Team Sepulveda

ARBITRATION PERSUANT TO THE RULES OF ARBITRATION OF THE

INTERNATIONAL COURT OF ARBITRATION AT THE

INTERNATIONAL CHAMBER OF COMMERCE, BRALUFT

IN THE PROCEEDING BETWEEN

PETER EXPLOSIVE

(CLAIMANT)

V.

REPUBLIC OF OCEANIA

(RESPONDENT)

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<td>Mr. John Dugard, Third report</td>
<td>Mr. John Dugard, Special Rapporteur, <em>Third report on diplomatic protection</em>, Documents of the fifty-fourth session, (7 March and 16 April 2002).</td>
</tr>
<tr>
<td>Philip Reznik</td>
<td>Philip Reznik, <em>Survival of BITs and investor rights in Crimea - Russia’s Trick or Treat(y) with investors</em>, (2015).</td>
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<td>Stephan Schill</td>
<td>Stephan Schill, <em>Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction – A Reply to Zachary Douglas</em>,</td>
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<td><strong>Paul Szasz</strong></td>
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**MISCELLANEOUS**

<p>| <strong>ILC’s Advisory opinion on Legal Consequences for States</strong> | <em>ILC’s Advisory opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution, 276 (1970).</em> |
| <strong>The Declaration on the Granting of Independence to Colonial Countries and Peoples</strong> | <em>The Declaration on the Granting of Independence to Colonial Countries and Peoples</em> United Nations General Assembly Resolution 1514 (XV), (1960). |
| <strong>UNCTAD Series on Issues in International Investment Agreements II</strong> | United Nations Conference on Trade and Development, Expropriation, UNCTAD Series on Issues in International Investment Agreements II. |</p>
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<td><strong>ICCPR</strong></td>
<td>International Covenant on Civil and Political Rights, (23 March 1976).</td>
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<tr>
<td><strong>UN Charter</strong></td>
<td>Charter of the United Nations, (24 October 1945).</td>
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<tr>
<td><strong>Netherlands-Czech BIT</strong></td>
<td>1991 Bilateral Investment Treaty between the Netherlands and the Czech Republic.</td>
</tr>
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<td><strong>UNCAC</strong></td>
<td>United Nations Convention against Corruption, (31 October 2003), A/58/422.</td>
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<td><strong>ABITRAL DECISIONS</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Abaclat v. Argentina</strong></td>
<td>Abaclat v. Argentina, ICSID Case No. ARB/07/5, Award on Jurisdiction and Admissibility, (October 28, 2011).</td>
</tr>
<tr>
<td><strong>Ambatielos (Greece v. United Kingdom of Great Britain and Northern Ireland</strong></td>
<td>Ambatielos (Greece v. United Kingdom of Great Britain and Northern Ireland), Award XII R.I.A.A. 91, 107. (6 March 1956).</td>
</tr>
<tr>
<td><strong>Ambiente Ufficio v. Argentina</strong></td>
<td>Ambiente Ufficio v. Argentina, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, (February 8, 2013).</td>
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<tr>
<td><strong>Amco Asia Corporation and others v. Republic of Indonesia</strong></td>
<td>Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1 -</td>
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<td><strong>Biwater Gauff (Tanzania), Ltd. v. Tanzania</strong></td>
<td>Biwater Gauff (Tanzania), Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Award, (24 July 2008).</td>
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<td><strong>Byron v. Clay</strong></td>
<td>Byron v. Clay, 867 F.2d 1049, 1051 (7th Cir. 1989).</td>
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<tr>
<td><strong>CMS Gas Transmission Company v. The Republic of Argentina</strong></td>
<td>CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8</td>
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<td>EDF (Services) Limited v. Romania</td>
<td>EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13</td>
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<tr>
<td>Emilio Agustín Maffezini v. The Kingdom of Spain</td>
<td>Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, (25 January 2000).</td>
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<td>Gas Natural v. Argentina</td>
<td>Gas Natural v. Argentina, ICSID Case No. ARB/03/10, Decision on Jurisdiction, (June 17, 2005).</td>
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<td>Gemplus v. Mexico</td>
<td>Gemplus v. Mexico, ICSID Case No. ARB(AF)/04/3, Award, (June 16, 2010).</td>
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<td>Ioannis Kardassopoulos v. Georgia</td>
<td>Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, (6 July 2007).</td>
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<td>CME (Netherlands) v. CzechRepublic</td>
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<td>C. D. Santa Elena S.A. v. Republic of Costa Rica</td>
<td>C. D. Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1</td>
</tr>
<tr>
<td>LG&amp;E Energy Corp, LG&amp;E Capital Corp, LG&amp;E International Inc v Argentine Republic (LG&amp;E)</td>
<td>LG&amp;E Energy Corp, LG&amp;E Capital Corp, LG&amp;E International Inc v Argentine Republic (LG&amp;E), Decision on Liability, ICSID Case No. ARB/02/1, (3 October 2006).</td>
</tr>
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<td>Metal-Tech Ltd v. Uzbekistan</td>
<td>Metal-Tech Ltd v. Uzbekistan, ICSID Case No. ARB/10/3, Award.</td>
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<td>Micula and Ors. v. Romania</td>
<td>Micula and Ors. v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction, (24 September 2008).</td>
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<tr>
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<td><strong>Mellacher and Others v. Austria</strong></td>
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<td><strong>Soufraki v. UAE</strong></td>
<td><em>Soufraki v. UAE,</em> ICSID Case No. ARB(AF)/02/7, Award, (July 7, 2004).</td>
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<td><strong>Suez, S. G. SA and ISIA SA v Argentina</strong></td>
<td><em>Suez, S. G. SA and ISIA SA v Argentina,</em> ICSID Case No ARB/03/17.</td>
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<td><strong>Tecnicas Medioambientales Tecmed SA v The United Mexican States</strong></td>
<td><em>Tecnicas Medioambientales Tecmed SA v The United Mexican States,</em> ARB (AF)/00/2, Award 29 May 2003, 43 ILM 133, (2004).</td>
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<td><strong>Teinver v Argentina</strong></td>
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<td><strong>Tokios Tokelés v Ukraine</strong></td>
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<td><strong>Veteran Petroleum Limited (Cyprus) v. The Russian Federation,</strong></td>
<td><em>Veteran Petroleum Limited (Cyprus) v. The Russian Federation,</em> UNCITRAL PCA Case No. AA 228, Interim Award on Jurisdiction, (30 Nov. 2009).</td>
</tr>
<tr>
<td><strong>Starret Housing Corp v. Islamic Republic of Iran</strong></td>
<td><em>Starret Housing Corp v. Islamic Republic of Iran,</em> AWARD NO. 314-24-1, (14 August 1987).</td>
</tr>
<tr>
<td><strong>Telenor Mobile Communications A.S. v. The Republic of Hungary</strong></td>
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<tr>
<td><strong>Wena Hotels v. Egypt</strong></td>
<td><em>Wena Hotels v. Egypt,</em> ICSID Case No. ARB/98/4, Award, (December 8, 2000).</td>
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<td><strong>Tecmed v. Mexico</strong></td>
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<td><strong>Ambatielos (Greece v. United Kingdom of Great Britain and Northern Ireland)</strong></td>
<td><strong>Ambatielos (Greece v. United Kingdom of Great Britain and Northern Ireland), Award XII R.I.A.A. VOLUME XII pp. 83-153 (6 March 1956).</strong></td>
</tr>
<tr>
<td><strong>Case Concerning Barcelona Traction, Light, and Power Company Limited (Belgium v. Spain)</strong></td>
<td><strong>Case Concerning Barcelona Traction, Light, and Power Company Limited (Belgium v. Spain), (Second Phase), Judgment, ICJ Reports, (1970).</strong></td>
</tr>
<tr>
<td><strong>Certain Norwegian Loans (France v. Norway)</strong></td>
<td><strong>Certain Norwegian Loans (France v. Norway), Judgment, ICJ Reports, (1957).</strong></td>
</tr>
<tr>
<td><strong>Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)</strong></td>
<td><strong>Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, ICJ Reports (2008).</strong></td>
</tr>
<tr>
<td><strong>German Settlers</strong></td>
<td><strong>German Settlers in Poland, Advisory Opinion, (1923) P.C.I.J., Ser. B., No. 6, (3 February 1923).</strong></td>
</tr>
<tr>
<td><strong>Nationality Decrees Issued in Tunis and Morocco</strong></td>
<td><strong>Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco, 4, Permanent Court of International Justice, (7 February 1923).</strong></td>
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<td><strong>Oil Platforms Case (Iran v. USA)</strong></td>
<td><strong>Oil Platforms Case (Iran v. USA), Judgment, ICJ Reports, (2003).</strong></td>
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<tr>
<td><strong>The Factory at Chorzów case</strong></td>
<td><strong>The Factory at Chorzów (Claim for Indemnity) (The Merits), Germany v. Poland, Permanent Court of International Justice, Judgment, 1928 P.C.I.J. (ser. A) No. 17, p. 47, (13 September 1928).</strong></td>
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STATEMENT OF FACTS

1. Peter Explosive, is a resident of Fairyland and the President of the arms production company Rocket Bombs Ltd. He is the Claimant in the dispute. The Respondent is the Republic of Oceania.

