Ninth Annual
Foreign Direct Investment
Arbitration Moot Court

Buenos Aires
3-6 November 2016

Memorial for Claimant

ICC International Court of Arbitration

On behalf of
Peter Explosive
(Claimant)

Against
Republic of Oceania
(Respondent)
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<td><em>exempli gratia</em>, for example</td>
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<td><em>et seq./seqq.</em></td>
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<tr>
<td>i.e.</td>
<td><em>id est</em>, that is to say</td>
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<td>MFN</td>
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Uncontested Facts  Statement of Uncontested Facts

UNCITRAL  United Nations Commission on International Trade Law

USD  United States Dollar

v  versus

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| MTD v Chile | MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile  
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## Statutes

| **Articles on Nationality of Natural Persons** | Nationality of Natural Persons in relation to the Succession of States, 1999, annex to General Assembly resolution 55/153 (A/RES/55/153) |
| **ICJ Statute** | Statute of the International Court of Justice, annexed to the UN Charter |
| **UN Charter** | Charter of the United Nations, 1945 |
Miscellaneous

General Assembly Resolutions


A/RES/68/262  Resolution adopted by the General Assembly on 27 March 2014 without reference to a Main Committee (A/68/L.39 and Add.1), Territorial integrity of Ukraine, 1 April 2014

Security Council Resolutions


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UN Doc. A/CN.4/546  
Diplomatic Protection  
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UN Doc. A/CN.4/SR.2603  
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Summary record of the 2603rd meeting  
Memorial for Claimant

Statement of Facts

1 The claimant in this case is Peter Explosive (“Claimant”), a national of the Republic of Euroasia (“Euroasia”). Claimant submits a claim for compensation arising out of his investment Rocket Bombs Ltd. (“Rocket Bombs”) located in the Republic of Oceania (“Respondent”, “Oceania”). The claim is based on the Agreement between Respondent and Euroasia for the Promotion and Reciprocal Protection of Investments, signed on 1 January 1995 (“Euroasia BIT”).

2 Prior to Claimant investing in Rocket Bombs in 1998, Rocket Bombs was a decrepit company.¹ Claimant acquired Rocket Bombs, became its sole shareholder and invested substantial resources.² This allowed the company, the community and the entire region to recover and thrive.³

3 To commence arms production, Claimant was required to obtain a license from the National Environment Authority of Oceania (“NEAO”). The Oceanian Environmental Act 1996 required unspecified production line adjustments.⁴ In order to modernize the decrepit company and bring it up to standard, Claimant applied for a subsidy from the Ministry of Environment. In July 1998, Claimant had a meeting with the President of the NEAO.⁵ On 23 July 1998, the NEAO issued an environmental license while the requested subsidy was denied on 3 August 1998.⁶

4 Claimant managed to obtain the required financial resources elsewhere by concluding two large arms supply contracts with the Ministry of Defence of Euroasia. The first contract was concluded on 23 December 1998 for a period of fifteen years with a possibility for renewal.⁷ It enabled Claimant to continuously modernize the production line until it fully complied with all environmental requirements in 2014.⁸ The second contract was concluded in February 2014 for a period of six years.⁹

¹ Uncontested Facts, para.2.
² Uncontested Facts, para.2.
³ Uncontested Facts, para.12.
⁴ PO2, para.1.
⁵ Uncontested Facts, para.6.
⁶ Uncontested Facts, paras.6, 7.
⁷ Uncontested Facts, para.9.
⁸ Uncontested Facts, para.13.
⁹ Uncontested Facts, para.15.
Over the years, Claimant turned Rocket Bombs into a prosperous company and one of the largest arms producers in Oceania.\textsuperscript{10} It was not until Respondent introduced sanctions and froze the company’s as well as Claimant’s personal assets, that Claimant’s investment deteriorated to the point of near destruction.\textsuperscript{11}

The background to Respondent’s sanctions was the reunification of the Fairyland region with Euroasia. Fairyland had historically belonged to Euroasia, but became part of the Republic of Eastasia (“Eastasia”) due to the Peace Treaty of 1918.\textsuperscript{12} On 1 November 2013, the authorities of Fairyland held a referendum on the secession of Fairyland from Eastasia and its reunification with Euroasia. The vast majority of people living in Fairyland, as well as Claimant’s family, are of Euroasian origin.\textsuperscript{13} In the referendum, the Fairylanders decided in favour of secession.\textsuperscript{14} Euroasia officially declared Fairyland a part of Euroasian territory on 23 March 2014.\textsuperscript{15} Eastasia, however, declared the reunification to be illegal and broke off diplomatic relations with Euroasia on 1 April 2014.\textsuperscript{16}

Claimant was originally a national of Eastasia. However, Euroasia passed the Citizenship Act on 1 March 2014, which allowed residents of Fairyland to apply for Euroasian nationality. Claimant applied for and was granted nationality on 23 March 2014.\textsuperscript{17}

The reunification divided the international community. On 1 May 2014, the President of Oceania issued the “Executive Order on Blocking Property of Persons Contributing to the Situation in Eastasia”\textsuperscript{18} (“Executive Order”). The sanctions it contained were extremely far-reaching. They imposed a ban on all business operations with affected persons. Moreover, they suspended existing contracts, made future contracts with affected persons illegal and prohibited them from selling their companies. The Executive Order \textit{de facto} deprived Claimant of any meaningful use of his investment.\textsuperscript{19}

\begin{flushright}
\begin{footnotesize}
\begin{enumerate}
\item Uncontested Facts, para.12.
\item Uncontested Facts, para.17.
\item Uncontested Facts, para.14; PO2, para.4.
\item Uncontested Facts, para.14.
\item Uncontested Facts, para.14.
\item Uncontested Facts, para.14.
\item Uncontested Facts, para.14.
\item PO2, para.4.
\item Uncontested Facts, paras.16, 17.
\item Uncontested Facts, para.17.
\end{enumerate}
\end{footnotesize}
\end{flushright}
After the sanctions were introduced on 5 May 2015, Claimant was informed that he was under investigation with regard to the environmental license obtained on 23 July 1998 for Rocket Bombs. The President of the NEAO had been convicted of bribery and, in exchange for a non-prosecution agreement, expressed his willingness to testify against Claimant. On 23 June 2015, Oceania initiated criminal proceedings against Claimant. Fifteen months of investigation have not yielded any evidence against Claimant. Respondent has not provided a witness statement by the President of the NEAO or any other direct evidence of Claimant’s alleged illegal conduct.

20 Uncontested Facts, para.19.
21 PO2, para.5.
22 Uncontested Facts, para.19.
Arguments

The core issue of this dispute is whether Respondent’s far-reaching sanctions violated the Euroasia BIT. Respondent, however, tries to hinder the Tribunal from reaching and deciding on this core issue by raising a colourful array of groundless objections and vague defences.

Respondent’s objections to the Tribunal’s jurisdiction will be addressed and refuted in the first part of the Memorandum (Issue 1 A, B and C). In the second part, Claimant will refute Respondent’s allegations of illegality, show that the sanctions unlawfully expropriated Claimant and address Respondent’s unspecified contention that Claimant contributed to the damage suffered (Issue 2 A, B and C).

Issue 1: Arguments on the Tribunal’s jurisdiction

Respondent objects to the Tribunal’s jurisdiction on the basis that Claimant should claim under the Eastasia BIT instead of the Euroasia BIT and that Claimant should submit the dispute to the local courts for two years. Both arguments are clear examples of dilatory tactics.

Respondent’s objection to Claimant’s Euroasian nationality is a mere pretext. If Claimant had to base his claim on the Eastasia BIT, Claimant could claim under an identical set of substantive guarantees as the Euroasia BIT. The Eastasia BIT includes an identical guarantee of compensation for expropriation.23 It would not benefit Respondent’s case and would not have any impact on Respondent’s obligation to pay damages if Claimant had to base his claim on the Eastasia BIT instead of the Euroasia BIT. Thus, Respondent’s objection to Claimant’s Euroasian nationality does nothing but gain Respondent more time.

Likewise, submitting this dispute to the local courts for two years and then going back to arbitration would have no other effect but to delay its resolution. It is undisputed between the Parties that it would take at least three to four years for the Oceanian courts to set the Executive Order aside.24 Thus, a resolution of the dispute within two years in the local courts is simply impossible. Forcing Claimant to wait through two years of litigation would mean nothing but lost time.

23 ExC1, p.42, ExR1, p.47.
24 PO3, para.6.
Claimant requests that the Tribunal reject these baseless arguments and find that it has jurisdiction, because Claimant is a Euroasian investor (A) and was not required to submit the dispute to Oceanian courts prior to this arbitration (B). In any event, the MFN clause in the Euroasia BIT allows Claimant to rely on the dispute settlement provision of the Eastasia BIT, which does not contain a local courts requirement (C).

