INTERNATIONAL CHAMBER OF COMMERCE
ICC ARBITRATION CASE NO. 28000/AC

PETER EXPLOSIVE
(Claimant)

V.

THE REPUBLIC OF OCEANIA
(Respondent)

MEMORIAL FOR CLAIMANT
19th SEPTEMBER 2016
I. THE TRIBUNAL HAS JURISDICTION TO HEAR THE PRESENT DISPUTE AS THE CLAIMANT FULFILLED THE REQUIREMENT OF RATIONE PERSONAE TO INITIATE THE PRESENT CLAIM

A. Nationality conferred by Euroasia is sufficient to make the Claimant a protected investor under Article 1.2 of the Euroasia Bilateral Investment Treaty ("BIT")

B. The Claimant’s nationality could not be determined based on the standards of international law.

C. The effective or dominant nationality principle is an inapplicable standard to determine nationality in the present case

D. Alternatively, the annexation of Fairyland to Euroasia was legal allowing the Claimant to rely on the Euroasia BIT by virtue of Article 15 of the Vienna Convention on Succession of States in respect of Treaties 1978 ("VCSS").

II. EVEN WITHOUT THE CLAIMANT FULLY COMPLYING WITH THE PRE-ARBITRAL PROCEDURE IN ARTICLE 9 OF THE EUROASIA BIT, THE TRIBUNAL STILL HAS JURISDICTION OVER THE DISPUTE

A. The Article 9 of the Euroasia BIT as a whole is not a mandatory due to the use of permissive language in the provision.

B. The only mandatory obligation of the Claimant in Article 9, that is entry into an amicable settlement, has been fully discharged.
## III. EVEN IF THE TRIBUNAL FINDS THAT COMPLIANCE TO THE PROCEDURE IS NECESSARY TO GIVE RISE TO ITS JURISDICTION, THE CLAIMANT CAN RELY ON ARTICLE 8 OF THE EASTASIA BIT VIA THE MOST FAVOURED NATION (“MFN”) CLAUSE.

A. The MFN clause extends to dispute settlement provisions based on the natural meaning of the words in Article 3 of the Euroasia BIT.  
B. The object and purpose of the BIT itself support the extension of MFN clause.  
C. The current jurisprudence in investment law supports the general notion that MFN clause extends to dispute settlement provisions regardless of how narrow the provision is construed.  
D. Article 8 of the Eastasia BIT is more favourable than Article 9 of the Euroasia BIT.

## IV. THE CLAIMANT MADE A PROTECTED INVESTMENT IN LIGHT OF THE “CLEAN HANDS” DOCTRINE

A. The “clean hands” doctrine should be implied into the Euroasia BIT.  
B. The tribunal has jurisdiction to hear the Claimant’s case although there are allegations of corruption made by the Respondent.  
C. There is insufficient evidence to prove corruption.

## V. THE CLAIMANT’S INVESTMENT HAD BEEN UNLAWFULLY INDIRECTLY EXPROPRIATED BY THE RESPONDENT

A. The Claimant suffered near-total loss in his investment.  
B. The Claimant suffered loss of control over his investment.  
C. The measure taken by the Respondent has a permanent effect on the Claimant’s investment.  
D. The measure taken by the Respondent is unlawful.  
   a. Due process of law was not complied with.  
   b. The Executive Order was not made for a public interest.  
E. The Respondent cannot rely on Article 10 of Euroasia BIT as a defence.  
   a. There was no state of necessity.
b. Article 10 of the Euroasia BIT is not a self-judging clause.

c. In the alternative, compensation should still be given to the Claimant as entrenched in Article 5 of the Euroasia BIT

VI. THE CLAIMANT DID NOT CONTRIBUTE TO THE DAMAGE SUFFERED BY HIS OWN INVESTMENT

A. The Claimant has exercised due diligence
   a. Definition of due diligence
   b. Standard of due diligence
   c. Effects of due diligence

B. There is no causal link between the injury suffered by the Claimant and the act done by the Claimant.

C. The Claimant did not fulfill the requirement sought in Article 39 of International Law Commission, Articles on State Responsibility for Internationally Wrongful Acts “ILC Articles” for the reparation to be reduced

PRAYERS FOR RELIEF
### LIST OF AUTHORITIES

<table>
<thead>
<tr>
<th>ABBREVIATION</th>
<th>FULL CITATION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ARTICLES</strong></td>
<td></td>
</tr>
<tr>
<td><em>Tanca</em></td>
<td>Antonio Tanca, Foreign Armed Intervention in Internal Conflict, Martinus Nijhoff (1993)</td>
</tr>
</tbody>
</table>
### Books

**Abdulhay Sayed**

**Cassese**

**Catharine Titi**
- Catharine Titi, Right to Regulate in International Investment Law, Nomos Hart (2014)

**Corten**

**Gary Born**

**Gokhan**

**Nolte**
- Georg Nolte, Intervention by Invitation, Encyclopedia of Public International Law, Max Planck (2010)

### Journals

**C. Le Mon**
<table>
<thead>
<tr>
<th><strong>Corten II</strong></th>
<th>Olivier Corten, “Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law,” Leiden Journal of International Law 24, no 1 (2011)</th>
</tr>
</thead>
</table>

**REPORTS**

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Duncan</strong></td>
<td>Duncan French and Tim Stephens ILA Study Group on Due Diligence in International Law First Report (2004)</td>
</tr>
<tr>
<td>STATUTES &amp; TREATIES</td>
<td></td>
</tr>
<tr>
<td>---------------------</td>
<td></td>
</tr>
<tr>
<td><strong>A/HRC/15/L.3</strong></td>
<td>The Situation of Human Rights in Sudan</td>
</tr>
<tr>
<td></td>
<td>A/HRC/15/L.3, (September 23, 2010)</td>
</tr>
<tr>
<td><strong>A/Res/25/2625</strong></td>
<td>United Nations General Assembly, A/Res/25/2625,</td>
</tr>
<tr>
<td></td>
<td>(October 24, 1970)</td>
</tr>
<tr>
<td><strong>Argentina-Italy BIT</strong></td>
<td>Agreement between Italy and Argentine Republic for</td>
</tr>
<tr>
<td></td>
<td>the Promotion and Protection of Investment,</td>
</tr>
<tr>
<td></td>
<td>Argentina-Italy, (May 22, 1990)</td>
</tr>
<tr>
<td><strong>Argentina-Spain BIT</strong></td>
<td>Agreement between Argentine Republic and the</td>
</tr>
<tr>
<td></td>
<td>Kingdom of Spain on the Reciprocal Promotion and</td>
</tr>
<tr>
<td></td>
<td>Protection of Investment,</td>
</tr>
<tr>
<td></td>
<td>Argentina-Spain, (October 3, 1991)</td>
</tr>
<tr>
<td><strong>Argentina-US BIT</strong></td>
<td>Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment,</td>
</tr>
<tr>
<td></td>
<td>Argentina-US, (October 20, 1994)</td>
</tr>
<tr>
<td><strong>IBA Rules</strong></td>
<td>1969 1155 U.N.T.S. 331</td>
</tr>
<tr>
<td></td>
<td>IBA Rules on Taking of Evidence in International Arbitration (May 29, 2010)</td>
</tr>
<tr>
<td></td>
<td>Adopted by a resolution of the IBA Council</td>
</tr>
<tr>
<td><strong>ICJ Statute</strong></td>
<td>United Nations, Statute of the International Court of Justice (April 18, 1946)</td>
</tr>
<tr>
<td>-----------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>UN Charter</strong></td>
<td>United Nations, Charter of the United Nations, (October 24, 1945), 1 UNTS XVI</td>
</tr>
</tbody>
</table>