2. In 1998, the Claimant purchased 100% of the shares of the decrepit Oceanian company, Rocket Bombs Ltd. he subsequently also became the President and the President and sole member of the Board of Directors of the Company. Before Peter Explosive acquired his shares, Rocket Bombs had lost its environmental license containing an approval for arms production. The downtime in the arms production was actually the reason behind the deteriorating situation of the company.

Obtaining the License for resuming production.

3. In order to resume arms production, Rocket Bombs was obliged by the environmental law of Oceania to obtain a license from the National Environment Authority of Oceania containing an environmental approval for the commencement of arms production. To obtain such a decision, Rocket Bombs was obliged to adjust its production line to the environmental requirements contained in the Environment Act 1996.

4. However, the Claimant lacked the necessary finances to fulfil the requirements and as a result he decided to turn to the Ministry of Environment of Oceania with a request for a subsidy for the purchase of the environmental-friendly technology. However, even with the required financial resources, the adjustment process of the production line and the administrative procedure to obtain an environmental license from the National Environment Authority of Oceania would be very long and time consuming.

5. And so to expedite the process, in July 1998 Peter Explosive managed to have a private meeting with the President of the National Environment Authority of Oceania. On the
23rd of July 1998, the license was granted. However, the subsidy asked for to modernise the production line was denied.

Obtaining the arms production contract from the Republic of Euroasia.

6. The denial of the subsidy request meant that Rocket Bombs lacked the resources to resume the arms production. So as to obtain the necessary funds, Peter Explosive approached his long-time friend, and the Minister of Defence of Euroasia, John Defenceless, so as to ask for a contract for arms, in light of the modernisation of the Euroasian military.

7. John Defenceless revealed that the country’s contract with their last arms producer was due to expire and promised that the that a new contract for the arms production will be concluded with Rocket Bombs. On December 23, 1998 they concluded a contract for the arms production. The contract was concluded for a period of fifteen years with a possibility for renewal.

8. As a result of the contract, the business became increasingly profitable, Peter Explosive started to modernise the production line and to adjust it to the requirements set forth in the Environment Act 1996. The production line fully complied with the legal requirements in Oceania by 1 January 2014.

The Annexation of Fairyland by Euroasia.

9. Fairyland was formerly a province of the Republic of Eastasia. However, the vast majority of people living in Fairyland are of Euroasian origin as historically it was a part of the territory of Euroasia. They do not identify with Eastasia and preferred to be reunited with Euroasia. In August 2013, the authorities of Fairyland decided to hold a referendum on the secession of Fairyland from Eastasia and its reunification with Euroasia. On 1 November 2013, the referendum was held and the majority decided in favour of secession.

10. The national government of Eastasia declared that the referendum was unlawful and had no effect on the shape of the Eastasian territory. In this situation, the authorities of Fairyland wrote an official letter to the Minister of Foreign Affairs of Euroasia, asking for an intervention.

11. After a long and publicized debate, the government of Euroasia decided to intervene and annex Fairyland to Euroasia. On 1 March 2014, the armed forces of Euroasia entered the
territory of Fairyland. The annexation was bloodless and rather peaceful as Eastasia did not send any armed forces to protect its territory.

12. On 23 March 2014, Euroasia officially declared Fairyland a part of the Euroasian territory. A few days later, on 28 March 2014, Eastasia declared the annexation to be illegal and in the light of the public international law, on 1 April 2014, it sent a notification to Euroasia, breaking off diplomatic relations between the two countries.

13. Before the Euroasian armed forces entered Fairyland, in February 2014, Peter Explosive on behalf of Rocket Bombs, renewed the arms production contract with the Republic of Oceania.

**Introduction of the Executive Order.**

14. The annexation divided the international community into two camps. One recognised the annexation as legal, and the other deemed it contrary to international law. Oceania was a part of the latter camp and on 1 May 2014 the President of the Republic of Oceania issued an Executive Order on Blocking Property of Persons Contributing to the Situation in the Republic of Eastasia. The Executive Order introduced a system of sanctions that also included a ban on business operations with such persons, suspending existing contracts and making future contracts with them illegal.

15. The sanctions were applied to Rocket Bombs, as well as to Peter Explosive. In fact, in the arms production sector, it was the only company designated by the sanctions. It resulted in the deterioration of Rocket Bombs’ business and in a rapid decrease in the value of its shares. Peter Explosive was unable to sell the shares in the company to a third person. Simultaneously, all the Oceanian companies that contracted with Rocket Bombs issued formal notices, declaring that pursuant to the Executive Order they were no longer bound by the provisions of the respective contracts and that they had no intention to perform them. Peter Explosive could neither conduct the business, nor sell it, making his investment virtually nugatory.

**The criminal investigation.**

16. Throughout 2013, the General Prosecutor’s Office of Oceania was conducting an investigation regarding the corruption in the National Environment Authority of Oceania. On 21 November 2013, the investigation resulted in a formal initiation of criminal
proceedings against those officials, including the President of the National Environment Authority of Oceania.

17. On 1 February 2015, the President of the National Environment Authority, along with the other officials, was convicted of accepting bribes. On 5 May 2015, Peter Explosive was informed that he was under investigation with regard to the environmental license obtained on 23 July 1998 for Rocket Bombs. On 23 June 2015, the General Prosecutor’s Office officially initiated criminal proceedings against Peter Explosive.

Initiation of Proceedings in the ICC.

18. The Claimant, after making an attempt at amicable negotiations, approached the ICC asking for remedies for expropriation of investment on September 2015.
SUMMARY OF ARGUMENTS

On Jurisdiction

19. The ICC tribunal has jurisdiction. First, The Claimant is an investor under Article 1.2 of the Euroasia BIT. As Euroasia’s annexation of Fairyland was lawful and therefore rules of succession of states in treaty law are applicable to this case. As such, Peter Explosive be recognised as a national of Euroasia. Therefore, the Euroasia BIT should apply. Second. The Claimant was not required to comply with the pre-arbitral steps as given in Article 9 of the Euroasia BIT. As approaching domestic forums of Oceania would be futile in the current circumstances, in any event, non-compliance would not negate jurisdiction. Third. The Claimant may invoke Article 8 of the Eastasia BIT in pursuance of Article 3 of the Euroasia BIT. As the relevant most-favoured nation clause applies to dispute resolution. The extension of MFN treatment is a substantive issue to investment protection. And, resorting to international arbitration will be more favourable in the current situation.

On Merits

20. If the Tribunal finds that it has jurisdiction and rules on the merits of the case, the Claimant submits that, first, the Claimant made a protected investment, especially in the light of the “clean hands” doctrine with reference to Article 1.1 of the Eastasia BIT. The Claimant made a protected investment under the Eastasia BIT. the ‘Clean Hands Doctrine’ does not negatively impact the Claimant’s case. In any event, the conduct of the claimant does not satisfy the requirements for the application of the ‘Clean Hands Doctrine’. And, the Respondent is barred from taking the ‘clean hands’ defence. Second. The Claimant’s investment was expropriated by the Respondent. As the Executive Order contains measures, the effect of which is tantamount to an Expropriation. Considering that the Order, did not serve a public purpose. Does not qualify as a regulatory measure, and does not fall within the ambit of Article 10 of the Euroasia BIT, therefore compensation must be made to the Claimant. Third. Claimant did not contribute to the damage suffered to his investment. The Respondent should not be allowed to escape its
obligations under the BIT to protect the investment by invoking the principle of contributory fault. In any case, the threshold for contributory fault has not been met. And there is no proximate causal link between the alleged contribution and the damage suffered by the claimant’s investment.
ARGUMENTS

ARGUMENTS ON JURISDICTION

I.  **Peter Explosive (“Claimant”) is an Investor pursuant to Article 1.2 of the Euroasia BIT**

21. This submission is in six parts. *Firstly*, the Claimant has nationality within the domestic jurisdiction of Euroasia (1.1). *Secondly*, the application of the effective nationality test makes Claimant a Euroasian national (1.2). *Thirdly*, according to the principle of Partial succession, the successor state acquires the rights and obligations (1.3). *Fourthly*, notwithstanding the legality of annexation, the occupant is not released from its obligations towards the acquired territory (1.4). *Fifthly*, non-recognition should not deprive the people of Euroasia of any advantages derived from international agreements (1.5). *Sixthly*, Fairyland’s secession from Eastasia and annexation into Euroasia was lawful (1.6).

