MEMORIAL FOR CLAIMANT

19 September 2016
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ICC

International Chamber of Commerce

ICC Rules

ICC Rules for Arbitration

ICC Secretariat

Secretariat of the International Court of Arbitration of the International Chamber of Commerce

ICJ

International Court of Justice

ICSID Convention

Convention on the Settlement of Investment Disputes between States and Nationals of other States

ILC

International Law Commission

ILC Articles.Dipl

ILC Articles on Diplomatic Protection

ILC Articles.Resp

ILC Articles on Responsibility of States for Internationally Wrongful Acts

MFN

Most Favoured Nation

Minister Defenceless

Minister of National Defence in Euroasia – John Defenceless

Ministry of Defence

Ministry of National Defence in Euroasia

NEA

National Environmental Authority of Oceania

Oceania/Respondent

Republic of Oceania

OEA

Oceanian Environment Act 1996

Parties

Peter Explosive and Oceania
Contracting Parties: Euroasia and Oceania

PO1: Procedural Order No. 1
PO2: Procedural Order No. 2
PO3: Procedural Order No. 3

p./pp.: Page(s)

Req.Arb.: Request for Arbitration

Rocket Bombs: Rocket Bombs Ltd

Tribunal: arbitral tribunal constituted in the present case

UN: United Nations

VCLT: Vienna Convention on the Law of Treaties

Vienna Convention on Succession: Vienna Convention on Succession of States in Respect of Treaties
STATEMENT OF FACTS

1. Peter Explosive, Claimant in this dispute, is an investor from Fairyland in Euroasia. In 1998 he acquired all the shares of a company Rocket Bombs and became its director. Rocket Bombs is incorporated in Oceania, which is Respondent in the present case. Euroasia and Oceania entered into the Treaty for the Promotion and Protection of Investments in 1992.

2. Rocket Bombs, which specialises in arms production, was in a difficult situation when Claimant purchased it. Its environmental licence was revoked and its production suspended. This, in turn, caused mass redundancies and widespread poverty in the Valhalla region, from where the company operated.

3. Due to Claimant’s endeavour, Rocket Bombs was granted necessary administrative licences which allowed it to recommence production. Claimant, through his business, improved the situation in the region by rehiring workers and building new factories. The business expanded internationally, since Claimant concluded two major contracts with Euroasia Ministry of Defence.

4. Until 2014 Claimant was, due to Fairyland’s Eastasian state affiliation, an Eastasian citizen. Fairyland, where the majority of citizens, including Claimant, have Eurasian roots, historically belonged to Euroasia. In a referendum held towards the end of 2013, citizens of Fairyland decided to separate the region from Eastasia. Eastasia did not agree with the will of Fairyland’s citizens. Fairyland’s authorities officially requested Euroasia of an intervention and Euroasia, after a long parliamentary debate, conceded to the request. Euroasia, striving to execute the right to self-determination of Fairyland’s citizens declared the annexation of the Fairyland region. The process was bloodless and peaceful. Claimant was granted Euroasian nationality on the day of annexation and holds it until today.

5. Despite no opposition to this political change on the part of UN, Respondent decided to impose economic sanctions against Eurasia by enacting an Executive Order. The sanctions touched persons engaged in specific sectors of Euroasian economy, including arms production, and encompassed: blocking all forms of trade in property; prohibiting professional business relations and rendering all contracts with such persons ineffective. Claimant’s company was the only entity from the arms production sector in Oceania.
which was touched by the Executive Order. The sanctions rendered Claimant’s shares in Rocket Bombs effectively without any value.

6. Claimant, in an attempt to save his rapidly deteriorating investment, notified Respondent on 23 February 2015 of his opposition to such expropriatory treatment and proposed to settle the dispute amicably. He never received a reply. However, on 5 May 2015, after 17 years of legally spotless conduct of business in Oceania, he was informed that he was under criminal investigation for allegedly breaching Respondent’s anti-corruptive laws. On 23 June 2015, Claimant received notice of Respondent officially initiating criminal proceedings against him.

7. On 11 September 2015, Claimant filed the Request for Arbitration.
SUMMARY OF ARGUMENTS

1. **Jurisdiction.** Claimant is an investor in light of Euroasia BIT since all requirements in Art.1(2) were met. Firstly, his investment was made in the territory of Oceania and he is a national of Euroasia. Secondly, he obtained Euroasian nationality legitimately and held it on the date relevant for establishing jurisdiction. Any doubts regarding legality of Fairyland’s annexation do not affect the legality of his nationality acquisition.

2. Secondly, Claimant was not required to comply with the pre-arbitral steps expressed in Art.9 Euroasia BIT. The negotiation clause is non-enforceable due to its wording and nature and, in any event, consultations would be futile. Similarly, the domestic litigation requirement is equally futile as Respondent’s courts could not provide Claimant with any effective remedy.

3. Thirdly, Claimant can benefit from easier access to arbitration pursuant to MFN Clause contained in Art.3 Euroasia BIT. MFN Clause ensures that Oceania treats Euroasian investors as favourably as investors from any other country. This includes treatment in terms of how Euroasian investors can resolve their disputes with Oceania. Since Eastasian investors have facilitated access to arbitration, Claimant can use MFN Clause to invoke better treatment and access arbitration on equal conditions.

4. Finally, Claimant’s investment is protected under both Eastasia BIT and Euroasia BIT. The investment fulfils the legality requirement set forth in Art.1(1) Eastasia BIT. Alternatively, Respondent is precluded from evoking this requirement due to its acquiescence and the application of estoppel to its conduct. In any case, under both BITs, the case is admissible due to the principles which underlie the clean hands doctrine.

5. **Merits.** Respondent indirectly and unlawfully expropriated Claimant’s investment by enacting Executive Order. Respondent substantially deprived Claimant of enjoyment of its investment and failed to observe Claimant’s legitimate, investment-backed expectations. Additionally, Respondent exceeded its general regulatory powers, since the adopted measures fell outside the public benefit, were disproportionate and discriminatory. Moreover, expropriation was unlawful under Art. 4(1) Euroasia BIT.

6. Secondly, Claimant did not contribute to the damage he suffered. He showed no willingness or negligence in his business conduct. Alternatively, if Tribunal finds his actions were contributory, it is Respondent who bears sole responsibility for damage, since the alleged contribution was insignificant and Claimant acted reasonably.
PART ONE: JURISDICTION

I. CLAIMANT IS AN INVESTOR PURSUANT TO ARTICLE 1(2) EUROASIA BIT

1. The treaty applicable to the present dispute is Euroasia BIT, since Claimant is a Euroasian national and he based the Req.Arb. thereon.¹

2. Article 1(2) Euroasia BIT establishes three conditions for a natural person to qualify as an ‘investor’. Firstly, he should make an investment in the territory of the other Contracting Party. Secondly, he should have the nationality of either Contracting Party. Lastly, the nationality should be granted in accordance with the laws of the Contracting Party that has granted the nationality.

3. The first condition is undisputable, as in the present case the investment was made in the territory of Oceania, which is a party to Euroasia BIT.² Claimant also fulfils the two latter requirements, i.e. Claimant acquired Euroasian nationality legitimately and timely (A), irrespective of any doubts regarding legality of Fairyland’s annexation (B).

A. Claimant obtained Euroasian nationality legitimately and timely

4. Claimant is a national of Euroasia in the light of Euroasia BIT. Most importantly, he acquired Euroasian nationality in accordance with Euroasian law (i). Moreover, Claimant had already held Euroasian nationality at the decisive moment for determination of Tribunal’s jurisdiction, i.e. when these arbitral proceedings commenced (ii).

   i. Claimant acquired Euroasian nationality in accordance with law of Euroasia

5. Claimant acquired Euroasian citizenship in accordance with the conditions set out in Citizenship Amendment.

6. Citizenship Amendment was adopted by Euroasia on 1 March 2014. It granted Euroasian nationality to every resident of Fairyland who applied for it.³ Claimant lived

¹ Req.Arb., p.3.
² Facts, p.32.
³ PO2, ¶4.
in Fairyland already in February 1998⁴, thus his residence of Fairyland has been continuous. Claimant was entitled to apply for Euroasian nationality because of the place of his residence, and he acquired it legitimately.

7. Respondent’s allegations relating Claimant’s acquisition of Euroasian citizenship to the secession of Fairyland are unfounded.⁵ Citizenship Amendment does not condition acquisition of citizenship on Fairyland’s affiliation to any state. Claimant, regardless of Fairyland’s status, has always been its resident. Consequently, he fulfilled the criteria imposed by Euroasia to become a citizen of this state. Furthermore, he would have fulfilled these requirements even if Fairyland had not been annexed by Euroasia.

8. Claimant’s residence in Fairyland is uncontested.⁶ Therefore, Claimant met objective legal requirements established in Citizenship Amendment and was fully entitled to obtain Euroasian nationality.

   ii. Claimant had Euroasian nationality on the date relevant for establishing jurisdiction

9. Claimant was a national of Euroasia on the date of commencement of the arbitral proceedings, i.e. when ICC Secretariat received Req.Arb. This date is decisive for determining nationality for the purpose of these proceedings pursuant to Art.4(2) ICC Rules governing this arbitration by virtue of Art.9(5) Euroasia BIT.

10. Euroasia BIT is silent on temporal criteria applicable to jurisdiction than ICC Rules and thus, Tribunal is entitled to adjudicate this matter on the basis of principles widely approved in international arbitration, such as the one confirmed by Schreuer:

   It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which judicial proceedings are instituted.⁷

11. This principle is also reflected in Art.25(2)(a) ICSID Convention which states that nationality should be assessed on the date on which the parties consented to submit a dispute to conciliation or arbitration, as well as on the date on which the request was registered in accordance with specific regulations.

