

CONFIDENTIAL

Bench Brief for the 2016 FDI Problem

The purpose of the Bench Brief is to make you aware of some potential arguments that could be raised in the memoranda and at the hearings in Buenos Aires. For this purpose, the bench brief committee has included a short explanation and the main authorities for the relevant legal issues. This bench brief is merely intended as an aid for arbitrators. It is the function of arbitrators to evaluate the quality of each argument, the knowledge of the 2016 FDI Problem, the relevant law and the advocacy skills of the teams. The bench brief does not offer an exhaustive list of relevant case law and scholarly writings.

In the bench brief, the terms are used as defined in the 2016 FDI Problem.

CONFIDENTIAL

Timeline

1 January 1992	Oceania and Eastasia an Agreement for the Promotion and Reciprocal Protection of Investments, which came into force on 1 April 1993
1 January 1995	Oceania and Euroasia concluded an Agreement for the Promotion and Reciprocal Protection of Investment, which came into force on 23 October 1995
November 1997	Rocket Bombs lost its environmental license containing approval for arms production
February 1998	Peter Explosive acquired 100 % shares in Rocket Bombs
March 1998	Peter Explosive became a president and sole member of the board of directors of Rocket Bombs
July 1998	Peter Explosive held a private meeting the President of the NEA
23 July 1998	The Oceanian National Environment Authority issued an environmental license approving the commencement of arms production by Rocket Bombs
3 August 1998	The Ministry of Environment denied Rocket Bomb's request for a subsidy
September 1998	Meeting between Peter Explosive and John Defenceless, a Minister of National Defence of the Republic of Euroasia
23 December 1998	Peter Explosive on behalf of Rocket Bombs and the Ministry of National Defense on behalf of the Republic of Euroasia concluded a contract for arms production, effective as of 1 January 1999 until 1 January 2014
August 2013	Fairyland, a province of the Republic of Eastasia, decided to hold a referendum for the secession of Fairyland from Eastasia and its reunification with Euroasia
1 November 2013	Fairyland held the referendum regarding the secession from the Republic of Eastasia and regarding its annexation to the Republic

CONFIDENTIAL

	of Euroasia
21 November 2013	General Prosecutor's Office formally initiated criminal proceedings against the NEA officials, including the President of the NEA
23 January 2014	Fairyland sent a letter to Euroasia, asking for an intervention
28 February 2014	Peter Explosive on behalf of Rocket Bombs and the Ministry of National Defence on behalf of the Republic of Euroasia concluded a new contract for arms production, effective as of 1 April 2014 until 1 April 2020
1 March 2014	The intervention of the armed forces of the Republic of Euroasia on the territory of Fairyland An amendment to the Euroasian Citizenship Act
2 March 2014	Peter Explosive sent an electronic e-mail to the President of the Republic of Eastasia, renouncing his Eastasian citizenship
23 March 2014	Euroasia officially declared Fairyland to be a part of the Euroasian territory Peter Explosive was recognized as a national of the Republic of Euroasia
28 March 2014	Eastasia declared the annexation to be illegal.
1 April 2014	Eastasia sent a notification to Euroasia breaking off all diplomatic relations between the two countries
1 May 2014	President of the Republic of Oceania issued an Executive Order on Blocking Property of Persons Contributing to the Situation in the Republic of Eastasia
1 February 2015	President of the NEA and its other officials were convicted of accepting bribes
23 February 2015	Peter Explosive notified the Oceanian Ministry of Foreign Affairs (with the Copiers to the Ministry of Finance, Ministry of Defence and Ministry of Environment) of his dispute with the Republic of

CONFIDENTIAL

	Oceania
5 May 2015	Peter Explosive was informed that he is under investigation with regard to Rocket Bombs' environmental license of 23 July 1998
23 June 2015	General Prosecutor's Office officially initiated criminal proceedings against Peter Explosive.
11 September 2015	Request for Arbitration
30 September 2015	Answer to the Request for Arbitration

CONFIDENTIAL

Arguments and Analysis

Jurisdiction

A. Whether Peter Explosive is an investor pursuant to Art. 1.2 of the Euroasia BIT (item 4 (1) (a) of the PO 1)

This issue revolves around (1) the definition of an ‘investor’ under Article 1.2 of the Euroasia BIT; (2) the lawfulness of the unilateral secession of Fairyland from Eastasia under international law; and is connected to whether (3) Euroasia’s subsequent annexation of Fairyland was lawful and effective under international law.