A. **Claimant has nationality within the domestic jurisdiction of Euroasia**

22. The Claimant has duly acquired Euroasian nationality as per the local laws of Euroasia. ¹

“Nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition of its nationality.”²

23. ‘Prior to Fairyland’s annexation, on 1st March 2014, Euroasia introduced an amendment to its Citizenship Act, which allowed all residents of Fairyland to apply for Euroasian nationality. The Citizenship Act does not allow Euroasian nationals to possess dual nationality. On 23rd March 2014, Euroasian authorities recognised Peter Explosive as a national of the Republic of Euroasia, and he was subsequently issued a Euroasian identity card and passport.’³

24. The Claimant acquired and confirmed his nationality by becoming a Euroasian citizen under its Citizenship Act.

1  **Claimant’s acquisition of nationality and passport was in accordance with the municipal laws**

1 The Nottebohm case (Liechtenstein v. Guatemala); International Investment Law: Understanding Concepts and Tracking Innovations.
2 Ibid.
25. The Euroasian BIT is *lex specialis* and the Tribunal must apply only substantive Euroasian Law to determine the Claimant’s nationality. The Claimant acquired Eurasian nationality in accordance with the Eurasian Citizenship Act. The Citizenship Act does not allow for Eurasian nationals to possess dual nationality. The Claimant was recognised as a national of the country and issued a Eurasian Identity card and passport which is considered a conclusive proof of nationality of the Claimant.

2. **Claimant’s naturalization must be accorded recognition by the Tribunal**

26. The “Citizenship Act” was enacted in exercise of its “domestic jurisdiction and in conformity with applicable positive international law”. It was enacted in good faith by Euroasia since it was not neither arbitrary nor in pursuance of illegitimate ends. Euroasia’s exercise of its right to accord nationality does not hinder other States from enjoying their own rights.

B. **The application of the effective nationality test makes Claimant a Euroasian national**

27. It is submitted that in the Nottebhom Case the International arbitrators have given their preference to ‘the real and effective nationality test’, that which accorded with the facts, “is based on stronger factual ties between the people concerned and one of the States whose nationality is involved”.

28. The courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer ‘the real and effective nationality’.

29. Different factors are taken into consideration, and their importance will vary from one case to the next: ‘there is the habitual residence of the individual concerned but also the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.’

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5 Micula and Ors. v. Romania, at ¶¶ 98- 106.
6 Supra, at Note 3.
7 Soufraki v. UAE, at ¶53.
8 Nationality Decrees Issued in Tunis and Morocco, at p. 4; UDHR, 217 A (III).
9 Supra, Note 1, at ¶23.
10 Article 3, ¶ 5, ICJ Statute.
11 Supra, Note 1, at ¶ 24.
30. Historically, Fairyland was part of the territory of the Republic of Euroasia. Thus, most of the residents of Fairyland are of Euroasian origin and speak the Euroasian language.\textsuperscript{12} They do not identify with Eastasia and preferred to be re-united with Euroasia. The family of Peter Explosive also has its roots in Euroasia.\textsuperscript{13} Hence, applying ‘the real and effective nationality test’, the Claimant must be regarded as a citizen of Euroaisa.

C. According to the principle of Partial succession, the successor state acquires the rights and obligations

31. The theory of ‘Partial Succession’ held that if the state's personality survived from one nation to another, then the successor state acquired the rights and obligations of the predecessor state.\textsuperscript{14}

32. The theory with its idea of popular continuity evolved into the theory, expressed by \textit{Huber}, of organic substitution.\textsuperscript{15} Under this theory, the identity of the state is actually determined by its populace, the organic core of the state. At the state's death the organic core is absorbed by the new state. Likewise, \textit{the rights and obligations of the state are absorbed} as the core is absorbed.

33. Therefore, rights and obligations pass intact with succession because of citizen continuity rather than political continuity.\textsuperscript{16} \textit{Jellinek} posited a duty of self-abnegation, a moral duty on the part of the state to absorb these rights and obligations in the interest of stability in the world order it is about to join.\textsuperscript{17}

34. Hence applying the principles above on ‘State Succession’, Euroasia is obligated to acquire the rights and obligations of the predecessor state and hence the Claimant will be an investor pursuant to the Euroasian BIT as the Eastasian BIT shall no longer be applicable.

\textsuperscript{12} Moot Proposition, Procedural Order 3, p. 61, ¶ 9.
\textsuperscript{13} Moot Proposition, Procedural Order 1, p. 35, ¶ 14.
\textsuperscript{14} K. Marek, at p. 10 (analysis of an Austrian Supreme Court decision in which the court ruled that the Republic of Austria was not a successor state because it was newly created. Obviously, a successor state may be "new.").
\textsuperscript{15} D. O’Connell, at p. 12.
\textsuperscript{16} \textit{Ibid}.
\textsuperscript{17} \textit{Ibid}, at p. 14.
D. Notwithstanding the legality of annexation, the occupant is not released from its obligations towards the acquired territory.

35. Though the maxim of ‘ex injuria jus non oritur’ holds that an illegal take-over cannot produce a legally valid outcome the fact that there is no title to the territory “does not release (the occupant) from its obligations and responsibilities under international law towards other states in respect of the exercise of its powers [emphasis added]”.

36. As a general principle of international law, the occupant has an obligation to care for the “interests” of the “nation as represented by the ousted government” and keeping obligations to foreign nationals could be argued an interest of the ousted government.

37. The circumstance that occupant does not have any legal title to administer the territory, does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this territory.

1. Acquired rights under existing law do not cease on a change of sovereignty.

38. Foreign nationals, previously regarded as right-holders, in respect to the ousted government, do not lose their rights, ipso facto, upon change in sovereignty, as stated in the German Settlers Case. If a change in sovereignty does not “destroy” acquired rights then neither should an occupation, where the sovereignty shall not be affected.

39. Thus, property, under the Law of Occupation, has been extended to cover also “vested rights”, at least when there is a ‘concession-agreement’. If a right under a BIT could be considered “vested” or “acquired” then Article 46 of The Hague Regulations should obligate the occupant to respect that right. The Law of Occupation does not exclude investor rights, and it seems that it may grant protection to many “forms” of property, unless the occupant finds it necessary to relinquish its obligations of protection.

18 ILC’s Advisory opinion on Legal Consequences for States.
19 Eyal Benvenisti, at p. 18, with reference to the above Advisory opinion.
20 Supra, note 18, Advisory Opinion, ¶¶117-127, 133.
21 German Settlers in Poland case.
22 Ibid.
23 Swan S. Ko, at p. 126; Yoram Dinstein, at p. 226.
24 Hague Regulations.
25 Philip Reznik.
E. Non-recognition should not deprive the people of Euroasia of any advantages derived from international agreements.

40. The Courts also introduced an element of flexibility to the ‘doctrine of non-recognition’, by stating that the non-recognition of Occupant’s administration of the Territory should not result in the depriving the people of Euroasia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of the Occupant, after the termination of the Mandate, are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

41. The 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. It is submitted that even if the mandate is in favour of the illegality of the annexation, Euroasia being the occupant shall be obligated to maintain the advantages conferred upon the citizens of the occupied territory with respect to International Agreements.

F. Fairyland’s secession from Eastasia and annexation into Euroasia was lawful.

42. The submission under this issue is twofold. Firstly, Fairyland being a colonized territory, people of Fairyland have the right to self-determination. Secondly, the right of the population of Fairyland to self-determination supersedes territorial integrity of Euroasia.

1. Fairyland being a colonized territory, people of Fairyland have the right to self-determination.

43. Article 1(2), which is a part of the Chapter I of the UN Charter dealing with the principles and purposes of the UN, refers to the concept of ‘self-determination’ while laying down one of the four purposes of the body. In addition, in Article 55, the ‘self-determination’ of peoples is cited as a principle on which “peaceful and friendly relations among nations” are conceived to be based.

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26 Supra, note 19, at p. 85.
27 Supra, note 18, at p. 276.
28 Moot Proposition, Procedural Order 2, at p. 56, ¶ 3.
29 Heather A. Wilson, at pp. 58-59.
44. *The Declaration on the Granting of Independence to Colonial Countries and Peoples* adopted by the General Assembly in 1960, stated that:

“All peoples have the right to *self-determination*; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

45. The Right of Self-Determination is stated in Article 1 of both *ICCPR* and *ICESCR*. Before the adoption of *ICCPR* and *ICESCR*, another important development concerning self-determination took place soon after the adoption of *Resolution 1514* which “arose as a direct result of the need to condemn Portuguese behaviour in refusing to report on its colonies...”

46. As *Castellino* stated;

“... the Resolution ... defines what constitutes ‘full measure of self-government’ stating that it must result in a decision where the people concerned vote in free and fair elections to decide whether to: (a) *Constitute themselves as a sovereign independent State*; (b) *Associate freely with an independent State* or (c) *Integrate with an independent State already in existence*”.

47. The Covenants do not restrict the right of ‘self-determination’ to colonised or oppressed peoples but include all peoples. *Euroasia* has long advocated for the ‘self-determination’ of the inhabitants of Fairyland and the people were merely exercising their right to ‘self-determination’ by participating in the referendum.

2. **The right of the population of Fairyland to self-determination supersedes territorial integrity of Euroasia**

48. The right of ‘self-determination’, as developed by the United Nations, has been applied exclusively to the decolonization of Non self-governing territories. *Therefore, any territorial claims based on limitations of the right can only be asserted against these*
territories. This is an important restriction since there are only a few such territories remaining.