⁴ Facts, ¶2, p.32.
⁵ Ans.Req.Arb., p.15.
⁶ PO1, ¶2.
⁷ Schreuer 2, p.92, ¶¶36-38.
12. In *Siag* tribunal ruled that the only dates of relevance to Article 25 ICSID Convention are those of consent and registration.\(^8\) Further, *Vivendi II* tribunal confirmed that jurisdiction is determined by the situation existing on the date of institution of the proceedings.\(^9\)

13. Taking the above into consideration, Claimant’s nationality should be determined as of the date when he commenced proceedings against Respondent. In the case at hand, Claimant’s Req.Arbitr. was received by ICC Secretariat on 11 September 2015.\(^10\) Claimant acquired Euroasian citizenship over a year earlier, on 23 March 2014.\(^11\) Consequently, Claimant already held Eurasian citizenship on the date of receipt of Req.Arbitr. by ICC Secretariat and therefore, he is an investor within the meaning of Euroasia BIT.

B. **Legality of annexation of Fairyland is irrelevant for determining Claimant’s nationality**

14. The issue whether Euroasia annexed Fairyland from Eastasia legally in the light of international law does not affect Tribunal’s jurisdiction with regard to Claimant’s nationality.

15. Despite Respondent’s arguments\(^12\), rules of succession deriving from Vienna Convention on Succession are irrelevant when it comes to Claimant’s acquisition of Euroasian citizenship since states are entitled to regulate the matter of nationality independently. Domestic law prevails over international law in this regard.\(^13\) In *Soufraki* case, tribunal decided that the question of investor’s Italian nationality was determined by Italian law.\(^14\) Tribunal noticed that a state settles, by its own legislation, the rules relating to the acquisition (and loss) of nationality.\(^15\) Also *Micula* tribunal applied this principle and ruled that as a general principle it is for each state to decide in accordance with its law who is its national.\(^16\)

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\(^8\) *Siag*, ¶499.
\(^9\) *Vivendi II*.
\(^10\) Req.Arbitr., p.7.
\(^11\) PO2, ¶4.
\(^12\) Ans.Req.Arbitr., p.15.
\(^13\) Dolzer/Schreuer, p.45.
\(^14\) *Soufraki*.
\(^16\) *Micula*, ¶86.
16. Here, Claimant acquired his second nationality on the grounds of domestic law of Euroasia, not public international law. Therefore, even if he could not acquire Euroasian citizenship as a result of succession of states, he would still be entitled to acquire Euroasian nationality through domestic law.

17. Hence, legality of Fairyland’s annexation has no impact on this issue.

II. CLAIMANT WAS NOT REQUIRED TO COMPLY WITH THE PRE-ARBITRAL STEPS EXPRESSED IN ART. 9 EUROASIA BIT

18. Article 9 Euroasia BIT establishes a multi-step dispute resolution procedure. According to Art.9(1) Euroasia BIT, the Parties should firstly commit to amicable consultations. Next, pursuant to Art.9(2) Euroasia BIT if they do not come to an agreement, a party may submit the dispute to the authority of the state in which the investment was made. Finally, according to Art.9(3) Euroasia BIT, if the dispute remains unresolved within twenty-four months, it can be submitted to international arbitration.

19. Notwithstanding, Claimant cannot be required to comply with the pre-arbitral steps as set forth in Art.9 Euroasia BIT. Amicable consultations requirement is of non-enforceable nature and moreover such negotiations would be futile (A). Also, Claimant cannot be required to litigate domestically as it would be equally futile (B).

A. Claimant cannot be required to further engage in amicable consultations

20. Article 9(1) Euroasia BIT constitutes a non-enforceable pre-arbitral step of amicable consultations (i). Moreover, amicable consultations clauses are permissive and optional in nature (ii). Regardless of the non-enforceable character of this step, Claimant entered the consultations and in the present case, further negotiations between the Parties would be futile (iii).

   i. Consultation clause contained in Art.9(1) Euroasia BIT is non-enforceable

21. Since clauses providing for negotiation or consultation are consensual in nature and their performance depends on the will of the parties, they cannot be seen as
enforceable.\textsuperscript{17} It is agreed that clauses providing for amicable consultations are only enforceable if they are construed in a sufficiently certain manner.\textsuperscript{18} They should give details of the procedure, such as an institution to conduct negotiations or their maximum time period.\textsuperscript{19} If the clause fails to do so, it is considered non-enforceable.\textsuperscript{20}

22. Here, amicable consultation clause does not contain any of the above specified elements. Firstly, neither the proceedings nor the point of failure are specified in Art.9(2) Euroasia BIT. The clause indicates that if the dispute cannot be settled amicably, it may be submitted to the competent judicial (…)[body]. Such an uncertain requirement for amicable dispute settlement before moving to the next pre-arbitral step is insufficient to create a mutual obligation. Therefore such a provision is non-enforceable.\textsuperscript{21}

\textbf{ii. Negotiation clause expressed in Art.9(1) Euroasia BIT is permissive and optional}

23. Clauses providing for amicable consultations are permissive and optional, which derives from their consensual and non-determinative nature.\textsuperscript{22} Successful result of negotiations depends solely on parties’ willingness to participate in a given proceeding.\textsuperscript{23} In Abaclat, where tribunal reviewed a clause worded similarly to the one in Euroasia BIT, it held it was not of mandatory nature but merely expressed the parties’ good will.\textsuperscript{24} It stated that such nature is determined by the wording of the clause, \textit{i.e.} the phrase \textit{to the extent possible} and the general purpose of such provision.\textsuperscript{25} Also, Lauder tribunal affirmed that the purpose of such provision is \textit{to allow the parties to engage in good-faith negotiations before initiating arbitration.}\textsuperscript{26} For this reason such provisions cannot serve as a mandatory requirement prior to arbitration.\textsuperscript{27}

24. In any case, the amicable consultations clause cannot be interpreted as depriving Tribunal of its jurisdiction. Lauder tribunal held that amicable consultations are a mere

\textsuperscript{17} Pryles, p.160.
\textsuperscript{18} Pryles, pp.167-168, Kayali, pp.572-574.
\textsuperscript{19} Born/Scekic, p.238-239.
\textsuperscript{20} Kayali, p.572; Born/Scekic, p.238.
\textsuperscript{21} Kayali, p.572.
\textsuperscript{22} SGS, ¶184.
\textsuperscript{23} Kayali, p.568.
\textsuperscript{24} Abaclat, ¶564.
\textsuperscript{25} Ibid.
\textsuperscript{26} Lauder, ¶187.
\textsuperscript{27} Born/Scekic, p.236.
procedural requirement facilitating the parties with the opportunity for amicable dispute settlement before submitting to arbitration. Similarly, tribunals in SGS, Ethyl and Biwater stated that amicable consultation clauses are in their nature directory and procedural rather than mandatory and jurisdictional.

25. The wording of the clause reveals Parties’ intentions that amicable consultations ought to be optional by the use of words to the extent possible. Thus, like in Abaclat case, the phrase from Art.9(1) Euroasia BIT does not reflect the intention to impose a requirement to comply with this pre-arbitral step, but rather should serve as a possibility for the parties.

26. In reference to the above, Claimant informed Respondent of his willingness to negotiate on 23 February 2015 by notifying Respondent of the dispute. Therefore he satisfied the relevant requirement by negotiating with Respondent to the extent possible.

27. The requirement to engage into amicable consultation, as argued above, cannot be considered a mandatory requirement. Consequently, the provision of Art.9(1) does not constitute a precondition to Respondent’s consent to arbitration. Such provisions do not influence in any way tribunals’ jurisdiction. Hence, it cannot impact Tribunal’s jurisdiction over the present dispute.

iii. In any case, entering into further consultations would be futile

28. Claimant did try to settle the case amicably, however Respondent did not react to Claimant’s attempt.

29. When further negotiations serve no other purpose than suspension of attempts to resolve the dispute, they are considered futile. Ethyl tribunal held that in cases in which there is no possibility of reaching an agreement within the frames of amicable consultations there is no reason to suspend investor’s right to proceed. Accordingly, tribunals in Occidental, SGS and Biwater held that where negotiations are futile, there is no need to comply with such requirement.

28 Lauder, ¶187.
29 SGS, ¶184; Ethyl, ¶¶85-88; Biwater, ¶343.
30 Abaclat, ¶564.
31 P03, ¶4.
32 SGS, ¶184; Schreuer, p.233.
33 Req.Arb., p.3.
34 Ethyl, ¶84.
35 Ibid.
36 Occidental, ¶94; SGS, ¶184; Biwater, ¶343.
30. Simultaneously, a clause providing for amicable consultations requires the parties to attempt amicable settlement, but not to reach an agreement. In Abaclat case, on the grounds of similar facts and analogous wording of negotiations’ clause, the tribunal held that:

where one of the parties did not have a good will to resort to consultation as an amicable means of settlement, it would be futile to force the parties into a consultation exercise.

Tribunals confirmed that amicable consultations clauses cannot preclude claimant from proceeding to the merit phase if consultations become deadlocked or futile. Attempt made by investor to settle the dispute within negotiation proceedings and failure of the state to respond to this attempt prove futility of a given procedure.

31. In the present case, on 23 February 2015 Claimant issued a notice informing Respondent of his willingness to negotiate with regard to the arising dispute. However, until the date of filing Req.Arb. Respondent did not react to this notice. Under the aforementioned circumstances Claimant inferred that Respondent had no will to engage in amicable consultations.

32. Thus, since Claimant demonstrated sufficient effort to pursue an amicable dispute resolution while Respondent showed no good will to settle the case, forcing the Parties to negotiate in wider extent would be futile.

B. Claimant cannot be required to litigate domestically in Oceania

33. Claimant should not be required to comply with the pre-arbitral requirement to recourse to domestic courts prior to arbitration since it would be futile.

34. The so-called futility rule is international customary law that provides an exception to the obligation of exhausting the local remedies before initiating international arbitration. The rule states that local remedies do not have to be exhausted if they are

37 Ambiente, ¶581.
38 Abaclat, ¶564.
39 Ambiente, ¶582; Occidental, ¶92; Biwater, ¶343.
40 Occidental, ¶92
41 Req.Arb., pp.3-4; PO3, ¶4.
42 Req.Arb., pp.3-4
43 Amerasinghe, p.208; Bjorklund, p.408; Biwater, ¶343; Ambiente, ¶601.
not reasonably available or do not provide any effective redress. The customary rule was also recognised by ILC and its reflection was endorsed by Art. 15 ILC Articles.Dipl.