The status of a unilateral secession under international law is not clear, with conflicting case-law of the International Court of Justice. An analogy to the 2015 Crimean status referendum is natural, and teams may use this example, however it should not be the core of the teams’ argumentation. Though flexibility and freedom are highly recommended for the teams’ oral pleadings, they should be based on the tension between the concepts of (a) self-determination and (b) territorial integrity and respect for established state borders (*uti possidetis*). Euroasia should claim that the inhabitants of Fairyland fulfil the definition of a distinct ‘people’ who were discriminated against by the government of Eastasia, granting them the right to so-called ‘remedial secession’. Eastasia’s main argument, on the other hand, should be that no kind of secession is possible, since (i) the people of Fairyland are not a distinct group and, hence, have no right to self-determination and (ii) it is prohibited under international law to interfere with the territorial integrity of a state.

Teams are also encouraged to make arguments based on the Eastasian constitution, but should be aware of the relation between domestic and international law, i.e. that national law may not be used to override the principles of international law.

CONFIDENTIAL

The teams' sources of arguments should be based more on state practice and case-law rather than on legal writing (doctrine).¹ The most important jurisprudential sources involve the ICJ's *Kosovo Advisory Opinion* (including dissenting and separate opinions), in which the ICJ stated that state practice does not suggest that there was a general prohibition of unilateral declarations of independence. The ICJ also added, however, that for a declaration of independence to be lawful, it needs to be a legitimate expression of peoples' will, made without duress and for a long period of time (i.e. independence may not be declared temporarily). Teams are invited to discuss the applicability of the Kosovo Advisory Opinion to the case at hand, including differences between the facts of the Kosovo declaration of independence (procedure, duration of abuse, etc.) and facts of the case.

Teams may also wish to rely on the Canadian Supreme Court's ruling in *Reference Re Secession of Quebec* as supporting authority to demonstrate that the lawfulness of secession under national law (i.e. the state's constitution) is an important factor in assessing whether a unilateral secession or declaration of independence is indeed allowed. This case also addresses the issue of conflict between national and international law, which may be of use for the teams.

The teams should conclude their analysis of secession on an argument regarding the effect of secession in the international law of treaties. Teams should, therefore, consider the rules governing the succession of treaties among states, pursuant to the Vienna Convention on Succession of States in Respect to Treaties, to which all involved countries are parties. The teams arguing on the part of Respondent may submit that the Convention is not applicable due to the fact that the secession was unlawful (Art. 6 of the Convention), while the teams

¹ Teams are however not discouraged from making arguments based on the doctrine. Relevant authorities involve: Peter Malanczuk, Akehurst's Modern Introduction to International Law (7th Revised ed, Routledge, 1997)78; Rein Müllerson International Law, Rights and Politics – Developments in Eastern Europe and the CIS (Routledge, 1994) 83; Bartram S Brown 'Human Rights, Sovereignty, and the Final Status of Kosovo' (2005) 80 Chi.-Kent l. Rev 235, 236; John Dugard and David Raič 'The role of recognition in the law and practice of secession' in Kohen, above n 2, 102; Antonello Tancredi 'A normative 'due process' in the creation of States through secession' in Kohen above n 2, 188; James Crawford The Creation of States in International Law (Second Edition, Oxford University Press, 2006), Zejnullah Gruda, 'Some Key Principles for a Lasting Solution of the Status of Kosovo: Uti Possidetis, the Ethic Principle, and Self-Determination' (2005) 80 Chicago-Kent Law Review 353, 381; Antonio Cassese Self-Determination of Peoples: A Legal Reappraisal Cambridge University Press, 1995).

CONFIDENTIAL

arguing on the part of Claimant may submit that the Convention is applicable and its principles should be used to assess which BIT binds investments made in the territory of Fairyland. The teams may also want to rely on Art. 15 of the Convention, which regulates succession in respect of a part of territory.