49. Territorial claims asserted against independent states must find some other justification in international law. “A territorial claim will not supersede a non-self-governing territory's right of self-determination”. Hence, the right of ‘self-determination’ of the population of Fairyland supersedes territorial integrity of Euroasia.

2. THE CLAIMANT WAS NOT REQUIRED TO COMPLY WITH THE PRE-ARBITRAL STEPS AS PROVIDED IN ARTICLE 9 OF THE EUROASIA BIT.

50. This submission is threefold. Firstly, the Claimant complied with the negotiation requirements provided in Article 9 (2.1). Secondly, approaching domestic forums would be futile in the current circumstances (2.2). Thirdly, in any event, non-compliance with the pre-arbitral steps would not negate the jurisdiction of the Tribunal (2.3).

A. The Claimant complied with the negotiation requirements provided in Article 9.

51. Article 9(1) of the Euroasian BIT lays down that in the event of the arising of a dispute it shall be settled in “amicable consultations” between the parties to the dispute. Therefore, it is explicit from this article that attempting amicable consultations is a jurisdictional pre-requisite to the jurisdiction of the tribunal.

52. “Amicable consultations” to the settlement of a dispute, in and of itself, involve the initiation of communication between the parties, generally by the party that has been aggrieved. It a process which involves negotiations outside of any legal overtures.

53. The amicable consultations clause in the Euroasian BIT does not contain a specific procedure for such negotiations. Hence, in such a case, attempts made to negotiate amount to substantial compliance of the Article.

54. In the instant case, the “Claimant notified the Oceanian Ministry of Foreign Affairs (with the copies to the Ministry of Finance, Ministry of Defence and Ministry of Environment)

37 J. Crawford, at p. 383.
38 Moot Proposition, at p. 44.
39 Schreuer, at pp. 59, 73.
of his dispute with the Republic of Oceania on 23 February 2015.”

It “complied with the requirements of Article 8 (1) and (2) of the Eastasian BIT.”

However, as to the date of the filing of the present arbitration, there has been no response from the relevant authorities, highlighting the failure of the authorities to amicably settle the dispute.

55. **Arguendo,** If the attempts at amicable resolution made by the Claimant are viewed as unsatisfactory, it is submitted that the phrase ‘to the extent possible’ mentioned in Article 9(1) of the Euroasian BIT be taken into consideration. The ‘consultation requirement’ set forth in Article 9(1) of the Euroasian BIT is not to be considered of a mandatory nature but as the expression of the ‘Goodwill’ of the Parties to try firstly to settle any dispute in an amicable way.

56. The ‘consultation requirement’ mentioned above refers to the possibility of such amicable settlement talks, whereby such term is to be reasonably understood as referring not only to the technical possibility of settlement talks, but also to the possibility, i.e. the likelihood, of a positive result. It also derives from the general purpose and aim of such provision, which is to allow amicable settlement where such settlement is wanted and supported by both Parties.

57. Where one or both Parties did not have the ‘Goodwill’ to resort to consultation as an amicable means of settlement, it would be futile to force the Parties to enter into a consultation exercise which is deemed to fail from the outset. Willingness to settle is the *sine qua non* condition for the success of any amicable settlement talk.

58. In the instant case, a potential non-compliance with the ‘consultation requirement’ would simply express that the premises for an amicable settlement were not given because the Respondent was not willing to give the dispute an amicable end. As such, it should not be considered to constitute *per se* a hindrance to the admissibility of the claim, thereby preventing any other mechanism of dispute resolution provided in Article 9 of the Euroasian BIT to come to play.

59. Further, the Respondent’s unwillingness to settle the dispute amicably- as witnessed by their conspicuous lack of response to the request to negotiate- expressly bars the Respondent from using an amicable settlement provision to object to the jurisdiction.

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41 Moot Proposition, Procedural Order 3, ¶ 4, at p. 60.
42 *Ibid.* at p. 60.
43 Moot Proposition, at p. 4.
44 Moot Proposition, at p. 44.
45 *Abacalt v. Argentina*, at ¶564.
46 *Lauder v. Czech Republic*, at ¶¶ 189, 590.
In both instances, the burden placed upon the Claimant to attempt ‘amicable consultations’ has been discharged. In the first instance, in the absence of any specific procedure for amicable consultations, the attempts made by the Claimant amount to substantial compliance. In the second instance, taking into consideration the text of the Article itself, willingness of the Parties to settle the dispute is essential to reaching an amicable conclusion.

B. Approaching domestic forums would be futile in the current circumstances.

Article 9(2) of the Euroasian BIT lays down a requirement for the dispute to be referred to domestic forums for resolution if the attempts at amicable consultation fail before the dispute can be referred to international arbitration.47

This requirement is referred to as ‘the exhaustion of local remedies’ and it makes the investor approaching domestic forums, a legal pre-requisite to them submitting to international dispute resolution mechanisms.

1. Applicability of the rule of futility to investment treaty arbitration.

This requirement is generally seen as mandatory in nature, however, this clause is not applicable unconditionally and there exists an exception to this requirement, which is ‘the rule of futility’. Under certain circumstances, the lack of a Claimant’s prior submission to domestic courts does not lead to the dismissal of the claim, notably in the law of diplomatic protection.48 For a State to bring a claim on behalf of one of its nationals under the title of diplomatic protection, the individual concerned must, as a matter of principle, exhaust the legal remedies available to him in the State where the alleged injury took place.49

This exception to the local remedies rule, the so-called ‘futility rule’, is now universally recognized in the law of diplomatic protection.50 It is set out in Article 15(a) of 2006 ILC Draft Articles on Diplomatic Protection in the following manner: “Local remedies do not need to be exhausted where [...] [t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress [emphasis added].”51

47 Moot Proposition, at p. 44.
48 Article 14 of the 2006 ILC Draft Articles on Diplomatic Protection.
49 Elettronica Sicula S.p.A. (ELSI) (USA v. Italy), at p 15, ¶ 50; Brownlie’s Principles of Public International Law, p. 492.
50 Certain Norwegian Loans (France v. Norway), Separate Opinion of Judge Lauterpacht at p. 34 at ¶ 39.
According to the ‘general rules of treaty interpretation’ as codified in Article 31 of the VCLT, it is required that when interpreting a treaty provision “any relevant rules of international law applicable in the relations between the parties” shall be “taken into account, together with the context [emphasis added]”. The term “relevant rules of international law” also includes pertinent customary international law.

Thus, in order to determine whether the ‘futility’ exception also applies in the context of a provision such as Article 9(2) of the Euroasian BIT, it is necessary for the Tribunal to assess whether the customary law exception of ‘futility’ regarding the rule of ‘exhaustion of local remedies’ in diplomatic protection is sufficiently comparable to the requirement of recourse to the domestic courts of Article 9(2) of the Euroasian BIT to identify the former as a rule of international law “relevant” to the latter. The conclusion that the ‘futility’ of local remedies constitutes an exception to the duty of having recourse to local courts is also affirmed in various case-law and in legal academia.

2. **Threshold to be met to be able to avail the futility rule**

To take protection under the ‘futility rule’, there is a heavy burden on the Claimant to prove that that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of effective redress offered by the local remedies.

In this form the test is supported by judicial decisions which have held that local remedies need not be exhausted where:

“the local court has no jurisdiction over the dispute in question; the national legislation justifying the acts of which the alien complains will not be reviewed by local courts; the local courts are notoriously lacking in independence; there is a consistent and well-established line of precedents adverse to the alien; the local courts do not have the competence to grant an appropriate and adequate remedy.

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52 Article 31 (3), VCLT.
53 Oil Platforms Case (Iran v. USA), at p. 161, ¶ 41.
54 Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), at p. 177, ¶ 112.
55 Ioannis Kardassopoulos v. Georgia, at ¶ 208.
56 A. Van Aaken, at p. 483, ¶¶ 497, 498.
57 Moot Proposition, at p. 44.
58 C. McLachlan, at p. 279, at ¶ 310.
59 BG Group Plc. v. Argentina, at ¶ 146; C. Schreuer, at p. 231, ¶ 238.
60 Biwater Gauff (Tanzania), Ltd. v. Tanzania, at ¶ 343; Saipem S.p.A. v. Bangladesh, at ¶ 153.
61 Supra, note 50.
to the alien; or the respondent State does not have an adequate system of judicial protection [emphasis added].”

69. In order to meet the requirements of Article 15(a) of 2006 ILC Draft Articles on Diplomatic Protection, it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief. It must be determined in the context of the local law and the prevailing circumstances.

70. Furthermore, since in the present case, there is only a temporary requirement to have recourse to domestic courts, as opposed to a fully-fledged exhaustion of local remedies requirement, the threshold to be met for the ‘futility’ exception to be realized in the present case cannot possibly be considered higher than in the context of diplomatic protection; On the contrary, ‘it is arguably rather lower.’

71. In the instant case, an Executive Order has been passed by the President of Oceania. Section 9 of the Order, “does not create any right or benefit, substantive or procedural, enforceable at law by any party against the Republic of Oceania.” In light of this provision and the fact that, although judicial review exists, given the Tribunal’s historic deference to the executive branch in the conduct of foreign policy, it seems rather unlikely that it would set aside the Executive Order of 1 May 2014. Even if it did, it would be an extremely lengthy process, taking up to 3 or 4 years.