**ARBITRAL DECISIONS**

<table>
<thead>
<tr>
<th><strong>ADC v Hungary</strong></th>
<th>ADC Affiliate Limited and ADC &amp; ADMC Management Limited v The Republic of Hungary, ICSID Case No. ARB/03/16 Award, (October 2, 2006)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>AdT v Bolivia</strong></td>
<td>Aguas del Tunari, S.A. v. Republic of Bol., ICSID Case No. ARB/02/3, Decision on Objections to Jurisdiction, (October 21, 2005)</td>
</tr>
<tr>
<td><strong>Berschader v Russia</strong></td>
<td>Vladimir Berschader and Moïse Berschader v Russia SCC Case No 080/2004, Award, (April 21, 2006)</td>
</tr>
<tr>
<td><strong>Biflower Gauff v Tanzania</strong></td>
<td>Biwater Gauff (Tanz.) Ltd v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award, (July 25, 2008)</td>
</tr>
<tr>
<td><strong>CMS v Argentina</strong></td>
<td>CMS Gas Transmission Company v The Republic of Argentina, ICSID Case No. ARB/01/08, Award, (May 12, 2005)</td>
</tr>
<tr>
<td><strong>EDF v Romania</strong></td>
<td>EDF (Services) Limited v Romania, ICSID Case No. ARB/05/13, Award, (October 8, 2009)</td>
</tr>
<tr>
<td><strong>Enron v Argentine</strong></td>
<td>Enron Corporation and Ponderosa Assets L.P v Argentine Republic, ICSID Case No. ARB/01/3 Award (May 22, 2007)</td>
</tr>
<tr>
<td><strong>Case</strong></td>
<td><strong>Description</strong></td>
</tr>
<tr>
<td>----------</td>
<td>----------------</td>
</tr>
<tr>
<td><strong>Fraport v Philippines</strong></td>
<td>Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award (August 16, 2007)</td>
</tr>
<tr>
<td><strong>Hochtief AG v Argentina</strong></td>
<td>Hochtief AG v. The Argentine Republic, ICSID Case No ARB/07/31, Decision on Jurisdiction (October 24, 2011)</td>
</tr>
<tr>
<td><strong>Impregilo v Argentina</strong></td>
<td>Impregilo SpA v Argentina, ICSID Case No ARB/07/17, Award (June 21, 2011)</td>
</tr>
<tr>
<td><strong>Lauder v. Czech Republic</strong></td>
<td>Ronald S. Lauder v. Czech Republic, Final Award, (September 3, 2001)</td>
</tr>
<tr>
<td><strong>LG&amp;E v Argentine</strong></td>
<td>LG&amp;E Energy Corp., LG&amp;E Capital Corp., and LG&amp;E International, Inc v Argentine Republic, ICSID Case No. ARB/02/1, Decision of Liability, (October 3, 2006)</td>
</tr>
<tr>
<td><strong>Maffezini v Spain</strong></td>
<td>Emilio Agustín Maffezini v The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objection to Jurisdiction, (January 25, 2000)</td>
</tr>
<tr>
<td><strong>MDC v Ghana</strong></td>
<td>Marine Drive Complex Ltd v Ghana Invs Ctr, the Gov’t of Ghana, Award (October 27, 1989) (1994) XIX YB Comm Arb 14, 15</td>
</tr>
<tr>
<td><strong>Micula v Romania</strong></td>
<td>Micula and others v Romania, ICSID Case No. ARB/05/10, Decision on Jurisdiction, (September 24, 2008)</td>
</tr>
<tr>
<td>Case Name</td>
<td>Description</td>
</tr>
<tr>
<td>---------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>MTD Equity v Chile</strong></td>
<td>MTD Equity Sdn Bhd and MTD Chile S.A v Republic of Chile, ICSID Case No. ARB/01/7 Award, (May 25, 2004)</td>
</tr>
<tr>
<td><strong>Natural Grid v Argentina</strong></td>
<td>National Grid Transco PLC v Argentina, UNCITRAL, Decision on Jurisdiction, (June 20, 2006)</td>
</tr>
<tr>
<td><strong>Parkerings v Lithuania</strong></td>
<td>Parkerings-Compagniet AS v Republic of Lithuania, ICSID Case No. ARB/05/8 Award (September 11, 2007)</td>
</tr>
<tr>
<td><strong>Philip Morris v Uruguay</strong></td>
<td>Philip Morris Brands Sarl and Philip Morris Products S.A. and Abal Hermnos S.A. v Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, (July 2, 2013)</td>
</tr>
<tr>
<td><strong>Phoenix Action v Czech</strong></td>
<td>Phoenix Action Ltd. V The Czech Republic, ICSID Case No. ARB/06/5 Award, (April 15, 2009)</td>
</tr>
<tr>
<td><strong>Plama v Bulgaria I</strong></td>
<td>Plama Consortium Limited v Republic of Bulgaria, ICSID Case No. ARB/03/24 Decision On Jurisdiction, (Feb 8, 2005)</td>
</tr>
<tr>
<td><strong>Plama v Bulgaria II</strong></td>
<td>Plama Consortium Limited v Republic of Bulgaria, ICSID Case No. ARB/03/24 Award, (August 27, 2008)</td>
</tr>
<tr>
<td><strong>RDC v Guatemala</strong></td>
<td>Railroad Development Corporation v Republic of Guatemala, ICSID Case No. ARB/07/23 (June 29, 2012)</td>
</tr>
<tr>
<td><strong>Rumeli Telekom v Kazahstan</strong></td>
<td>Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S v Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, (July 29, 2008)</td>
</tr>
<tr>
<td>Case Title</td>
<td>Description</td>
</tr>
<tr>
<td>----------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td><em>Salini v Morocco</em></td>
<td>Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco, ICSID Case No. ARB/00/4 Decision of Jurisdiction, (July 31, 2001)</td>
</tr>
<tr>
<td><em>SDG v Argentina</em></td>
<td>Gas Natural SDG v Argentina, ICSID Case No ARB/03/10, Decision on Preliminary Questions on Jurisdiction, (June 17, 2005)</td>
</tr>
<tr>
<td><em>Sempra v Argentina</em></td>
<td>Sempra Energy International v The Argentine Republic, ICSID Case No. ARB/02/16 Award, (September 28, 2007)</td>
</tr>
<tr>
<td><em>Siag v Egypt</em></td>
<td>Siag and Vecchi v Egypt ICSID Case No. ARB/05/15, Decision on Jurisdiction, (April 11, 2007)</td>
</tr>
<tr>
<td><em>Siemens v Argentina</em></td>
<td>Siemens A.G. v Argentina Republic, ICSID Case No. ARB/02/8, Award, (February 6, 2007)</td>
</tr>
<tr>
<td><em>Soufraki v UAE</em></td>
<td>Soufraki v United Arab Emirates ICSID Case No. ARB/02/7, Award, (July 7, 2004)</td>
</tr>
<tr>
<td><em>Suez v Argentina</em></td>
<td>Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Aqua SA v Argentina ICSID Case No ARB/03/17, Decision on Jurisdiction, (May 16, 2006).</td>
</tr>
<tr>
<td><em>S.D. Myers v Canada</em></td>
<td>S.D. Myers, Inc v Goverment of Canada, UNCITRAL, Final Award, (December 30, 2002)</td>
</tr>
<tr>
<td><em>Tecmed v Mexico</em></td>
<td>Tecnicas Medioambientales Tecmed S.A. v United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, (May 29, 2003)</td>
</tr>
<tr>
<td><em>Teinver v Argentina</em></td>
<td>Teinver SA v Argentina, ICSID Case No ARB/09/1, Decision on Jurisdiction, (December 21, 2012)</td>
</tr>
<tr>
<td><em>Westinghouse v Philippines</em></td>
<td>Westinghouse and Burns and Roe (USA) v National Power Company and the Republic of Philippines, ICC case no 640, (December 19, 1991)</td>
</tr>
<tr>
<td><strong>Yukos v Russia</strong></td>
<td>Yukos Universal Limited (Isle of Man) v The Russian Federation, UNCITRAL, PCA Case No. AA 227 Final Award, (July 18, 2014)</td>
</tr>
<tr>
<td>--------------------</td>
<td>---------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>COURT DECISIONS</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Cable &amp; Wireless plc v IBM</strong></td>
<td>Cable &amp; Wireless plc v IBM [2002] EWHC 2059 (Comm)</td>
</tr>
<tr>
<td><strong>East Timor</strong></td>
<td>East Timor, (Portugal v Australia) Judgement, ICJ Reports 1995</td>
</tr>
<tr>
<td><strong>Hanafin v MFE</strong></td>
<td>Hanafin v Minister of the Environment [1996] 2 IR 321</td>
</tr>
<tr>
<td><strong>Kosovo</strong></td>
<td>Accordance with International Law of Declaration of Independence of Kosovo (Request for Advisory Opinion), General List No. 141, ICJ (July 22, 2010)</td>
</tr>
<tr>
<td><strong>Namibia</strong></td>
<td>Legal Consequences for States of the Continued Presence of south Africa in Namibia (South West Africa) notwithstanding Security Council Resolutions 176 (1970), Advisory Opinion, ICJ Reports 197</td>
</tr>
<tr>
<td><strong>Nicaragua</strong></td>
<td>Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Judgment 1986 I.C.J. 14 (June 27, 1986)</td>
</tr>
<tr>
<td><strong>Oil Platforms</strong></td>
<td>Oil Platforms (Islamic Republic of Iran v United States of America) Merits, (May 1, 2004)</td>
</tr>
<tr>
<td><strong>Quebec</strong></td>
<td>Reference Re Secession of Quebec [1998] 2 SSR 217</td>
</tr>
<tr>
<td><strong>Wall Opinion</strong></td>
<td>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004</td>
</tr>
<tr>
<td><strong>Western Sahara</strong></td>
<td>Western Sahara, Advisory Opinion, ICJ Reports 1975</td>
</tr>
</tbody>
</table>
STATEMENT OF FACTS

1. In February 1998, Peter Explosive, an investor, purchased 100% shares in Rocket Bombs Ltd, an arms production company incorporated in the Republic of Oceania. (“Oceania”). At such point in time, Peter Explosive was undisputedly a national of Eastasia.

2. Rocket Bombs lost its environmental license in November 1997 and its business was suspended. The Environment Act 1996 required the factory to adjust its production line in order to obtain the environmental license. After Peter Explosive bought over the company, he was able to obtain an environmental license from the President of the National Environment Authority (“NEA”) on 23 July 1998 without adjusting its production line.

3. Due to the failure in obtaining a subsidy from the Ministry of Environment of Oceania, Peter Explosive approached John Defenceless, the Minister of National Defence in the Republic of Euroasia, in an attempt to secure finances to resume production. Peter Explosive secured a fifteen-year contract to provide arms to Euroasia effective from 1 January 1999.

4. The advance payments received pursuant to the contract of supply with Euroasia’s Minister of National Defence enabled Rocket Bombs to resume production. Subsequently, the company secured many other contracts for arms production and opened several new factories.

5. On 1 November 2013, a referendum was held in the territory of Fairyland deciding in favour of the secession of Fairyland from Eastasia and its reunification with Euroasia. Subsequently, Euroasia officially declared Fairyland a part of its territory on 23 March 2014.
6. Due to Oceania’s political stands that the annexation was unlawful under public international law, the President of the Oceania issued an Executive Order on Blocking Property of Persons Contributing to the Situation in the Republic of Eastasia on 1 May 2014.

7. This sanction was applied to Rocket Bombs due to its existing contract with the Minister of National Defence of Euroasia. The sanction caused all its contracts with Oceanian companies to be severed. This led to the decrease of value in Rocket Bombs’ shares.

8. Throughout 2013, many officials in the NEA were charged for corruption in expediting the issuance of environmental licenses for pecuniary gratifications. On 1 February 2015, the President of the National Environment Authority, along with the other officials, were convicted of accepting bribes.

9. Peter Explosive was investigated for the environmental license he obtained on 23 July 1998 for Rocket Bombs. On 23 June 2015, the General Prosecutor’s Office officially initiated criminal proceedings against Peter Explosive.
SUMMARY OF ARGUMENTS

10. JURISDICTION. The tribunal has jurisdiction over the present dispute. First, the Claimant falls within the ambit of a protected investor as he complied with Article 1.2 of the Euroasia BIT when the authority of Euroasia conferred nationality onto him in accordance with the Euroasian Citizenship Act. Second, the Claimant’s non-compliance with the pre-arbitral procedures in Article 9 of the Euroasia BIT will not vitiate this tribunal’s jurisdiction over the dispute as those procedures are not mandatory but merely directory. Third, even if the tribunal finds that compliance to the pre-arbitral procedures in Article 9 of the Euroasia BIT is necessary to give rise to its jurisdiction, the Claimant can rely on Article 8 of the Eastasia BIT imported through the operation of the MFN clause in Article 3 of the Euroasia BIT.

