



2019 清华大学法学院国际仲裁模拟法庭比赛

The 2019 Tsinghua University School of Law International Arbitration Moot Competition

2019 Tsinghua Cup Problem

1. The SUNNY State is located in the EU. The climate is tropical in the coastal strip and desert in the interior. In 2010, a cereal production project was launched in the desert zone of SUNNY Land. The Authority for Land Reclamation and Development of the SUNNY State (“**Authority**”) decided to reclaim and develop an area of 5,000 hectares at the Green Oasis in the framework of that project.
2. The Green Oasis is located in the south-eastern part of the SUNNY State, at the border with the GREEN State. It is located on a large aquifer, which would allow the ground water to be extracted using water wells. The Green Oasis is also on the eastern side of the SUNNY Valley, a Neolithic site consisting of an extensive cave

system. Some of the caves contain paintings and engravings depicting vivid scenes of every life of the culture from about 15,000 to 10,000 BC. For a number of years the GREEN State has claimed that the Green Oasis reflected the culture of the GREEN State, not of the SUNNY State, and that the site was part of a larger cultural site located on the GREEN side of the border.

3. The ASIA CEREAL Co. (“AC”) is a famous enterprise specialising in center pivot irrigation (circular field) registered in XANADU (not a EU Member). Due to the increase of the price of cereals, the AC decided to invest in the SUNNY State and to develop and create cereal production to be re-exported to the nearby GREEN State (non-EU Member).
4. The ASIA CEREAL Co. and its local partner in the SUNNY State, the SUNNY Food Development Co., a company specialising in drilling water wells, incorporated a local joint venture in the SUNNY State (“**Joint Venture**”) with ownership in equal shares. On 1 July 2015, after completion of a tender procedure, the Joint Venture was awarded a concession for 15 years, by the SUNNY State Investment Authority.

5. The Concession Agreement granted the Joint Venture the exclusive right to create and manage the 5,000 hectares at the Green Oasis. The Joint Venture undertook to carry out the following works at the Green Oasis:

- 1) carry out aerial photographs, preparation of soil maps and reconnaissance and detailed surveys;
- 2) conduct a comprehensive study of water recourses and prepare the necessary maps;
- 3) supply all machinery and materials to the importer for the drilling of wells, for the execution of the works and for the cultivation of 5,000 hectares for 10 years
- 4) conduct drilling tests and build piezometric wells (4 of each) for an approximate depth of 500 meters;
- 5) drilling of 125 production wells of approximate depth 5000 meters;
- 6) erection of equipment and materials for the exploitation of 5,000 hectares as well as the execution of necessary facilities;
- 7) joint management of the project for 10 years and provide a guarantee of production.

6. the SUNNY State has a bi-lateral investment treaty with XANADU.

The treaty was signed and ratified in 1998.

7. On 1 January 2017, presidential elections took place in the GREEN State. After a closely contested election, Ms. Anastasia Barat, the leader of the opposition party, was elected president. Newspapers in the GREEN State credited Ms. Barat's victory to her promises to preserve the cultural heritage of the GREEN State and ensure that the development of the GREEN State's economy would be sensitive to environmental and cultural issues.

8. The new GREEN State government decided to revive an old project to submit a nomination proposal for the cave system in the SUNNY Valley to be considered for inclusion in UNESCO's World Heritage List as a cultural landscape. By Presidential order No. 1/2017 the government ordered that all wells located at a distance less than 100 meters from the site be dismantled. Three of the five wells located on the western side of the site were required to be dismantled and no land would be allowed to be further reclaimed. On July 1, 2018, the SUNNY Valley was inscribed on the UNESCO World Heritage List.

9. Pending the inscription of the the SUNNY Valley onto the World Heritage List, tensions increased between the SUNNY State and the GREEN State over the cultural ownership over the site. Protest groups in both the SUNNY State and the GREEN State organized marches in multiple locations in both countries as well as organized sit-ins in and around the the SUNNY Valley. On 2 June 2018, a SUNNY activist group organized a peaceful sit-in protest at the Green Oasis. While the protest was entirely peaceful, the number of attendees was large enough to cause disruptions to the Joint Venture's business operations, forcing the Joint Venture to suspend operations for five days.