72. Further, Oceanian Courts lay down that “claims directly brought under international treaties may not be adjudicated by the Oceanian national courts neither in accordance with the international law nor in accordance with the Oceanian national law.” Therefore, to bring in any treaty claim to Oceanian Courts would effectively have no effect since they will not be adjudicated by national courts in accordance with international or domestic law.

73. The Tribunal in the case of Ambiente had similar findings in which Argentina was not in a position to adequately address the present dispute within the framework of its domestic

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62 Mr. John Dugard, Third report, at ¶¶ 38-44; Ambiente Ufficio v. Argentina, at ¶609.

63 2006 ILC Draft Articles on Diplomatic Protection, Commentary, Article 15.

64 Supra, note 62 ¶ 617.

65 Moot Proposition, Executive Order, at p. 36, ¶ 16.

66 Moot Proposition, p. 53.


68 Ibid. at ¶ 5.
legal system.\(^{69}\) Hence, having recourse to the Oceanian domestic courts would not have offered the Claimant a reasonable possibility to obtain effective redress from the local courts and would have accordingly been ‘futile’.

C. **In any event, non-compliance with the pre-arbitral steps would not negate the jurisdiction of the Tribunal.**

74. Non-Compliance with the pre-arbitral steps will not negate the jurisdiction of the Tribunal due to the following two submissions. *Firstly*, as the provision to abide by the amicable settlement provision is a non-mandatory procedural requirement; *secondly*, as the waiting period of twenty-four months is not a jurisdictional requirement.

1. **Non-compliance with the requirement to settle the dispute amicably.**

75. The provision to abide by the amicable settlement provision is a non-mandatory procedural requirement,\(^{70}\) which does not bar jurisdiction of the Tribunal\(^{71}\). Essentially, the failure to abide by the ‘amicable consultations’ clause would not negate the jurisdiction of the tribunal, since the nature of the clause itself is non-mandatory.

2. **The waiting period of twenty-four months is not a jurisdictional requirement.**

76. Claimant’s disregard of the 24 month’s litigation requirement is in itself not yet sufficient to preclude Claimants from resorting to arbitration. The real question is whether this disregard, based on its circumstances, can be considered compatible with the object and purpose of the system put in place by Article 9 of the Executive Order, or whether it goes against it.\(^{72}\) Hence, non-compliance with the 24 months’ period would not preclude the jurisdiction of the tribunal.

3. **THE CLAIMANT MAY INVOKE ARTICLE 8 OF THE EASTASIAN BIT IN PURSUANCE OF ARTICLE 3 OF THE EUROASIAN BIT.**

77. This submission is *threefold*. *Firstly*, the Most-Favoured Nation (hereinafter MFN) clause applies to dispute resolution provisions (3.1). *Secondly*, the extension of MFN treatment is a substantive issue to investment protection (3.2). *And thirdly*, resorting to international arbitration will be more favourable in the current situation (3.3).

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\(^{69}\) *Supra*, note 62, ¶ 625.

\(^{70}\) *Bayindir Insaat Turizm Tecret Ve Sanayi v. Pakistan*, at ¶ 100.

\(^{71}\) *Ethyl Corporation v. Government of Canada*, at ¶¶ 77-85; *S.G.S. S.A. v. Islamic Republic of Pakistan*, at ¶ 184.

\(^{72}\) *Supra* note 5, ¶ 580.
A. The Most-Favoured Nation clause applies to dispute resolution provisions.

78. A MFN clause contained in a treaty will extend the better treatment granted to a third state or its nationals to the beneficiary of the treaty. It is possible to avoid the conditions and limitations attached to consent to arbitration in a treaty by relying on a MFN clause in the treaty provided the respondent state has entered into a third state that contains a consent clause without these conditions and limitations.

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 [emphasis added].”

79. Further, unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, MFN provisions in BITs should be understood to be applicable to dispute resolution.

1. Treatment of investments includes resolution of disputes related to investments.

80. The assurance of independent international arbitration is an important element in investor protection. Unless it appears clearly that the state parties to a BIT or parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favoured-nation provisions in BITs should be understood to be applicable to dispute settlement.

81. In considering whether the application of national laws concerning the administration of justice, namely local remedies, should be available to foreign traders, the arbitral commission in Ambatielos, stated:

“It is true that ‘the administration of justice’, when viewed in isolation, is a subject-matter other than ‘commerce and navigation’, but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the

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73 Emilio Agustín Maffezini v. The Kingdom of Spain.
74 Siemens v. Argentina, at ¶¶ 87-90.
75 National Grid v. Argentina, at ¶ 92.
76 Gas Natural v. Argentina. ¶ 40.
77 Ibid. at ¶ 49.
matters dealt with by Treaties of commerce and navigation. Therefore, it
cannot be said that the administration of justice, in so far as it is concerned
with the protection of these rights, must necessarily be excluded from the field
of application of the MFN clause, when the latter includes ‘all matters
relating to commerce and navigation’. The question can only be determined
in accordance with the intention of the Contracting Parties as deduced from a
reasonable interpretation of the Treaty.”

82. Also, treatment of investments includes resolution of disputes related to investments; and
broadly worded MFN clauses, as in the present case, cover dispute settlement. In the
instant case, Article 3 of the Euroasian BIT contains the phrase “investment and matters
relating to investment”, and hence dispute resolution is matter related to investments
the MFN clause would be applicable. Especially taking into account the interpretation of
the term “investment and investment matters”, it is clear that the intention of the parties
to the Treaty was to extend the protection of the MFN clause to dispute settlement. This
would also be expressly applicable because there is no conflicting procedure for
settlement of disputes laid out.

B. The extension of MFN treatment is a substantive issue to investment
protection.

83. MFN clauses have direct effect in extending more favourable treatment to the beneficiary
of the clause without the need to claim such benefits through an arbitral proceeding.
Furthermore, even though MFN clauses may not have been applied to the specific issue
at stake, namely that of conferring jurisdiction to an international court or tribunal, MFN
clauses have been applied in the past, including by the International Court of Justice, as
instruments to allocate adjudicatory authority between different dispute settlement
bodies. There is no reason to treat the adjudicatory authority exercised by an investment
treaty tribunal differently from that of any other domestic or international court or
tribunal.

“Understanding the issues in this broader perspective, that of allocating
adjudicatory authority, also shows that the distinction between substance, on

78 Ambatielos (Greece v. United Kingdom of Great Britain and Northern Ireland, at pp. 91, 107.
79 Supra, note 73.
80 Moot Proposition, Article 3, Euroasia- Oceania BIT, p. 49.
the one hand, and dispute settlement procedure and jurisdiction, on the other, is a distinction that has no bearing on the issue at stake. Rather, the allocation of adjudicatory authority between domestic courts and international arbitral tribunals is a question relating to access to justice and thus ultimately a question of substantive investment protection.”\(^8\)

84. The *Ambatielos* arbitration commission, the *ICJ*, and the arbitral tribunal in *Emilio Agustín Maffezini* all concurred that the element of dispute settlement at issue was part of the protection – treatment – of investors.\(^8\)

C. Resorting to international arbitration will be more favourable in the current situation.

85. In *Emilio Agustín Maffezini*, the tribunal considered that the MFN clause in the Spain–Argentina BIT allowed the Argentine investor to benefit from the mechanisms for the settlement of disputes incorporated into other treaties concluded by Spain to the extent that those mechanisms were more favourable to the protection of the investor’s rights. The Tribunal stated:

“There are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. (…) International arbitration and other dispute settlement arrangements….are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded.”\(^8\)

86. From the above considerations it can be concluded that if a third party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the MFN clause as they are fully compatible with the ‘*ejusdem generis*’ compared to that of Euroasian BIT\(^8\) and Claimant has complied with

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\(^8\) *Stephan Schill*, at p. 362.
\(^8\) *Supra*, note 75, ¶ 89.
\(^8\) *Supra*, note 73, ¶¶ 54-56.
\(^8\) *Suez, S. G. SA and ISIA SA v Argentina*. 

the requirements for its invocation.\textsuperscript{85} Hence, invoking the MFN clause would be more favourable to the investor in the current situation.

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Teinver v Argentina.
ARGUMENTS ON LIABILITY

4. **CLAIMANT MADE A PROTECTED INVESTMENT, ESPECIALLY IN THE LIGHT OF THE ‘CLEAN HANDS’ DOCTRINE WITH REFERNENCE TO ARTICLE 1.1 OF THE EASTASIA BIT**

87. This submission is twofold. Firstly, the Claimant made a protected investment under the Eastasia BIT. And secondly, the ‘Clean Hands Doctrine’ does not negatively impact the Claimant’s case.

A. **Claimant made a legal investment.**

88. The purpose of investment treaties is manifest in their preamble, as one to “promote and protect foreign investments made in their territories”. The pre-requisite to attaining protection under the relevant BIT is to make an investment in one of Contracting Parties, in accordance with the conditions stipulated therein.