11. MERITS. If the tribunal finds that it has jurisdiction and proceeds to the merits of the case, the Claimant argues first, that the Claimant has made a protected investment in relation to the “clean hands” doctrine with reference to Article 1.1 of the Euroasia BIT. Although the “clean hands” doctrine should be implied into Euroasia BIT, the tribunal still has jurisdiction to hear the Claimant’s case despite there being allegations of corruption made by the Respondent, as the alleged illegality does not point at the making of the investment. Furthermore, the allegation of corruption cannot be proven by the Respondent, as there is insufficient evidence. Second, the Respondent had indirectly expropriated the Claimant’s investment unlawfully thereby violating Article 4 of the Euroasia BIT. Furthermore, the Respondent cannot rely on Article 10 of the Euroasia BIT as a defense. Lastly, the Claimant did not contribute to the damage suffered by his own investment as there was no negligent conduct done by the Claimant.
ARGUMENTS ON JURISDICTION

I. THE TRIBUNAL HAS JURISDICTION TO HEAR THE PRESENT DISPUTE AS THE CLAIMANT FULFILLED THE REQUIREMENT OF RATIONE PERSONAE TO INITIATE THE PRESENT CLAIM

12. The Claimant fulfills the requirement of rationae personae as the nationality conferred by Euroasia is sufficient to make the Claimant a protected investor (Section A), the Claimant’s nationality could not be determined based on the standards of international law (Section B), the effective or dominant nationality principle is an inapplicable standard to determine nationality in the present case (Section C) and alternatively, the annexation of Fairyland to Euroasia was legal allowing the Claimant to rely on the Euroasia BIT (Section D)

A. The nationality conferred by Euroasia is sufficient to make the Claimant a protected investor under Article 1.2 of the Euroasia BIT.

13. Article 1.2 explicitly provides one objective criterion to establish a protected investor under the Euroasia BIT which is merely having the nationality of either Contracting Party in accordance with its laws. The phrase “in accordance with its laws” refers to the laws of the state from which nationality is pleaded.¹

“2. The term “investor” shall mean … natural person having the nationality of either Contracting Party in accordance with its laws;”²

14. In the present case, the Claimant has been conferred nationality by the Euroasian authority in accordance to the Euroasian Citizenship Act³. Pursuant to this, the Claimant has fulfilled the requirement of an investor under the Euroasia BIT.

¹ Soufraki v UAE, paras. 23 - 24.
² Euroasia BIT, Article 1.2.
³ 2016 FDI Moot Problem, Procedural Order No. 2, page 56, para. 4.
15. The tribunal cannot adopt any other standard to determine nationality. The BIT with clear definition of nationality, referring to the law regulating citizenship of the state in question, is decisive and should be given full effect.\(^4\)

16. The Respondent cannot challenge the documents proving the Claimant’s nationality in this case which was given by a competent authority of the state exercising its rightful jurisdiction. It was agreed by \textit{Schreuer}\(^5\) that a certificate of nationality issued by a competent authority of a state is strong evidence to prove nationality, though it may not be conclusive. The tribunal only has limited capacity to look behind the documents of nationality, if the obtainment of those documents was through unlawful or fraudulent means which is not made in accordance with the state’s law.\(^6\)

17. In this case, the Respondent did not make any allegation that the Claimant has obtained his nationality by any unlawful means but challenged the Claimant’s newly acquired nationality that was given pursuant to an alleged illegal annexation. Thus, based on the rationale in \textit{Soufraki v UAE}, the tribunal has no jurisdiction to question the nationality of the Claimant conferred “in accordance with its laws” as per Article 1.2 of the Eurosia BIT.

\textbf{B. The Claimant’s nationality could not be determined based on the standards of international law.}

18. The wordings in Article 1.2 of the Euroasia BIT provide a clear criterion as to nationality. The tribunal should not go beyond the objective criterion of nationality provided in the BIT, and should adhere strictly to the terms of the applicable BIT.\(^7\) By taking into consideration of the international law standards, the tribunal would deviate

\(^4\) \textit{Siag v Egypt}, paras. 195 - 201.
\(^5\) \textit{Schreuer}, page 521.
\(^6\) \textit{Soufraki v UAE}, paras. 68-69.
\(^7\) \textit{AdT v Bolivia}, paras. 330 and 332.
from Euroasia BIT’s contracting parties’ intentions in expressly including an objective criterion to prove nationality

19. Euroasia’s authority to confer nationality cannot be challenged as it is a domestic affair. The objective criterion provided in Article 1.2 of the Euroasia BIT is to give effect to a state’s sovereignty in conferring nationality in accordance with its own laws.

20. Further, even if the tribunal decides that nationality, in this case, is dependent on the legality of the annexation, the present tribunal does not have jurisdiction to make such a finding on its own. Being an ad-hoc investment tribunal deciding matters in a private bilateral treaty, its jurisdiction does not extend to making a determination on public international law.

21. The competent body to decide on such matters is the International Court of Justice (“ICJ”), which is the judicial arm of the United Nations, deriving its jurisdiction under the purview of the *ICJ Statute*.

22. In absence of such a finding, the tribunal cannot take matters into its own hands and make a finding on its own. Thus, the legality of the annexation becomes an inapplicable standard of the international law in the present case.

C. The effective or dominant nationality principle is an inapplicable standard to determine nationality in the present case.

23. The Claimant only has one nationality which is the nationality conferred by Euroasia pursuant to the Citizenship Act. Through the Claimant’s action of sending an e-mail to the President of the Republic of Eastasia, he had signified his ultimate intention to renounce his Eastasian citizenship.

---

8 *ICJ Statute*, Article 36.
9 2016 FDI Moot Problem, Procedural Order No. 2, page 56, para. 4.
10 2016 FDI Moot Problem, Procedural Order No. 3, page 60, para. 2.
24. It was decided in *Soufraki v UAE* that if the laws of the subsequent state do not allow for dual nationality, then upon acceptance of the subsequent nationality, the former nationality is relinquished automatically by the operation of the subsequent state’s law.\(^{11}\)

25. Due to the nature of the Euroasian Citizenship Act, the Claimant’s nationality in Eastasia cannot be said to be retained as the assertive laws in Euroasia requires a positive act towards maintaining his nationality in Eastasia. Failing of which, his former nationality is ceased automatically upon acceptance of the new nationality.

26. Thus, the Claimant effectively only has one nationality. Since there is only one nationality at issue, the effective and dominant nationality principle is inapplicable to determine the nationality of the Claimant.\(^{12}\)

27. Even if the Claimant arguably has dual nationality, the present claim will not be affected by such an issue as it is not prohibited under the BIT.\(^{13}\) Thus, his effective and dominant nationality in Euroasia need not be proven.

**D. Alternatively, the annexation of Fairyland to Euroasia was legal allowing the Claimant to rely on the Euroasia BIT by virtue of Article 15 of the Vienna Convention on Succession of States in Respect of Treaties 1978 (“VCSS”).**

28. The annexation is legal as it was exercised through the right of self-determination of Fairyland’s residents under international law. The right of self-determination is an established principle under international law and the United Nations has incorporated the right to self-determination in various documents.\(^{14}\) The ICJ has also illustrated the existence of such rights in various cases.\(^{15}\) In the *Wall Opinion*, the court held that such rights extend outside of the colonial context of a state.\(^{16}\)

---

1. *Soufraki v UAE*, para. 52.
5. *Namibia*, paras. 31-32; *Western Sahara*, paras. 121-122; *East Timor*, para. 29.
29. Under international law, secession is neither authorized nor prohibited and the ICJ has taken the position that the absence of prohibition under international law allows it to be permissible.

30. A secession can be carried out under the right of self-determination, which are attached to the “people”. One of the current view on this principle is that such rights allows a group of individuals in a territory, with the desire of its members, to carry out secession.

31. The definition of “people” is essential in this respect, and the “two-prong test” by United Nations Educational, Scientific and Cultural Organization (“UNESCO”) has been used to define the term “people”. The test is divided into two categories, the objective and the subjective test. The objective test defines “people” as people who live in distinct territory with clear majority and possesses differences from others. The subjective test is when individuals in a particular group see themselves as a group of people who are distinct, and such group possesses political or social structures that can be used to represent them.

32. In our present dispute, the people of Fairyland have collectively agreed through the referendum of their intention to leave Eastasia and reunite with Euroasia, whom they were more related with. Most of the residents of Fairyland are of Euroasian origin and was part of Euroasian territory before it was annexed by Eastasia during the World War II.

33. The secession of Fairyland from Eastasia is legal as it was carried out by exercising the rights of self-determination of Fairyland residents which falls under the definition of “people” and such rights were exercised without any violation of international law.

---

17 *Corten II*, at page 88.
18 *Kosovo*, para. 48.
19 *Quebec*, para. 112.
20 *Dietrich*, page 127; *Pavkovic*, page 486-487.
21 *Final Report UNESCO*, para. 22(1).
34. A referendum that has been held in August 2013 is legal and it was held in accordance with international law. The referendum indicates the voice of the people.\textsuperscript{23} This is consistent with customary international law requires referendum to be held before any territorial changes are made.\textsuperscript{24}

35. The freedom of election is enshrined in Article 25 of \textit{ICCPR},\textsuperscript{25} and the \textit{Code of Good Practices on Referendum} drafted by the Venice Commission has substantiated the principle of fair voting.

36. It is a practice that freedom of referendum requires an absence of military forces of the opposing parties and a neutral position of the authorities.\textsuperscript{26} This is important to ensure that the military forces did not influence the voting as it must come from the people themselves.\textsuperscript{27}

37. There were no military forces present during the referendum, as Euroasia’s troops only interfere upon the invitation by the authorities, and the entry was only made in March. There is also no indication that the Fairyland authorities did not act in neutrality.

38. According to the Venice Commission,\textsuperscript{28} a referendum must be simple and not misleading. In the issue involving the secession of Crimea from Ukraine and its annexation to Russia, the legality of the referendum was disputed because the question posed was not a polar question and it was ambiguous.

39. In the case at hand, the question proposed in the referendum leads to a simple answer, in which both can be answered in affirmative. Hence, the issue of ambiguity of the question does not arise as it provides a clear illustration of the intention of the people of Fairyland.