After addressing the issue of secession, teams should also address whether the subsequent annexation of Fairyland was lawful under international law. The answer to this question is highly dependent on the result of the teams' analysis of the issue of secession - had there been no lawful secession, Fairyland would have been precluded from acceding to the territory of Euroasia. However, when discussing annexation teams should also argue the intervention of Euroasia in Eastasia and the general prohibition of the use of force under the UN Charter. Teams are encouraged to make arguments based on *the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case, as well as on relevant resolutions of the UN General Assembly. Eastasia should, therefore, argue that it is a norm of customary international law that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. Eastasia should also argue that none of the exceptions to the prohibition of use of force (collective measures or self-defence) were fulfilled in the case. Euroasia, on the other hand, may argue that (1) the intervention was upon consent and (2) it was of a humanitarian character.

Teams should be careful when addressing the issue of international recognition. Arbitrators are encouraged to ask questions regarding the effect of recognition of the secession as lawful by some states, however, given the complex status of *de facto* and *de iure* recognition, it is not advisable to delve into this issue too deeply. For purposes of oral argumentation, it is sufficient if the teams:

- are aware of the fact that recognition of secession may take the form of legal or factual actions;
- recognition of the secession itself is not equal to recognition of annexation of Fairyland by Euroasia;

CONFIDENTIAL

- recognition (or lack of it) does not by itself validate the act of secession, but it is a strong sign of whether the international community perceives the secession as lawful;
- recognition creates bilateral effects, i.e. only between the recognising state and the recognised state;
- there is a general obligation of states not to recognise actions which are prohibited under international law (*ex injuria jus non oritur*).

When making these arguments, the teams are expected to rely on: *the ICJ Advisory Opinion on the Wall in the Occupied Palestinian Territory*, *ICJ Advisory Opinion on Western Sahara*, the Security Council resolution no. 478 (1980) of 2 August 1980, para. 5 on the non-recognition of the Israeli annexation of East Jerusalem and the Security Council resolution no. 662 (1990) of 9 August 1990, para. 2 on the non-recognition of the Iraqi annexation of Kuwait.

Finally, teams are also expected to interpret the definition of ‘investor’ under the BIT, as well as support their argumentation in regard to the status of Peter Explosive under the international law definition of ‘citizenship’ (for instance, the *Nottebohm* case (Liechtenstein v. Guatemala)).

B. Whether Claimant was required to comply with the pre-arbitral steps as provided in Art. 9 of the Euroasia BIT prior to bringing his claims before the Tribunal (item 4 (1) (b) of the PO 1) and whether Claimant may invoke Art. 8 of the Eastasia BIT pursuant to Art. 3 of the Euroasia BIT (item 4 (1) (c) of the PO 1)

The main point in both these issues is whether the MFN clause provided in Art. 3 of the Euroasia BIT can be interpreted so as to include Art. 8 of Eastasia BIT (i.e. dispute resolution clause). The participants are expected to advance arguments relating to two divergent views adopted by tribunals on the scope of application of MFN clauses. These two approaches primarily disagree on whether MFN clauses may extend to dispute

CONFIDENTIAL

resolution mechanisms. Simultaneously, it will provide an answer whether Claimant was obliged to comply with the pre-arbitral steps provided for in Art. 9 of the Euroasia BIT.

Claimant's Arguments

Firstly, the teams may advance the argument that generally MFN clauses should extend to dispute resolution mechanisms. The Claimant may rely here on arbitral decisions such as *Maffezini*,² *Siemens*,³ *Impregilo*⁴ amongst others. They may contend that excluding dispute resolution mechanisms from the purview of MFN clauses will defeat the basic purpose of an MFN clause (as in *Maffezini*, *Siemens*).

The teams may then make an attempt to interpret the specific wording of the MFN Clause. They may contend that the words “*and to such other investment matters regulated by this agreement*” as used in the MFN clause show that the contracting states intended a broad interpretation of the MFN clause and did not intend to restrict its application merely to substantive rights. The Claimant may support his argument by contending that the dispute resolution mechanisms are covered as ‘*other investment matters*’ and that the dispute resolution mechanism is an integral component of ‘*treatment accorded to the investor*’. The claimant may rely on *Impregilo*, *Hochtief*,⁵ *Gas Natural*,⁶ and *Siemens* amongst others.

The teams may also try to establish that the waiting period and submission of disputes to local courts does not amount to a jurisdictional pre-requisite. The Claimant may argue that on a literal interpretation of Art. 9(2) of the Euroasia BIT, the use of the words ‘*it may be submitted*’, makes submission of the dispute to local courts permissive rather than

² *Maffezini vs. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000.