89. Claimant's shareholding in Rocket Bombs constitutes a legal investment within the meaning of Article 1(1) of the Euroasian BIT and is thereby entitled to treaty protection as *shares of companies and claims to any performance under contract* having a financial value associated with the investment is considered within clause 1(b) and 1(c) of the same article, as constituting as a ‘protected investment’.

90. Further, the investment is protected under various provisions of the Euroasia BIT for ‘fair and equitable treatment’, against impairing enjoyment and against expropriation. The preamble also contains the object and purpose of the treaty, including the desire “to promote greater economic cooperation” and providing “a stable framework for investment”. In light of this, the BIT needs to be interpreted to provide broad protection to investors and their investments.

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86 Moot Proposition, at p.46.
88 Supra, note 86.
89 Stephan Schill, at p. 41.
92 Andrew Newcombe and Lluís Paradell, at p. 116.
93 Tokios Tokelés v Ukraine, at ¶ 31.
B. The ‘Clean Hands Doctrine’ does not negatively impact the Claimant’s case

91. The ‘clean hands doctrine’ precludes a tribunal from accepting a claimant’s contention when the claimant itself has been involved in an illegality with a nexus to the dispute, in the present case the doctrine applies expressly, as mentioned in Article 1.1 of the Eastasia BIT.\(^94\) applies only to the making of the investment itself.

92. However, “investment” under Article 1.1 of the Euroasia BIT\(^95\) is not required to be made in accordance with the laws of the Respondent, as there is no express mention of this clause in Article 1.1 of the BIT. The legality of the investment must be assessed ‘vis-à-vis’ the Euroasia BIT,\(^96\) as invocation of the favourable treatment in Article 8 of the Eastasia BIT does not attract corresponding obligations as a pre-condition to enjoying the benefit sought.

1. The ‘Clean Hands Doctrine’ is not a part of general international law

93. Since the doctrine itself is not mentioned in the Euroasia BIT, its corresponding applicability to the investment made must be assessed in light of customary international law and ‘general customary law’.

94. Several tribunals have found that the ‘Clean Hands Doctrine’ is not a part of ‘general customary law’.\(^97\) In fact, it is still an ambiguous concept, the precise content of which is still ill defined\(^98\) and the doctrine itself has been rarely applied.\(^99\) Further, ICJ has declined to apply this doctrine and has never relied on it to bar admissibility of a claim or recovery.\(^100\) Therefore, the “Doctrine of unclean hands” is not a settled general principle of international law.\(^101\)

95. Taking into consideration the status of this doctrine in customary international law and the fact that it is not an express requirement prescribed by the Euroasia BIT, it would not be applicable in the current scenario to bar the dispute.

2. In any event, the conduct of the claimant does not satisfy the requirements for the application of the ‘Clean Hands Doctrine’

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\(^94\) Moot Proposition, at p. 52.
\(^95\) Supra, note 86.
\(^96\) Veteran Petroleum Limited (Cyprus) v. The Russian Federation.
\(^97\) Ibid. at ¶ 1355; J.Crawford(2).
\(^98\) Niko Resources Ltd. v. Bangladesh et al.
\(^99\) J.Crawford(3).
\(^100\) Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.
96. Even if the doctrine was applicable the conduct of Claimant, it does not satisfy the requirements for the application of it.  

97. The act in question, the Claimant’s private meeting with the President of the National Environment Authority, does not trigger the application of the doctrine as the doctrine is restricted to acts of corruption, fraud or deliberate violation of the Host State’s law. In the instant case, the meeting itself cannot act as a proof of any of the criteria, especially corruption, as is alleged by the Respondent.  

98. Further, the burden of proof to prove corruption is on the Respondent. The standard of proof in such cases is high and ‘beyond reasonable doubt’. The evidence adduced by Respondent fails to meet the high standard of proof required in establishing cases of corruption. And the standard of proof of ‘beyond reasonable doubt’ for criminal allegations of corruption has not been met as there was no manifest violation of the laws of the Host State.  

99. In the first instance, the investment in terms of the acquisition of shares was made legally; and in the second instance, the license was obtained without any violation of the law. A meeting between the Claimant and the President of the National Environmental Authority of Oceania as evidence with regard to corruption is circumstantial evidence at best and provides no concrete proof of corruption. It certainly does not suffice as a high standard of proof or even proof beyond reasonable doubt.  

3. **The Respondent is barred from raising the defence of the ‘Clean Hands Doctrine’**  

100. Even if there was proof of corruption presented by the Respondent, it would still be barred from using it as a defence, having granted the necessary license itself. The government officials cannot invoke the ‘clean hands doctrine’ to escape their liabilities against the investor.  

101. The corruption alleged by the Respondent is the bribing of the President of National Environment Authority. As such there was complicity between the Claimant and the President in the establishment of investment. And since the President is a

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102 Supra, note 98, ¶483.  
103 World Duty Free Company Ltd. v. Kenya.  
104 Metal-Tech Ltd v. Uzbekistan, at ¶ 19.  
105 Himpurna California Energy v. PT Perusahaan Listruk Negara.  
106 EDF (Services) Limited v. Romania.  
107 T. Leigh Anenson, at pp. 455-459.  
108 Supra, note 104, at ¶¶ 19-80.  
representative of the State, his actions are attributable to the Respondent under international law.\textsuperscript{110}

102. The Respondent must “bear the consequences of corruption and assume full responsibility” for the actions of its officials.\textsuperscript{111} The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question. \textsuperscript{112} And, in view of the non-prosecution agreement, Respondent has acquiesced this right.\textsuperscript{113}

103. Further, a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and that exercising a State’s discretion on the basis of corruption is a fundamental breach of transparency and legitimate expectations.\textsuperscript{114} It is also a violation Article 15 of the \textit{UNCAC}, to which both Parties are signatories.\textsuperscript{115}

104. In light of all the discretions committed by the Respondent, their invocation of the ‘Clean Hands Doctrine’ would amount to denying its obligations under international law and the specific BIT entered into. By contributing to the alleged act of corruption by soliciting the alleged bribe the Respondent is precluded from raising this defence.

4. The claim cannot be declared inadmissible even if the Claimant is held to have violated the ‘Clean Hands Doctrine’

105. Unless there is a manifest violation of legality, the Tribunal cannot deny protection to the investment.\textsuperscript{116} In the alternative, assuming but not conceding that the actions of Claimant were not clean, the gravity of the violation of the Claimant’s rights outweighs the severity of his prior iniquitous actions.\textsuperscript{117}

106. The arbitrators’ function is not to declare admissible or inadmissible the request for arbitration of a person claiming the payment of commissions, according to the degree of

\textsuperscript{110} Aloysius P. Llamzon, at ¶ 10.52.
\textsuperscript{111} Article 7, Draft Articles on Responsibility of States for Internationally Wrongful Acts.
\textsuperscript{112} Ibid.
\textsuperscript{113} Wena Hotels v. Egypt, at ¶ 116.
\textsuperscript{114} EDF v. Romania, at ¶221.
\textsuperscript{115} Article 15, UNCAC.
\textsuperscript{116} Phoenix Action Ltd. v. Czech Republic, at ¶ 104.
\textsuperscript{117} Byron v. Clay, at ¶ 1051.
contractual morality of the claimant, to some extent as a doctrine of “clean hands” might do. The protection of the superior interests of the international community, rather, requires the arbitrator, not to decline his jurisdiction, but to examine the merits and the conformity of the contract with the requirements of transnational public policy. As such the claim cannot be declared as inadmissible as Claimant’s act does not amount to a fundamental breach of international public policy.118

107. In the alternative that even if corruption by Peter Explosive is proved as a fact, his claim regarding expropriation is still admissible as, his investment is a ‘protected investment’ as per Article 1.1 of the Euroasian BIT. The investment was made in accordance with the laws and regulations of the host state. Subsequent illegalities in the operation of the investment do not affect the protection offered to investors under BITs.119

5. THE CLAIMANT’S INVESTMENT WAS EXPROPRIATED BY THE RESPONDENT

108. The Executive Order (“EO”) passed by the Respondent contains measures, the effect of which is tantamount to an Expropriation. Considering that the Order (a) did not serve a public purpose, (b) does not qualify as a regulatory measure, and (c) does not fall within the ambit of Article 10 of the Euroasia BIT, compensation must be made to the Claimant.

109. Article 4 of the Euroasia BIT120 states 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 public purpose.”

110. In Telenor v Hungary121, the test the Tribunal applied is whether, viewed as a whole, the investment has suffered substantial erosion of value. The Tribunal, in Metalclad122 held that expropriation under NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

118 Lalive, Transnational (Or Truly International) Public Policy.
120 Moot Proposition, at p. 42.
121 Telenor Mobile Communications A.S. v. The Republic of Hungary.
122 Metalclad Corporation v. The United Mexican States.
111. In Starret Housing Corp\textsuperscript{123} it was stated that

“It is recognized in International law that measures taken by a state that interfere with property rights to such an extent that these rights are rendered useless must be deemed to have been expropriated.”