A The Tribunal has jurisdiction under the Euroasia BIT because Claimant is an investor according to Article 1(2) Euroasia BIT

Respondent’s objection to the Tribunal’s jurisdiction ratione personae is ill-founded. Claimant brings his claim for compensation as a natural person and a Euroasian national under the Euroasia BIT. Claimant obtained Euroasian nationality on 23 March 2014 under the Euroasian Citizenship Act, which allows all residents of Fairyland to apply for citizenship.\(^\text{25}\)

Euroasia has the right to extend nationality to its diaspora within Fairyland. The only relevant limitation to that autonomy is that Euroasia may not violate international law in the act of granting nationality.\(^\text{26}\)

Claimant submits that he is a Euroasian national under Euroasian law and therefore an investor under the Euroasia BIT (1). Euroasia’s granting of nationality to Claimant under the Citizenship Act did not violate international law (2). Even if Claimant’s Euroasian nationality did not follow from the Euroasian Citizenship Act, Claimant is necessarily a Euroasian national according to the law on state succession (3).

1 Claimant is a Euroasian national pursuant to Euroasian law

Claimant is an investor according to Euroasian law as required by Article 1(2)(a) Euroasia BIT.\(^\text{27}\) An “investor” is “any natural […] person of one Contracting Party who invests in the territory of the other Contracting Party […].”\(^\text{28}\) The term “natural person” is defined as “any natural person having the nationality of either Contracting Party in accordance with its laws.”\(^\text{29}\)

\(^{25}\) PO2, para.4.
\(^{26}\) Articles on Nationality of Natural Persons, preamble (“Nationality is essentially governed by internal law within the limits set by international law”); UN Doc. A/CN.4/SR.2603, Mr. Economides, para.67.
\(^{27}\) ExC1, p.40.
\(^{28}\) ExC1, p.40.
\(^{29}\) ExC1, p.40, Article 1(2)(a) (emphasis added).
A natural person’s nationality under the BIT is not determined according to his or her place of residence. Therefore, Claimant emphasises that the change in territory with regard to Fairyland, where Claimant resides, has no impact on the determination of the Tribunal’s jurisdiction \textit{ratione personae}.

Claimant was a Euroasian national pursuant to Euroasian law on both relevant dates, the date of the Request for Arbitration and the date of the registration of the Request for Arbitration.\textsuperscript{30} Claimant obtained Euroasian nationality when he applied for and was granted that nationality under the Euroasian Citizenship Act on 23 March 2014.

Respondent’s potential counterargument – that Eastasia refused to accept Claimant’s renunciation of Eastasian citizenship due to formal errors\textsuperscript{31} – should be summarily rejected. Each state has the right to determine who are its nationals.\textsuperscript{32} Thus, Eastasia’s application of its own law has no bearing on Euroasia’s decision to grant nationality in accordance with its laws.

Therefore, pursuant to Article 1(2)(a) Euroasian BIT, Claimant is an investor because he was a Euroasian national on 11 September 2015 when the Request for Arbitration was made and registered.

2 \textbf{Euroasia’s grant of nationality to Claimant is in accord with all relevant principles of international law}

Respondent might argue that it is under a duty not to recognise Claimant’s change in nationality and that the Tribunal must take this duty into account when determining Claimant’s nationality. Such duty of non-recognition, Respondent might contend, arises because Euroasia allegedly used force in connection with the act of granting nationality to Fairylanders. The duty of non-recognition would find a putative legal basis in the law of state responsibility, which can create an obligation for states not to recognise as lawful the consequences of internationally illegal conduct.

The foregoing arguments, however, do not affect this Tribunal’s jurisdiction.

\textsuperscript{30} Compare Soufraki v Arab Emirates, para.53.
\textsuperscript{31} PO2, para.4; PO3, para.2.
\textsuperscript{32} Articles on Nationality of Natural Persons, \textit{preamble} (“Nationality is essentially governed by internal law within the limits set by international law”).
First, the Tribunal should not determine the reunification of Fairyland with Euroasia to be illegal absent a resolution of the UN Security Council (2.1). Second, even if a UN resolution was not necessary, neither the reunification nor Euroasia’s grant of nationality to Claimant violated international law (2.2). Third, even if this Tribunal found that Respondent was under a duty not to recognize Euroasia’s title to Fairyland, this duty does not affect the Tribunal’s determination of Claimant’s nationality (2.3).

2.1 The UN Security Council has not issued a resolution concerning Fairyland

If Euroasia’s acceptance of Fairyland’s request for assistance constituted an illegal use of force, it would be the UN Security Council’s responsibility to make that determination. Claimant recognises that states do have a duty to refrain from recognising the legality of international situations if condemned by the Security Council as threats to international peace and security. In other words, the explicit determination by the Security Council that an act is illegal may give rise to a duty of non-recognition for other states.

However, the UN Security Council has not been able to agree on any resolution with respect to Fairyland. It is also significant to note that not even the UN General Assembly has expressed any concern with respect to Fairyland. This stands in stark contrast to Russia’s annexation of Crimea, which resulted in a UN resolution expressing specific concerns in that case.

The Tribunal should not go to such lengths that it determines the situation to be illegal when the international community cannot decide on the illegality of the situation.

2.2 Neither the reunification nor Euroasia’s grant of nationality to Claimant violated international law

Assuming that the lack of a UN Security Council resolution was not material, Claimant submits that the Act was passed in conformity with international law.

33 UN Charter, Article 24 ("primary responsibility for the maintenance of international peace and security").
34 See S/RES/541 (1983) (calling on states not to recognise a “Turkish Republic of North Cyprus”); Pert, The “Duty” of Non-recognition in Contemporary International Law, p.15; also implicitly applied in East Timor (Portugal v Australia), paras.30, 31, 34.
35 PO2, para.3.
36 A/RES/68/262.
First, the Citizenship Act was not an intervention in Eastasian political affairs. The Citizenship Act gave Fairylanders the ability to apply for Euroasian nationality, but it did not oblige any person to become Euroasian. Consequently, Euroasian law has no influence on Eastasia’s political decisions within its territory. As stated by the ICJ, it is “[t]he element of coercion, which defines, and indeed forms the very essence of, prohibited intervention”. The Citizenship Act did not have the intent or the effect of coercing Eastasia.

Second, and in any event, the Citizenship Act could not have been a coercive action with respect to Eastasia once Fairyland became independent from Eastasia.

The crucial point is that Euroasia did not send military forces into Fairyland – or interfere in Fairyland in any way – prior to or during the referendum in November 2013 that led to Fairyland’s declaration of independence. Euroasia followed Fairyland’s invitation only after the referendum.

In November 2013, Fairyland had become an independent, sovereign state through its declaration of independence. International law does not prohibit declarations of independence. Such a prohibition is also not implied in the principle of territorial integrity, since the scope of this principle is “confined to the sphere of relations between states”.

Having achieved independence, the democratically elected government of Fairyland had the authority to invite Euroasia to assist with the realization of the mandate of the Fairyland referendum.

Thus, when Euroasia accepted Fairyland’s decision to become part of Euroasia on 23 March 2014, the presence of the Euroasian military in Fairyland upon invitation of the government was not a coercive action.

In sum, the Citizenship Act did not violate international law because it only extended a choice of nationality to the people of Fairyland after Fairyland had declared independence through a democratic and self-initiated referendum.

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37 Nicaragua v USA, para.205.
38 For the right of self-determination see A/RES/1514(XV); UN Doc. A/51/18 (1996).
39 ICJ Advisory Opinion, Kosovo, para.79; Crawford, The Creation of States in International Law, p.389.
40 ICJ Advisory Opinion, Kosovo, para.80.
2.3 Even if Respondent was under a duty of non-recognition, this does not affect the Tribunal’s determination of Claimant’s nationality for the purpose of this proceeding

Even if Respondent had a duty not to recognise the change in Eastasian territory, the duty is not a principle applicable to the determination of Claimant’s nationality in this proceeding.

The content of the obligation of non-recognition is essentially political in nature. As set out by the ICJ in the Namibia Advisory Opinion, other states are not to enter into diplomatic or economic relationships and must refrain from any other dealings which involve active intergovernmental cooperation with regard to occupied territory. In essence, the duty of non-recognition is merely the obligation for a state not to recognise another state’s legal title to territory in its dealings with that state.

This duty of Respondent would not be affected in case the Tribunal found Claimant to be a Euroasian investor. The issue of nationality in the context of this investment dispute does not involve any active intergovernmental cooperation by Respondent with regard to Fairyland. The Tribunal is not making a determination concerning the territorial status of Fairyland which would in any event be outside the scope of its jurisdiction. Likewise, the tribunal in Corn Products International v Mexico considered

“that, in the context of such a [NAFTA] claim, there is no room for a defence based upon the alleged wrongdoing not of the claimant but of its State of nationality.”

Oceania’s potential duty of non-recognition could at most amount to a refusal of the territorial status of Fairyland, and this obligation does not conflict with Oceania’s obligation to compensate Claimant as a Euroasian national for its unlawful expropriation.