³ *Siemens A.G. vs. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004.

⁴ *Impregilo SpA v Argentina*, ICSID Case No. ARB/07/17, Award of 21 June 2011. **This case is of particular importance as the wording of the MFN clause contained in Art. 3 of the Euroasia BIT was based on the wording of the MFN clause contained in the Argentina - Italy BIT.**

⁵ *Hochtief AG v Argentina*, ICSID Case No. ARB/07/31, Decision on Jurisdiction of 24 October 2011.

⁶ *Gas Natural SDG SA v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction of 17 June 2005.

CONFIDENTIAL

mandatory. They may heavily rely on *Impregilo* to support its argument. Additionally, the teams may contend that it would be futile for Claimant to go to the courts of Oceania as they would be bound by the Executive Order. In other words, the Oceanian courts would not have the authority to go against the Executive Order and award compensation to Peter Explosive. The teams may rely here on, for instance, *Teinver*⁷.

Respondent's Arguments

Relying on *Plama*,⁸ *Wintershall*,⁹ *Daimler*,¹⁰ *Kilic*¹¹ and others, the Respondent may firstly advance the view that generally MFN clauses are applicable only to substantive rights and cannot be extended to dispute resolution provisions.

The teams may advance public policy arguments against the hazards of extending MFN clauses to dispute resolution clauses by contending that such an interpretation encroaches upon the state's consent to arbitration. They may rely on *Daimler* and *Wintershall*.

The teams may next argue that the wording of the MFN clause is unclear and ambiguous. They may insist that unless MFN clauses use specific and unambiguous words that clearly depict the contracting states' intent, the tribunal cannot presume the extension of MFN clauses to dispute resolution mechanism clauses. The teams may rely here on *Plama*, *Daimler* and *Wintershall* amongst others.

The Respondent may further argue that the Claimant cannot bypass the pre-arbitral steps by invoking the MFN clause since that would deprive Art. 9 of the Euroasia BIT of its *effet utile*. The Respondent may rely on *Impregilo* and *Wintershall*. The teams may also rebut the Claimant's futility argument by relying on *Daimler* and arguing that the Claimant has

⁷ *Teinver SA v Argentina*, ICSID Case No ARB/09/1, Decision on Jurisdiction of 21 December 2012.

⁸ *Plama Consortium Ltd. vs. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005.

⁹ *Wintershall Aktiengesellschaft vs. Argentina*, ICSID Case No. ARB/04/14, Award of 8 December 2008.

¹⁰ *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award on Jurisdiction of 22 August 2012.

¹¹ *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/01, Award of 2 July 2013.

CONFIDENTIAL

not been able to produce any proof to substantiate his contention that proceedings before the domestic courts would have been futile.

Admissibility

C. Whether Claimant made a protected investment, especially in the light of the “clean hands” doctrine with reference to Art. 1.1 of the Eastasia BIT (item 4 (2) (a) of the PO 1)

The main point here is whether Peter Explosive when making and developing its investment was required to comply with the “clean hands” doctrine and whether he complied with it. The teams should in the first place concentrate on whether the “clean hands” doctrine referred to in Art. 1.1 of the Eastasia BIT is applicable to the dispute and whether, irrespective of the exact wording of the Euroasia BIT, Peter Explosive was obliged to make its investment in accordance of the Oceanian laws under the Euroasia BIT. Then, the teams should concentrate on the timing of the alleged corruption and argue whether it is encompassed by the “clean hands” doctrine.

Claimant’s Arguments

In the first place, the teams may argue that the Euroasia BIT, which is applicable to the dispute, does not contain any specific reference to the “clean hands” doctrine and that there is no evidence that the Contracting States intended to include it. The “clean hands” doctrine is applied only when it is expressly placed in the applicable investment treaty.¹²

Additionally, Art. 1.1 of the Eastasia BIT may not be applied to the case at hand as the use of Art. 3 of the Euroasia BIT (the MNF clause) does not extend to the definition of

¹² Rudolph Dolzer, Christopher Schreuer, Principles of International Investment Law, Oxford 2012

CONFIDENTIAL

investment contained in another BIT.¹³ Firstly, the teams may rely here on the explanation of the *Metal-Tech* tribunal that “one must fall within the scope of the treaty, which is in particular circumscribed by the definition of investment and investors, to be entitled to invoke the treaty protection, of which MFN treatment forms part” or in other words, “one must be under the treaty to claim through the treaty”.¹⁴ Similarly, the teams may rely on the *Société Générale* case.¹⁵ Secondly, it is important to note that MFN clauses refer to ‘treatment’ and a definition of the term “investment” is not considered to be ‘treatment’ (*Société Générale*).