112. The Respondent’s actions clearly violate Article 4 of the Euroasia BIT by causing the deterioration of Rocket Bombs’ business, rapid decrease in the value of its shares, and annulment of the Claimant’s contracts. All of these acts cause the deprivation of ownership rights and has the effect of depriving the owner, of the use and reasonably-to-be-expected economic benefit of property.

A. The Respondent illegally expropriated the Claimant’s investment

113. Within the contemplation of Article 4(1) of the Euroasia BIT, expropriation is legal only when (a) it serves a public purpose, and (b) is 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. Both conditions have to be met for the act to constitute a legal expropriation.

114. In this case no public purpose is served by the Respondent’s actions, there has been a violation of Due Process, and no compensation has been paid to the Claimant\textsuperscript{124}, rendering the expropriation illegal.

1. The Executive Order does not serve any public purpose

115. In \textit{ADC v Hungary}\textsuperscript{125} it was stated: “The Tribunal can see no public interest being served by the Respondent’s depriving actions of the Claimants”. The Respondent failed to substantiate such a claim with convincing facts or legal reasoning. With the claimed “public interest” unproved, the Tribunal must reject the arguments made by the Respondent in this regard.

116. In \textit{Tecmed}\textsuperscript{126}, the tribunal stated that:

“After establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, the Arbitral Tribunal will

\textsuperscript{123} Starret Housing Corp v. Islamic Republic of Iran.
\textsuperscript{124} Amoco Int’l Finance Corp. v. Iran, p. 15; Malcolm N. Shaw.
\textsuperscript{125} ADC Affiliate Ltd. v. Hungary
\textsuperscript{126} Tecmed v. Mexico, at ¶ 122.
consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments.”

117. It was further stated:

“The Tribunal is not barred from examining the actions of the State in light of the Agreement to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must also be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.”

118. The expropriation does not satisfy the test of suitability, necessity and proportionality in order to be excluded for ‘public purpose’.

119. In arguendo, even if expropriation was for a public purpose, Respondents cannot be excused from compensating the Claimant and the lack of prompt, adequate and effective compensation makes such action violative of Article 4.1 of the Euroasia BIT and therefore, illegal.

2. The Executive Order is not a regulatory measure

120. Three points differentiate an act pursuant to public purpose or an expropriation from a regulatory measure: (a) Degree of interference with the property right, (b) Character of governmental measure and (c) Interference of the measure with reasonable investment-backed expectations.

121. The severity of the economic impact caused by a government action is an important element in determining whether it rises to the level of an expropriation requiring compensation. The interference has to be substantial in order to constitute expropriation, i.e. when it deprives the foreign investor of fundamental rights of ownership, or when it

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127 Mellacher and Others v. Austria, at p. 24; Pressos Compañía Naviera and Others v. Belgium, at p. 19.
128 Andenas & Zlepim.
130 Supra, note 125.
interferes with the investment for a significant period of time. A regulation may constitute expropriation when it substantially impairs the investor’s economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless.

122. In **CME (the Netherlands) v. the Czech Republic**\(^{132}\) The Claimant, had purchased a joint venture media company and alleged, breach of the obligation of the [host country] not to deprive the investor of its investment\(^{133}\) because of the actions of the national Media Council. The Tribunal, found that an expropriation had occurred because “the Media Council’s actions and omissions…caused the destruction of the operations, leaving the [joint venture] as a company with assets, but without business”.\(^{134}\) Therefore, “Expropriation of the investment is a consequence of the Respondent’s actions and inactions as there is no immediate prospect at hand that the venture will be reinstated in a position to enjoy an exclusive use of the license…”\(^{135}\)

123. The severity of the impact upon the legal status and the practical impact on the owner’s ability to use and enjoy his/her property is one of the main factors in determining whether a regulatory measure effects an indirect expropriation.

124. In the **Tippetts** case\(^{136}\), the Tribunal held that “the intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact”.

125. A significant factor in characterising a government measure as being expropriatory is whether the measure refers to the State’s right to promote a recognised “social purpose” or the “general welfare”\(^ {137}\) by regulation.

126. The European Court of Human Rights has adopted a common approach to “deprivations” and “controls” of use of property. There has to be a reasonable and foreseeable national legal basis for the taking, because of the underlying principle in stability and transparency and the rule of law.\(^ {138}\) In relation to either deprivation or control of use, the measures adopted must be proportionate. The Court examines whether the interference at issue strikes a reasonable balance between the demands of the general interest of the community and the private interests of the alleged victims of the deprivation and whether an unjust burden has been placed on the claimant.

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\(^ {132}\) **CME (Netherlands) v. Czech Republic.**

\(^ {133}\) Article 5, *Netherlands-Czech BIT.*

\(^ {134}\) CME ¶ 591, p. 166

\(^ {135}\) CME ¶ 607, p. 171.

\(^ {136}\) Tippets, Abbett, McCarthy, Stratton v TAMS-AFFA, *Consulting Engineers of Iran.*

\(^ {137}\) B. Weston, at p. 116.

\(^ {138}\) D.J. Harris, at p. 535.
127. The Investment in this case is severely impacted by the Executive Order without any reasonable and foreseeable national legal basis for the taking. The Claimant cannot conduct his business, nor sell it and in the meanwhile the share value is plummeting and all contracts have been annulled. The owner’s right to use and enjoy property has been negated, necessitating a declaration that the acts of the Respondent do not fall within the Regulatory powers of a state.

3. **The Executive Order violated the Due Process requirement in Article 4 of the Euroasia BIT**

128. Article 4(1) of the Euroasia BIT states that, an 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.

129. The due-process principle requires (a) that the expropriation complies with procedures established in domestic legislation and fundamental internationally recognized rules in this regard and (b) that the affected investor have an opportunity to have the case reviewed before an independent and impartial body (right to an independent review).\(^{139}\)

130. In addition, the expropriation process must be free from arbitrariness. The *International Court of Justice (ICJ)* defined arbitrariness as “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety”.\(^{140}\)

131. In *ADC v Hungary* the Tribunal held that “…‘due process of law’, in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful.”\(^{141}\)

132. It follows from the above that the actions of the Respondent were tainted with illegality as Article 9 of the Executive Order prevented the Claimant from enforcing his rights against the Republic of Oceania. The respondent also failed to provide a reasonable advance notice to the investor as no warning was given to the Claimant before imposing the sanctions.

4. **The Respondent cannot take the defence of ‘Essential Security Interest’**

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\(^{139}\) *UNCTAD Series on Issues in International Investment Agreements II*, at p. 36

\(^{140}\) *Elettronica Sicilia S.p.A. (ELSI) v. United States of America*, at ¶ 128.

\(^{141}\) *Supra*, note 126, ¶ 435.
133. A perusal of Article 10 of The Euroasia BIT in light of Article 31 of the VCLT will show that it does not permit the Respondent to act against “an unusual and extraordinary threat to the national security and foreign policy of the State” as the Respondent is only empowered to “take measures to fulfil its obligations with respect to the maintenance of international peace or security” and in this case no such obligation to act rests on the State of Oceania, to the contrary, the sanctions are illegal in International Law. Further Article 10 is not a self-judging provision.

134. The expert opinion of Professor Alvarez on the Essential Security Interest Clause of the Argentina – US BIT, which is similar to Article 10 of the Euroasia BIT, is that this essential security/public order clause is not self-judging; and (3) even when it does apply, is not the equivalent of a ‘denial of benefits’ or termination clause in a treaty, and so does not negate state responsibility to pay compensation for actions that harm investors.”

135. Article 10 of the Euroasia BIT is a ‘Non Precluded Measures’ (hereinafter NPM) clause, the function of which are to allow states to take actions otherwise inconsistent with the treaty when, the actions are necessary for the protection of essential security, the maintenance of public order, or to respond to a public health emergency. NPM provisions effectively “permit host-state impairment of covered investment” and, in turn, weaken the BIT “as an instrument for regulating host-state governments.”

136. The Essential Security Interest Clause in the Euroasia BIT is a non-self-judging NPM clause. The international rule is that, domestic determinations based on internal law, that an act is not wrongful or otherwise excused, cannot be adduced as proper justification for the non-performance of international legal obligations. When treaty partners do not specify the degree of deference to be accorded to their invocation of an NPM clause, arbitrators must determine what deference to give to a state’s determination. In such cases, arbitrators will have to deduce the appropriate deference from the treaty’s language.

137. The principal task for a tribunal adjudicating claims involving a non-self-judging NPM clause would then be to determine the appropriate boundaries of the respondent state’s freedom of action. In the ECHR’s jurisprudence, states do not possess “an unlimited power of appreciation”; rather, a domestic margin “goes hand in hand” with international

142 L.P. v. Argentine Republic, at ¶ 8.
143 Article XI, US-Argentina BIT.
144 Kenneth J. Vandevelde, at p. 159, 170.
145 VCLT, Article 27, Articles on Responsibility of States for Internationally Wrongful Acts, Article 3.
146 Burke-White, William W. and von Staden, Andreas, at p. 307.
“supervision,” and such supervision “concerns both the aim of the measure challenged and its ‘necessity.’\textsuperscript{147} The margin of appreciation given to a state would vary in breadth, based on the character of the permissible objectives asserted and the level of state interference with investor rights.\textsuperscript{148}

138. The relevant clause must be examined in context of the BIT, International law, and Domestic Law. In this case the Tribunal must examine the international obligations of the Respondent state in light of the Executive Order it purports to fulfil.