35. The futility exception rule was primarily established regarding the obligation to exhaust local remedies. However, Ambiente tribunal held that the clause requiring claimant to recourse to domestic courts for 18 months has strong parallels with requirement to exhaust local remedies. Tribunals in Ethyl and Biwater followed this reasoning. Thus, the futility rule applies to clauses requiring recourse to local courts for a specific period of time in international investment law.

36. In the present case, Claimant is entitled to apply the futility rule since Art.9 Euroasia BIT contains a requirement to recourse to domestic litigation for a specific period of 24 months.

37. Moreover, Abaclat tribunal stated that the opportunity to redress the claim to domestic litigation cannot be theoretical, but Claimant should have a real possibility of obtaining effective resolution of the dispute.

38. To apply the futility rule, the circumstances of a given case must fulfil its threshold. The applicable test is whether there are reasonably available remedies that can provide effective redress. This means that in cases where the local court system is not capable of providing an effective relief or grant an investor with an adequate remedy, claimants do not need to exhaust local remedies.

39. Claimant was precluded from approaching domestic courts of Oceania. Section 9 Executive Order states that the order does not create any right or benefit, either procedural or substantial that would be enforceable at law by any party against Oceania. As a consequence, Claimant did not have any real possibility of obtaining enforceable, fair verdict from the domestic courts of Oceania. This holds true despite the possibility to file a request for reconsideration of the imposed sanctions to President of Oceania. Article 9(2) Euroasia BIT expressly states that the dispute may be submitted to judicial

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44 Finnish Ships, pp.1496-1497; Panevezys-Saldutiskis, p.18; Amerasinghe, p.208; Borklund, p.408; ILC Rep.Dipl, ¶40; Ambiente, ¶601.
45 Ambiente, ¶601-604.
46 Ethyl, ¶84; Biwater, ¶343.
47 Ambiente, ¶603.
48 Abaclat, ¶583
49 Commentaries.Dipl., pp.76-78; Ambiente, ¶¶610-612.
50 Ibid.
51 Ambiente, ¶¶610-612; Finnish Ships, pp.1496-1497; Vélezquez-Rodríguez, ¶¶93-95; Yağci and Sargin, ¶42; Hornsby v. Greece, ¶37.
52 PO3, ¶10.
or administrative courts of the host state. The proceeding before the President cannot be considered a possibility to redress the dispute to the domestic courts. In no way can President be deemed a judicial or administrative court.

40. Therefore, Executive Order deprived Claimant of any possible effective remedy. Subsequently, the threshold for invoking the futility exception is, by this mere fact, satisfied.

III. ARTICLE 3 EUROASIA BIT ENTITLES CLAIMANT TO BE TREATED AS FAVOURABLY AS EASTASIAN INVESTORS IN TERMS OF ACCESS TO ARBITRATION

42. Regardless of unenforceability of pre-arbitral steps, Claimant can benefit from easier access to arbitration provided to Eastasian investors operating in Oceania. This benefit is affordable pursuant to MFN Clause contained in Art. 3 Euroasia BIT. MFN Clause ensures that Oceania treats Euroasian investors no less favourably than investors of other nationalities. However, Euroasian investors can have their disputes with Oceania arbitrated only after 24 months of domestic litigation, whereas investors from Eastasia can do so merely after 6 months of amicable negotiations. Euroasian investors can thus invoke the latter provision in place of the former.

43. MFN clauses serve foreign investors to incorporate advantages granted to other nationalities with which they were not equipped originally. MFN provisions can afford easier access arbitration if their wording and BIT’s purpose indicate it is permitted, and where such MFN application does not extend tribunal’s jurisdiction.

44. In the present case, easier access to arbitration set forth by Art. 8 Eastasia BIT falls within the scope of more favourable treatment under MFN Clause both in view of its plain text (A) as well as object and purpose of Euroasia BIT (B). Furthermore, import of the dispute settlement mechanism from Eastasia BIT does not extend Tribunal’s jurisdiction beyond the agreed scope (C).

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53 Caron/Shirlow, p.400; Schill, p.187.
54 Dolzer/Schreuer, pp.271-272; Schill, p.194.
A. Plain text of MFN Clause implies that it encompasses treatment in form of access to arbitration

45. Interpretation of MFN Clause is governed by VCLT which applies to treaties between states, such as Euroasia BIT. VCLT lays firm foundations on the side of textual interpretation. Accordingly, investment tribunals focus on the ordinary meaning of the term ‘treatment’ in MFN clauses when establishing their scope.

46. Here, the ordinary meaning of treatment justifies broad applicability of MFN Clause in Art. 3(1) Euroasia BIT (i), which remains unrestricted due to the absence of any specific inclusions and in light of exclusions in Art. 3(2) Euroasia BIT (ii).

i. The term ‘treatment’ in its ordinary meaning includes dispute settlement

47. Article 31(1) VCLT specifies that the treaty terms should be given their ordinary meaning. Article 31(4) VCLT adds that for such terms to be given a special meaning, it must be proved intended by the parties. Hence, these two provisions establish that ordinary meaning is default, and can be derogated if the need to do so is evidenced.

48. Interpreting MFN clauses, tribunals held that ordinary meaning of the word ‘treatment’ entails dispute resolution. ICJ in Ambatielos found that ‘treatment’ in a clause concerning commerce and navigation encompassed dispute settlement. Siemens tribunal considered ‘treatment’ to plainly mean behaviour in respect of an entity or a person, and asserted that it covered dispute resolution in international arbitration. Suez tribunal achieved similar conclusion noting that ‘treatment’ referred to the rights and privileges granted on investments. Other tribunals also confirmed neutral arbitration to lie within MFN clauses. No legal rule was found to imply that ‘treatment’ fails to include the host state’s acceptance of arbitration.
49. Definition of the term ‘treatment’ confirms the above explaining it as *the manner in which someone behaves towards or deals with someone.* Investor-state dispute resolution, requiring a state to decide on prosecution, negotiation and settlement, is nothing but a state’s behaviour towards an investor. Dispute settlement provisions are enforceable regulation of the conduct of states in respect to investors. Also in the present case, the term ‘treatment’ includes dispute resolution in general, and international arbitration in particular.

50. Firstly, as the word was not specifically defined, any departure from its ordinary meaning is groundless. If the word treatment were to exclude dispute resolution, a special meaning outside of its ordinary meaning should be evidenced.

51. Secondly, MFN Clause obliges Oceania to accord no less favourable treatment to investments, income and activities related to such investments and to such other investment matters regulated by this Agreement. Disputes over foreign investments made in Oceania qualify as matters related to investments. Settlement of such disputes is regulated in Euroasia BIT. Thus, dispute resolution is an *investment matter regulated by this Agreement.* A virtually same wording was similarly found to include dispute settlement by *Impregilo* tribunal.

52. This leads to the conclusion that the term treatment includes dispute resolution.

53. **ii. The term ‘treatment’ is unrestricted by any specific inclusions or exclusions**

53. The wording of MFN Clause misses any qualifications of the term ‘treatment’ which might justify restrictive interpretation and hypothetically constrain its application.

54. Tribunals hold that any general rule of restrictive interpretation is not an accurate reflection of international law on this matter, and in fact contradicts VCLT, as well as customary international law. In *Rights of Nationals*, ICJ found that a broadly worded MFN clause entitled the beneficiary to claim jurisdictional privileges in a third-party treaty. In *Wimbledon*, PCIJ observed that if the parties wanted to limit a

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63 Oxford Dictionary.
64 Parker, p.45.
66 Impregilo, ¶99.
67 Austrian Airlines, ¶119.
68 Siemens, ¶81.
69 ICS, ¶282.
70 Rights of Nationals of the US in Morocco.
provision’s applicability, the treaty would not fail to say so, and if it did, the omission was no doubt intentional.\footnote{Wimbledon, p.23.} Suez and RosInvest tribunals confronting MFN clauses that only excluded \textit{treatment, preference or privilege} resulting from \textit{customs union} or \textit{arrangement relating ... to taxation}, concluded that such wording did not preclude MFN application to resolution of disputes.\footnote{Suez ¶58; RosInvest ¶135.}  

55. It is incumbent upon states to prevent unwanted application of MFN clauses by adopting necessary exclusions or indicating specific inclusions.\footnote{Radi, p.774.} Lack of restrictions plays to the benefit of MFN application to dispute settlement provisions.\footnote{Gaillard 2, p.163.} Denying such effect despite no indications to do so would amount to ineffective treaty analysis.\footnote{Gaillard 1, p.4.}  

56. In the present case, MFN Clause does not contain any listing of advantages—exhaustive or exemplary—narrowing the scope of MFN treatment. Neither does it provide for exclusions barring MFN application to dispute resolution. MFN Clause only excludes \textit{advantages and privileges} deriving from \textit{customs or economic union} or \textit{tax-related arrangements}. Suez and RosInvest tribunals confronting such wording concluded that it did not preclude MFN application to resolution of disputes.\footnote{Suez ¶58; RosInvest ¶135.}  

57. To conclude, MFN Clause contains no textual basis to imply that its applicability should be limited. Moreover, with the ordinary meaning given to the term \textit{treatment} pursuant to Art. 31(1) VCLT, the term entails investor-state dispute resolution.  

\section*{B. Supplementary means of treaty interpretation confirm the application of MFN Clause to the dispute resolution mechanism}  

58. MFN Clause’s applicability to settlement of investor-state disputes is further supported when considered in the context as well as object and purpose of Euroasia BIT.  

59. Final words of Art. 31(1) VCLT deliver additional means of shedding light on the ordinary meaning of treaty language.\footnote{Gardiner, p.211; Tawil, p.12.} The treaty terms should also be interpreted \textit{in their context and in the light of its [the treaty’s] object and purpose}. 