10. On 5 July 2018, following the inscription of the SUNNY Valley onto the World Heritage List, and after the latest round of negotiations between the SUNNY and GREEN States failed, the SUNNY State issued Presidential Decree 2542/18, declaring a blockade of the GREEN State, closing the border and forbidding all import and export with the GREEN State. The measure directly affected the Joint Venture's export of cereals to the GREEN State.

11. On 10 July 2018, a local newspaper in the SUNNY State released

photos of an alleged cave-in at the Green Oasis. The photos depicted extensive debris and rubble, which the newspaper attributed to the Joint Venture's drilling operations nearby. Several days later, government investigators found that several of the caves that had extended under the Green Oasis had collapsed, destroying the pictographs and engravings contained within. While it was unclear at the time whether the damage to the cave system had been caused by the Joint Venture's drilling operations, multiple local newspapers, media outlets, and social media picked up the story, fueling public anger and discord in both the SUNNY and GREEN States.

THE DISPUTE

12. On 18 July 2018, the AC gave notice to the Government that they were considering starting investment arbitration under the SUNNY-XANADU BIT, claiming that the actions of the SUNNY government had substantially diminished the value of their investment and seeking compensation for the five-day shutdown caused by the public protests and lost profits due to the border closure. The AC requested a meeting with senior government officials in order to negotiate an amicable resolution.

13. On 24 July 2018, the SUNNY Government reacted by issuing Presidential Decree 2555/18, annulling the Concession Agreement. In that decree, the SUNNY government stated that it had the absolute right to protect what it saw as an attack on the SUNNY State 's cultural heritage. The Decree also made mention that the AC and the Joint Venture had breached its obligations to help protect the SUNNY State 's cultural heritage, and that such breaches entitled the SUNNY State to annul the Concession Agreement.

THE ARBITRATION PROCEEDINGS

14. On 25 January 2019, the AC filed its request for arbitration with the International Centre for the Settlement of Investment Disputes (“ICSID”). The AC seeks damages for breach of the **SUNNY-XANADU** BIT, alleging that the actions of the Government constitute expropriation, a breach of the full protection and security standard and a breach of the fair and equitable standard under the BIT. It seeks lost investment costs of the Concession Agreement in the amount of US\$ 250 million. It also seeks lost profits from the expected operation of the farm in excess of US\$ 500 million. In its request for arbitration the AC appointed Ms. Arbitrator 1 as its

party-appointed arbitrator.

15. On 13 February 2019, the SUNNY State filed its response to the request for arbitration. In the response, the SUNNY State appointed Mr. Arbitrator 2 as its party-appointed arbitrator. The SUNNY State raised the following objections to jurisdiction and admissibility:

1) The European Court of Justice decision in *Achmea* prevents the SUNNY State to settle its investor-state disputes in arbitration;

2) The Claimant's claims do not constitute treaty claims but are merely contract claims that do not involve any treaty breach.

16. Alternatively, on the merits, the SUNNY State argues that none of the conditions for an expropriation, or breach of the full protection and security or fair and equitable standards are met.

17. On 23 February 2019, the Parties agreed to appoint Mr. Arbitrator 3 as the presiding arbitrator.

18. On 1 March 2019, the arbitral tribunal held the first hearing and issued Procedural Order No. 1, wherein the arbitral tribunal reviewed

the case and decided that the Parties would argue the following issues:

- 1) Whether the European Court of Justice decision in *Achmea* prevents the SUNNY State to settle its investor-state disputes in arbitration;
- 2) Whether the Claimant's claims constitute treaty claims or are contractual claims that do not involve any treaty breach.
- 3) Whether the Respondent has breached the fair and equitable treatment standard.
- 4) Whether the Respondent has breached the full protection and security standard.
- 5) Whether the Claimants' investments have been expropriated and whether the Respondent has a valid defense.