3 Even if Claimant’s Euroasian nationality did not follow from Euroasian law, Claimant is necessarily a Euroasian national according to the law on state succession

Claimant’s Euroasian nationality follows alternatively from the Rules on Succession of States. Respondent may argue that Claimant is not a national under the Citizenship Act because the Euroasian Citizenship Act prohibits dual nationality and Eastasia does not accept Claimant’s

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41 ICJ Advisory Opinion, Namibia, para.126.
43 Corn Products International v Mexico, para.161.
renunciation of his Eastasian citizenship due to formal errors.\textsuperscript{44} Claimant maintains that it is Euroasia’s autonomy to determine how its own law on nationality should be applied. However, in case the Tribunal has concerns, Claimants submits an alternative argument based on the Rules on Succession of States.

Contrary to what Respondent argues\textsuperscript{45}, the Articles on Nationality of Natural Persons in Relation to the Succession of States, which represent customary international law\textsuperscript{46}, are applicable. The reunification of Fairyland with Euroasia falls under the definition of “succession” contained in Article 2:

“‘succession of States’ means the replacement of one State by another in the responsibility for the international relations of territory; […].”

Eastasia is replaced by Euroasia in the responsibility for the international relations of Fairyland.

Article 5 of the same articles provides that:

“Subject to the provisions of the present articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession.”\textsuperscript{47}

Since Claimant is a resident of Fairyland, he is presumed to have acquired Euroasian nationality on 23 March 2014, the date of the reunification of Fairyland with Euroasia.

Respondent might assert that Article 3 of the above quoted articles serves to rebut the presumption of Euroasian nationality in this case. Article 3 states:

“The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.”

However, the succession in the case at hand conformed with international law because the legitimate and effective government of Fairyland sought reunification with Euroasia in fulfilment of the people’s democratic self-determination.\textsuperscript{48}

\textsuperscript{44} PO2, para.4; PO3, para.2.
\textsuperscript{45} ARfA, p.15.
\textsuperscript{46} See UN Doc. A/CN.4/497, para.14 (“provisions reflecting customary rules, hence those contained in part I of the draft articles”).
\textsuperscript{47} Emphasis added.
\textsuperscript{48} See above paras.30 et seqq.
In conclusion, Claimant is a Euroasian national as required by Article 1(2) Euroasia BIT because he obtained his nationality in accordance with Euroasian law and there are no applicable limits to Euroasia’s autonomy imposed by customary international law. Alternatively, the rules on State succession yield the same result as they presume that a natural person assumes the nationality of the successor state, in this case Euroasia. Therefore, the Tribunal has jurisdiction *ratione personae*.

**B  Claimant complied with the pre-arbitral steps in Article 9 Euroasia BIT**

Claimant has properly submitted this dispute to arbitration. Respondent’s second objection to this arbitration – that Claimant did not submit his claim for compensation to Oceanian courts – should therefore be rejected.

First, Claimant attempted to settle his dispute with Respondent amicably (1). Second, Claimant was not required to resort to the Oceanian courts for twenty-four months before commencing arbitration (2). Even if Article 9 Euroasia BIT generally contained such a requirement, it should not apply in the present case because Claimant could not obtain relief through Oceanian courts (3).

1 **Claimant attempted to settle this dispute amicably in accordance with Article 9(1) Euroasia BIT**

Article 9(1) Euroasia BIT requires that the dispute “*shall, to the extent possible, be settled through amicable consultations*”. Claimant complied with the requirements of Article 9(1) Euroasia BIT by notifying the relevant Ministries on 23 February 2015 of this dispute and his intent to pursue arbitration as necessary. To date, Respondent has remained silent.

2 **Article 9(2) Euroasia BIT does not require Claimant to submit his claim to Oceanian courts**

Claimant submits that Article 9(2) Euroasia BIT is not a mandatory pre-arbitral step. Rather it is an option that either the host state or the investor may choose as an alternative to arbitration.

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49 ExCl, p.44.
50 PO3, para.4.
51 RfA, p.4.
In other words, the State Parties have consented to two alternatives: First, where either party files a claim in the host state’s courts, those courts must be given twenty-four months to resolve the case. Second, where the investor submits the claim to arbitration, he is given a choice of forum.

Article 9 Euroasia BIT reads in the relevant parts:

“2. If the dispute cannot be settled amicably, it may be submitted to the competent judicial or administrative courts of the Contracting Party in whose territory the investment is made.

3. Where, after twenty four months from the date of the notice on the commencement of proceedings before the courts mentioned in paragraph 2 above, the dispute between an investor and one of the Contracting Parties has not been resolved, it may be referred to international arbitration.

4. From the time arbitration proceedings are commenced, each party to the dispute shall take any such measures as may be necessary to dismiss any pending court proceedings.

5. Where the dispute is submitted to international arbitration, the investor may choose to refer the dispute either to: [...]”

Article 9(2) clearly states that a dispute “may” be submitted to local courts. This is an option given to both the state party and the investor. Article 9(3) then contains a limitation on the investor’s freedom to proceed to arbitration in that case: the dispute must remain in the courts for two years. Only then may the investor submit the case to arbitration.

The policy behind this “limited option” is clear: Where the investor or the state has a particular interest in the dispute being brought before the national courts, the BIT grants this option. An investor may prefer the local courts due to potentially lower costs involved in litigation or in order to safeguard its relationship with the host state. On the other hand, the state may have an interest in obtaining a decision from its own courts in order to harmonise the state’s treaty obligations and its domestic law.

If either party chooses the local courts, the court should have a fair opportunity to resolve the dispute. The courts should not waste time and resources on disputes which are withdrawn before the court reaches a decision. Twenty-four months is a reasonable amount of time to

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52 ExC1, p.44.
53 See for average costs and duration of trials in OECD member states: OECD Study, pp.3, 4, 11; For average costs and duration in arbitration see LCIA, Arbitration and ADR worldwide, and ICC (for ICC: Salsas, Durée et coûts d’une procédure d’arbitrage international: le contrôle des coûts en amont).
54 ICS v Argentina, fn.298.
decide a standard administrative dispute in the **first instance**.\(^{55}\) If, however, neither party chooses the local courts – as in the present case – this policy is of no relevance and the investor is free to proceed directly to arbitration.

If the Contracting Parties intended Article 9(2) as a requirement and not as an option, they would have used different language. Indeed, some BITs do contain clear language expressing the mandatory nature of certain steps. For example, in the case of *ICS v Argentina*, the tribunal found that the phrase “**shall be submitted...to the decision of the competent tribunal [...]**” required mandatory resort to local courts.\(^{56}\)

The tribunal in *Daimler v Argentina* came to a similar conclusion:

> “This language makes clear that the disputing parties’ dispute resolution options are tightly circumscribed under the Treaty. The parties **shall** – not may, but **shall** – comply with the provisions as set down.”\(^{57}\)

Another example can be found in *Garanti v Turkmenistan*: “The use of the auxiliary verb ‘shall’ makes that statement mandatory.”\(^{58}\) This interpretation is confirmed by the scholars Gary Born and Marija Scekic:

> “As in other contexts, the use of imperative terms, such as ‘shall’ or ‘must’, has sometimes been held to be consistent with a mandatory obligation; in contrast, terms such as ‘can’, ‘may’, or ‘should’ are typically non-mandatory.”\(^{59}\)

By contrast, the use of the term “may” in the Euroasia BIT clearly expresses a voluntary choice. This finds support in the fact that in Article 9(1), 9(7) and 9(8) Euroasia BIT, the Contracting Parties used a different formulation. Article 9(1) states: “Any dispute [...] **shall** [...] be settled in an amicable consultations.”\(^{60}\) The Parties did not use the term “shall” or a similar term in Article 9(3) Euroasia BIT which demonstrates that they intended it to be assessed differently. Submission to the local courts is simply an option open to either Party.

Consequently, Claimant was not required to submit this dispute to local courts.

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55 Compare OECD Study, p.11.
56 *ICS v Argentina*, para.247 (emphasis added).
57 *Daimler v Argentina*, para.181 (emphasis added).
58 *Garanti v Turkmenistan*, para.28.
59 Born/Scekic, Pre-Arbitration Procedural Requirements, p.238.
60 ExC1, p.44 (emphasis added).
3 Submitting the dispute to Oceanian courts would have been futile

Claimant was alternatively not required to go to the Oceanian courts in this specific case because the effort would have been futile. There was no reasonable possibility for Claimant to resolve the dispute within the twenty-four months as prescribed by Article 9(2) Euroasia BIT.

Requiring an investor to submit a dispute to the courts for two years, where it is clear that the dispute cannot be resolved in that time frame, would be a mere waste of time and resources. Several tribunals have found that local courts requirements should be read in such way that no investor is forced to seek an illusory resolution. This is also in line with the historical context of the clause as the futility exception is well established in the law on diplomatic protection, which was the predecessor regime to BITs.

In the present case, resolution of the dispute within the twenty-four month period was illusory. In order to have only the President’s Executive Order set aside, Claimant would have to spend at least three to four years before the Constitutional Tribunal of Oceania. Moreover, a fair hearing before the Constitutional Tribunal of Oceania would be doubtful. It historically defers to Oceania’s executive branch, so that it is very likely that the Constitutional Tribunal would refuse to impugn an Order by the President, the highest executive organ of the state.