60. Here, the context of the MFN Clause, construed on the basis of Euroasia BIT’s preamble, reveals firm emphasis on supplying investors with effective means of
enforcing their rights (i). Equally, object and purpose of the entire Euroasia BIT and protection of investments justify Claimant’s resort to international arbitration pursuant to Art. 8 Eastasia BIT (ii).

i. Euroasia BIT’s preamble confirms that MFN treatment entails dispute resolution

61. Treaty preambles provide readers with valuable knowledge of the parties’ motivations and aims underlying the substantive provisions. As such, they constitute the supplementary apparatus for attributing the terms under scrutiny with the right weight. In case of ambiguity, the preamble may justify a wider interpretation, or at least rejection of a restrictive one. The language used in treaties’ preambles served as an indication of the correct scope of MFN treatment.

62. Siemens tribunal analysed a preamble which expressed objectives such as to promote and to protect investments. The tribunal inferred from such objectives a clear intention of the parties to create favourable conditions for investments, to stimulate private initiative and to increase the well-being of the peoples of both countries. Koza tribunal followed this approach, holding that the aim to create favourable conditions for greater investment implies that the investor should be treated no less favourably in terms of available dispute resolution processes. BITs which in the preamble assure promoting investment protection allow claimants to import more favourable dispute settlement through the MFN clause.

63. In the case at hand, Euroasia BIT’s preamble admits that the countries seek to promote greater activity so as to stimulate the flow of capital and economic development. More importantly, it also recognizes the importance of effective means being provided in order to assert claims and enforce rights. In such context, MFN Clause can be applied to dispute resolution. For Claimant to enforce his rights, it is essential to have resort to arbitration without undue obstacles.

78 Gardiner, p.206.
79 Suy, p.256.
80 Gardiner, p.206.
81 Koza, ¶63; Siemens, ¶81; Berschader, ¶144; Daimler, ¶¶254-255; Kilic, ¶¶5.2.6, 7.2.2; Plama ¶¶192-193.
82 Koza, ¶63.
83 Freyer/Herlihy, p.63.
84 Preamble to Euroasia BIT.
ii. Euroasia BIT’s object and purpose shows MFN treatment entails dispute resolution

64. The goal of BITs is to protect foreign investors and their investments. An essential element that any such protection necessarily comprises is the right to enforcement. Access to arbitration is therefore a weighty factor in considering the object and purpose of BITs.

65. ICJ was first to focus on the purpose of treaty provisions as indicators of whether or not MFN treatment was applicable to dispute resolution. In Ambatielos case, the panel observed that the object of protecting the rights of traders naturally complemented matters regulated by treaties of commerce and navigation.

66. Further, Maffezini tribunal noted that just as extraterritorial jurisprudence protect rights of traders under treaties of commerce, dispute resolution mechanisms protect foreign investors under BITs. Gas Natural, RosInvest and Siemens concurred, acknowledging dispute settlement provisions are essential to protection of foreign investment. Even Plama award, although largely dissenting from Maffezini line, underlined the protective dimension of dispute resolution clauses. This protective aim is complemented with investors being allowed to rely on MFN clauses also in terms of finding and importing more favourable dispute resolution mechanisms.

67. In the present case, Euroasia BIT specifies its goal as expanding economic cooperation, particularly through establishing effective and enforceable protection of investors’. This object confirms that MFN treatment applies to issues of dispute settlement, such as access to a neutral forum of international arbitral tribunals.

C. MFN Clause application is allowed as it merely amounts to a procedural modification and leaves Tribunal’s jurisdiction unaffected

68. Investment tribunals have generally accepted that MFN clauses allow circumvention of access restrictions to investor-state arbitration, in particular, longer waiting periods and

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85 Hochtief, ¶67.
86 Rentia, ¶100; Reinisch, p.172.
87 Ambatielos, p.107.
88 Maffezini, ¶54.
89 Gas Natural, ¶29; RosInvest, ¶130; Siemens, ¶102.
90 Plama, ¶193.
91 Parker, p.60; Radi, p.769; Schill, p.193.
obligatory resort to litigate domestically.\textsuperscript{92} On the other hand, the cases in which the effect of the MFN clauses was denied, concerned attempts to extend the scope of jurisdiction substantively to issues not covered by the basic clause.\textsuperscript{93}

69. \textit{Plama} and \textit{Tza Yap Shum} tribunals rejected MFN-based claims since they effectively imported a whole arbitral mandate which was absent from the text of examined BITs.\textsuperscript{94} \textit{Salini} tribunal rejected application of MFN clause as the basic treaty specifically limited affordable remedies to those foreseen in its own provisions.\textsuperscript{95} In \textit{Telenor} and \textit{Berschader} cases, tribunals denied MFN clauses’ application as claimant sought to expand the types of claims that could be submitted to arbitration.\textsuperscript{96}

70. The effect of expanding jurisdiction versus bypassing procedural requirements is perceived so well-established that \textit{Telefonica} tribunal justified its approval to apply MFN clause to dispute resolution with a remark that it was not asked to extend jurisdiction.\textsuperscript{97}

71. Additionally, Dolzer concludes examination of the jurisprudence with an assertion that if the time for pre-arbitral consultation is shortened, the MFN clause may be applied.\textsuperscript{98}

72. Here, easier access to arbitration does not extend jurisdiction. It simply gives more favourable treatment in terms of a procedural framework. Claimant only seeks to smoothen the access to arbitration instead of widening such access.

73. Therefore, Tribunal is asked to simply modify procedural requirements based on MFN Clause while leaving the jurisdiction unaffected. In such light, Claimant’s recourse to Art. 8 Eastasia BIT via Art. 3 Euroasia BIT is affordable.

\textbf{IV. CLAIMANT HAS MADE A PROTECTED INVESTMENT IN ACCORDANCE WITH THE CLEAN HANDS DOCTRINE AND RESPONDENT’S LAWS}

74. Claimant submits that Euroasia BIT is applicable to the present dispute, whereas Respondent asserts it is Eastasia BIT. Depending on which BIT Tribunal finds applicable, the legality of Claimant’s investment will influence either Tribunal’s jurisdiction or this case’s admissibility. The clean hands doctrine, not backed by treaty

\begin{footnotesize}
\begin{enumerate}
\item[92] Dolzer/Schreuer, pp.271-272; Schill, p.194.
\item[93] Maupin, p.172; Acconci, p.387; Rodriguez, p.96.
\item[94] Plama, ¶118, Tza Yap Shum, ¶220.
\item[95] Salini, ¶75.
\item[96] Telenor ¶97; Berschader, ¶179.
\item[97] Telefonica, ¶102.
\item[98] Dolzer/Myers, p.60.
\end{enumerate}
\end{footnotesize}
provisions conditioning protection of the investment on its compliance with the law, determines the admissibility of the case. Conversely, a legality requirement in the BIT’s definition of investment determines the jurisdiction of a tribunal.

75. The issue of Claimant’s investment complying with the law was raised by Respondent in the context of Art.1(1) Eastasia BIT, which sets out requirements of material jurisdiction. To meet them, Claimant had to invest in accordance with the laws and regulations of Respondent. Respondent seeks to create a delusional obstacle to Tribunal’s jurisdiction by arguing that Claimant’s investment was illegal.

76. Claimant’s investment satisfies the legality requirement (A). Alternatively, even if Tribunal finds otherwise, Respondent is estopped from relying on the legality requirement due to its involvement in the alleged illegal conduct (B). Therefore Tribunal has jurisdiction. In any event, regardless of whether Tribunal applies Eastasia BIT or Euroasia BIT and of alleged illegality of Claimant’s investment, the case is admissible (C).

A. Claimant’s investment satisfies the legality requirement contained in Art.1(1) Eastasia BIT

77. Claimant’s investment comprised not only shares in Rocket Bombs, but also Rocket Bombs’ contractual rights. Respondent alleges Claimant’s investment is contrary to Respondent’s laws. However, it is Respondent who bears the burden of proof as regards the alleged bribery committed by Claimant (i) and it has not satisfied the requisite standard of proof for the investment to be considered illegal (ii). Hence, Respondent’s accusations have no bearing on Tribunal’s jurisdiction.

i. Respondent should prove the alleged illegality of Claimant’s investment

78. Respondent bears the burden of proof, which cannot be shifted to Claimant. A party in investment arbitration is precluded from shifting the burden to the opponent by simply asserting a proposition. It would result in an adverse inference being drawn from the

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99 Banifatemi, p.39.
100 Ibid.
101 See Section V(A) of this memorandum.
failure to produce evidence. Arbitration is neither inquisitorial adjudication where the burden rests upon the tribunal, nor a system where sole prima facie evidence suffices to toss the burden to the responding party.

79. The burden of proof in case of alleged illegality has been held in several cases to rest solely on the party claiming the illegality to its favour. As tribunal in Siag noticed, reversing the burden of proof to the allegedly unclean party would make defence almost impossible and cause violation of due process standards. Similarly, Rompetrol tribunal underlined that the responding party should never bear the burden of disproof, because the burden never shifts throughout the forensic process.

80. Here, the burden of proof of the illegality allegations rests solely on Respondent. Respondent brought up the private meeting Claimant held with the President of NEA 18 years ago in order to cast a shadow on the legality of Claimant’s investment. Respondent’s allegations, if proven, would be profitable for Respondent. Shedding the burden of disproving such empty allegations on Claimant, under threat of this Tribunal finding its lack of jurisdiction, would be an undue hindrance of his right to a due process.

ii. Respondent failed to prove illegality of Claimant’s investment

81. In the present case, considering the gravity of Respondent’s allegations, Tribunal ought to implement a particularly high standard of proof. Art.25 ICC Rules stipulates that in order to establish the facts a tribunal may make use of all appropriate means.

82. Cases related to illegality of investors’ conduct require a heightened standard of proof. In order to rely on bribery, the alleging party is required to make out a very high standard of proof. Rumeli tribunal spoke of clear and convincing evidence to prove alleged criminal conspiracy. In African Holding to prove corruption an irrefutable proof, such as that resulting from criminal prosecution was required. Similarly, in Bayindir in order to rely on bad faith a proof sufficient to exclude any reasonable doubt

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102 Sandifer, p.131.
103 Oostergetel, ¶¶147-148.
104 Siag, ¶317.
105 Rompetrol, ¶178.
107 EDF, ¶221.
108 Rumeli, ¶709.
109 African Holding, ¶52.
was needed.\textsuperscript{110} Finally, \textit{Saba} tribunal stated that for allegations of impropriety the standard was \textit{particularly heavy}.\textsuperscript{111}

83. In this dispute, Respondent seeks to taint Claimant’s hands with bribery charges solely on the basis of evidence of a private meeting between Claimant and President of NEA in July 1998. Criminal proceedings were initiated by a solitary testimony of the President of NEA, delivered after he concluded a non-prosecution agreement with Respondent.\textsuperscript{112} Respondent presented no other evidence of Claimant’s alleged bribery.