19. At the hearing scheduled to take place in Beijing on 18-19 May 2019, the Parties are instructed to argue the above issues identified by the arbitral tribunal.

AGREEMENT
BETWEEN THE GOVERNMENT OF THE SUNNY STATE AND
THE GOVERNMENT OF XANADU CONCERNING THE ENCOURAGEMENT
AND RECIPROCAL PROTECTION OF INVESTMENTS

The Government of the SUNNY State and the Government of XANADU
(hereinafter referred to as the Contracting Parties),

CONVINCED that sustained inflows of new investments and
reinvestments will promote and ensure dynamic development of the
Contracting Parties' economies;

RECOGNISING that a conducive investment environment will enhance
freer flow of capital, goods and services, technology and human
resources as well as overall economic and social development between
the Contracting Parties;

RECOGNISING that the provisions of this Agreement preserve the right
of the Contracting Parties to regulate within their territories and the
Contracting Parties' flexibility to achieve legitimate policy objectives,
such as public health, safety, environment, public morals and the

promotion and protection of cultural diversity;

DETERMINED to further intensify economic cooperation between the Contracting Parties; and

REAFFIRMING their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions;

HAVE AGREED as follows:

ARTICLE 1

For the purposes of this Agreement,

1. The term “investment” means every kind of assets invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, and in particular, though not exclusively, includes:
 - (a) movable, immovable properties and other property rights such as mortgages and pledges;
 - (b) shares, stocks and any other kind of participation in companies;

- (c) claims to money or to any other performance having an economic value;
- (d) copyrights, industrial property, know-hows and technological processes;
- (e) concessions conferred by laws or under contracts, including concessions to search for or exploit natural resources.

2. The term “investors” means:

In respect of the SUNNY State:

- (a) Natural persons who, according to the laws of the SUNNY State, have its nationality;
- (b) All juridical persons established in accordance with the laws of the SUNNY State and domiciled in the territory of the SUNNY State, including civil and commercial companies and other associations with or without a legally acknowledged existence that perform an economic activity included within the sphere of this Agreement and which are directly or indirectly controlled by nationals of the SUNNY State.

In respect of XANADU:

- (a) Natural persons which have the nationality of XANADU in accordance with its laws;

- (b) Economic entities established in accordance with the laws of XANADU, domiciled in the territory of XANADU and which are directly or indirectly controlled by nationals of XANADU.
- 3. The term “returns” means the amounts yielded by investments, such as profits, dividends, interests, royalties or any other legitimate income.

ARTICLE 2

- 1. Each Contracting Party shall encourage investors of the other Contracting Party to make investments in accordance with its laws and regulations.
- 2. Each Contracting Party shall grant assistance in and provide facilities for obtaining visa and working permit to nationals of the other Contracting Party to or in the territory of the former in connection with activities associated with such investments in accordance with its laws and regulations.

ARTICLE 3

1. Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party.
2. The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State.
3. The treatment and protection as mentioned in Paragraphs 1 and 2 of this Article shall not include any preferential treatment accorded by the other Contracting Party to investments of investors of a third State based on customs unions, free trade zones, economic unions or agreements relating to the avoidance of double taxation or for facilitating frontier trade.
4. Each Contracting Party shall in its territory accord to investors of another Contracting Party and to their investments treatment no less favourable than that it accords in accordance with its laws and regulations in like circumstances to its own investors and their investments with respect to investment activities.

ARTICLE 4

1. Neither Contracting Party shall expropriate, nationalize or take similar measures (hereinafter referred to as “expropriation”) against investments of investors of the other Contracting Party in its territory, unless the following conditions are met:
 - (a) for the public interests;
 - (b) under domestic legal procedure;
 - (c) without discrimination;
 - (d) against compensation.

2. The compensation mentioned in Paragraph 1 (d) of this Article shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay.

ARTICLE 5

Investors of one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party owing to war, a state of national emergency, insurrection, riot or other similar events, shall be accorded by the latter Contracting Party, with respect to measures it adopts or maintains relating to the losses, treatment no less favourable than that accorded to investors of a third State.