Thus, Claimant had no reasonable chance to resolve the dispute in Oceanian Courts within twenty-four months. Consequently, Claimant can invoke the implied futility exception to the general rule imposed by Article 9(2) Euroasia BIT.

C In the alternative, Claimant can rely on the procedural provisions in the Eastasia BIT pursuant to the MFN clause in Article 3 Euroasia BIT

Even if Article 9 Euroasia BIT in principle obliged Claimant to submit his claim to Oceanian courts for twenty-four months, he is still entitled to proceed directly to arbitration. The dispute resolution clause in Article 8 Eastasia BIT does not require any steps prior to the commencement of arbitration apart from the amicable settlement clause. Claimant can import

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61 Compare ST-AD v Bulgaria, paras.364, 365; Ambiente Ufficio v Argentina para.599.
62 Ambiente Ufficio v Argentina, para.599; Amerasinghe, Local remedies in International Law, p.113.
63 PO3, para.6.
64 PO3, para.6.
An interpretation of the MFN clause in Article 3 Euroasia BIT according to Article 31 Vienna Convention on the Law of Treaties (“VCLT”) shows that it is sufficiently broad to extend to dispute settlement provisions of the treaty (1). Applying the clause in this manner would also align with investment law jurisprudence (2).

1 The MFN clause in the Euroasia BIT is sufficiently broad to extend to dispute settlement provisions

Article 3 Euroasia BIT covers both substantive guarantees and procedural matters. It provides that:

“Each contracting Party shall (...) accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments and to such other investment matters regulated by this Agreement a treatment that is no less favourable than that accorded to its own investors or investors from third-party countries.”

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Article 31 VCLT requires a treaty to be interpreted in accordance with the ordinary meaning of the mentioned terms in their context and considering their object and purpose.

The ordinary meaning of the terms “treatment” and “income and activities related to such investments and to such other investment matters regulated by this Agreement” includes the pre-arbitral procedure regulated by the BIT (1.1). This finding is corroborated by the provision’s context (1.2) and accords with the treaty’s object and purpose as expressed in the preamble (1.3).

1.1 The ordinary meaning of the terms in Article 3 Euroasia BIT includes the procedural treatment of investment matters

The ordinary meaning of “treatment” of “activities related to such investments” or at least of “other investment matters regulated by this Agreement” includes dispute settlement provisions, in particular relating to the pre-arbitral procedure.

65 Emphasis added.
First, the term “treatment” is

“a broad term which […] refers to the legal regime that applies to investments once they have been admitted by the host State.”

Dispute settlement mechanisms are part of the legal regime that applies to investments. Procedural requirements are aspects of the investment’s treatment which are no less important than substantive standards of expropriation or fair and equitable treatment. This has been confirmed manifold. The tribunal in Siemens v Argentina for instance found:

“that the Treaty itself […] has as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.”

This interpretation is also supported by the historical context of MFN clauses. The historical context of a provision may serve as valuable guidance when determining the ordinary meaning of a term at the time the provision was drafted. The UK Model BIT from 1991 for instance confirms the UK’s broad understanding of the term “treatment”. It states:

“For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.”

Articles 1 to 11 of the Model BIT contain both substantive and procedural guarantees. While of course the UK Model BIT is not conclusive for the Euroasia BIT, it may serve as an indication of how states in the early 1990s understood the term, namely as including procedural treatment.

Second, Article 3 Euroasia BIT refers to the objects of “treatment” as not only accorded “to investments” but also to “activities related to such investment” and to “other investment matters regulated by this Agreement”. Since the Euroasia BIT only deals with investment matters, such “other matters” regulated by this Agreement can be equated to “all matters” regulated by this agreement. There are no non-investment matters in the Euroasia BIT.

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66 Dolzer/Stevens, Bilateral Investment Treaties, p.58.; also compare the opinion of Charles N. Brower in Daimler v Argentina, para.20.; Impregilo v Argentina, para.99; RosInvestCo v Russia, para.132.
67 Maffezini v Argentina, para.99; Hochtief v Argentina, para.25; Suez and InterAguas v Argentina, para.67; Siemens v Argentina, para.102.
68 Siemens v Argentina, para.102 (emphasis added).
69 Daimler v Argentina, para.220; ICS v Argentina, para.289.
70 UK Model BIT 1991, Article 3(3) (emphasis added).
Tribunals faced with equivalent “all matter”-clauses, for example in the Argentina-Spain BIT, have almost unanimously decided that the clauses include dispute settlement.\(^{71}\)

For example, the *Suez and InterAguas* tribunal stated:

“[…] the Tribunal finds that the ordinary meaning of that provision is that matters relating to dispute settlement are included within the term “all matters” and that therefore InterAguas and AGBAR may take advantage of the more favorable treatment […] with respect to dispute settlement”.\(^{72}\)

Alternatively, the term “treatment” in the Euroasia BIT refers not only to “other investments matters”, but also to “activities related to such investments”. This latter category is also broad enough to include dispute settlement.

The tribunal in *Hochtief v Argentina* considered similar language in Article 3(2) Germany-Argentina BIT, which states:

“(2) Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State.”

With regard to that provision the tribunal considered

“that there can be no doubt that the settlement of disputes is an “activity in connection with investments” [...]”.\(^{73}\)

In summary, the ordinary meaning of the terms in Article 3 Euroasia BIT encompasses dispute settlement.

### 1.2 The context of Article 3 Euroasia BIT supports Claimant’s interpretation

The MFN clause’s context supports the conclusion that it includes dispute settlement provisions. Article 3(2) Euroasia BIT contains a list of explicit exceptions, e.g. taxation measures, which are not covered by the MFN guarantee. According to the principle of *expressio unius est exclusio alterius*,\(^{74}\) the term “treatment” in Article 3(1) Euroasia BIT includes all manner of treatment not explicitly excluded in Article 3(2) Euroasia BIT. Dispute settlement is not among the items in Article 3(2) Euroasia BIT. Thus, it should be assumed to be covered by the term “treatment”.

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\(^{71}\) Impregilo v Argentina, para.99; Suez and InterAguas v Argentina, para.59; Teinver v Argentina, para.160.

\(^{72}\) Suez and InterAguas v Argentina, para.59 (emphasis added).

\(^{73}\) Hochtief v Argentina, para.73.

\(^{74}\) “The explicit mentioning of one item excludes all others”; compare National Grid v Argentina, para.82.
The tribunal in *Suez and InterAguas v Argentina* came to the same conclusion examining the Argentina-Spain BIT:

“As noted above, the use of the expression “in all matters” when *coupled with a list of specific exceptions* that does not include dispute resolution, leaves no doubt that dispute resolution is covered by the MFN clause.”

The context of the clause therefore confirms that the exclusion of dispute settlement from the scope of the MFN clause was not the Parties’ intention.

1.3 **The object and purpose of the Euroasia BIT points to an inclusion of dispute settlement in the scope of the MFN clause**

Finally, a look at the object and purpose of the BIT – as required by Article 31 VCLT – also indicates that the MFN clause is meant to encompass dispute settlement. The object and purpose of any BIT is the protection and promotion of investments. The preamble of the Euroasia BIT specifies this purpose further and explicitly recognises the intent to provide

“effective means of asserting claims and enforcing rights enforcing rights with respect to investments under national law as well as through international arbitration.”

The object and purpose of the Euroasia BIT – and the MFN clause – would be best served by a consistent application of the MFN clause to all forms of treatment afforded by the host state to diverse foreign investors. An interpretation including dispute settlement gives the investor an effective means to assert his claim while guaranteeing consistent treatment of all investors and ensuring confidence in the Oceanian investment climate. Claimant’s interpretation is thus in accordance with the object and purpose of the Euroasia BIT as expressed in the preamble.

2 **Eliminating the local courts requirement would align with investment arbitration awards**

An application of the MFN clause would rest upon a well-established line of case law while respecting the established limits on the scope of MFN clauses.

In the cases *Maffezini v Spain, Siemens v Argentina, Suez and InterAguas v Argentina* and *Teinver v Argentina* the tribunals decided on the extension of the MFN clause to the eighteen months in local courts requirement, which is comparable to the twenty-four month period

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75 *Suez and InterAguas v Argentina*, para.63 (emphasis added).