84. Furthermore, reasonable doubts arise as to what purpose Respondent may have had in sparking the illegality allegations. Claimant was informed of being under investigation in May 2015, which was after the Executive Order was enacted and after Respondent was notified by Claimant of the dispute.\textsuperscript{113} Criminal proceedings remain pending for over a year and relate to a situation which took place 18 years ago.\textsuperscript{114} These circumstances point to Respondent’s dubious motifs in referring to alleged illegality and reinforce the conclusion that Claimant’s investment has been made in compliance with Respondent’s laws and regulations.

\textbf{B. Alternatively, Respondent is precluded from evoking the legality requirement due to its acquiescence and the application of estoppel}

85. Acquiescence and estoppel are accepted as general principles of international law recognized by civilized nations.\textsuperscript{115} The two doctrines apply to unilateral, explicit and implicit, declarations made by states.\textsuperscript{116} Therefore they apply to the present dispute.

86. Respondent is precluded from relying on the legality requirement to bar Tribunal’s jurisdiction for two reasons: it has acquiesced to the alleged illegality (i) and estoppel prevents him from raising legality as a defence (ii).

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{110} Bayindir, ¶142-143.
\item \textsuperscript{111} Saba Fakes, ¶131.
\item \textsuperscript{112} PO2, ¶5.
\item \textsuperscript{113} Facts, ¶19; PO3, ¶4
\item \textsuperscript{114} PO2, ¶5.
\item \textsuperscript{115} Dixon, pp.39-40.
\item \textsuperscript{116} Crawford, p.421.
\end{itemize}
\end{footnotesize}
i. **Respondent acquiesced to Claimant’s alleged illegal conduct**

87. Acquiescence constitutes the lack of reaction in relation to conduct where the circumstances would call for a response expressing disagreement or objection.\(^\text{117}\) The state, in consequence of its silence, is understood to have accepted the situation. An example of the effects of acquiescence can be found in the *King of Spain* case, where ICJ precluded respondent from relying on invalidity of an award due to respondent’s inaction in evoking the issue of invalidity in previous years.\(^\text{118}\)

88. Claimant obtained the Environmental Licence on 23 July 1998, shortly after the private meeting with the President of NEA.\(^\text{119}\) The regular procedure for obtaining such a licence is complicated.\(^\text{120}\) Expedited circumstances in which Claimant received the licence, although justified by the objective need of improving the situation in Valhalla, were unusual. However, none of Respondent’s authorities verified the legality of the environmental licence, despite it being an uncontested fact that Claimant met the stringent requirements several years after obtaining the licence, and despite Respondent’s laws explicitly providing for such verification and even potential revocation of the licence.\(^\text{121}\) Rocket Bombs operated with no blemish on its reputation until 2015, when criminal proceedings alleging corruption were commenced against Claimant.\(^\text{122}\) The criminal proceedings have been launched on the eve of the dispute before this Tribunal, almost as if the forecast of the arbitral proceedings required building arguments which could put Tribunal’s jurisdiction at question.\(^\text{123}\)

89. Respondent, by reason of its 17 year-long inaction in investigating possible irregularities, has acquiesced to the circumstances in which Claimant obtained the environmental licence. Consequently, Respondent is precluded from relying on the alleged illegality.

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\(^{\text{117}}\) Shaw, pp.837-838.

\(^{\text{118}}\) The King of Spain, p.213; Lim, ¶126.

\(^{\text{119}}\) Facts, ¶6.

\(^{\text{120}}\) PO2, ¶1.

\(^{\text{121}}\) Facts, ¶1; PO3, ¶1.

\(^{\text{122}}\) PO2, ¶5.

\(^{\text{123}}\) Facts, ¶19.
ii. **Respondent is estopped from evoking the legality requirement**

90. The essential element of estoppel is a representation and then subsequent reliance by one party on the conduct of the other party.\(^{124}\) The effect of the operation of this doctrine is that a party is precluded from claiming a right which is inconsistent with its previous representations.\(^{125}\) Investment tribunals applied this rule and held that bearing principles of fairness in mind, governments cannot raise violations of its own law as a jurisdictional defence, where they have knowingly overlooked the violations and endorsed an allegedly illegal investment.\(^{126}\)

91. Respondent represented to Claimant his acquiescence with the investment. Claimant relied on Respondent’s acquiescence in thinking that the legal and factual state of affairs he has found himself in, was endorsed by Respondent. During the period of 17 years, Rocket Bombs prospered and developed with no one questioning the lawfulness of its environmental licence.\(^{127}\) He demonstrated his reliance by rehiring previous employees, building new factories, concluding numerous contracts with companies incorporated in Respondent’s state and investing in the modernisation of the production line so that it now complies with Respondent’s strict environmental regulations.\(^{128}\)

92. Therefore, both conditions of estoppel have been met. Respondent may evoke the alleged illegality of Claimant’s investment, since, through its acquiescence, it represented that the investment is legal, and Claimant relied on this representation.

C. **In any case, the claim should be admitted regardless of the applicable BIT and the alleged illegality of Claimant’s investment**

93. The clean hands doctrine, which operates irrespective of any BIT containing a legality requirement, touches not upon tribunals’ jurisdiction, but rather conditions the admissibility of a particular case because it concerns issues which lie beyond the application or interpretation of the basis of jurisdiction and are directed at the claim rather than the tribunal.\(^{129}\) In this case, irrespective of the applicable BIT and alleged illegality of Claimant’s investment, the claim should be admitted. This proposition is

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\(^{124}\) Crawford, p.420.

\(^{125}\) Preah Vihear, pp.39-40.

\(^{126}\) Fraport, ¶¶346-347; Kardassopoulos, ¶¶191-192.

\(^{127}\) PO2, ¶5.


\(^{129}\) Banifatemi, p.18.
grounded on the principles which sustain the clean hands doctrine: protection of the integrity of the court (i) and proportionality of punishment (ii).130

i. Protection of integrity of the tribunal would be denied if the case were declared inadmissible

94. The clean hands doctrine is justified by the fact that assisting a party who breached the law would taint the tribunal and endanger its integrity. However, as in this case, allowing for a manifest injustice to go unchallenged by depriving Claimant of the only remedy he has in the present political situation, cuts against the grain of the court as a court of justice.131

95. Respondent in this case has not acted benevolently in shedding light on Claimant’s alleged illegality. It could have done it during the 17 years in which Claimant developed his investment, yet it has chosen this moment, because the ‘clean hands’ defence would allow it to get away with the acute expropriation of Claimant’s investment.

96. The integrity of this Tribunal requires it to admit this claim even if Claimant’s hands indeed were found unclean. Otherwise, the application of the ‘clean hands’ doctrine would run counter to the utmost principle of doing justice.

ii. Claimant would be disproportionately sanctioned if the case were found inadmissible

97. The international law principle of proportionality is reflected in investment arbitration proceedings, by, inter alia, proportionality of punishment.132 This requires that a tribunal performs a weighing exercise, in which the wrongful conduct of both parties is weighed against one another.

98. On the facts of this case, Tribunal ought to weigh on one hand the alleged, unconfirmed corruption charges Claimant is facing, with the gross expropriation, which has led Claimant’s investment to a ruin, committed by Respondent in circumstances of a political conflict. This balancing has to be conducted with the circumstances of the case in mind, especially the fact that allegedly illegal, prompt recommencement of the

130 Llamazon, p.42.
131 Herstein, p.176.
132 Llamazon, p.43.
operation of Rocket Bombs was beneficial not only to Claimant, but also to Respondent and the entire local population of the city of Valhalla. Thanks to an expedited recommencement of the production line people were rehired and the labour market flourished.\textsuperscript{133}.

99. Consequently, for the sake of proportionality, even if the Tribunal were to find Claimant’s hands tainted, the claim remains admissible.

\textsuperscript{133} Facts, ¶11.
PART TWO: MERITS

V. RESPONDENT INDIRECTLY AND UNLAWFULLY EXPROPRIATED CLAIMANT'S INVESTMENT BY INTRODUCING THE EXECUTIVE ORDER

100. Adoption of Executive Order by Respondent resulted in indirect and unlawful expropriation in breach of Art. 4(1) Euroasia BIT.

101. Article 4(1) Euroasia BIT provides that any investment may be neither directly nor indirectly expropriated, or subject to any other measure the effects of which would be tantamount to expropriation in the territory of the host state. Further, it states that the expropriation may only be considered lawful when it is for the public purpose, carried out under due process of law, non-discriminatory and when the host state provides an investor with compensation.

102. In this context, Art. 4(1) Euroasia BIT casts a broad net in defining expropriation, which includes a measure that seemingly does not affect a transfer of property, but interferes with the use of property to an extent where the owner is deprived of its economic benefits.134

103. Here, the implementation of Executive Order by Respondent unmistakably falls within this net, since the adopted measures indirectly expropriated Claimant’s investment. Firstly, Claimant made a legitimate investment which comprises not only shares but also Rocket Bombs contractual rights (A). Secondly, Respondent’s measures substantially and permanently deprived Claimant of enjoyment of his investment (B). Thirdly, Respondent violated Claimant’s legitimate expectations (C). Fourthly, any justification submitted by Respondent based on the dominium of its general regulatory power should be dismissed, since Respondent exceeded its scope (D). Lastly, measures in question constituted an illegal expropriation, since they did not comply with the requirements set forth in Art. 4(1) Euroasia BIT (E).