ARTICLE 6

1. Each Contracting Party shall, subject to its laws and regulations, guarantee investors of the Contracting Party the transfer of their investments and returns held in the territory of the one Contracting Party, including:
 - (a) profits, dividends, interests and any other legitimate income;
 - (b) amounts from total or partial liquidation of investments;
 - (c) payments made pursuant to a loan agreement in connection with investments;
 - (d) royalties in Paragraph 1 (d) of Article 1;
 - (e) payments of technical assistance or technical service fee, management fee;
 - (f) payments in connection with projects on contracts associated with investments;

(g) earnings of nationals of the other Contracting Party who work in connection with an investment in the territory of the one Contracting Party.

2. The transfers mentioned above shall be made at the prevailing exchange rate of the Contracting Party accepting the investment on the date of transfer.

ARTICLE 7

If a Contracting Party or its Agency makes payment to an investor under a guarantee it has granted to an investment of such investor in the territory of the other Contracting Party, such other Contracting Party shall recognize the transfer of any right or claim of such investor to the former Contracting Party or its Agency and recognize the subrogation of the former Contracting Party or its Agency to such right or claim. The subrogated right or claim shall not be greater than the original right or claim of the said investor.

ARTICLE 8

Each Contracting Party shall observe any obligation it may have entered into with regard to investments.

ARTICLE 9

1. Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
2. If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit this dispute to the competent court of the Contracting Party accepting the investment.
3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to international arbitration of the International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, signed in Washington, D.C., on 18 March 1965. Any disputes concerning other matters between an investor of either Contracting Party and the other Contracting Party may be submitted to ICSID if the Parties to the disputes so agree. The provisions of this Paragraph shall not apply if the investor

concerned has resorted to the procedure specified in Paragraph 2 of this Article.

4. ICSID shall adjudicate in accordance with the laws of the Contracting Party to the dispute accepting the investment including its rules of the conflict of laws, the provisions of this Agreement as well as the generally recognized principles of international law accepted by both Contracting Parties.

ARTICLE 10

[Omitted]

ARTICLE 11

If the treatment to be accorded by one Contracting Party in accordance with its laws and regulations to investments or activities associated with such investments of investors of the other Contracting Party is more favourable than the treatment provided for in this Agreement, the more favourable treatment shall be applicable.

ARTICLE 12

This Agreement shall apply to investments which are made prior to or after its entry into force by investors of either Contracting

Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter.

ARTICLE 13

1. The representatives of the two Contracting States shall hold meetings from time to time for the purposes of:
 - (a) reviewing the implementation of this Agreement;
 - (b) exchanging legal information and investment opportunities;
 - (c) forwarding proposals on the promotion of investment;
 - (d) studying other issues in connection with investments.
2. Where either Contracting Party requests consultation on any matters of Paragraph 1 of this Article, the other Contracting Party shall give prompt response and the consultation be held alternatively in the SUNNY City and the capital of XANADU.

ARTICLE 14

1. This Agreement shall enter into force on the first day of the following month after the date on which both Contracting Parties have notified each other in writing that their respective internal legal procedures have been fulfilled, and shall remain in force for a period of ten years.

2. This Agreement shall continue to be in force if either Contracting Party fails to give a written notice to the other Contracting Party to terminate this Agreement by giving at least one year's written notice to the other Contracting Party.
3. After the expiration of the initial ten-year period, either Contracting Party may at any time thereafter terminate this Agreement by signing at least one year's written notice to the other Contracting Party.
4. With respect to investments made prior to the date of termination of this Agreement, the provisions of Articles 1 to 13 shall continue to be effective for a further period of fifteen years from such a date of termination.

In witness whereof, the duly authorized representatives of their respective Governments have signed this Agreement.

Done in duplicate in SUNNY City, on 15 April 1998.

