandemics," "epidemics" or "diseases. A peculiar reference to a "pandemic" mentioned in a provision will make it easier to bring a force majeure claim, However, if the contract does not include the provision, then it will be necessary to consider COVID-19, or its impact, such as an "Act of God,". It portrays a clear picture that a pandemic such as COVID-19 would qualify as force majeure under such a provision.

The occurrence of the pandemic was an Act of God as in the case of Nugent v Smith,[84] Act of God has been explained as:-

"such a direct and violent and sudden and irresistible act of Nature as the defendant could not, by any amount of ability, foresee would happen, or, if he could foresee that it would happen, he could not by any amount of care and skill resist, so as to prevent its effect".

The Acts of God are also related to natural disasters and which involves "no human agency" as stated in *"*Transco plc v Stockport Metropolitan Borough Council*" [85]* Also, the pandemics can also be seen as natural disasters in which some acts are restricted due to unforeseen events. Laws

[83] F Paddeu and F Jephcott, "COVID-19 and Defences in the Law of State Responsibility, Walters Kulwer ,17 March 2020
[84] 1876, 1 CPD 423; Cockburn CJ at para, 426
[85] 2003, UKHL 61

passed in response to a pandemic may be overriding mandatory provisions[86]. And in the present case, the situations were similar as the pandemic was unforeseeable and the respondents could not prevent its effect on the contract.

In a case of *Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach., Inc.*, 184 Ariz[87] an Arizona court held that If the contract is silent on force majeure, other defenses may be available, such as impossibility, impracticability, or frustration of purpose.

[3.2] THERE IS A MENTION OF TRIGGER EVENT IN FORCE MAJEURE CLAUSE

Yes, there is a mention of trigger event in the Force Majeure Clause. Article 10.16 clause (2) and article 10.18 clause (b) of CEPA specifically talks about the trigger events.

Also, Article 10 clause (2) of BIT talks about the trigger events in the Force Majeure.

[A] TRIGGER EVENT AS PER CEPA-:

Article 10.16 (2) particularly mention the "trigger events" such as Public Interest, Health, Safety and Environmental concerns.

Article 10.18 (b) mentions "trigger events" such as to the requirement that such measures are not applied in a manner Subject which would constitute a means of arbitrary or unjustifiable discrimination between States where like conditions prevail, or a disguised restriction on investors and investments,

Nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures:

(b) Necessary to protect Human, Animal or Plant life or Health, or the Environment.

[B]TRIGGER EVENTS AS PER BIT-:

As per the Article 10(2) of BIT, trigger events such as preventing Spread of Disease, and Pests in Animals and Plants.

These two above mentioned articles under CEPA and BIT clearly specifies that in the present case there are trigger events present in the facts. Respondent state does clarifies that due to the presence of trigger event, such as safety and preventing the disease from spreading, compelled it

[86]) Article 9 of *Regulation on the law applicable to contractual obligations ((EC) 593/2008)*
[87]) 341, 909 P.2d 408 (Ct. App. 1995)

to not the allocate the Gas Supply and followed its government notice issued in the same reference.

In St. Joe paper Co. Vs state department of Envtl. regulation[88] the court observed that a Force Majeure clause that excuses delays for " any cause not within the reasonable control of the company" was enforceable.

[3.3] WHETHER NECESSARY STEPS HAVE BEEN TAKEN TO MITIGATE THE EVENT?

A party will never take steps to mitigate the event if its beyond their control. There are no particular reasonable and tangible measures that Union of Tilawin could take to mitigate the event. There are no specific steps or approach available that can be taken to mitigate the event. A party relying on a *force majeure* clause must also show that there are no reasonable steps that it could have taken to mitigate or avoid the effects of the Force Majeure event.

The extremely rapid developments surrounding COVID-19, including the related governmental directives and restrictions regarding the outbreak and reasonable measures taken to safeguard the wellbeing of the people, make it likely that strong arguments could be made that many tangible impacts of the pandemic could neither be foreseen nor mitigated in any meaningful or reasonable manner.

This is to be contrasted with other cases on reasonable endeavours clauses, such as Phillips Petroleum Co (UK) Ltd v Enron (Europe) Ltd[89], which found that parties were entitled to consider the financial effect on them when determining how reasonable endeavours should be exercised. . A clause requiring a party to use 'reasonable endeavours' to reach a commercial agreement – something which inevitably requires some give and take – is very different from a clause requiring a party to use 'reasonable endeavours' to issue an instruction – something which is 'easy to do' whether or not it is to the benefit of the instructing party to do so.

The given moot problem is also based on the Jurisprudence of the force majeure clause and it is for the Hon'ble Court to decide with the facts and circumstances of the case. The approach is clear that the performance of the contract was impossible in the time of pandemic. It was not possible for the government to perform the contractual obligation as "Health" of people becomes the first priority.

[88] 371 so.2d 178, 180 (Fla. Dist. Ct. App.1979

[89] [1997] CLC 329

Referring to the above mentioned paragraph, fulfillment of the principle of reasonable endeavours there were no steps available that could be taken to mitigate the Force Majeure Event.

PRAYER FOR RELIEF

Wherefore in lights of issues raised, arguments advanced and authorities cited, it is most humbly prayed and implored before this Hon'ble Court that it may be pleased to hold, adjudge and declare that:

1. *This Honourable court does not has jurisdiction over the present Investment realted arbitral dispute; and that*

2. *Tilawin's measures are non-discriminatory in nature and therefore Tilawin has not violated its international obligations; also that*

3. *The Force Majeure clause can't be invoked in the present contract between Tilawin and Dgem ; and also*

Pass any such orders as the Hon'ble Court may deem fit in the lights of equity, justice and good conscience.

All of which is most respectfully affirmed and submitted

Agents for the Respondent