A. Claimant’s investment comprises shares and Rocket Bombs’ rights

104. Claimant is a sole shareholder of Rocket Bombs and its shares constitute an investment pursuant to Art. 4(1) Euroasia BIT. However, not only shares, but also Rocket Bombs’

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134 CME ¶604; CMS ¶262; Metalclad ¶103; Tecmed, ¶115; Reinish, p.410.
rights deriving from Environmental Licence and arms contracts are an investment in this dispute. All these components were expropriated by Respondent.

105. Protection against expropriation depends on the scope of a definition of the term ‘investment’ under the relevant BIT.\(^{135}\) Article 1 Euroasia BIT provides for a broad definition of an investment, which \textit{comprises every kind of asset directly or indirectly invested by an investor.} It further enumerates shares of companies and rights under contracts or licences. According to Schreuer, such specific language of a BIT allows to avoid limitations on the rights of a shareholder to present his claim for injuries suffered by the company.\(^{136}\)

106. Moreover, a claim in which a shareholder requests compensation for damages resulting from a measure that was directed against the company where it holds shares is widely accepted.\(^{137}\) With respect to dismantling licences that were granted to local companies, tribunals concluded that shareholders have a \textit{separate cause of action} which can be asserted independently from the rights of the company.\(^{138}\) Consequently, the tribunals found that claimants can present their claim with respect to frustrated company’s rights.\(^{139}\)

107. Further, \textit{Continental} and \textit{Telefonica} tribunals developed that in the case of a sole or controlling shareholder, the treaty protection extends to the standards of protection in the BIT with regard to the operation of the company.\(^{140}\) Another interpretation of the BIT, as \textit{Continental} tribunal stated, would be contrary to its object and purpose, and would render most of its provisions useless for investors.\(^{141}\)

108. Further, \textit{Genin} tribunal stated that investment clearly embraces not only shares of stock but also \textit{ownership interest in company that was owned indirectly.}\(^{142}\) \textit{CME} tribunal also agreed that the investment may be shares, other kinds of interests in companies and joint ventures, as well as rights deriving therefrom and other assets.\(^{143}\)

109. Here, Claimant invested in Oceania by purchasing 100% of the shares in the company, Rocket Bombs.\(^{144}\) Then, he also became its president and the sole member of the board

\(^{135}\) Schreuer 3, p.6 Smutny, p.370.
\(^{136}\) Schreuer 3, p.7 Smutny, p.372.
\(^{137}\) Azurix, ¶73; CMS, ¶65; LG&E, ¶60.
\(^{138}\) Azurix, ¶73; CMS, ¶65.
\(^{139}\) LG&E, ¶60.
\(^{140}\) Continental, ¶79; Telefonica, ¶76.
\(^{141}\) Continental, ¶80.
\(^{142}\) Genin, ¶324.
\(^{143}\) CME, ¶¶375,376.
\(^{144}\) Facts, ¶2.
of directors.\textsuperscript{145} Therefore, Claimant operates as a sole and controlling shareholder which, as provided in \textit{Continental} and \textit{Telefónica} cases, should be distinguished from minority shareholders.\textsuperscript{146} In fact, Claimant made every decision concerning further development of Rocket Bombs. He concluded contracts with suppliers and Ministry of Defence and made the company a strong actor on the market.\textsuperscript{147} Finally, obtaining Environmental Licence and meeting all requirements for arms production in Oceania put the seal on Claimant’s efforts.\textsuperscript{148} As a result, Claimant as an investor acquired the entire capital of Rocket Bombs and as such became a \textit{true investor} with respect to company’s rights.\textsuperscript{149}

110. Thus, Claimant’s rights and interest comprises also Rocket Bombs’ contractual rights. Consequently, Claimant is entitled to seek protections under Euroasia BIT in relation to shares, Environmental Licence and arms contracts, which were affected by Executive Order.

\textbf{B. Respondent substantially and permanently deprived Claimant of enjoyment of its investment}

111. To determine whether indirect expropriation occurred, tribunals and scholars give priority to the ‘sole effects’ doctrine.\textsuperscript{150} This doctrine focuses on the effects of a governmental measure rather than purpose behind it.\textsuperscript{151} Therefore, the effects of the adopted measures on an investment are a prerequisite of an indirect expropriation.\textsuperscript{152}

112. Tribunals found that indirect expropriation takes place where the act substantially deprives investor of economic use and enjoyment of its investment.\textsuperscript{153} CMS tribunal asserted, even more precisely, that substantial deprivation of utility occurs if enjoyment of investment was neutralized.\textsuperscript{154} Other tribunals underlined that the impact is substantial if it deprives the investor in whole or in significant part of fundamental

\textsuperscript{145} \textit{Ibid.}
\textsuperscript{146} \textit{Telefónica}, ¶76.
\textsuperscript{147} Facts, ¶9.
\textsuperscript{148} Facts, ¶6.
\textsuperscript{149} Goetz, ¶89.
\textsuperscript{150} CMS, ¶262; Metalclad, ¶103; Pope&Talbot, ¶102; Dolzer/Schreuer, p.101; Reinish, p.444.
\textsuperscript{151} Tokios Tokeles, ¶120; Vivendi II, ¶7.5.20; Reinish, p.440.
\textsuperscript{152} Dolzer/Schreuer, p.101.
\textsuperscript{153} Tecmed, ¶115.
\textsuperscript{154} CMS, ¶262.
rights of ownership, use, enjoyment or management of the business by rendering them ‘essentially useless’.\(^{155}\)

113. Furthermore, the lasting impact of measures on an investment matters.\(^{156}\) As it was stated in *LG&E* and *Tippetts* the rights of an owner may not be limited for a fleeting amount of time.\(^{157}\) Thus, the expropriation occurs when an investor is unable to enjoy its rights for a long-lasting period.

114. Here, Respondent introduced a system of sanctions by adopting Executive Order.\(^{158}\) The sanctions were imposed against the persons engaged in certain sectors of Euroasian economy, including those producing arms for Euroasia.\(^{159}\) The sanctions provided that all property and interests in property of Claimant are *blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in*. The sanctions included a ban on business operations with Claimant, suspending existing contracts with arms suppliers and Minister Defenceless and making future contracts with them illegal.

115. The sanctions were applied to Rocket Bombs and Claimant.\(^{160}\) Rocket Bombs’ business collapsed and the value of its shares plummeted almost to zero.\(^{161}\) To make matters worse, Claimant was precluded from selling its shares for even the little they were worth.\(^{162}\)

116. Further, under Executive Order all contracts with Oceanian companies that contracted with Rocket Bombs were cancelled.\(^{163}\) Consequently, Executive Order put arms production to a standstill.\(^{164}\) As a result, Rocket Bombs defaulted on its obligations towards entities from outside of Oceania.\(^{165}\) Moreover, Environmental Licence became useless, since Claimant is unable to maintain its business in Oceania. Therefore, Claimant could neither conduct its business, nor sell.

117. Furthermore, the measures adopted by Respondent affect Claimant’s investment for a significant period. Here, it is already the second year Claimant is unable to enjoy its investment,\(^{166}\) even though, arbitral tribunals pointed to shorter periods of time as ‘long-

\(^{155}\) AES, ¶14.3.1; Biwater Gauff, ¶452; Metalclad, ¶103; Tecmed, ¶¶115–116.

\(^{156}\) SD Myers, ¶283; Reinish, p.441.

\(^{157}\) LG&E, ¶193; Saghi, ¶3; Tippetts, ¶¶219,225.

\(^{158}\) Facts, ¶16.

\(^{159}\) Facts, ¶17.

\(^{160}\) Ibid.

\(^{161}\) Ibid.

\(^{162}\) Ibid.

\(^{163}\) Ibid.

\(^{164}\) Ibid.

\(^{165}\) Ibid.

\(^{166}\) Facts, ¶16.
lasting’.

Moreover, the state of useless investment is permanent as, given the Oceanian Constitutional Tribunal’s historic deference to the executive branch, setting aside Executive Order is very unlikely. Even with the fair winds it would be an extremely lengthy process.

118. Hence, as Claimant’s rights derived from the BIT were substantially and permanently deprived of their utility, they were subject to expropriation.

C. Respondent failed to observe Claimant’s legitimate expectations

119. Another criterion to establish the existence of indirect expropriation is the extent of interference with investor’s legitimate expectations. Metalclad tribunal, in the context of indirect expropriations, described investor’s legitimate expectations as reasonably-to-be-expected economic benefit.

120. States can create legitimate expectations through contractual representations and the general regulatory framework. However, expectations are assessed from an investor’s point-of-view at the time of making the investment. Thus, even when there is no representation from the host state, the expectations of an investor at the time of making the investment are material in determining indirect expropriation.

121. Firstly, Claimant had legitimate expectations arising out of the fact he obtained Environmental Licence. According to OEA, obtaining the licence guarantees the commencement of arms production for the unlimited period of time. However, OEA provided strict requirements for the production line in arms industry.

122. Due to Claimant’s tremendous efforts, Rocket Bombs obtained Environmental Licence from NEA. Claimant then expected to commence and operate arms production in Oceania for an indefinite period. Consequently, Claimant had a legitimate expectation that Rocket Bombs could operate successfully within the territory of Oceania eternally.

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167 LG&E, ¶193; Tippetts, ¶¶219,225.
168 PO3, ¶6.
169 Ibid.
170 Metalclad, ¶43.
171 Saluka, ¶304; Waste Management, ¶98; Reinish, p.447.
172 Potesta, p.110; Reinisch, p.448.
173 Saluka, ¶304; Tecmed, ¶117.
174 Tecmed, ¶117; Paulsson, pp.148-52.
175 PO3, ¶1.
176 Facts, ¶4.
177 Facts, ¶6.
123. Secondly, based on his legitimate expectations, Claimant made everything in order to resume production in Rocket Bombs and generate necessary income to cover the initial expenses. To gain the necessary financial resources, Claimant turned to Respondent for a subsidy to modernize the production line.\(^{178}\) However, due to the high threshold imposed by OEA, Claimant did not receive such a subsidy.\(^{179}\) Thus, Claimant as a reasonable investor, willing to secure necessary financial resources, managed to obtain a number of contracts for arms production, including contract with Ministry of Defence.\(^{180}\) Expecting to commence arms production in Oceania, he also concluded several contracts with arms suppliers that operated in Oceania.\(^{181}\) Therefore, Claimant’s conduct was reasonable and Respondent should validate Claimant’s expectations in that regard.