For the Government of the SUNNY State For the Government of
XANADU

[Signature]

[Signature]

EXHIBIT 1
EXTRACTS FROM THE JOINT VENTURE CONCESSION AGREEMENT

AGREEMENT FOR EXPLOITATION AND DEVELOPMENT OF THE GREEN OASIS

BETWEEN
THE SUNNY STATE COUNCIL FOR LAND RECLAMATION AND DEVELOPMENT
AND
THE ASIA CEREAL SUNNY JOINT VENTURE

Whereas the Council intends to reclaim and develop an area of 5,000 hectares at the Green Oasis in the framework of the Cereal Production Project in the SUNNY Valley, and to employ an experienced international company to carry out the project work at current prices, it requested and obtained an offer submitted by the ASIA CEREAL JOINT VENTURE (the "Contractor").

A Committee has been appointed to study and evaluate such offer and the Committee issued its recommendations accepting the offer referred to above.

1. SUBJECT OF THE CONTRACT

1.1 The Contractor undertakes to carry out the execution and management or joint management of 5,000 hectares at the Green Oasis in the framework of the Cereal Production Project in SUNNY Valley in compliance with the technical specifications, drawings and contract documents referred to in ANNEX 1 [*intentionally not produced here*], in the sites indicated in the SUNNY Valley, including the following matters:

- (a) Carry out aerial photography, preparation of soil maps and reconnaissance and detailed surveys;
- (b) Comprehensive study of water resources and preparation of necessary maps;
- (c) Supply of all machinery and materials to be imported for the drilling of wells, for the execution of the works and for the cultivation of 5,000 hectares for five years;
- (d) Drilling test and piezometric wells (4 of each) of an approximate depth of 500 meters;
- (e) Drilling of 125 production wells of approximate depth 500 meters;
- (f) Erection of equipment and materials necessary for the exploitation of 5,000 hectares as well as the execution of necessary facilities;
- (g) Joint management of the project for five years and guarantee of production.

2. VALUE OF THE CONTRACT

[*intentionally not produced here*]

3. GUARANTEES

[intentionally not produced here]

4. OBLIGATIONS OF THE CONTRACTOR

- 4.1 The Contractor commits to comply with the laws and regulations in force in the SUNNY State throughout the performance of the contract, including any adaptations that may be necessary in light of new laws and regulations implemented by the SUNNY State.
- 4.2 The Contractor shall ensure that any protected sites and archeological resources within the Green Oasis are not disturbed or damaged by the Contractor, including the Contractor's employees, agents and contractors, except in accordance with the applicable laws and only with the prior approval of the Director.
- 4.3 All antiquities and other valuable things found by the Contractor or his workers in the course of work shall be immediately notified to the Project Director, to the Antiquity Department or the police station, and precautions shall be taken to prevent any damage to them. If the Contractor discovers statues, fossils, or any other antiquities that are not removable, he shall stop the work in the place of their existence, and shall notify this immediately to the Project Director and to the authorities concerned at the Antiquity Department, or the police station. The Contractor shall not be responsible for any delay caused therefrom.

5. TERMINATION AND PENALTIES

- 5.1 The Council shall be entitled to cancel this contract in any of the following cases:
 - (a) If the Contractor fails to start the work in due time or if he is slow in carrying out the work in a manner that the Council deems that he will not be able to complete the contract work in the fixed date;
 - (b) If the Contractor stops the work for 15 (fifteen) consecutive days without prior consent of the Council;
 - (c) If the Contractor leaves or withdraws from the work;
 - (d) If the Contractor fails to carry out the contract in the agreed dates and the Council does not deem to give him another respite, or if he fails to carry out despite the additional period conferred to him;
 - (e) If the Contractor or any of his subordinates bribes directly or indirectly any of the Council's officials or workers or colludes with him to the prejudice of the Council or starts to do such thing;
 - (f) If the Contractor by himself or by means of any of his employees or workers, uses any means of cheat, fraud, or misappropriation;
 - (g) If the Contractor is insolvent or announces his bankruptcy or enters into a protective conciliatory agreement with the creditors;

(h) If the Contractor acts in breach of any of the conditions of the contract, or neglects to perform any of his determined obligations and he does not avoid such within the period fixed by the Council.