\textsuperscript{23} Cassese, pages 261-262; Peters, page 286.
\textsuperscript{24} Peters, page 288; Gokhan, page 85.
\textsuperscript{25} ICCPR, Article 25.
\textsuperscript{26} A/HRC/15/L.3, para. 7; Wambaugh, page 241.
\textsuperscript{27} Hanafin v MFE, page 425.
\textsuperscript{28} Code of Good Practice on Referendums, para. 1.3; Quebec, para 87.
40. In addition, the provinces in Eastasia are allowed to hold referendums on matters involving their exclusive competence. The constitution of Eastasia does not include any provision to govern the matters of secession from Eastasia. Therefore, it can be concluded that the referendum was held in accordance with Eastasian law and has complied with the requirements under the international law, rendering the status of the referendum as legal.

41. The interference by Euroasian government was done legally as it was made by virtue of invitation and there was no use of force throughout the process of annexation.

42. The general principle of international law allows a state to invite the military troops of other states to its country or territory, provided that such invitation is issued by the highest authority of that state. The highest authority in this context refers to the official government, and precludes groups who oppose the government from inviting foreign troops into the state. It is a principle under international law that the government, who intends to send such invitation, must have effective control over the state.

43. The authorities of Fairyland have sent an official letter to the Euroasian government, requesting for assistance in the issue of secession of Fairyland from Eastasia. There is no facts within the documents which suggests that the authorities of Fairyland are an illegal government nor does it state that Fairyland authorities does not have control over its territory.

44. The law of Eastasia allows the Fairyland authorities to hold referendum pertaining to issues within their competency proving that the authorities of Fairyland have effective control over its territory. Furthermore, there was no use of force by the Euroasian troops, and such interference was peaceful. Since the letter was issued by the authorities of Fairyland.

---

29 Nicaragua, page 126; Kassim, page 125; Tanca, page 26; C. Le Mon, page 742.
30 Corten, page 263.
31 Nicaragua, page 126.
34 2016 FDI Moot Problem, Procedural Order No 2, page 55, para. 2.
Fairyland, pursuant to the referendum concluded in August 2013, the interference by the Euroasian government is not a violation of international law.

45. In conclusion, since the annexation of Fairyland to Euroasia is legal, the Claimant can rely on the Euroasia BIT by virtue of Article 15 of VCSS.

II. EVEN WITHOUT THE CLAIMANT FULLY COMPLYING WITH THE PRE-ARBITRAL PROCEDURE IN ARTICLE 9 OF THE EUROASIA BIT, THE TRIBUNAL STILL HAS JURISDICTION OVER THE DISPUTE

46. Non-compliance with the pre-arbitral steps does not exclude the jurisdiction of this tribunal as Article 9 of the Euroasia BIT as a whole is not mandatory due to the use of permissive language in the provision (Section A) and the only mandatory obligation of the Claimant in Article 9 of the Euroasia BIT, that is entry into an amicable settlement, has been fully discharged (Section B).

A. The Article 9 of the Euroasia BIT as a whole is not mandatory due its permissive language in the provision.

47. The Article 9 of the Euroasia BIT uses permissive language and does not contain clear and consistent words to give them a binding effect. The use of the word “may” shows that the parties never intended it to be a mandatory clause.35

48. In deciding whether pre-arbitration negotiation requirements are mandatory and enforceable in such jurisdictions frequently depends in substantial part on the specific wording and structure of the relevant clause. The word “may” in Article 9.2 of the Euroasia BIT shows that it is not mandatory for the parties to go to the court to exhaust local remedies.

35 2016 FDI Moot Problem, Exhibit C1, page 43.
49. In order to understand the nature of the word used in Article 9 of the Euroasia BIT, the tribunal will have to refer to the rules of interpretation in deciding whether the domestic litigation requirement relates to jurisdiction, admissibility or procedure.\(^{36}\)

50. According to *Philip Moris v Uruguay*, when the word “shall” is used in a dispute settlement provision, it is generally understood that it is binding upon the parties when it is unmistakably mandatory and obviously intended.\(^{37}\)

51. In the present case, Article 9.1 of the Euroasia BIT states that any dispute regarding an investment shall, to the extent possible, be settled in an amicable consultation. While Article 9.2 of the Euroasia BIT states that if the dispute cannot be settled amicably, it may be submitted to the local courts.

52. The words “shall” and “may” were used inconsistently thus by virtue of Article 31 of the *VCLT* and the case of *Philip Moris v Uruguay*, the Claimant does not need to comply with all of the pre-arbitral procedures in Article 9 of the Euroasia BIT.

**B. The only mandatory obligation of the Claimant in Article 9 of the Euroasia BIT that is entry into an amicable settlement has been fully discharged.**

53. Article 9.1 of the Euroasia BIT states that any dispute between the parties shall be settled in an amicable consultation. The word “shall” here makes it the only clause that can be construed as mandatory.

54. In the present case, the Claimant have already informed and notified the Respondent that the Claimant has an intention to initiate arbitral proceedings.\(^{38}\) However, there was no reply from the Respondent. This shows that there has been an adequate attempt by the Claimant to notify the Respondent.

\(^{36}\) *VCLT*, Article 31: General rule of interpretation.

\(^{37}\) *Philip Moris v Uruguay*, para. 140.

\(^{38}\) 2016 FDI Moot Problem, Request of Arbitration, page 4, para. 1.
55. Where an attempt to negotiate has been made by one party but the other party did not respond, it shows that a sufficient attempt to negotiate has been exhausted.39

56. In the alternative, the requirement of an amicable settlement is not mandatory due to the lack of clarity on how it should be executed.

57. Even if the Claimant did not manage to settle the dispute in an amicable consultation, it was never an obligation that it has to be performed, as in this case the settlement was not possible.

58. The phrase “amicable consultation” in Article 9.1 of the Euroasia BIT remains unclear. This is because, the requirements to participate in a specified pre-arbitral dispute resolution was not supported with clear guidelines.40

59. The provision in the arbitration clause that disputes may be settled in an amicable way constitutes no condition precedent to refer the dispute to arbitration, but rather underlines the parties’ intention to litigate disputes in court.41

60. Although amicable consultation has been complied with, it should not be treated as a condition precedent to arbitration because imposing such obligation would bar access to arbitral remedies, imposes disproportionate costs and delays on the entire dispute resolution process. These consequences could not be assumed to have been intended by the contracting parties in drafting Article 9 of the Euroasia BIT in the absence of the explicit language.42

61. Thus, it shows that the clause providing amicable settlement has been complied with and even if it has not been complied with, “amicable settlement” is not mandatory due to the lack of clarity in the provision pertaining to the process.

40 Cable & Wireless plc v IBM, page 9
41 Gary Born, page 234.
42 Ibid, page 250.
III. EVEN IF THE TRIBUNAL FINDS THAT COMPLIANCE TO THE PROCEDURE IS NECESSARY TO GIVE RISE TO ITS JURISDICTION, THE CLAIMANT CAN RELY ON ARTICLE 8 OF THE EASTASIA BIT VIA THE MFN CLAUSE.

62. The Claimant can rely on Article 8 of the Eastasia BIT as the MFN clause extends to dispute settlement provisions based on the natural meaning of the words in Article 3 of the Euroasia BIT (Section A) and the object and purpose of the BIT itself support extension of MFN clause (Section B). In addition, the current jurisprudence illustrates that MFN clause extends to dispute settlement provisions regardless of how narrow the provision is construed (Section C) and Article 8 of the Eastasia BIT is more favourable than Article 9 of the Euroasia BIT (Section D).

63. Should this tribunal find that compliance to the pre-arbitral procedure mandatory, the Claimant contends that Article 8 of the Eastasia BIT can be relied upon in order to give rise to the tribunal’s jurisdiction, by way of the MFN clause in Article 3 of the Euroasia BIT.

64. In accordance with the principles set out in Article 31 of the VCLT, the wordings of Article 3 of the Euroasia BIT must be "interpreted in good faith in accordance with the ordinary meaning" and "in the light of its object and purpose."\(^4^3\)

A. The MFN clause extends to dispute settlement provisions based on the natural meaning of the words in Article 3 of the Euroasia BIT.

65. Article 3.1 of the Euroasia BIT states that:

    “Each Contracting Party shall, within its own territory, accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments and to such other

\(^4^3\) VCLT, Article 31.
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”.

66. The Respondent may argue that the phrase “within its territory” in Article 3.1 of the Euroasia BIT indicates the intention of the contracting parties to limit the scope of the MFN clause. Nonetheless, the tribunal in Impregilo v Argentina has concluded that despite the existence of such phrase in Article 3.1 of the Argentina-Italy BIT, the application of the MFN clause covers dispute settlement as well.

67. In arriving to such conclusions, the tribunal in Impregilo v Argentina decided:

“… legal protection to foreign investors is in no way an issue over which Argentina has no power to decide, nor is it tied to any particular territory.”

Therefore, the tribunal considers that the phrase “within its own territory” does not exclude the application of the MFN clause to dispute settlement.

68. The provision follows with the phrase “income and activities related to such investment”. In Siemens v Argentina, the tribunal concurred with the final decisions of Maffezini v Spain, although noting that the MFN clause in Argentina-Spain BIT referred in Maffezini v Spain was broader compared to the Argentina-Germany BIT. Nonetheless, the tribunal in Siemens v Argentina stated that despite the MFN clause in the latter being narrower, the phrase “activities related to the investments” are sufficiently wide to include settlement of disputes.

---

44 Oceania-Euroasia BIT, Article 3.
45 Impregilo v Argentina, para. 100.
46 Siemens v Argentina, para. 103.
69. The Respondent may argue that the wording of “such other investment matters regulated by this Agreement” is meant to exclude dispute settlement matters from the application of the MFN clause. It may be contended that albeit the MFN clause in the present BIT is almost identical with Article 3.1 of the Argentina-Italy BIT referred in *Impregilo v Argentina*, however the latter used the broad wordings of “all other matters regulated by this Agreement”. This position should not be followed, as agreed in various cases\(^{47}\) that have coincided with the fact that resolution of disputes is indeed a matter related to investment.

70. Dispute settlement provision has been closely associated as a form of protection to investors. For instance, the tribunal in *Maffezini v Spain* stated that,

> “…dispute settlement arrangements are inextricably related to the protection of foreign investors...”\(^{48}\)

71. Thus it would be a misapplication of law if the interpretation of “such other investment matters” is to exclude settlement of disputes.