Even if the “clean hands” doctrine is applied to the dispute, then still it applies merely to the time when the investment was made, a specific one-off event.¹⁶ No allegation of bribery pertains to the time when Peter Explosive acquired shares in Rocket Bombs Ltd in February 1998. The allegation of bribery refers to the time when he acquired the license on 23 July 1998, months after he made his investment in Oceania.

Finally, the “clean hands” doctrine is inapplicable as the alleged bribery has not been proven and Peter Explosive has been not convicted. The teams may differentiate the factual background of the case from the factual background of the *World Duty Free* case¹⁷. Despite the fact that there was no formal conviction for bribery, in the *World Duty Free* case one of the shareholders expressly testified that he offered money to certain officials in Kenya. The *World Duty Free* tribunal found it to be a bribe. In the present case, the teams may argue that there is no proof that Peter Explosive offered any money to the President of the NEA.

Respondent’s Arguments

¹³ *Metal-Tech Ltd. V. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award of 4 October 2013.

¹⁴ *Metal-Tech Ltd. V. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award of 4 October 2013, para. 145.

¹⁵ *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction of 19 September 2008.

¹⁶ Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press 2009, para. 106.

¹⁷ *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/07, Award of 4 October 2006.

CONFIDENTIAL

Firstly, the teams may argue that if Peter Explosive intends to benefit from the dispute resolution clause contained in the Eastasia BIT through Art. 3 of the Euroasia BIT (MFN clause), it may not ignore other requirements of investment protection, including the “clean hands” doctrine, expressed in the Eastasia BIT. Also, irrespective of the the Euroasia BIT, Claimant was obliged to comply with the legality requirement based on the general principles of law.¹⁸

Thus, the teams may argue that Claimant’s investment is not protected under any of the BITs as it was tainted by a bribe. The protection of investment treaties does not extend to the investments made illegally.¹⁹ Investments made by illegal means are contrary to the good faith principle and may constitute an abuse of process; thus they do not deserve protection under any investment treaty.²⁰

Simultaneously, they may emphasise that the formal conviction in the national courts is not necessary as investment tribunals have a competence to assess by themselves whether the bribery was involved on the facts of the case (*World Duty Free*).

Finally, time of making an investment in the case at hand extends also to the time when Peter Explosive obtained an environmental license, not only to the time when he obtained shares of Rocket Bombs Ltd. It stems from the fact that the expression “making an investment” corresponds to a long and complex process, not a one-time event.²¹

Merits

D. Whether Claimant’s investment was expropriated (item 4 (2) (b) of the PO 1)

¹⁸ See here: T. Obersteiner, „In Accordance with Domestic Law” Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors, *Journal of International Arbitration* 2014, Volume 31, Issue 2, p. 267; see also: *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03.26.

¹⁹ *Teinver S.A., Transportes de Cercanias S.A. & Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction of 2012, para. 317; *Franz Sedelmayer v. Russian Federation*, SCC Award of 1998, para. 275.

²⁰ *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/02, Award of 2009, para. 175; *Phoenix Action, Ltd. V Czech Republic*, ICSID Case No. ARB/06/05, Award of 2009, para. 113

²¹ *Frontier Petroleum Services Ltd. V. The Czech Republic*, UNCITRAL, Final Award of 12 November 2010.

CONFIDENTIAL

The main point here is whether the sanctions introduced by the President of the Republic of Oceania in the Executive Order of 1 May 2014 on Blocking Property of Persons Contributing to the Situation in the Republic of Eastasia could have expropriated the Claimant's investment. The teams should mainly concentrate on Art. 4 and Art. 10 of the Euroasia BIT.

Was there an expropriation?