5.2 Cancellation of the contract and confiscation of guarantee in the above cases shall be mailed via a registered letter addressed to the Contractor without a need for notice or warning of taking legal action, together with the retention of the Council's right for all damages resulting therefrom and to recover such from any sums due to the Contractor by the Council or by any other governmental authority at home or abroad.

6. THE GOVERNING LAW AND DISPUTE RESOLUTION

6.1 This contract shall be governed by the laws and regulations in force or which may come into force in the SUNNY State, therefore any disputes related to its stipulation, execution, interpretation, cancellation or liquidation shall be resolved amicably otherwise they shall be referred to the International Chamber of Commerce in Paris according to the arbitration rules then in force.

7. FORCE MAJEURE

7.1 The Contractor agrees to perform this contract and the conditions included herein in good faith and to the best of its ability and to utilize its technical expertise in performing this contract.

7.2 If an event of force majeure or unforeseen circumstances which could not be prevented shall occur during the performance of this contract so that the performance by the Contractor of its obligations becomes impossible, the Contractor will not be responsible for any loss or damage caused by such an occurrence and the performance period set forth in this contract will be extended automatically by a period equal to the period of this force majeure or other event and such period thereafter as may be necessary to recover from the effects thereof.

7.3 Force majeure or other unforeseen conditions which are intended are: natural disasters, earthquakes, floods, insurrections, acts of any military or civil authority, civil commotion.

7.4 The Council will compensate the Contractor for any expenses it incurs during any period of delay caused by the Council.

EXHIBIT 2
THE SUNNY STATE: PRESIDENTIAL DECREE 2555/18

Presidency of the SUNNY State Republic

Mr. Olivio Madrinás
Constitutional President of the Republic

Considering:

WHEREAS the people of the SUNNY State have since time immemorial prided themselves on being the natural and indigenous inhabitants of the territory currently known as the SUNNY State,

WHEREAS the history of the SUNNY State has been recorded not only in the written and oral histories of its people, but through antiquities, relics, and archeological treasures dating back to prehistoric times,

WHEREAS the SUNNY State condemns unsolicited and unwarranted attempts to appropriate the rightful cultural heritage of the SUNNY State by foreign actors,

WHEREAS the SUNNY State condemns the reckless efforts of profit-minded foreign actors that are destroying areas of archeological importance without consideration of their impacts on future generations, in breach of their agreed upon obligations to help protect the SUNNY State's cultural heritage,

WHEREAS the SUNNY State acknowledges its obligation to protect its cultural heritage and history not only for its own people but for the peoples of the world, as reflected not only in its domestic laws but as part of its international obligations, and

WHEREAS the SUNNY State affirms that it has the absolute right to protect itself against attacks on its cultural heritage from all threats domestic or foreign, including the right to annul, terminate, or otherwise void any agreement that may adversely affect the SUNNY State's efforts to protect itself.

I hereby DECREE:

ARTICLE 1: All drilling, mining, exploration, exploitation or development work in the area known as the Green Oasis in the SUNNY Valley is hereby prohibited.

ARTICLE 2: All government contracts, licenses, and concessions for the development and exploitation of the area known as the Green Oasis in the SUNNY Valley are hereby immediately nullified and void.

ARTICLE 3: All companies currently exploiting or developing the area known as the Green Oasis in the SUNNY Valley must cease operations pending environmental impact assessments and archeological surveys to be conducted by the government of the SUNNY State.

ARTICLE 4: All companies currently exploiting or developing the area known as the Green Oasis in the SUNNY Valley must fully compensate for the costs of any environmental impact assessment or archeological surveys.

ARTICLE 5: All companies currently exploiting or developing the area known as the Green Oasis in the SUNNY Valley must fully compensate for any damage to any archeological site in the Green Oasis within their area of operations as well as for any loss of archeological relics, treasures, or other items of importance as to be determined by the SUNNY State Department of Antiquities.

I order that this Decree be published immediately in the Official Gazette of the SUNNY State.

SUNNY City, 24 July 2018

SIGNED

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Olivio Madrinaz, Constitutional President of the Republic