72. Furthermore, despite the narrow construction of Article 3.1 of the Euroasia BIT, the application of the MFN clause has not explicitly excluded resolution of disputes. The tribunal in *SDG v Argentina* noted that there were certain matters expressly excluded from the application of the MFN clause in the Argentina-Spain BIT, however there was no exclusion for resolution of disputes.\(^{49}\) Therefore, if the contracting Parties truly wished to exclude dispute settlement matters from the area covered by the MFN clause, it should have been drafted in such a way by the contracting parties.

73. With regard to the word “treatment”, numerous investment tribunals have concurred that such a term certainly includes dispute settlement. In *Siemens v Argentina*, the tribunal stated that “treatment” is a general term hence its application cannot be limited unless

\(^{47}\) *Siemens v Argentina, RosInvest v Russia, Impregilo v Argentina.*  
\(^{48}\) *Maffezini v Spain*, para. 54.  
\(^{49}\) *SDG v Argentina*, para. 30.
specifically agreed by the parties.\textsuperscript{50} The tribunal in \textit{Impregilo v Argentina} was of the opinion that such a term is wide enough to include dispute settlement.\textsuperscript{51}

B. The object and purpose of the BIT itself support the extension of the MFN clause.

74. The object and purpose of the Euroasia BIT can be referred to in the preamble of the BIT, which is stated as follows:

   “Desiring to achieve these objectives in a manner consistent with the protection of health, safety and the environment…”\textsuperscript{52}

75. An essential factor that needs to be considered by the tribunal is the common intention of the contracting states through the BIT. In summary, it can be said that the object and purpose of the Euroasia BIT is to promote investment between the two nations. Thus, investment should include both substantive and procedural protection of investment.

76. In \textit{Siemens v Argentina}, the preamble to the Argentina-Germany BIT provides that the parties have recognised that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the people of both countries.

77. The tribunal in \textit{Siemens v Argentina} explains that:

   “[Dispute settlement] … is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.”\textsuperscript{53}

\textsuperscript{50} \textit{Siemens v Argentina}, para. 106.
\textsuperscript{51} \textit{Impregilo v Argentina}, para. 99.
\textsuperscript{52} Oceania-Euroasia BIT, preamble.
\textsuperscript{53} \textit{Siemens v Argentina}, para. 102
78. The same subject matter was also discussed in *Suez v Argentina*, whereby the tribunal said, that dispute settlement is as important as other matters governed by the BITs and is an integral part of the investment protection regime that the respective sovereign states have agreed upon.\(^{54}\)

79. Furthermore, the tribunal in *SDG v Argentina* was of the opinion that the MFN provisions in BITs should be applicable to dispute resolution except if it appears clearly that the state parties agrees that on a different method for resolution of disputes.\(^{55}\)

80. Therefore, if Article 3.1 of the Euroasia BIT is to be interpreted according to its object and purpose, it can be derived from the common intention between Oceania and Euroasia that the MFN clause extends to dispute settlement provisions as well.

C. The current jurisprudence in investment law supports the general notion that MFN clause extends to dispute settlement provisions regardless of how narrow the provision is to be construed.

81. After the decision of *Maffezini v Spain*, there are several other cases that supported the MFN application to dispute settlement provisions. It is important to note that although Article IV of the Argentina-Spain BIT in *Maffezini v Spain* is regarded as a broad provision, other cases such as *Siemens v. Argentina* involved a narrower MFN clause than *Maffezini v Spain*. Nevertheless, the tribunal in notable cases have allowed it to extend to dispute settlement provisions. Thus, the decision in *Siemens v Argentina* is considered as a significant extension to *Maffezini v Spain*.\(^{56}\)

82. Among other jurisprudences in investment law that strongly affirmed the proposition set by *Maffezini v Spain* are *SDG v Argentina*, *National Grid v Argentina*,\(^{57}\) *Suez v Argentina*, and *Hochtief v Argentina*.\(^{58}\)

\(^{54}\) *Suez v. Argentina*, para. 57.
\(^{55}\) *SDG v Argentina*, para. 30.
\(^{56}\) *Stephanie*, page 40.
\(^{57}\) *National Grid v Argentina*, para 57.
83. The tribunal in *National Grid v Argentina* has rejected the notion brought by the decision in *Plama v Bulgaria* which adopted a stricter construction of the MFN clause, stating that it would deprive the MFN clause of its legitimate meaning or purpose in a particular case. The MFN clause is an important element to ensure that foreign investors are treated on a basis of parity with other foreign investors and with national investors when they invest abroad.\(^{59}\)

84. Other recent cases with regard to this particular matter are *Impregilo v Argentina\(^{60}\)* and *Teinver v Argentina*.\(^{61}\) It has been established that the narrow scope of MFN clause in *Impregilo v Argentina*, which is very similar to the present BIT, extends to dispute settlement provisions as well. The tribunal in *Impregilo v Argentina* allowed the Claimant to use the MFN clause contained in the basic treaty to access the more favourable Argentina-U.S. BIT that provided him a choice between international and domestic arbitration when the basic treaty did not provide a choice.\(^{62}\)

85. In *Teinver v Argentina*, the tribunal said:

> “…the tribunal is cognizant of the concern articulated by numerous tribunals that the reach of the MFN clause not extend beyond appropriate limits.”\(^{63}\)

The tribunal also acknowledges the nature of the dispute settlement provisions that the Claimants seek to replace via the Article IV(2) MFN clause is relevant to any such determination.

\(^{58}\) *Hochtief AG v Argentina*, para. 45.  
\(^{59}\) *Natural Grid v Argentina*, para. 92.  
\(^{60}\) *Impregilo v Argentina*, para. 74.  
\(^{61}\) *Teinver v Argentina*, para. 119.  
\(^{62}\) *Stephanie*, page 41.  
\(^{63}\) *Teinver v Argentina*, para. 181.
86. Despite the opposite approaches taken by other arbitral tribunals in deciding the scope of the MFN clause, such deviation shall not affect the determination in the present dispute.\textsuperscript{64}

87. Rodríguez has categorized the cases according to the issue at stake namely, (i) \textit{Maffezini v Spain, Siemens v Argentina, SDG v Argentina and Suez v Argentina} as a less fundamental procedural requirement; a mere preliminary step for accessing arbitration; and (ii) by contrast, \textit{Salini v Morocco and Plama v Bulgaria} dealt with core matters (basically an extension of jurisdiction) which could easily have been categorized as “public policy provisions” following \textit{Maffezini v Spain}. In all these cases a radical effect was intended by the Claimant; in the words of \textit{Plama v Bulgaria}, to replace the dispute resolution clause in the basic treaty into a dispute resolution mechanism from another treaty.\textsuperscript{65}

88. \textit{Maffezini v Spain} and \textit{Siemens v Argentina} dealt with bypassing a procedural pre-condition to a dispute settlement, while the other category dealt with the issue of extending the jurisdiction of the tribunal beyond the consent of the state parties.

89. In the present case, the Claimant intends to bypass the procedural pre-condition to a dispute settlement laid in the Euroasia BIT. Such intention is similar to the issue discussed in the first category rather than the latter. Hence, more weight should be given to the decisions in \textit{Maffezini v Spain, Siemens v Argentina, Impregilo v Argentina} and other related jurisprudence as mentioned earlier in giving rise to its jurisdiction.

D. The Article 8 of the Eastasia BIT is more favourable than Article 9 of the Euroasia BIT.

90. The Article 8 of the Eastasia BIT can be imported through the operation of the MFN clause because it is more favourable compared to Article 9 of the Euroasia BIT. This is because the latter offers direct access to arbitration while the former provides more on the requirements preceding to arbitration.

\textsuperscript{64} Berschander v Russia, para. 52.
\textsuperscript{65} Rodríguez, paras. 95-96.
91. The Article 9 of the Euroasia BIT not only forces the Claimant to submit the case to a local court first, but it also outlines that the Claimant must wait for 24 months after the date of the commencement of the proceedings of the court, only then the Claimant is allowed to refer the dispute to international arbitration.

92. The condition provided in Article 9 of the Euroasia BIT is clearly less favourable as it requires a longer waiting time before getting access to arbitration, as compared to the 6-months period in Article 8 of the Eastasia BIT.

93. Many arbitral tribunals, as mentioned earlier, in regards to dispute settlement provisions, have regarded that a shorter cooling-off period in other BITs is more favourable than a longer cooling-off period.

94. In SDG v Argentina, the tribunal declared that access to arbitration only after resort to national courts and an 18-month waiting period is a less favorable degree of protection than access to arbitration immediately upon expiration of the negotiation period.66

95. By applying the decision quoted above, Article 8 of the Eastasia certainly provides a higher degree of protection as it gives an instant access to arbitration if the dispute cannot be settled through negotiation within six months, thus making Article 9 of the Euroasia BIT to be less favourable.

66 SDG v. Argentina, para. 31.
ARGUMENTS ON MERITS

IV. THE CLAIMANT MADE A PROTECTED INVESTMENT IN LIGHT OF THE “CLEAN HANDS” DOCTRINE WITH REFERENCE TO ARTICLE 1.1 OF EUROASIA BIT

96. The “clean hands” doctrine is implied in the Euroasia BIT (Section A). The tribunal has jurisdiction over the Claimant’s case although there is allegation of corruption by the Respondent. (Section B). There is insufficient evidence to prove corruption (Section C)

A. The “clean hands” doctrine is implied into the Euroasia BIT.

97. The clean hands doctrine consists of the equitable maxim “ex turpi cause non oritur actio and nemo auditur turpitudinem suam allegans” which means that an unlawful and immoral act cannot be protected under the law. Therefore, the clean hands doctrine is implied in the Euroasia BIT although there is an absence of the phrase “in accordance with law”. This is because it could not be said that the host state would agree for the Claimant to be protected under the BIT if there is a breach of its domestic laws.