76 ExC1, p.40.
prescribed in the Euroasia BIT. Tribunals found that the MFN clause could be used to eliminate the eighteen month waiting period.77

Claimant notes that there is a line of decisions rejecting an application of MFN clauses to certain procedural provisions. However, careful examination shows that none of these decisions applies to the present case. The tribunals that have rejected the use of an MFN clause to circumvent certain BIT requirements were uniformly faced with excessive requests that would have essentially created the host state’s consent to arbitrate.85

Famously, the claimants in Plama v Bulgaria and Salini v Jordan attempted to use the MFN clause to submit the dispute to ICSID arbitration although the treaty containing the MFN clause did not permit ICSID arbitration.78 Both tribunals found that an MFN clause cannot be used to establish ICSID jurisdiction where there is no consent to such arbitration in the basic treaty, i.e. the BIT which contained the MFN clause.79

In Telenor v Hungary, the claimant tried to use an MFN clause to extend the tribunal’s jurisdiction to types of investment disputes that were not included under the basic treaty.80 The basic treaty in that case, the Norway-Hungary BIT limited a tribunal’s jurisdiction to expropriation disputes.81 Therefore, the tribunal did not permit the claimant to use the MFN clause to arbitrate a fair and equitable treatment dispute as this “would subvert the common intention of Hungary and Norway”.82

The situation in the present case can be clearly distinguished from the cases discussed. The local courts clause in the Euroasia BIT merely delays the commencement of an ICC arbitration to which both parties unequivocally consented. Claimant neither tries to replace or recreate this consent through an MFN clause. His request does not touch upon the State Parties’ decision to give this ICC Tribunal jurisdiction. Nor does Claimant seek arbitration of a dispute that the State Parties specifically excluded from arbitration.87

All Claimant asks for is permission to continue this proceeding without having to submit his claim to an Oceanian court for two years. Thus, the present case can be clearly distinguished from the cases refusing to apply an MFN clause.

77 Compare Maffezini v Spain, para.64; Siemens v Argentina, para.103; Suez and InterAguas v Argentina, para.66; Teinver v Argentina, paras.182, 333.
79 Plama v Bulgaria, para.227; Salini v Jordan, para.119.
80 Telenor v Hungary, paras.47(1), 52.
81 Norway-Hungary BIT, Article 11.
82 Telenor v Hungary, para.100.
With respect to the proper limitations of an MFN clause, Respondent may argue certain exceptions announced by the tribunal in *Maffezini v Spain*. This argument would be misplaced because the exceptions listed in the *Maffezini* case are not given in this case. The tribunal in *Maffezini* identified four exceptions to the application of an MFN clause to procedural provisions, naming them “public policy considerations”. According to the tribunal, the application of MFN clauses must be limited in some cases as it should not be possible

“to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question.”

The core issue is again the consent to arbitrate. The four “Maffezini exceptions” are fork-in-the-road clauses, clauses providing for one particular arbitration forum, exhaustion of local remedies and provisions of highly institutionalized systems of arbitration. Article 9 Euroasia BIT does not contain any of these provisions and the concerns raised by the foregoing exceptions are not implicated in this case. The waiting period in the case at hand cannot be equated to an exhaustion of local remedies clause. An exhaustion of local remedies clause requires the submission of a claim to each instance in domestic courts. Article 9 Euroasia BIT merely requires a twenty-four month waiting period. Consequently, the *Maffezini* exceptions are of no importance to this case. Thus, an application of the MFN clause would rest upon a well-established line of case law while respecting the established limits on the scope of MFN clauses.

Claimant is therefore entitled to proceed with this arbitration in accord with the standard of treatment that is imported from Article 8 Eastasia BIT by operation of Article 3 Euroasia BIT.

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83 *Maffezini v Spain*, para.62 (emphasis added).
84 *Maffezini v Spain*, para.63.
Issue 2: Arguments on the merits of the dispute

Claimant submits that Respondent unlawfully expropriated Claimant’s investment. Claimant will show first that Rocket Bombs is a protected investment under the Euroasia BIT (D). Second, Claimant contends that the sanctions violated Article 4 Euroasia BIT prohibiting the unlawful expropriation of investments (E). Lastly, Claimant will address Respondent’s vague defence that Claimant contributed to the damage he suffered (F).

D Claimant made a protected investment under the Euroasia BIT

Prior to Claimant investing in Rocket Bombs, it was a decrepit company and its decline had taken its toll on the local community. Claimant’s investment in Rocket Bombs allowed the company and the local community to thrive. Oceania benefitted from this investment for many years and never challenged Rocket Bomb’s compliance with environmental law. It was not until 2015, after Claimant’s investment had been expropriated, that Respondent started to investigate and indict Claimant.

Respondent now argues that Claimant should be denied all of the BIT’s protection because he allegedly only obtained the environmental licence by bribery. Respondent offers its own allegations as proof and relies on the testimony of a compromised Oceanian official to argue that Claimant has “unclean hands”.

As an initial matter, Claimant submits that there is no legal basis for Respondent to assert a general and undefined standard of investor conduct under the guise of “clean hands” (1). Even if there were a legal basis, mere allegations are not sufficient to fulfil Respondent’s burden of proof for this defence (2). But even if the allegation of bribery were true, this would not deprive Claimant of the BIT’s protection. Illegality can only have such an effect if it occurs during the establishment phase (3). Finally, and in any event, Respondent should be estopped from raising a “clean hands” defence (4).

86 Uncontested Facts, para.3.
87 Uncontested Facts, para.12.
88 Uncontested Facts, para.18.
89 ARfA, pp.15, 16.
90 ARfA, p.15; PO2, para.5.
1 Respondent’s clean hands defence lacks a legal basis

The Euroasia BIT does not contain a legality clause, i.e. a clause requiring the investment to be made in accordance with the host state’s law. Contrary to Respondent’s assertions, there is no “implied” legality requirement in the Euroasia BIT either (1.1) and the “clean hands doctrine” is no general principle of international law (1.2). The definition of “investment” in Article 1(1) Eastasia BIT, which contains a legality clause, is not relevant in this case (1.3).

1.1 The Euroasia BIT does not contain an implied legality requirement

Respondent may try to argue that the definition of “investment” in Article 1(1) Euroasia BIT impliedly contains a legality requirement or clean hands principle.

However, any attempt to import such a nebulous concept of equity into a jurisdictional definition is not possible in this case. As Professor Paulsson in his Individual Opinion in the Hrvatska case stated:

“a term may be implied only when it is clear beyond peradventure, from the overall text of the relevant instrument, its negotiating history, or its actual implementation by the parties, that all Contracting States would have had no hesitation to include the term if they had applied their minds specifically to the situation with which the term is to deal.”

There is no indication that the Contracting Parties would have had “no hesitation” to include such a clause if they had applied their minds to it. First, Euroasia concluded other BITs apart from those with Eastasia and Euroasia and the language is not comparable, indicating that all are specifically and carefully negotiated. Moreover, the Eastasia and Euroasia BITs, one of which contains the legality requirement whereas the other does not, were concluded in timely proximity: 1992 and 1995. Second, the absence of a legality requirement was more likely a deliberate choice by the Contracting States. Claimant notes that Article 2 Euroasia BIT, which regulates the admission of investments, contains a legality requirement. It states that the Parties shall “[...] admit such investments in accordance with its legislation.” Thus, the Parties chose to reference the law of the host state with respect to the admission of investments but to leave it out of the investment definition.

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91 Individual Opinion of Jan Paulsson in Hrvatska v Slovenia, para.64.
92 PO2, para.8.
93 ExC1, p.40; ExC2, p.46; PO3, para.13.
94 ExC1, p.41.
In light of the foregoing, this Tribunal should not imply any clean hands requirement into the Euroasia BIT’s clear and unambiguous definition of investment.

1.2 Clean hands is not an applicable principle of international law within the meaning of Article 9(7) Euroasia BIT

Because the “clean hands doctrine” has no basis, explicit or implicit, in the Euroasia BIT, Respondent may assert that the doctrine is applicable as a general principle within the meaning of Article 38 ICJ Statute. In order for a legal rule to be elevated to the status of a general principle it must reach a certain level of acceptance. In Brierly’s Law of Nations, a general principle is defined as follows:

“[...] a principle which is found to be generally accepted by established legal systems may fairly be assumed to be so reasonable as to be necessary to the maintenance of justice under any system. Prescription, estoppel and res judicata are examples of such principles.”

The “clean hands doctrine” has not reached this level of acceptance. The recent Yukos case considered, in great detail, the existence and acceptance of the “clean hands doctrine” as a general principle of law. Rather tellingly, the tribunal concluded:

“...despite what appears to have been an extensive review of jurisprudence, Respondent has been unable to cite a single majority decision where an international court or arbitral tribunal has applied the principle of “unclean hands” in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim.”

Moreover, the Draft Articles on Diplomatic Protection intentionally left out the “clean hands doctrine”. The sixth report on diplomatic protection, by Special Rapporteur Dugard, explains the reasoning:

“The present report has shown that the evidence in favour of the clean hands doctrine is inconclusive. Arguments premised on the doctrine are regularly raised in direct inter-State cases before ICJ, but they have yet to be upheld.”

As there is nothing to support the “clean hands doctrine” as a general principle of law, the Tribunal should reject the “clean hands” defence and proceed on the basis that Claimant made a protected investment.

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95 Brierly’s Law of Nations, p.63; see for similar definitions e.g. Schreuer, ICSID commentary, Article 42 para.178; Inceya v El Salvador, para.227.
96 Yukos v Russia, para.1362.
97 UN Doc. A/CN.4/546, para.18.
1.3 **Article 1(1) Eastasia BIT does not limit the scope of protection under the Euroasia BIT**

Contrary to Respondent’s assertion, the legality requirement in Article 1(1) *Eastasia BIT* is of no relevance to the scope of protection under the Euroasia BIT.