Claimant should focus on the effects of the Executive Order and argue that it resulted in an indirect expropriation in violation of Art. 4 of the Euroasia BIT. To support its claim, Claimant should contend: i) that its investment was substantially deprived of its value, and ii) that this substantial deprivation is permanent.²² As it would be difficult for Respondent to argue that the investment has not substantially lost its value, its main argument in response to these arguments should be that the investment has only been affected temporarily and therefore that the deprivation is not permanent as required by the case law.²³ Moreover, Respondent can argue that Claimant did not lose control over its investment, and that it therefore could not have been expropriated.²⁴

Was the expropriation unlawful?

After Claimant has made its argument that there is an expropriation, Claimant may concentrate on the argument that the expropriation was unlawful (reminder: expropriation is not *per se* unlawful in international law) by showing that it violates the four cumulative requirements set out in Art. 4 of the Euroasia BIT. Whilst Claimant can argue that the measures were i) discriminatory because “in the arms production sector, [Claimant] was the

²² LG&E Energy Corp. LG&E Capital Corp. LG&E International Inc. v Argentine Republic, Decision on Liability, ICSID Case No ARB/02/1, p 57, para. 191; Tecnicas Medioambientales Tecmed S.A. v The United Mexican States, Award, ICSID Case No ARB (AF)/00/2, p. 43, para. 115.

²³ Metalclad Corporation v The United Mexican States, Award, ICSID Additional Facility Case No ARB (AF)/97/1, p. 29, paras. 108-109; Siemens A.G. v The Argentine Republic, Award, ICSID Case No ARB/02/8, pp 83-84, para. 271; LG&E Energy Corp. LG&E Capital Corp. LG&E International Inc. v Argentine Republic, Decision on Liability, ICSID Case No ARB/02/1, p. 58, para. 193.

²⁴ Pope & Talbot Inc. v The Government of Canada, Interim Award, UNCITRAL, pp 34-35, paras 100-102; Azurix Corp v The Argentine Republic, Award, ICSID Case No ARB/01/12, p 116, para. 322.

CONFIDENTIAL

only company designated by the sanctions”,²⁵ that ii) they served no public purpose or that iii) they were not in accordance with due process, or Claimant can simply point to the fact that iv) he received no compensation.

Was the Executive Order a legitimate regulation in accordance with the police powers doctrine?

Respondent should focus his case on demonstrating that the Executive Order was a sovereign exercise of its police powers. According to the police powers doctrine, a *bona fide* regulation that is non-discriminatory and in the public interest is not an expropriation, and therefore not subject to compensation.²⁶ Claimant should demonstrate, in response, that: i) Respondent’s measures were not legitimate regulations that fall within its police powers, or that ii) the police powers doctrine is not customary international law, and therefore does not apply.

Was the Executive Order adopted for the maintenance of international peace or security?

Respondent should also bring the Tribunal’s attention to Art. 10 of the Euroasia BIT, which is a non-precluded measures clause and which was inspired by the policy of the United Nations, especially by the preamble and relevant provisions of the UN Charter. Respondent should argue that the Executive Order was adopted with the purpose of enabling Respondent to “fulfil its obligations with respect to the maintenance of international peace or security”, and that therefore the Euroasia BIT’s provisions do not apply to the Executive

²⁵ FDI Moot Case, p. 36, para. 17.

²⁶ *Tecnicas Medioambientales Tecmed S.A. v The United Mexican States*, Award, ICSID Case No ARB (AF)/00/2, p 45, para. 119; *Saluka Investments BV v The Czech Republic*, Partial Award, UNCITRAL, p 52, para. 255; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, Decision on Liability, ICSID Case No ARB/03/19, p 52, para. 139. *CME Czech Republic B.V. v The Czech Republic*, Partial Award, UNCITRAL, p 87, para. 320. See also Mostafa, B., *The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law*, 2008, p 273.

CONFIDENTIAL

Order, meaning that there can be no indirect expropriation in violation of Art. 4 of the Euroasia BIT.

E. Whether Claimant contributed to the damage suffered by his investment (item 4 (2) (c) of the PO 1)

This issue revolves around an aspect of quantification of damages (as recently appreciated in the Yukos decisions²⁷) in investment treaty arbitration often referred to as contributory fault. The main question here is whether or not Peter Explosive contributed to the damage suffered by the fact that he produced and supplied weapons to the Republic of Eurasia. An affirmative answer should result in a decision to reduce damages to be awarded to the investor.