98. In Plama v Bulgaria, although the phrase “in accordance with the law” was not expressed in the Energy Charter Treaty (ECT), the tribunal held that the clean hands doctrine can be implied in the treaty. The ECT’s substantive protections do not apply to investments that are made contrary to the law. The absence of a specific provision does not mean that a BIT would protect investments which are made contrary to international and domestic law. This was agreed by the Yukos tribunal which stated that as investment treaties impose obligations on States to treat investors fairly, it encourages legal and bona fide investments. Thus, an investor who has made an investment contrary to domestic laws

67 Lim K., para. 14.
68 Article 1.1 Euroasia BIT, page 40.
69 Plama v Bulgaria II, para. 139.
should not be allowed to benefit from the substantive protections of the treaty.\textsuperscript{72} An investment obtained by wrongful means should not be allowed by a tribunal as it is contrary to the principle "\textit{nemo auditor propriam turpitudinem allegans}" and international public policy.\textsuperscript{73}

98. Similarly, in the present dispute, Oceanian law must be complied with at the commencement of the investment and also during its lifetime. Had there been a violation of Oceanian law, it would be contrary to the principle of international public policy. However, the investment made by the Claimant was lawful as the shares and license obtained by the Claimant were made in accordance with Oceanian domestic law.\textsuperscript{74}

99. In the present case, the tribunal should have jurisdiction to hear the Claimant’s case as the license and shares obtained were made bona fide. The Claimant’s investment had been unlawfully expropriated thus enabling the Claimant to bring the case to arbitration as guaranteed in Article 9 of the Euroasia BIT.

\textbf{B. The tribunal has jurisdiction to hear the Claimant’s case although there is allegation of corruption made by the Respondent.}

100. In \textit{Plama v Bulgaria}, the tribunal opined that if the illegality occurs during the making of the investment, the tribunal does not have jurisdiction to hear any disputes brought by the Claimant. However, if the illegality occurs after the making of the investment, the tribunal still has jurisdiction to hear the Claimant’s case.\textsuperscript{75} The underlying reason behind this is because the host state could not have given its consent for the investor to be protected under the BIT if the investor had commit illegality before or at the making of the investment\textsuperscript{76} which disallow the Claimant from relying on the dispute settlement clause to seek remedy from this tribunal.\textsuperscript{77}

\textsuperscript{72} \textit{Yukos v Russia}, page 430, para. 1352.
\textsuperscript{73} \textit{Phoenix Action}, page 43, para. 111.
\textsuperscript{74} 2016 FDI Moot Problem, page 32, para. 2, page 33, para. 6.
\textsuperscript{75} \textit{Plama v Bulgaria I}, para. 229.
\textsuperscript{76} \textit{Zachary}, page 156, para. 2.
\textsuperscript{77} Ibid.
101. However, this is not similar to the case at hand. This is because the allegation of corruption by the Respondent points to the lifetime of the investment that is during the obtainment of license on 23 July 1998. The Respondent did not question the legality of Claimant’s investment before or at the start of the investment which commenced in February 1998.

102. In *Yukos v Russia*, the tribunal affirmed that the right to invoke the BIT is not denied to an investor in the case of illegality during the lifetime of the investment. This is consistent with the *Fraport v Philippines*’ decision where the tribunal stated that illegality during the life of the investment may be a substantive defense, but cannot deprive the tribunal of its jurisdiction. There is no justification to deny the right to apply the BIT to an investor who has breached the host state’s law during the lifetime of the investment. This is because, the host state can correct an investor’s behaviour whom have acted illegally and punish them under domestic law, as what the Russian Federation appeared to have done by evaluating taxes and introducing fines. In spite of that, if investor thinks that the punishment is not justified as the Claimant in the present case feels, there must be a medium to challenge the validity of the punishment in light of the applicable investment treaty. It would defeat the purpose of a BIT to deny investor’s rights to bring his case before an arbitration tribunal.

103. The Respondent’s argument to have the tribunal’s jurisdiction denied in totality is baseless. The Respondent has first agreed for the Claimant to be protected at the time the shares were obtained lawfully. It would defeat the whole motive of having the Euroasia BIT concluded between Euroasia and Oceania if investors from Euroasia cannot then claim their right to bring their case to the tribunal.

---

78 2016 FDI Moot Problem, page 33, para. 6.
79 2016 FDI Moot Problem, page 37, para. 19.
80 *Yukos v Russia*, page 430, para. 1355.
81 *Fraport v Philippines*, page 164, para. 345.
82 Supra note 79.
104. Furthermore, the Respondent could correct the Claimant’s actions that are unlawful. However, they have failed to do so, although the Respondent has full power to revoke the license granted to the Claimant at any time.\textsuperscript{83} Apart from that, the Claimant still affirms that the Claimant should be given means to challenge any sanction imposed by the Respondent.

C. There is insufficient evidence to prove corruption

105. The standard of proof for corruption in investment cases is clear and convincing evidence. As mentioned by Antonio, only one out of twenty-five cases applies a low standard of proof, whereas in fourteen cases, it was found that high standard of proof was applied that was described as “with certainty”, “clear proof”, “clear and convincing evidence” and “conclusive evidence”.\textsuperscript{84}

106. In \textit{EDF v Romania}, the case concerns corruption alleged by a foreign investor. The investor, EDF argued that in 2001, Romania had unlawfully expropriated its investment and treated its investment unfairly and unreasonably when EDF did not follow the demand for bribes by senior Romanian Government officials. The tribunal agreed that it is notoriously difficult to prove corruption as there is little or no physical evidence but asserts that to prove that a bribe had been demanded by a government official, the investor must produce evidence that is clear and convincing due to the seriousness of the accusation made.\textsuperscript{85}

107. In this case, as the Respondent is alleging that Claimant has bribed the President of NEA, the same standard of clear and convincing evidence should be applied. Allegation of corruption is a serious and grave allegation. Therefore it demands a high standard of proof.\textsuperscript{86}

\begin{flushright}
\textsuperscript{83} 2016 FDI Moot Problem, Procedural Order No.3, page 61, para. 10.
\textsuperscript{84} Antonio, pages 115-117.
\textsuperscript{85} EDF v Romania, para. 221.
\textsuperscript{86} 2016 FDI Moot Problem, page 37, para. 19.
\end{flushright}
108. Furthermore, in *Westinghouse v Philippines*, despite there being evidence that could be used to prove that Westinghouse wanted to bribe President Marcos with the aid of a local agent, the tribunal opined that the Respondent still has not fulfilled the burden of proof. This is because, there was no evidence of payment to President Marcos nor was there a proof of an agreement between President Marcos and Westinghouse. The tribunal ruled that bribery is a fraud that requires “a clear preponderance of the evidence”. In the present case, the Respondent could not provide any concrete evidence, instead they are merely relying on assumptions surrounding the case. As the same standard applies, the Respondent should give concrete evidence that is required to fulfill the high standard of proof.  

109. The definition of clear and convincing evidence is that evidence must be conclusive and that it must be persuasive to the tribunal.  

110. The Respondent has failed to meet the threshold of clear and convincing evidence. They could neither provide direct evidence or circumstantial evidences that amount to a clear and convincing evidence standard. In *Rumeli Telekom v Kazakhstan*, the tribunal held that to prove clear and convincing evidence, the Respondent must prove that there must be direct evidence, but if it is difficult for the party to provide, the circumstantial evidence must be conclusive and persuasive.  

111. In the present case, the witness testimony given by President of NEA is a direct evidence. However, he is not a credible witness. According to *Abdulhay Sayed*, little weight is given to testimonies of persons who have an interest in the outcome of the case, unless there are other consistent statements given by other witness or documentary evidence to support his or her claim. Moreover, the character of the witness and his or her neutrality would be taken into consideration.  

---

87 *Abdulhay Sayed*, page 107.  
88 *EDF v Romania*, para. 221.  
89 *Rumeli Telekom v Kazakhstan*, para. 323.  
90 *Abdulhay Sayed*, page 96, para. 3.
112. In the present dispute, the President of NEA has an interest when giving out his witness testimony. In the statement of facts, he receives a non-prosecution agreement in exchange of the testimony. There are no other witness testimony or documentary evidence to support the President of NEA’s testimony. Therefore, the witness testimony by the President of NEA should be rejected.\(^9\) As entrenched in the case of \textit{EDF v Romania}, if the evidence has a low probative value, the tribunal can decide to reject the admissibility of the evidence. Apart from that, President of NEA has also been convicted of other bribery charges. This shows that he is not a reliable and credible witness.

113. Further supported by Article 9.1 of the \textit{IBA Rules}\(^9\), which states that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence. Therefore, the tribunal has full discretionary power to reject the evidence submitted by the Respondent.

114. In respect to the circumstantial evidence, none of the circumstantial evidence that surrounds the case is conclusive. Firstly, the non-compliance of the Environment Act 1996 does not lead to the fact that the Claimant has bribed the President of NEA\(^9\) as the President of NEA could give the license within his discretionary power. Secondly, on the fact that the Claimant has received the license within a short period of time is merely an allegation\(^9\). It could not be proved based on Oceanian law that the time period of when the Claimant received the license from President of NEA is indeed unreasonable. Lastly, the wide prosecution in Oceania does not conclusively show that the Claimant’s involvement in bribery.\(^9\) The Claimant has only been charged but the investigation is still on-going. He has not been prosecuted yet, therefore the presumption of innocence should be given to the Claimant. The Claimant should be considered innocent of bribery until proven guilty.\(^9\)

\(^9\) 2016 FDI Moot Problem, page 56.
\(^9\) \textit{IBA Rules}, Article 9.1.
\(^9\) 2016 FDI Moot Problem, page 32, para. 4.
\(^9\) 2016 FDI Moot Problem, page 33, para. 6.
\(^9\) 2016 FDI Moot Problem, page 37, para. 19.
\(^9\) \textit{ICC Statute}, Article 66.
115. Furthermore, the fact that the prosecution and investigation had been on-going for the past one year, yet the Respondent still fails to provide any conclusive evidence to show that the Claimant has committed corruption raises doubt on the allegation of bribery made by the Respondent. In short, they have failed to meet the threshold of clear and convincing evidence.

V. THE CLAIMANT’S INVESTMENT HAD BEEN UNLAWFULLY INDIRECTLY EXPROPRIATED BY THE RESPONDENT.

116. Article 4 of Euroasia BIT provides that:

“Investments by investors of either Contracting Party may not directly or indirectly be expropriated … The expropriation shall be carried out under due process of law, on a non-discriminatory basis and shall be accompanied by provisions for the payment of prompt, adequate and effective compensation.”

117. The Claimant has suffered a near-total loss in his investment. (Section A) The Claimant has lost control over his investment. (Section B) The measure taken by the Respondent has a permanent effect on the Claimant’s investment. (Section C) the Respondent had taken an unlawful measure against the Claimant. (Section D) The Respondent cannot invoke Article 10 of Euroasia BIT as a defence. (Section E).