Claimant is entitled to use the Euroasia BIT’s MFN clause to access more beneficial provisions of the Eastasia BIT while disregarding the provisions in that treaty which are disadvantageous. This follows from the ordinary meaning to be given to the terms of the MFN clause in their context and in the light of the BIT’s object and purpose. The MFN clause relates to “more favourable treatment” not to a “more favourable treaty”, taken in its entirety.

The *Siemens* tribunal noted this when it rejected Argentina’s argument that by using the MFN clause to eliminate the waiting period, the claimant also had to put up with a disadvantageous “fork-in-the-road” provision. It stated:

> “The disadvantages may have been a trade-off for the claimed advantages. However, this is not the meaning of an MFN clause. As its own name indicates, it relates only to more favourable treatment.”

In the *Siemens* case, the tribunal even permitted the claimant to pick one pre-arbitral step and leave another contained in the same provision.

In the present case, the Tribunal need not go so far as the *Siemens* tribunal. The definition of investment is completely unrelated to the more favourable Eastasian pre-arbitral steps which Claimant imports. Thus, Claimant may invoke Article 8 Eastasia BIT without also invoking the definition of “investment” from Article 1 Eastasia BIT.

In summary, Respondent’s clean hands defence has no basis in the Euroasia BIT and it cannot be applied as a general principle or by reference to the Eastasia BIT.

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98 AfRA, p.15.
99 VCLT, Article 31.
100 Compare MTD v Chile, para.104; CME v Czech Republic, para.500; White v India, para.11.2.2.
101 Siemens v Argentina, para.120.
2 Even if there were a legality requirement, Respondent has not shown that Claimant violated any Oceanian law

In any event, the Tribunal should reject Respondent’s “clean hands” defence because mere allegations are insufficient to fulfil Respondent’s burden of proof. Respondent alleges that Claimant obtained the environmental licence in 1998 which permitted Rocket Bombs to resume arms production through bribing the NEAO’s President.102

Respondent bears the burden to prove its accusations. *Onus probandi actori incumbit* is a general principle of international law.103 More specifically, the tribunal in *EDF v Romania* stated that in case a party alleges solicitation of a bribe, it bears the burden of proof.104 According to the tribunal, in matters of corruption,

“*There is general consensus among international tribunals and commentators regarding the need for a high standard of proof [which it found to be] clear and convincing evidence.*”105

Here, Respondent has not submitted “clear and convincing evidence”. It merely expected this Tribunal to infer from uncertain circumstances that Claimant bribed a public official. Respondent’s allegation is based on the following. First, Claimant in July 1998 had a private meeting with the President of the NEAO.106 Second, Rocket Bombs was allowed to operate without being environmentally compliant. Third, more than sixteen years later the President of the NEAO was convicted of accepting bribes and, according to Respondent, named Claimant as an accomplice in exchange for a non-prosecution agreement.107 Finally, Respondent has initiated criminal proceedings against Claimant.108

This sequence of events is not sufficient evidence to show that Claimant bribed a public official. Until actual evidence is brought forward this remains hearsay coming from a witness with a non-prosecution agreement.109 Respondent has been investigating this case for three

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102 ARfA, p.15.
103 Salini v Jordan, para.70; see also Tsatsos, Burden of Proof, p.92; Tradex Hellas S.A. v Albania, para.74; Middle East Cement v Egypt, paras.89 et seq.; Soufraki v Arab Emirates, para.58.
104 EDF v Romania, para.232.
105 EDF v Romania, para.221.
106 Uncontested Facts, para.2.
107 Uncontested Facts, para.3; PO2, para.5.
108 Uncontested Facts, para.3.
109 PO2, para.5.
years\textsuperscript{110} and has not been able to present a witness statement, an incriminating bank transfer or any evidence concerning Rocket Bomb’s operations under its environmental license.

In reality, there is a perfectly reasonable explanation other than corruption for Oceania giving Claimant an environment licence: Respondent wanted Rocket Bombs to continue providing much needed employment to the local community.

As Respondent has not discharged its burden of proof, there is no factual basis to support any version of the “clean hands doctrine”.

3 \textbf{Even if Respondent’s allegations were true, the establishment of the illegality would not relate to Claimant’s investment and thus leave it protected}

While an illegality in the establishment of the investment could hypothetically run afoul of a theoretical “clean hands clause”, there is a general consensus that illegality during the lifetime of the investment does not deprive an investor of the BIT’s protection.\textsuperscript{111}

In the present case, Claimant made his investment when he purchased Rocket Bombs in February 1998.\textsuperscript{112} Such was the moment Claimant decided to make a substantial commitment and assume the risk of spending money on a decrepit company. Respondent alleges that Claimant bribed a public official only several months later, in July 1998.\textsuperscript{113} This is a separate act which did not take place during the establishment of the investment, but during its lifetime.

In other words, Claimant’s investment would have protection even if the licence had not been granted. Therefore, the protection is not dependent on the alleged illegality.

Thus, even if Respondent’s allegations of bribery were true, applying Respondent’s own rule would not deprive Claimant of the BIT’s protection.

\textsuperscript{110} Uncontested Facts, para.18.
\textsuperscript{111} Explicitly in Hamester v Ghana, para.129; Yukos v Russia, para.1354; Metal-Tech v Uzbekistan, para.267; implied in Plama v Bulgaria, para.139; Phoenix Action v Czech Republic, para.101; Inceysa v El Salvador, para.239.
\textsuperscript{112} Uncontested Facts, para.2.
\textsuperscript{113} Uncontested Facts, para.2.
4 In any event, Respondent should be estopped from raising a “clean hands” defence

In any event, Respondent is estopped from raising unclean hands on Claimant’s part. If the Tribunal considered Claimant’s hands to be unclean for having paid a bribe, Respondent’s hands are necessarily unclean for having accepted one. If Respondent demands that “he who comes into equity must come with clean hands”, Respondent should not be allowed to apply double standards.

It is true that it was the President of the Environmental Authority that accepted the bribe, not Respondent itself. This action, however, is attributable to Respondent under customary international law.

The Articles on State Responsibility, which are accepted as a codification of customary international law, provide a rule for state attribution in their Article 7:

“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”

As if the drafters particularly had bribery in mind, the official commentary to this rule reemphasizes that “[i]t is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power”. Accordingly, the tribunal in the already mentioned case of EDF v Romania concluded that (in a reversed situation) the solicitation of a bribe by an official is attributable to the state.

Claimant wishes to briefly address the award in World Duty Free v Kenya, where the tribunal denied attribution of the accepting of the bribe to the state. However, the tribunal made its award without even addressing the Articles on State Responsibility. For this reason (amongst others), the award has been heavily criticized and should not be considered good authority for this Tribunal.

115 Commentary on Draft Articles on State Responsibility, Article 7 para.13.
116 EDF v Romania, para.213.
To conclude, Respondent cannot rely on a clean hands defence, because the acceptance of the alleged bribe by a public official is attributable to Respondent and thus Respondent itself has unclean hands.

E  Respondent illegally expropriated Claimant

Respondent destroyed Claimant’s entire company simply to underline a political viewpoint with regard to a conflict between two third states. Respondent’s viewpoint was that the situation in Fairyland was unlawful – although Fairyland held a referendum in favour of being re-unified with Euroasia118 and although the actual reunification “was bloodless and rather peaceful”.119 With the Executive Order of 1 May 2014 Respondent introduced strangling sanctions on persons even remotely connected to various parts of the Euroasian economy.120

These sanctions destroyed Claimant’s business. Respondent thus illegally expropriated Claimant’s investment in breach of Article 4 Euroasia BIT (1). Respondent might try to argue that the expropriation was justified under the “non-precluded measures-clause” of Article 10 Euroasia BIT. Such attempt, however, is bound to fail. The sanctions do not qualify as “measures to fulfill [a Contracting Party’s] obligations with respect to the maintenance of international peace and security” in the sense of Article 10 Euroasia BIT (2).

1  Respondent illegally expropriated Claimant by introducing the sanctions

Respondent’s Executive Order introduced a whole spectrum of devastating sanctions against Claimant.121 Such is exactly a situation that Article 4(1)(1) Euroasia BIT means to protect investors from, stating that:

“Investments by investors of either Contracting Party may not directly or indirectly be expropriated, nationalized or subject to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public purpose.”

The sanctions leading to the destruction of Claimant’s business as a whole constituted an illegal expropriation (1.1). As a matter of precaution, Respondent cannot argue that the

118 Uncontested Facts, para.6.
119 Uncontested Facts, para.1.
120 ExC2, p.52 et seq., Sections 1, 4.
121 ExC2, p.52 et seq., Sections 1, 4.
sanctions had been justified as a “legitimate exercise of police powers”. The sanctions do not qualify as such measures (1.2).

1.1 Respondent expropriated Claimant’s business

The sanctions constituted an indirect expropriation of Claimant’s entire business. Unlike the direct expropriation, which takes or destroys the investor’s right,122 the indirect expropriation formally leaves the right untouched but still “effectively neutralizes the enjoyment of the property”.123 Respondent’s sanctions had such an effect.