124. However, Respondent, after annexation of Fairyland to Euroasia, imposed sanctions on Claimant and Rocket Bombs due to their respectively national and contractual relationship with Euroasia.\(^{182}\)

125. Due to Respondent’s governmental measures Claimant had been prevented from pursuing economic activity which was the sole purpose of his investment. Thus, Executive Order constituted a violation of Claimant’s legitimate expectations. Like in Enron, where the tribunal found that Argentina frustrated investor’s legitimate expectations when it substantially changed the legal framework, under which the investment was decided.\(^{183}\) Here, Claimant could not have foreseen these sweeping legislative changes.

126. Therefore, since Respondent’s system of sanctions brought arms production in Rocket Bombs to a halt, Respondent betrayed Claimant’s legitimate expectations.

**D. Respondent exceeded its general regulatory powers**

127. Respondent argues that its actions fall within the regulatory power of the state, and thus they did not constitute an expropriation.\(^{184}\) Claimant does not dispute that a state has the right to regulate its domestic affairs. Yet, this right is not unlimited. It has definitive

\(^{178}\) Facts, ¶5.
\(^{179}\) Facts, ¶7.
\(^{180}\) Facts, ¶9.
\(^{181}\) Facts, ¶11.
\(^{182}\) Facts, ¶16.
\(^{183}\) Enron, ¶303.
\(^{184}\) Ans.Req.Arb., p.16.
boundaries such as international treaty obligations and proportionality to the pursued aims.

128. Regulatory measures may result in expropriation when a state exceeds its power to regulate.\textsuperscript{185} Following \textit{Tecmed} tribunal, no matter how beneficial the measures are to the whole society, there is no principle which would render regulatory actions excluded from the scope of an applicable BIT.\textsuperscript{186} The aims of states’ actions have to be proportionate to the deprivation of economic rights and the legitimate expectations of investors.\textsuperscript{187}

129. Here, Respondent’s measures amount to expropriation rather than to non-compensable regulatory measures. In particular, Executive Order was adopted without public purpose (i), is disproportionate (ii) and was undertaken in discriminatory manner (iii).

i. The adopted measures fall outside the public benefit

130. The measure adopted by state, in order to be considered as regulatory, has to be made for the public benefit or the national interest.\textsuperscript{188}

131. Respondent’s allegations that Executive Order was implemented to secure international peace and security pursuant to the Art.10 Euroasia BIT are groundless.\textsuperscript{189} This provision comprises an essential security interest clause which does not expressly confer self-judging character.\textsuperscript{190} It exempts only those measures that are required to fulfil obligations with respect to maintenance of international peace and security. However, pursuant to UN Charter, only Security Council is entitled to determine a threat to international peace and security.

132. Additionally, \textit{BP v. Libya} tribunal stated that public purpose does not encompass political retaliation.\textsuperscript{191} Expropriatory measures adopted by a state cannot, therefore, be arbitrary, but need to lead directly to the implementation of legitimate public cause.

133. Firstly, Respondent cannot consider itself as a world peace-maker. Oceania had only common diplomatic relations with Euroasia and Eastasia. Consequently, there was no particular duty on Oceania to issue an Executive Order in response to annexation of

\begin{itemize}
\item \textsuperscript{185} Occidental, ¶89.
\item \textsuperscript{186} Tecmed, ¶¶115,119.
\item \textsuperscript{187} Waste Management, ¶98.
\item \textsuperscript{188} Reinish, p.420; OECD, p.3.
\item \textsuperscript{189} Ans.Req.Arb., p.16.
\item \textsuperscript{190} CMS, ¶373; Enron, ¶336.
\item \textsuperscript{191} BP v. Libya, ¶329.
\end{itemize}
Fairyland. Further, the Security Council has not mandated Oceania to institute these measures. Therefore, the act substantially depriving Claimant of the use of his investment is not covered by the Art.10 Euroasia BIT.

134. Secondly, the requirement imposed by Respondent does not constitute a measure which would benefit Respondent’s population. In contrast, sanctions implemented by Respondent negatively influenced Rocket Bombs which was a company with a high impact on the local community. The sanctions caused suspension of arms production and likely as it was before may led to massive redundancies, leaving a lot of workers from Valhalla without means to make a living.

135. Therefore, these measures were arbitrary, leading Respondent to breach of Art. 4(1) Euroasia BIT.

i. The adopted measures were disproportionate

136. Pope&Talbot tribunal established that the test to distinguish an expropriation from a regulation is whether the interference is sufficiently restrictive that the property has been taken from its owner. Hence, regulatory actions, even if within the scope of a state’s regulatory authority, may still constitute an indirect expropriation when they are disproportionate to the deprivation of investor’s economic rights.

137. In this dispute, Respondent failed to maintain a balance between obligation to protect international security and obligation to promote and protect investments made by Claimant in Oceania.

138. Respondent’s actions were disproportionate to the minimal harms posed. The international security threat related to annexation of Fairyland is debatable. On the contrary, the deprivation imposed upon Claimant and other entities within the reach of Executive Order was substantial. In fact, Executive Order made all Claimant’s contracts void which put an end to any future profits. Claimant lost all practical ability to use its rights as a sole shareholder of Rocket Bombs.

192 PO2, ¶3.
193 Facts, ¶3.
194 Facts, ¶16-17.
195 Pope&Talbot, ¶102.
196 Tecmed, ¶117-122.
197 Facts, ¶16.
198 Facts, ¶17.
199 Ibid.
Moreover, the actions taken by Respondent were political in nature, not regulatory. Respondent alleged that it introduced sanctions against investors from Euroasia as part of an international response to condemn an illegal act of annexation. However, the annexation was bloodless and peaceful, and was an effect of a legitimately held referendum. Thus, strict regulations imposed on investors connected with Euroasia were a political manoeuvre, not a regulatory measure.

Therefore, even if Respondent’s actions fell within the regulatory authority of the state, they would be disproportionate to the harm posed.

iii. Respondent adopted discriminatory measures

A state measure will be discriminatory if it results in an actual injury to the alien with the intention to harm the aggrieved alien. The discriminative intention or effect of the state measures is considered as an important criterion to assert indirect expropriation. Following Eureka and Methanex tribunals, discriminatory measures aimed at excluding foreign control from the host state market, as such, fulfil a key requirement for establishing expropriation.

Tribunals and scholars affirmed that discrimination exists whenever a state accords dissimilar treatment of investors in similar situations, without proper justification. As such, a measure is discriminatory if it has a discriminatory impact on one of several similar parties.

Here, although Executive Order is directed to any person professionally or in other kind related to Euroasia, the collection of actions and reasons behind them show a discriminatory intent towards Claimant.

Firstly, Rocket Bombs was the only company affected by the sanctions in the arms production sector. It resulted in the deterioration of Rocket Bombs’ business and in a rapid decrease in the value of its shares.

Secondly, Respondent has targeted only investors involved in Euroasian economy. The sanctions were not imposed on other countries’ investors. As such, the property of the
similarly placed Oceanian arms production entities has not been blocked. This discriminatory behaviour is in complete violation of Art. 4(1) Euroasia BIT. The treatment received by Claimant and that received by other investors operating in Oceania but not involved with Euroasian economy was different and thus, discriminatory.

146. Setting the requirement concerning relationship with Euroasia, Respondent unreasonably interfered with the autonomy of Claimant as an investor. Actually, only Claimant, whose investment was based on contract with Euroasian Ministry of Defence, was practically affected by Executive Order.

147. Hence, the overall result of Respondent’s regulatory actions was the imposition of a discriminatory regime.

E. **Expropriation was unlawful under Art.4(1) Euroasia BIT**

148. Euroasia BIT follows a typical concept of lawful expropriation. It frames it into four requirements rendering state’s expropriatory actions lawful: public purpose, accordance with the due process of law, non-discrimination and compensation. These requirements are parallel to that determining the scope of regulatory powers of the state (Section V(D)). The use of conjunction ‘and’ literally suggests that any failure to meet at least one of these requirements makes the expropriation unlawful. However, Respondent in this case met none of them.

149. Firstly, Respondent did not adopt its measures for the public benefit. Like in case of regulatory powers, lawful expropriation has to be made for the public benefit or the national interest.\(^{208}\)

150. As it was mentioned above measures taken by Respondent fall outside of the regulatory authority of the state, leading Respondent to breach of Art. 4(1) Euroasia BIT.

151. Secondly, the requirement of conduct under due process of law may be breached not only by judiciary, but also executive bodies.\(^{209}\) Respect for the rule of law constitute a protection against the danger of one group being excessively favoured or burdened. This may underlie the trend to require a fair process of decision-making in the context of the law governing regulation and expropriation.\(^{210}\)

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\(^{208}\) Reinish, p.420; OECD, p.3.

\(^{209}\) Schreuer 4, p.381.

\(^{210}\) Dolzer, p.75.
152. In this dispute, Claimant questions the urgency in passing of Executive Order within 1 month of the annexation. Moreover, by virtue of Executive Order, Respondent took from both Claimant and Rocket Bombs an opportunity to raise claims before national courts against depriving actions taken by Respondent. Consequently, Respondent failed to ensure transparent and predictable legal framework.

153. Thirdly, measures adopted by Respondent had a discriminatory effect upon Claimant’s investment. Rocket Bombs was the only company affected by the sanctions. It resulted in severe deterioration of Rocket Bombs’ business and in a rapid decrease in the value of its shares.

154. Finally, Art. 4(1) Euroasia BIT requires that expropriation occurs against compensation to deprived investors. This requirement is not unique. It is found in BITs, and is seen to be part of customary international law. Past tribunals applied similar requirements. In the present case, Respondent has not compensated Claimant for the significant losses stemming from expropriatory measures.

155. Therefore, Respondent’s measures do not count as lawful expropriation and Respondent has violated Art. 4(1) Euroasia BIT.