118. The tribunal from S.D. Myers v Canada interpreted the word “expropriate” that is embedded in the North Atlantic Free Trade Agreement (“NAFTA”) to carry with it the connotation of a “taking” by a governmental-type authority of a person’s property. Similarly, the word “tantamount” under Article 1110(1) rendered the tribunal to look at

---

97 2016 FDI Moot Problem, page 37, para. 19.
98 Euroasia BIT, Article 4(1).
99 S.D. Myers v Canada, para. 280.
the substance of what has occurred and not only at form.\textsuperscript{100} Hence, in Article 4 of the Euroasia BIT, the word “tantamount” should be interpreted likewise because the Claimant has suffered losses due to the unlawful indirect expropriation conducted by the Respondent.\textsuperscript{101}

A. The Claimant suffered a near-total loss in his investment.

119. In \textit{Sempra v Argentina}, the tribunal established that to prove indirect expropriation, the investor must prove that his business had been virtually annihilated.\textsuperscript{102} Mere adverse effects such as lifting of a subsidy could not be deemed as an act of indirect expropriation.\textsuperscript{103} This is different from the present dispute as the effects of the Executive Order had destroyed the Claimant’s company. Firstly, all of the companies in Oceania had severed their contract made with the Claimant as per the Executive Order.\textsuperscript{104} These companies are vital assets to the Claimant since raw materials for the company to operate is supplied by the Oceanian companies.\textsuperscript{105}

120. Secondly, liquidation of the Claimant’s company is not a far off implication since the Claimant could not sell his shares to third party\textsuperscript{106} due to the rapid decrease of the shares which now amounts to zero.\textsuperscript{107} The complete devaluation of shares is a clear indication of how the Claimant’s business had been virtually annihilated. This is congruent to \textit{Sempra v Argentina} whereby the tribunal must look at the elements whether the party has suffered a significant loss and whether there is a reduction of the investment’s value due to the expropriation.\textsuperscript{108} It is no doubt that both elements from \textit{Sempra v Argentina} has been fulfilled because (I) the Claimant could not contract with other already contracted companies and (II) the company’s shares reduced almost completely.\textsuperscript{109}

\textsuperscript{100} Ibid, para 280.
\textsuperscript{101} Supra note 97.
\textsuperscript{102} \textit{Sempra v Argentina}, para. 284.
\textsuperscript{103} Ibid, para. 285.
\textsuperscript{104} 2016 FDI Moot Problem, page 36, para. 16.
\textsuperscript{105} Ibid, para 11, page 34.
\textsuperscript{106} Ibid, para 17, page 36.
\textsuperscript{107} 2016 FDI Moot Problem, page 5.
\textsuperscript{108} \textit{Sempra v Argentina}, para. 284.
\textsuperscript{109} Ibid, para. 284.
B. The Claimant has suffered loss of control over his investment

121. The *Sempra v Argentina* tribunal opined that there is a substantial deprivation of rights over the investor’s company when the deprivation results to, inter alia, loss of control over their investment, deprived of managing their day-to-day operations of the company, depriving the company of its property or control in whole or in part.\(^{110}\) The indirect expropriation conducted by the Respondent has resulted to the Claimant’s inability to have a complete control or rather the usual control over the company.\(^{111}\) The supply of raw materials had ceased\(^{112}\) when the contracts from Oceanian companies were severed.\(^{113}\)

122. In the case of *S.D. Myers v Canada*, it has been affirmed that “an expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary.”\(^{114}\)

123. *Baiju S. Vasani*, in his presentation on “Complexities of Indirect Expropriation” defined the said term to mean where an investor retains legal title, but investment becomes unusable or essentially worthlessness; while the term direct expropriation to mean the legal title of the business changes hands.\(^{115}\)

124. Thus, the Executive Order had deprived the Claimant of the ability to manage their day-to-day operations as noted in *Sempra v Argentina* and *S.D. Myers v Canada*. This eventually lead to the loss of control over the Claimant’s company besides not having to operate in their ordinary nature of business, another contributing factor is the complete

---

\(^{110}\) Ibid, para. 284.  
\(^{111}\) 2016 FDI Moot Problem, page 36, para. 17.  
\(^{112}\) Ibid, page 34, para. 11.  
\(^{113}\) Ibid, page 36, para. 17.  
\(^{114}\) *S.D. Myers v Canada*, para. 283.  
\(^{115}\) Complexities of Indirect Expropriation
The devaluation of shares\textsuperscript{116} which disabled the company to conduct ordinary investments\textsuperscript{117}. Therefore, even though the Claimant still owns and manages the company, but is unable to operate his business, specifically weapons production, would amount to the Claimant’s loss of control over the investment; hence it is an indirect expropriation as per the definition given by Baiju S. Vasani.\textsuperscript{118}

C. The measure taken by the Respondent has a permanent effect on the Claimant’s investment.

125. The tribunal from \textit{RDC v Guatemala} had to evaluate the effect of the alleged expropriatory measure\textsuperscript{119} and whether, inter alia, there is a substantial interference that could be considered equivalent in effect to a direct expropriation; and such substantial interference must be permanent, irrevocable, or irreversible.\textsuperscript{120} If the party fails to demonstrate that such interference was substantial and permanent, the tribunal cannot acknowledge the existence of an indirect expropriation.\textsuperscript{121}

126. In regards to Rocket Bombs, the expropriation can be deemed to be one of a substantial interference since the ordinary operation of the company cannot be performed.\textsuperscript{122} Moreover, since the Executive Order does not specify any duration thus the effect is also one that is permanent and irreversible, which is also evident through the complete devaluation of shares\textsuperscript{123} that lead to the Claimant’s loss of control over their company.\textsuperscript{124} This clearly shows that the measure has a permanent effect on the Claimant’s investment.

\textsuperscript{116}2016 FDI Moot Problem, page 5.
\textsuperscript{117}2016 FDI Moot Problem, page 36, para. 17
\textsuperscript{118}Complexities of Indirect Expropriation.
\textsuperscript{119}\textit{RDC v Guatemala}, para. 17.
\textsuperscript{120}Ibid, para. 18.
\textsuperscript{121}Ibid, para. 65.
\textsuperscript{122}2016 FDI Moot Problem, page 36, para. 17.
\textsuperscript{123}2016 FDI Moot Problem, page 5.
\textsuperscript{124}Supra note 121.
D. The measure issued by the Respondent is an unlawful expropriation.

127. It should be noted that certain tribunals agree that sovereign States have rights to regulate its domestic affairs, but these rights are limited to what is laid down in the BIT. In other words, the measure should not amount to an unlawful expropriation. In determining whether the expropriation is lawful or unlawful, several tribunals have to analyze BITs and see the requirements of an unlawful expropriation. The BIT from *ADC v Hungary* mentioned there are four requirements which are due process, non-discriminatory, just compensation and public interest, which is similar to Article 4.1 of the Euroasia BIT. The Executive Order issued by the Respondent is illegal for two reasons; firstly, the Respondent did not follow due process of law. Secondly, Executive Order was not made for a public interest.

a. Due process of law was not complied with.

128. In *ADC v Hungary*, in analyzing the Cyprus-Hungary BIT, the tribunal concluded that the Respondent did not follow due process of the law because they failed to abide by the minimum standard of due process. ADC mentioned the requirement of due process consists of reasonable and advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the claims. It is highly unlikely for the Claimant to foresee the political response of the Oceanian government, such as imposing economic sanctions upon domestic companies contracting with any Eastasian companies by virtue of the Executive Order.

---

125 *ADC v Hungary*, para. 424.
127 Ibid, para. 425.
128 Ibid, paras. 426 - 444.
129 Euroasia BIT, Article 4.1.
130 *ADC v Hungary*, paras. 426 - 444.
131 Ibid, paras. 426 - 444.
132 2016 FDI Moot Problem, page 36, para. 16.
133 Ibid, page 36, para. 17.
129. The media reports on the implementation of the Executive Order could not amount to a sufficient notification as they were mere speculations.\textsuperscript{134} It would be a risk for the Claimant to rely on mere speculations, thus a formal notice to the investor and a fair hearing is imperative especially for the Claimant’s nature of business. Hence, this is in line with the reasoning given by the tribunal in the aforementioned case as providing notification is a minimum standard of due process of law.\textsuperscript{135} None of these were made available to the Claimant.

b. The Executive Order was not made for a public interest.

130. According to Catharine Titi, the definition of public interest is people’s general welfare and well-being.\textsuperscript{136} Additionally, the tribunal in \textit{ADC v Hungary} confirmed that in order for a measure to be a lawful regulatory measure, it has to, inter alia, serve the public interest.\textsuperscript{137} Though in the said case, the tribunal failed to see how the measure was in the public’s interest, thus deeming the measure to be one that is unlawful and amounted to an unlawful expropriation.\textsuperscript{138}

131. The business conducted by the Claimant, did not in any way affect the well-being of the people in Oceania.\textsuperscript{139} Furthermore, the Executive Order implemented by the Respondent did not in any way benefit the public interest of Oceanian citizens.\textsuperscript{140} There is no proof to show that the act of succession of Fairyland into Euroasia has either affected the people in Oceania or impede the Oceanian’s general welfare and well-being. Thus, the Executive Order is not a measure that is lawful and therefore should be seen as not a regulatory measure but an unlawful measure bordering expropriation.\textsuperscript{141}

\textsuperscript{134} 2016 FDI Moot Problem, page 56, para. 7.
\textsuperscript{135} \textit{ADC v Hungary}, para. 432.
\textsuperscript{136} \textit{Catharine Titi}, page 100.
\textsuperscript{137} \textit{ADC v Hungary}, para. 444.
\textsuperscript{138} Ibid, para. 446.
\textsuperscript{139} 2016 FDI Moot Problem, page 36, para. 17.
\textsuperscript{140} 2016 FDI Moot Problem, page 56, para. 7.
\textsuperscript{141} \textit{ADC v Hungary}, para. 444.
E. The Respondent cannot invoke Article 10 of the Euroasia BIT as a defence.

132. Article 10 of Euroasia BIT provides the following,

“Nothing in this 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”\(^\text{142}\)

133. The Respondent’s reliance of Article 10 of the Euroasia BIT should not be acknowledged and cannot be invoked for two reasons; firstly, there was no state of necessity. Secondly, Article 10 is not a self-judging clause. Alternatively, even if Article 10 of Euroasia BIT could be invoked, compensation must be given to the Claimant.

a. There was no state of necessity.