Contributory fault as a concept has been developed to address the significance of an intentional wrongful act committed by the conduct of the injured party as a ground to reduce the liability of the respondent state.²⁸ In other words, it reflects the notion that the damages awarded in investment arbitration proceedings should reimburse the damage incurred by the investor, but at the same time the investor should not gain additional profit from the award. The test for the application of the contributory fault concept requires the establishment of:

- the responsibility of the host state for the violation of an investment treaty;²⁹
- the culpable action or in other words, blamable conduct of an investor (please see Art. 39 of the ILC Articles on Responsibility of States for Internationally Wrongful

²⁷ Please note that the Yukos decisions have been recently annulled, thus their persuasiveness in certain aspects may be diminished. *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Award of 18 July 2014; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award of 18 July 2014 and *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227 Final Award of 18 July 2014.

²⁸ Article 39, ILC Draft Articles; *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013 ¶1331 (reasserting that claimant's conduct be taken into account in determining compensation)

²⁹ Article 39, ILC Draft Articles

CONFIDENTIAL

Acts).³⁰ Also, tribunals have agreed that lawful but commercially imprudent behavior may also be regarded as blamable,³¹ similarly the non- exercise of diligence and reasonableness;³²

- the presence of a causal link between the action of an investor and the damage suffered to its investment.³³ What is important here is the concept of an intervening act. It has been held that an intervening event will only release the State from liability when that intervening event is (i) the cause of a specific, severable part of the damage, or (ii) makes the original wrongful conduct of the State too remote.³⁴

Claimant's Arguments

Claimant has to agree that the first prerequisite for the application of contributory fault is met due to the fact that it claims expropriation under Art. 4 of the Euroasia BIT. In regard to the second requirement, the teams may argue that there is no blamable conduct on the part of Claimant because when both contracts for arms production with the Republic of Euroasia were concluded, Claimant was not in a position to know that the Republic of Euroasia was modernising the equipment of its armed forces for the sole reason to annex Fairyland. What is more, when the second contract for arms production was concluded on 28 February 2014, Claimant could not have reasonably known about Respondent's intentions. Finally, with regard to the third criterion, the teams might argue that there was no use of arms and hence Claimant as an arms producer did not directly contribute to the situation. In other words, it is not possible to establish a causal link.

Respondent's Arguments

³⁰ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), United Nations 2008, ¶110.

³¹ MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award of 25 May 2004, ¶242-243; Azurix Corp. v. The Argentine Republic, (ICSID Case No. ARB/01/12, Award of 14 July 2006)

³² Case concerning S.S. Wimbledon, (PCIJ, Judgment of 17 August 1923, Series A, p. 31), Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3, Award of 22 May 2007), CME Czech Republic B.V. v. The Czech Republic (UNCITRAL, Partial award of 13 September 2001).

³³ Abengoa, S.A. y COFIDES, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013 ¶670

³⁴ Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, Award, 11 December 2013 ¶923 - 926

CONFIDENTIAL

First of all, the teams may argue that Respondent is free of any responsibility due to various reasons (including the ones presented in regard to the expropriation claim). However, if the Tribunal were to hold that in fact Respondent was responsible for the violation of an investment treaty, it should also consider the contributory fault doctrine. Thus, in regard to the second criterion, the teams may argue that the actions of Claimant were culpable due to a number of reasons. First, the possibility of a succession must have been known to Peter Explosive as he originates from Fairyland and should have realized that for a long time it intended to be reunited with the Republic of Euroasia. Secondly, Eurasia has long supported Fairyland's right to self-determination, which was confirmed by its intervention. Thirdly, in August 2013 the authorities of Fairyland decided to hold a referendum on 1 November 2013, all this prior to Claimant's conclusion of the second contract for the arms production. Fourthly, the authorities of Fairyland sent a letter to the Republic of Euroasia, asking for an intervention, on 23 January 2014, also prior to the conclusion of the second contract for the arms production. Finally, Peter Explosive knows the Minister of the National Defence of the Republic of Euroasia on personal basis.

Finally, the teams may argue that the factual background helps in the determination of the intervening act on the part of Claimant and in establishing a causal link. Thus, they may contend that despite the awareness of the reasons for the modernisation of the Euroasian army, Peter Explosive signed the second contract for the arms production on 28 February 2014 and exposed himself and Rocket Bombs to sanctions.