VI. CLAIMANT DID NOT CONTRIBUTE TO THE DAMAGE SUFFERED

156. Contributory negligence, as a mean of diluting responsibility, is part of customary international law. Since neither Euroasia BIT nor Eastasia BIT establish special standards of contribution or responsibility for it, determination whether Claimant’s actions amounted to contribution needs to be based on international law. In doing so, Tribunal should rely on ILC Articles. Resp as a supplementary guidance.

157. Contrary to Respondent’s allegations, Claimant did not contribute to the damage suffered by virtue of his own conduct. Claimant merely concluded two contracts for supply of arms with Euroasia in 1998 and 2014. In the meantime in Fairyland, separatist movements were gaining in gravity, eventually leading to military, but bloodless, incorporation of Fairyland to Euroasia. Afterwards, aggravated Respondent issued

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211 Facts, ¶16.
212 Metalclad, ¶99.
213 PO2, ¶6.
214 Facts, ¶16.
216 Continental, ¶276-77; Santa Elena, ¶71; Unglaube, ¶203-05.
Executive Order which included imposition of sanctions on Claimant’s investment. As a result, Claimant’s value of shares decreased to almost zero and the performance of any of Claimant’s contractual obligations were banned.218

158. Thus, Claimant’s actions do not constitute a contribution to the injury, as they do not fulfil the tests set by international law (A). Alternatively, even if his actions could have had an impact on the damage, there is sufficient ground for Respondent to bear sole responsibility for the damage (B). Therefore, regardless of the assessment of Claimant’s actions, in light of international standards, no deduction in damages should be made.

A. Claimant’s actions do not fulfil the requirements of contribution

159. The primary source of international law for the purpose of assessing contribution is customary law219 reflected in Art.39 ILC Articles.Resp. Moreover, this provision was already recognised by at least one arbitration tribunal as supplementary guidance to establishing causation.220

160. Article 39 ILC Articles.Resp expresses the essential element needed to claim contribution: a wilful or negligent act or omission. In this case, the test would require Claimant to have supplied weapons to Euroasia with intention to engage in an international conflict (i) or to have negligently failed to exercise due care in his business conduct while assessing potential hazards deriving from 1998 Contract and 2014 Contract. Additionally, his negligence should have resulted in the breach of his property rights (ii).221 If this test cannot be satisfied, then any allegations of contribution are ungrounded.222 Claimant’s actions demonstrated none of these traits, therefore Claimant does not bear responsibility for the damage.

i. Claimant showed no willingness to expose his entity to sanctions

161. Claimant had no will to escalate the conflict between Eastasia and Euroasia and to bring upon himself sanctions related to this alleged action. His reputedly contributory activity was based on concluding and performing two contracts for supply of weapons with

218 Facts, ¶¶8-11,14-17.
219 LaGrand ¶57,116.
220 JC Lemire ¶156.
221 ILC Report, p.110.
222 El Paso, ¶684.
Euroasia: 1998 and 2014 Contract. All the information possessed by Claimant at the time of conclusion of both contracts indicated that the weapon supply contracts played a role only in consistent modernization process of Euroasian armed forces that had been ongoing for the last two decades. During the time of contracting, he could not have reasonably foreseen that Euroasia would annex Fairyland by military force.

162. The 1998 Contract had been concluded 14 years before the secession referendum and performed before any significant circumstances other than the referendum outcome occurred. There was no sign of a military threat at that time. Therefore, 1998 Contract falls outside of any considerations upon contribution.

163. The second contract was concluded after the Fairyland’s authorities wrote an official letter to Minister Defenceless, asking for an intervention. In response, a parliamentary debate was held in Euroasia. However, this event by no means suggested a military invasion would occur. The date of parliamentary discussions is unknown. Therefore, it cannot be assumed that it took place before the conclusion of the 2014 Contract. These circumstances disallow the conclusion that Claimant willingly supplied Euroasia whilst being aware of the forthcoming military intervention.

164. In conclusion, Claimant did not willingly become a part of an international conflict by supplying Euroasia with support to a military intervention. His Environmental Licence was granted without restrictions on trade partners. Arms production is a specific sector of economy, aimed at securing states’ international interests by delivering the means of potential appeals to force. Rocket Bombs cannot be held liable for the fact that during normal business conduct its client decided to put words into action. Claimant, as a reasonable investor, was merely exercising his property right by contracting. Therefore, Claimant had no will to aggravate the relation between the two states.

ii. Claimant demonstrated no negligence in his business conduct

165. No one, including Claimant, can be required to know of political decisions reached in closed cabinets. Such information is impossible to obtain by legal means and its lack should not put Claimant at disadvantage.

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223 Facts, ¶9.
224 Facts, ¶9,14.
225 Ibid.
166. The standard of care required from an entrepreneur in determining negligence is of basic reasonability. *Gemplus* tribunal analysed the wording of Commentaries. Resp and found that if Claimant did not know or could not have reasonably known of certain facts while performing the alleged contributory action, no lack of due care can be found.\(^{227}\)

167. Furthermore, *MTD* tribunal expressed in detail the standard of due care for reasonable investors asserting that they should be aware of potential business risks and held responsible for decisions which increase those.\(^{228}\)

168. Claimant could not have reasonably known of a potential military annexation during the time of concluding 1998 and 2014 Contract due to the fact that such information is generally not known to the public.

169. Claimant was not obliged to acquire such information, since there was no reliable source from which to obtain it. It is unknown when the publicly transmitted parliamentary debate as to potential use of Euroasian military force took place. Therefore, it cannot be assumed that it happened before the conclusion of 2014 Contract.

170. While Claimant acknowledges the significance of *MTD* tribunal’s reasoning, there are differences between the factual tissue, substantial enough to distinguish the application of *MTD* in this case. Scope of the said risks was situated around ordinary business and markets judgment, not international politics and the results stemming from its instability.\(^{229}\) A strict implication, similar to the use of tracing paper, would be an overextension of the principles on which *MTD* was based.

171. Therefore, there can be no negligence attributed to Claimant’s actions, since the circumstances did not require him to have the knowledge of planned international steps in the Fairyland issue. Alternatively, the standards of care applicable to this case do not impose such duty.

**B. Even if Tribunal finds that Claimant’s actions were contributory, Respondent still bears sole responsibility for the damage**

172. Claimant may not be held liable for his actions, even if contributory, because the alleged contribution was not significant enough to be taken into account when assessing the

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\(^{228}\) *MTD*, ¶178.

\(^{229}\) *MTD*, ¶178.
division of responsibility (i). Additionally, in light of past circumstances he acted reasonably (ii).

i. The alleged contribution was insignificant

173. Responsibility for contributory negligence can be attributed only in cases of material and significant contribution to damage and minor factors cannot be considered legally as an obstacle in the causative chain. *Occidental* tribunal noted:

...it is not any contribution by the injured party to the damage which it has suffered which will trigger a finding of contributory negligence. The contribution must be material and significant. In this regard, the Tribunal has a wide margin of discretion in apportioning fault.\(^{230}\)

174. Hence, the existence of a contributory act and the responsibility for damage caused by it is not permanently linked. Thus, even if Claimant’s actions may seem contributory, the final effect is immaterial and insignificant enough to impose responsibility.

175. Considering that the performance of 2014 Contract lasted only a month, which is 1/72 of what the contract anticipated, there could be no significant contribution. Respondent’s accusation of *continued supply of weapons*\(^{231}\) to Euroasia has no fact-based ground, since no actual deliveries were made or noted neither by Claimant nor Respondent. It is highly doubtful that during the monthly contract performance period Rocket Bombs managed to exceed anywhere beyond production lane. Hence, although Claimant did commence on performance of his contractual obligation, Euroasia did not benefit, while Eastasia did not detriment from Claimant’s actions.

176. The last year of performance of 1998 Contract should not be taken into account since the contract expired before the Euroasian parliament commenced any discussions with regard to the referendum.\(^{232}\)

177. Consequently, since the performance of 2014 Contract did not have any impact on the benefit of Euroasia and detriment of Eastasia, and 1998 Contract does not fall into scope of contribution assessment, the alleged contribution was insignificant to bear Claimant with joint responsibility.

\(^{230}\) *Occidental*, ¶670.

\(^{231}\) Ans.Req.Arb., p.16.

\(^{232}\) Facts, ¶9.
ii. **Claimant acted reasonably**

178. Claimant ought to be found free from responsibility if Tribunal finds that the allegedly contributory action was reasonable. *Wimbledon* tribunal found that it is necessary to consider any contributory fault, but—establishing at the facts of the case—tribunal may withhold from doing so, if the conduct of the victim was reasonable.\(^\text{233}\) Considering the complex international situation, Claimant, with his limited knowledge at that time, acted reasonably and therefore should not be held responsible.

179. Since, during the last year of performance of 1998 Contract there was nothing known aside from the referendum outcome, it was reasonable for Claimant to perform the contract completely rather than to expose his investment to contractual penalties.

180. Claimant was incapable of being reasonably aware of the forthcoming annexation whilst concluding 2014 Contract and of the forthcoming sanctions whilst commencing the performance of this contract. Therefore, he was obliged to keep his contractual duties. Non-performance based on a foggy prediction on the evolution of a complicated relation between two states, with many factors in play, would be an irresponsible path for any entrepreneur.

181. Therefore, if Claimant’s actions were to be treated as contributory, in light of the facts he acted reasonably to the extent of his knowledge and does not bear responsibility for the damage.

\(^{233}\) *Wimbledon*, p.4,31.
PRAYER FOR RELIEF

In light of all the submissions, Claimant respectfully requests Tribunal to find that:

(1) Tribunal has jurisdiction over the dispute as:
   
a) Claimant is an investor pursuant to Euroasia BIT;

b) Claimant was not required to comply with the pre-arbitral steps prior to bringing his claims;

c) Claimant is entitled to be treated no less favourably than Eastasian investors who can more easily refer their disputes with Oceania to arbitration;

d) Claimant has made a protected investment in accordance with the clean hands doctrine;

(2) Respondent expropriated Claimant’s investment by introducing the Executive Order;

(3) Claimant did not contribute to the damage he suffered and thus, Claimant is entitled to compensation.

Respectfully submitted on 19 September 2016.

By and on behalf of Claimant,

Team Klaestad