134. The tribunal of \(LG&E v Argentina\) analyzed Article XI of the BIT\(^\text{143}\) to see whether the Respondent is entitled for the protection included under the article and whether the measures were necessary to maintain order or the protection of international peace and security.\(^\text{144}\) The tribunal mentioned that to invoke such article there must be a state of necessity whereby it will be necessary to prove the existence of a serious public disorder.\(^\text{145}\) Article 25 of the \(ILC Articles\) was also read together with Article XI of the BIT.\(^\text{146}\) Article 25 of \(ILC Articles\) provides that the measure imposed by the host state must be proportionate to the effect of the measure.\(^\text{147}\)

\(^{142}\) Euroasia BIT, Article 10.
\(^{143}\) US-Argentine BIT.
\(^{144}\) \(LG&E v Argentina\), para. 205.
\(^{145}\) Ibid, para. 228.
\(^{146}\) \(ILC Articles\)
\(^{147}\) \(LG&E v Argentina\), para. 225.
135. In the present case, the aim of the Executive Order which is to provide economic blockage to Oceania was not proportionate as the effect of the Executive Order has destroyed the Claimant’s business.148 Meanwhile, the LG&E v Argentina tribunal marked that there was a state of serious public disorder since the evidence presented to them portrayed that there was an “extremely severe crises in the economic, political and social sectors reached their apex and converged in December 2001, threatening total collapse of the Government and the Argentine State.”149 Unlike Oceania’s case, or the Respondent, there was definitely no sign of extreme public disorder that could suggest the topple of the Oceanian government or anything of the like.150 Thus, the argument surrounding the state of necessity should be rejected.

b. Article 10 of the Euroasia BIT is not a self-judging clause.

136. The LG&E v Argentina tribunal explained the applicability of a self-judging clause by determining whether Article XI is a self-judging clause.151 Argentina, or the Respondent, contended that the state should make a good faith determination as what constitute as measures for the maintenance of public order or the protection of its essential security interests.152 The tribunal concurred with the Respondent since it was evident that Argentina was in a state of extreme public disorder caused by the economic crisis of 2001, thus good faith was established.153

137. Though in contrast, in the event that Oceania invokes Article 4 of the Euroasia BIT and contends that it is self-judging, then the burden of proving that it was in good faith is put upon the Respondent. Nevertheless, it is imperative to note that the facts did not suggest any state of turmoil, such as civil unrest, collapse of economy or government, military intervention, etc, faced by the Respondent.154 Thus it is highly difficult to say that the Respondent has implemented the Executive Order in good faith for the maintenance of

---

148 2016 FDI Moot Problem, page 36, para. 17.
149 LG&E v Argentina, para. 231.
150 2016 FDI Moot Problem, page 36, para. 16.
151 LG&E v Argentina, para. 208.
152 Ibid, para. 208.
153 Ibid, para. 214.
154 2016 FDI Moot Problem, page 36, para. 16.
peace and security as well as public order by virtue of Article 4 of the Euroasia BIT.\textsuperscript{155} Hence, the Respondent cannot arbitrarily claim good faith and contend that Article 4 of the Euroasia BIT is a self-judging clause.

c. In the alternative, compensation should still be given to the Claimant as entrenched in Article 5 of the Euroasia BIT.

138. Article 5 of Euroasia BIT provides that

“Where investments of investors of either Contracting Party suffer losses owing to war, armed conflict, a state of national emergency, revolt, insurrection, riot or other similar events attributable to authorities in the territory of the other Contracting Party, such investors shall be accorded by the latter Contracting Party treatment as regards restitution, indemnification, compensation or other settlement, not less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third state, whichever is more favourable.”\textsuperscript{156}

139. Even if Article 10\textsuperscript{157} is invoked by the Respondent, as the purpose of issuance of Executive Order is the existence of national emergency, the Claimant can rely on Article 5\textsuperscript{158} of the Euroasia BIT to claim compensation against the Respondent. The Claimants from the LG&G case invoked Article 27 of the ILC Articles. The Claimants contend that even if the state of necessity defense is available to Argentina under the circumstances of this case, Article 27 of the ILC Articles makes it clear that Argentina’s obligations to the Claimants are not extinguished and Argentina must compensate the Claimants for losses incurred as a result of the Government’s actions.\textsuperscript{159}

\textsuperscript{155} Euroasia BIT, page 45.
\textsuperscript{156} Ibid, page 42.
\textsuperscript{157} Ibid, page 45.
\textsuperscript{158} Ibid, page 42.
\textsuperscript{159} LG&G v Argentina, para. 264.
VI. THE CLAIMANT DID NOT CONTRIBUTE TO THE DAMAGE SUFFERED BY HIS OWN INVESTMENT

A. The Claimant has exercised due diligence.

a. Definition of due diligence.

140. According to Duncan, due diligence under international law is manifested in reasonable efforts by a state to inform itself of factual or legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them.\textsuperscript{160}

141. The tribunal in Parkerings noted that the foreign investor only has a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances.\textsuperscript{161}

b. Standard of due diligence.

142. A.V Freeman noted that the standard of due diligence requires nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.\textsuperscript{162} This is an “objective” assessment criterion. It has however been rejected by several scholars, and arbitrators, which have instead relied on the “subjective due diligence standard”, taking into consideration the means at the disposal of the State, and the specific circumstances present in the State.\textsuperscript{163}

\textsuperscript{160} Duncan, page 6.
\textsuperscript{161} Ibid, page 10.
\textsuperscript{162} Ibid, page 10.
\textsuperscript{163} Duncan, page 10.
c. Effects of due diligence

143. In *MTD Equity v Chile*, the tribunal concluded that for an investor to discharge his liability, he must show that an act is not foreseeable and he has taken due diligence.\(^{164}\) The Claimant in this case took a business action that increased their risks in the transaction in which they have to be responsible for.\(^{165}\) The tribunal rationalised that it is not the Respondent’s fault that the Claimant conducted the project without any legal protection or sufficient due diligence.\(^{166}\)

144. In contrast to the present case, at the conclusion of the 2nd contract with Euroasia, which was dated on 28 February 2014, there was neither succession nor use of force in Fairyland.\(^{167}\) The military force only entered Fairyland on 1 March 2014.\(^{168}\) Therefore, it could not be foreseeable to the Claimant that the contract would bring any jeopardy to him.\(^{169}\) It is also not reasonable for the Claimant to foresee that the referendum was an unlawful act that would affect his business, as it is a domestic affair.\(^{170}\)

145. The Claimant in *MTD Equity v Chile* would foresee such financial debacle if they were to conduct proper due diligence before conducting their investment.\(^{171}\) However for Peter Explosive, it would not be foreseeable for him to be aware that Euroasia would be on the camp against the succession and implement the Executive Order.\(^{172}\) Plus, the media reports were mere speculation and cannot be relied upon.\(^{173}\) Thus, any argument pertaining to the lack of due diligence by Peter Explosive should be nullified and not be given any merits.
B. There is no causal link between the injury suffered by the Claimant and the act done by the Claimant.

146. In *Yukos v Russia*, the tribunal held that the Claimant contributed to the damage suffered by his own investment and had reduced reparation made to the Claimant to only 75%. The tribunal explained that in invoking Article 31 of *ILC Articles*, reparation shall be made in full to the victim unless it can be shown that there is a sufficient causal link between any willful or negligent act or omission done by the Claimants or of Yukos and the loss that the Claimant has suffered. The tribunal later found that the Claimant should pay a price as Yukos had abuse the low tax region done by its trading entities and Yukos’ questionable use of the Cyprus-Russia DTA which had contributed to its own detriment in the hands of Russian Federation. However, the tribunal agreed that that act of the Russian Federation is disproportionate which amounted to the Claimant’s investment to be expropriated.\(^{174}\)

147. In contrary to the case at hand, the Claimant did not perform any illegal act neither did the Claimant abuse any law in Oceania or Euroasia when conducting his business in Oceania and Euroasia. The contract made between the Claimant and John Defenceless was a legal contract while the investments made by the Claimant in Oceania are also lawful investments.\(^{175}\) The sanction imposed by the Respondent to the Claimant was not provoked due to the Claimant’s actions. This is because, the Respondent’s act to impose such sanction was due to its political disagreement with Euroasia, which led to the Claimant’s investment being expropriated.\(^ {176}\) Therefore, there is no sufficient causal link between the Claimant’s conduct in renewing contracts with John Defenceless and the expropriation done by the Respondent.

\(^{174}\) *Yukos v Russia*, para. 1600.
\(^{175}\) 2016 FDI Moot Problem, page 35, para. 15.
\(^{176}\) Ibid, page 36, para. 16.
C. The Claimant did not fulfill the requirement sought in Article 39 of the ILC Articles for the reparation to be reduced

148. The Claimant did not fulfill requirement sought in Article 39 of *ILC Articles*. The said provision provides that,

“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.”\(^{177}\)

149. In order to reduce reparation made to the Claimant, only those actions or omissions which are deemed to be willful or negligent will be taken into account. In the *LaGrand* case, the court took into account the state’s conduct in assessing the form and amount of reparation. As Germany had delayed in making claims that there had been a breach and in instituting proceedings, the court took that into account when reducing the reparation made to Germany.\(^{178}\)

150. In the case at hand, the Claimant’s actions to renew Rocket Bomb’s contract with John Defenceless is not a negligent act that could lead to a reduce for the reparation awarded to the Claimant. It is a business conduct that exists independently without any political agenda. The Claimant is only exercising his rights as an investor in Euroasia.

\(^{177}\) *ILC Articles.*

\(^{178}\) *Commentary on ILC Articles*, Article 39.
PRAYERS FOR RELIEF

The Claimant respectfully seeks for the tribunal to find in favour that:

1. The Claimant is a protected investor under the Euroasia BIT.
2. The non-compliance to the pre-arbitral steps will not affect this tribunal’s jurisdiction.
3. The Claimant can rely on Article 8 of the Eastasia BIT by virtue on the MFN clause.
4. The Claimant made a protected investment in light of the clean hands doctrine with reference to Article 1.1 of the Euroasia BIT.
5. The Claimant’s investment had been unlawfully indirectly expropriated by the Respondent.
6. The Claimant did not contribute to the damage suffered by his own investment.

TEAM MO
On behalf of Claimant
Marcella Mine