To determine whether a state measure “effectively neutralizes the enjoyment of the property”, tribunals have developed two main criteria: the severity124 of the measure and its duration.125

Respondent’s sanctions were sufficiently severe. The sanctions completely froze Claimant’s property and interests in property.126 The Executive Order stated that all plants, factory sites etc. “may not be transferred, paid, exported, withdrawn, or otherwise dealt in”.127 It is uncontested between the Parties that Claimant “could neither conduct the business, nor sell it”.128 Therefore, while Claimant was not formally deprived of his property rights, the business nevertheless became utterly useless. That deprived Claimant of any conceivable “enjoyment of the property”.

The second factor tribunals have looked to is the duration of the measure.129 Notably, the duration requirement is not understood to be “permanent” in its strictest understanding.130 Rather, the state's measure must not be *merely ephemeral*.131 Accordingly, in *Middle East Cement v Egypt*, the tribunal considered four months to be sufficient.132 In this case, Claimant

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122 OECD, “Indirect Expropriation” and the “Right to Regulate”, p.3; compare also Telenor v Hungary, para.38; Dolzer/Schreuer, Principles of International Investment Law, p.92; Suez and Vivendi v Argentina, para.133.
123 Lauder v Czech Republic, para.200; see for similar formulations the comprehensive list in Fortier/Drymer, Indirect Expropriation in International Investment Law, p.305.
124 UNCTAD, Expropriation: A Sequel, p.63; Telenor v Hungary, para.70; LG&E v Argentina, para.190; Tecmed v Mexico, para.115; Total v Argentina, para.195.
125 UNCTAD, Expropriation: A Sequel, p.69; Telenor v Hungary, para.70; SD Myers v Canada, paras.284, 287; LG&E v Argentina, para.190.
126 ExC2, p.52, Section 1(a).
127 ExC2, p.52, Section 1(a).
128 Uncontested Facts, para.1.
129 UNCTAD, Expropriation: A Sequel, p.69; Tecmed v Mexico, para.116; SD Myers v Canada, paras.287, 288.
130 Middle East Cement v Egypt, para.107; UNCTAD, Expropriation: A Sequel, p.69 et seqq.
131 Tippets et al v TAMS-AFFA (Iran), p.225.
132 Middle East Cement v Egypt, para.107.
has been deprived of his property for twenty-eight months already, with no end in sight. This is long enough to warrant a finding of expropriation.

As the sanctions meet both the threshold for severity and duration and as Respondent did not pay any compensation, it breached Article 4(1) Euroasia BIT.

1.2 **Respondent cannot invoke “police powers”**

Respondent might argue that it has no liability for the sanctions because the Executive Order was a regulatory measure covered by Respondent’s “police powers”. Indeed, tribunals have held that states should have a certain regulatory freedom. Measures included within police powers should therefore not give rise to expropriation claims. While Claimant does not contest the existence of Respondent’s police powers as such, the sanctions in the case at hand are not an exercise of these police powers.

For a measure to be covered by police powers, tribunals have identified four prerequisites: it needs to be a [regulatory](#) measure for a legitimate [public purpose](#), enacted in a [non-discriminatory](#) manner with [due process](#). For the sanctions at hand, Respondent can neither invoke a public purpose (1.2.1) nor do the sanctions qualify as regulatory measures in this sense (1.2.2).

1.2.1 **Respondent did not legitimately pursue a public purpose**

Respondent cannot convincingly argue that its sanctions legitimately pursue a public purpose. In the Executive Order, Respondent vaguely names an alleged threat to the “national security and foreign policy” of Oceania as the purpose for its measures. While Claimant recognises that Respondent has a wide margin of appreciation, so far, such threat to Oceania has not been substantiated in any way. The dispute over Fairyland concerns Eastasia and Euroasia and has no bearing on the third state Oceania. There is no indication whatsoever that the situation in Fairyland was a conflict of such magnitude as to “radiate” and threaten national security in Oceania. Rather, Oceania merely wishes to take a political stand with regard to the Fairyland controversy and prevent supply to Euroasia which in Respondent’s view violated international law.

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133 As of the submission of this memorandum and lasting.
134 See e.g. Feldman v Mexico, para.83; Saluka v Czech Republic, para.255.
135 Methanex v USA, Part IV Chapter D para.7; Saluka v Czech Republic, para.255.
136 Methanex v USA, Part IV Chapter D para.7; Saluka v Czech Republic, para.255; Chemtura v Canada, para.266.
137 ExC2, p.52, introduction.
In any event, such purpose cannot be pursued at all cost. The *Tecmed v Mexico* tribunal stated that “measures are [to be] proportional to the public interest presumably protected”. The reason for such a limit is clear: if no proportionality were required, any randomly picked public purpose could undermine the investor’s protection from expropriation. Such a blanket exception “would create a gaping loophole in international protections against expropriation”. Accordingly, the imperative of proportionality has been recognised in subsequent arbitral proceedings and it has received significant scholarly approval.

The sanctions imposed by Respondent were out of proportion to their purpose: to prevent aid to Euroasia. The only connection Claimant had to the Fairyland controversy was his weapons supply contract with Euroasia. It would have required but one measure to sever this connection, namely an export ban on weapons. That would have prevented Claimant from making any weapon deliveries to Euroasia.

Instead, Respondent decided to – figuratively – drop a nuclear warhead on Claimant and ordered inter alia: a comprehensive freezing of his assets, destruction of Claimant’s contracts, making future contracts with Claimant illegal, the “prohibition [of other people] to engage professionally in any way with the blocked person” and the extended application of the sanctions to such people “who engage […] in the business dealings with the blocked person, even in the unrelated matter”. Not only Claimant’s business was affected. Claimant was personally targeted as well. These measures were grossly excessive and unnecessary for Respondent to reach its objective.

It can reasonably be assumed that if solely the export to Euroasia had been banned, Claimant could very well have continued to conduct some part of his business. After all, Euroasia was not Claimant’s only customer but Claimant had “a great number of contracts for arms

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138 *Tecmed v Mexico*, para.122.
139 *Pope & Talbot v Canada*, para.99.
140 *LG&E v Argentina*, para.195; *Azurix v Argentina*, para.312; *Occidental v Ecuador*, paras.402 et seqq., 455, 452.
141 Behrens, *Towards the Constitutionalization of International Investment Protection*, p.167; *Kingsbury/Schill, Investor-State Arbitration as Governance*, p.22; *Krommendijk/Morijn, ‘Proportional’ by What Measure(s)?*, pp.445, 446.
142 Compare ExC2, p.52, introduction.
143 ExC2, p.52, Section 1(a).
144 ExC2, p.52, Section 1(b) sentence 2; *Uncontested Facts*, para.16.
145 *Uncontested Facts*, para.16.
146 ExC2, p.52, Section 1(b) sentence 1.
147 ExC2, p.52 Section 1(b) sentence 3.
148 ExC2, p.52, Section 1(b); *Uncontested Facts*, para.17.
Consequently, there were much less intense means that would have equally served Respondent’s aim. The excessive sanctions therefore cannot be justified by a public purpose.

1.2.2 The sanctions do not qualify as regulatory measures

The Executive Order was not a “regulatory measure” in the sense of police powers. The measures counting as police powers have not been abstractly defined so far. Instead of a definition proper, tribunals have held that a state does not expropriate unlawfully “when it adopts general regulations that are ‘commonly accepted as within the police power of States’”. Measures “commonly accepted as within the police power” are

“protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like.”

These measures have certain features in common: all of the measures relate to internal affairs and all of the measures relate to everyday administrative functions. Respondent’s sanctions, in contrast, are connected to Oceania’s external affairs as they are introduced to corroborate Oceania’s political position in the Fairyland controversy. Likewise, political sanctions might be an instrument for extraordinary situations in the international context but they hardly qualify as everyday administration.

The Tribunal should note that Respondent as of now has not and likely will not be able to cite to a single award in support of political sanctions counting as regulatory measures. Accordingly, Respondent would stretch the definition of police powers beyond recognition if it were to assert without a single supporting decision that sanctions are “commonly accepted as within the police powers of States”.

For these reasons, the sanctions do not fall under Respondent’s police powers. Their expropriatory effect without compensation thus constitutes a breach of Article 4(1) Euroasia BIT.

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149 Uncontested Facts, para.12.
150 Saluka v Czech Republic, para.262; Sedco v Iran, p.275; Too v Greater Modesto, p.378.
151 Feldman v Mexico, para.103.
2 Article 10 Euroasia BIT does not justify the sanctions

Respondent attempts to justify its behaviour “with the view of maintaining international peace and security”. This appears to be an invocation of Article 10 Euroasia BIT. This so-called “non-precluded measures clause” states:

“Nothing in the Agreement shall be construed to prevent either Contracting Party from taking measures to fulfil its obligations with respect to the maintenance of international peace or security.”

The above clause explicitly describes the nexus between the state measure and the envisaged objective: the clause requires an obligation.

However, Article 10 Euroasia BIT only covers obligations imposed by UN resolutions. Since there is no resolution here, Respondent was under no obligation to introduce the sanctions (2.1). Even if the clause were to be understood more widely so as to encompass other obligations as well, Respondent was under none in this case (2.2).

2.1 Respondent cannot rely on Article 10 Euroasia BIT because the UN did not impose any obligation on Respondent

Article 10 Euroasia BIT covers only obligations imposed by the UN Resolutions as revealed by a historical observation. Non-precluded measures clauses that refer to “obligations with respect to the maintenance (or restauration) of international peace or security” like Article 10 Euroasia BIT can be found in many BITs concluded by various states from the early 1980s until today.

These clauses have historically been included to ensure that UN member states, which must comply with UN resolutions (Article 24 UN Charter), are not liable for BIT breaches in furtherance of such a resolution.

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152 ARfA, para.2.
153 Emphasis added.
154 See e.g. US-Panama BIT (1982), Article X; Albania-Turkey BIT (1992), Article VII(1); Bosnia and Herzegovina-Quatar BIT (1998), Article 7(1); Japan-Viet Nam BIT (2003), Article 15(b); Jordan-Singapore BIT (2004) Article 19(c); Canada-Jordan BIT (2009), Article 10(4)(c); Japan-Myanmar BIT (2013), Article 19(2)(b); likewise the newer “EU-treaties”, e.g. EU-Georgia Association Agreement (2014), Article 136(1)(c).
Accordingly and as an example, the Protocol to the US-Argentina BIT clarifies that

“‘obligations with respect to the maintenance or restoration of international peace or security’ means obligations under the Charter of the United Nations.” 156

In the absence of indications to the contrary, it is to be assumed that the Contracting Parties – Euroasia and Oceania, which are both members to the UN 157 – shared this general understanding. Article 10 Euroasia BIT would therefore just be of relevance in cases of UN resolutions.

Here,

“[t]he UN Security Council has discussed the situation in Fairyland, but it has not been able to agree on any Resolution with respect to its status.” 158

Consequently, Respondent cannot invoke Article 10 Euroasia BIT to justify its sanctions.

2.2  **Respondent was under no other obligation to impose sanctions either**

Even if Article 10 Euroasia BIT were not limited to obligations stemming from UN resolutions, Article 10 Euroasia BIT would not apply. Respondent had no other obligation under international law to expropriate companies within its territory either.

The only other conceivable source for an obligation in this case are rules on state responsibility. However, these rules did not impose a positive obligation on Oceania either. Respondent might cite to Article 41 of the Articles on State Responsibility in an attempt to convince the Tribunal of the contrary. It provides:

“1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.”

Such argument would be misguided.

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157 PO2, para.8.
158 PO2, para.3.
First and foremost, the article is only triggered if there is a “breach in the meaning of article 40” which is a “serious breach [...] of a peremptory norm of general international law”. As explained above (paras. 30 et seqq.), the reunification of Fairyland with Euroasia did not violate international law.

Second, even if Article 41 of the Articles on State Responsibility had been triggered, its application would not have imposed a positive obligation for Respondent to introduce sanctions. Article 41(1) requires states to cooperate; it does not provide a justification for unilateral actions. Respondent can therefore not invoke Article 41(1) of the Articles on State Responsibility.

Respondent cannot invoke Article 41(2) of the Articles on State Responsibility either because Respondent cannot depict its sanctions as measures to “not recognize” or “not render aid or assistance”. The only duty imposed by this section is “a duty of abstention”. A positive action such as imposing sanctions is therefore not covered. Consequently, Respondent cannot invoke Article 10 Euroasia BIT to justify the sanctions.

In summary, Respondent’s sanctions constitute an expropriation which cannot be excused as an exercise of police powers nor justified under Article 10 Euroasia BIT. Since Respondent did not compensate Claimant for the taking, the expropriation violates Article 4 Euroasia BIT.

**F Claimant did not contribute to the damage suffered by his investment**

The Tribunal should reject Respondent’s vague contention that Claimant contributed to the damage suffered by his investment. The only support Respondent gives for this assertion is that Claimant’s

“continued supply of weapons to Euroasia even after Peter Explosive should have known of Euroasia’s intention to incorporate Fairyland into its territory by direct military intervention if necessary, led to the imposition of sanctions upon Rocket Bombs Ltd”.

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159 Articles on State Responsibility, Article 40(1).
160 Commentary on Draft Articles on State Responsibility, Article 41, para.4.
161 ARFA, p.16.
Respondent contends that Claimant should have foreseen Respondent’s introduction of smart sanctions against weapons suppliers to Euroasia and that Claimant acted negligently when he nevertheless concluded the weapons contract with Euroasia. In essence, Respondent alleges that Claimant threw himself in front of a train already set in motion. This contention is inherently flawed.

Claimant did not act negligently when it concluded the contract with Euroasia on 28 February. Claimant did not and could not have known about the intervention on that date (1). Even if the intervention had been foreseeable, Claimant would be entitled to continue his daily business to sell weapons, even to countries in a political crisis (2).

1 Claimant did not and could not have foreseen that Euroasia would assist Fairyland by sending its troops when he concluded the contract with Euroasia

There is no information available that Claimant knew or could have known about any of Euroasia’s plans to send military assistance to Fairyland before he concluded the contract and before this decision became publicly known on 1 March 2014.

Claimant had a meeting with the Minister of the National Defence of Euroasia, John Defenceless, to discuss the renewal of the contract in February. It is, however, a mere speculation that the minister informed Claimant about any plans to support the Fairylanders. The deliberations of the Euroasian Parliament on the Government’s proposal to intervene were broadcast on Euroasian public television. However, the date of the Government’s decision is unknown. Therefore, when Claimant concluded the contract, it was public knowledge that deliberations had taken place, but nothing was known about the result.

Thus, there is no information suggesting that Claimant as a private party should have foreseen the political events that unfolded.

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162 ARfA, p.16.
163 Uncontested Facts, para.15.
164 PO2, para.3.
165 PO2, para.3.
Even if Euroasia’s military assistance to Fairyland had been foreseeable, Claimant was not negligent for carrying on its normal business.

Even if Claimant should have foreseen Euroasia’s support of Fairyland, none of Claimant’s actions were negligent acts under the law governing contribution to damages.

Article 39 of the Draft Articles on State Responsibility, which Claimant accepts can be applied to determine an investor’s contributory negligence, states:

“In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.”

Thus, in order to limit the host state’s liability, the investor must have shown wilful or negligent misconduct irrespective of the actions of the host state.

There are only very few investment arbitration cases where tribunals affirmed contributory negligence. In all of these cases the investor either acted in violation of the law or took business decisions which were unwise – unrelated to the host state’s breach of the BIT.

First, in the case at hand, Claimant did not violate Oceanian law by selling the weapons to Euroasia nor did he damage his business irrespective of Respondent’s actions.

Claimant’s contract with Euroasia was in complete accordance with Oceanian law. Moreover, it is a common and legal practice to sell arms to states involved in conflicts. Even states participate in arms trade to politically instable regions. For instance, the Russian government concluded weapons contracts in the amount of 282 million USD with Syria when the Syrian civil war began in 2011. The Federal Republic of Germany delivered weapons to Iraq.

There is no law, national or international, which Claimant violated by concluding the supply contract.

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165 Compare Gemplus and Talsud v Mexico, para.11.12.
166 MTD v Chile, para.178; compare the chronologies in Yukos v Russia, para.1614 and Occidental v Ecuador, para.662.
167 Yukos v Russia, para.1634, violation of the law on taxation; Occidental v Ecuador, para.680, failure to obtain the required ministerial authorisation.
168 See MTD v Chile, para.178.
169 Sipri, TIV of arms exports from Russia in 2011.
170 BMWi, Military Equipment Export Report.
Second, to conclude the weapons contract with Euroasia was not a bad business decision but it was a decision vital to the survival of Claimant’s business. Claimant is a weapons producer. Euroasia is its biggest customer with a long-standing business relationship. Absent Respondent’s disproportionate and illegal sanctions, the contract would have led to continued prosperity of Claimant’s investment.

In conclusion, Claimant could not and should not have foreseen the intervention. Even if it had been foreseeable, the conclusion of the contract with Euroasia was not a wilful, negligent misconduct on his part but merely a conduct of his daily business as a weapons’ producer.

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172 Uncontested Facts, para.9.
G  Request for Relief

For the reasons set out above, Claimant respectfully requests that the Tribunal

(1) find that it has jurisdiction under the Euroasia BIT because
   (a) Claimant is an investor pursuant to Article 1(2) Euroasia BIT; and
   (b) Claimant fulfilled the amicable settlement provision and was not required to comply with the local courts requirement as provided in Article 9 Euroasia BIT; or
   (c) Claimant may invoke Article 8 Eastasia pursuant to Article 3 Euroasia BIT.

(2) find that
   (a) Claimant made a protected investment; and
   (b) Respondent unlawfully expropriated Claimant’s investment; and
   (c) Claimant did not contribute to the damages his investment suffered.

Respectfully submitted on 19 September 2016

/s/

Team Mbaye