139. NPM clauses require that measures taken by a state that would otherwise deviate from a treaty obligation must be sufficiently related to the permissible objectives specified in the clause. This relationship is termed the “Nexus Requirement”. Article 10 of the Euroasia BIT states that, “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.” The actions in this case do not serve to fulfil the maintenance of international peace and security the “Nexus Requirement” is not met.

140. Member States of the United Nations do not have a right to impose economic sanctions upon another Member States or any Sovereign State. Article 2(4) of the UN Charter ‘prohibits all UN members from resorting to the threat or use of force against the territorial integrity or political independence of any State.’\textsuperscript{149} While the word ‘force’ initially was generally understood to refer to military force, various resolutions adopted by the General Assembly and culminating in the 1997 UN Secretariat’s convening of an ad hoc group on the use of economic sanctions dispelled any doubt that basic principles of international law limited the meaning of the word ‘force’ to military action.\textsuperscript{150} The ad hoc group concluded that ‘basic legal norms’ proscribe ‘the imposition of coercive economic measures as instruments of intervention in matters that are essentially within the domestic jurisdiction of any State.’ Dr. Szasz states: ‘[A]s the twentieth century reaches its close, at least ‘\textit{de lege ferenda}’ no State may any longer claim a general legal right to impose economic sanctions against other States . . .’\textsuperscript{151}

141. Therefore, the question of authorizing the imposition of economic sanctions upon States falls squarely within the authority of the Security Council under Ch. V of the UN Charter.

\textsuperscript{147} Handyside v. United Kingdom.
\textsuperscript{148} Paul Mahoney, at pp. 78–80.
\textsuperscript{149} Paul Szasz, ibid. at 456–58
\textsuperscript{150} Ibid. at 458.
\textsuperscript{151} Ibid. at 458.
Article 24(1) clarifies this mandatory obligation: ‘Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.’ The process leading to a Security Council decision to impose sanctions follows a multi-step procedure comprising formal requirements. The first step is a determination by the Security Council under Article 39 of ‘the existence of any threat to the peace, breach of the peace, or act of aggression.’ This first step requires the Security Council to investigate a purported dispute under Article 34 ‘to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace or security.’ Having made an investigation under Article 34, and having made a determination under Article 39, the Council may, pursuant to Article 40, ‘call upon the parties concerned to comply with such provision measures as it deems necessary or desirable.’ Article 51, the only exception to this procedure, articulated as the inherent ‘right of self-defense’ is inapplicable regarding the economic sanctions imposed against Euroasia.

142. The Security Council has not found that the Euroasia has committed an act of aggression, likely to endanger international peace and security, or an act to destabilize the peace or stability of Oceania and therefore the Sanctions violated International Law.

143. In the alternative, compensation must be paid even if the Executive Order is upheld as in CMS v Argentina it was held that “While it is difficult to reach a determination as long as the crisis is unfolding, it is possible to envisage a situation in which the investor would have a claim against the government for the compliance with its obligations once the crisis was over; thereby concluding that any suspension of the right to compensation is strictly temporary, and that this right is not extinguished by the crisis events”.

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152 U.N. Charter Article 24, ¶ 1.
153 Ibid. at Article 39.
154 Ibid. at Article 34.
155 Ibid. at Article 40
156 CMS v. Argentina, ¶¶390-392
ARGUMENTS ON DAMAGES AND COMPENSATION

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

144. This submission is **threefold**. **Firstly**, the Respondent should not be allowed to escape its obligations under the BIT to protect the investment by invoking the principle of contributory fault (6.1). **Secondly**, in any case, the threshold for contributory fault has not been met (6.2). **And thirdly**, there was no proximate causal link between the alleged contribution and the damage suffered by the claimant’s investment (6.3).

A. **The Respondent should not be allowed to escape its obligations under the Euroasia BIT, to protect the investment by invoking the principle of contributory fault.**

145. States have certain unequivocal obligations to investor as a result of entering into BITs, therefore it should not be allowed to escape its obligations pertaining to investors enshrined under it.\(^{157}\) As such the Executive Order breached the International ‘**Minimum Standard**’ implicit in investment treaties.\(^{158}\)

1. **The action(s) of the Respondent was against the legitimate expectation of the investor under Article 2.2 of the Euroasia BIT.**

146. ‘Legitimate expectations’ are a standard of investment protection that ensures that the legal and regulatory framework of the Host State remain stable and reasonable throughout the time that the investment exists in the state.\(^{159}\) ‘Legitimate expectations’ are created at the time the investment is made.\(^{160}\) It has been emphasised by Tribunals that, what matters for an existence of an investment is not so much the ownership of specific assets but rather the combination of rights that were necessary for the economic activity at issue, known as the doctrine of ‘**general utility of an investment operation**’.\(^{161}\) Essentially, the State should not violate the ‘legitimate expectations’ in such a way as to remove the general utility of the investment.\(^{162}\)

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\(^{157}\) Stephen J. Kobrin, at pp. 67-80.

\(^{158}\) Todd J. Grierson-Weiler & Ian A. Laird, at pp. 272-290.

\(^{159}\) CMS Gas Transmission Company v. The Republic of Argentina.

\(^{160}\) LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v Argentine Republic (LG&E); Tecnicas Medioambientales Tecomé SA v The United Mexican States; Metalclad Corporation v. The United Mexican States.

\(^{161}\) CSOB v. Slovakia, at p. 335.

\(^{162}\) Christoph Shreuer and Ursula Kriebom.
In the instant case, this standard has been violated, as the sanctions placed were against the ‘legitimate expectation’ of a stable regulatory framework and instead resulted in the complete destruction in the value of the investment. Further, since ‘legitimate expectations’ are created at the time the investment is made, it is highly improbable for an investor to foresee the placing of sanctions that would render the investment nugatory.

B. In any case, the threshold for contributory fault has not been met.

Article 39 of the ILC Articles on State Responsibility ‘precludes full or any recovery, where, through the wilful or negligent act or omission of the claimant state or person, the state or person has contributed to the injury for which reparation is sought from the respondent state’. The ILC’s Commentary on Article 39 refers to like concepts in national laws referred to as “contributory negligence”, “comparative fault”, “faute de la victime” etc. The common feature of all these national legal concepts is, of course, a fault by the claimant which has caused or contributed to the injury which is the subject-matter of the claim; and such a fault is synonymous with a form of culpability and not any act or omission falling short of such culpability.  

This interpretation of Article 39 is confirmed by the ILC Commentary. It states, in Paragraph 39(5):

“Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights ...It follows that something which is not wilful, negligent or otherwise culpable falls out with the principle expressed in Article 39 [emphasis added].”

Further, for application of principle of ‘contributory fault’, the existence of a wrongful act of the state, blamable conduct of the injured party and the causal link between the two aforementioned facts must be present. In the instant case, the Claimant did not contribute to the damage suffered as he was merely fulfilling his contractual

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164 Article 39, ILC ARTICLES.
165 B. Bollecker-Stern, at p. 303.
obligations\textsuperscript{166} towards Euroasia by continuing trade subsequent to the implementation of the Executive Order. Also, the Executive Order was not a direct and immediate consequence of Claimant’s supply of arms nor was it a reasonably foreseeable consequence of the supply of arms and ammunitions, since, there is no link between the annexation and the arms supply. Especially as the arms contracts were concluded before any military action took place. Additionally, the contribution by Claimant was not ‘material and significant’.

C. There was no proximate causal link between the alleged contribution and the damage suffered by the claimant’s investment.

151. Political scenario should not have an impact on the business of the investor.\textsuperscript{167} Claimant cannot be expected to foresee the political situation in Eastasia at the time of making the investment nor the imposition of such sanction by the Respondent. The Executive Order fails to demonstrate the link between Claimant and Euroasia’s actions.

152. The Claimant entered into the contract with the State of Euroasia on the 28th of February for arms production making it impossible for him to be aware of the intention of the state of Euroasia to annex Fairyland which occurred on the 1st of March. Subsequently making it evident that the claimant could not have contributed to the damage suffered by the investment as their intention to enter into a contract was independent of the actions of the state of Euroasia.

153. Further, they could not have been aware of the position that would be taken by the state of Oceania with regard to the annexation. Therefore, there is so proximate causal link to the damage suffered by the investment.

7. The Claimants seek restitution against the loss so suffered as reparation.

154. Article 4.1 states that such compensation must be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or other measures publicly known.

155. An unlawful expropriation is, a wrongful international act requiring reparation. Investment treaties do not usually include rules on reparation leaving this matter to

\textsuperscript{166} ICC Case No. 7110, First Partial Award of June 1995, 10(2) ICC Bulletin 39 (1999).
\textsuperscript{167} Supra, note 158.
customary international law. The applicable standard for the assessment of damages resulting from an unlawful act is set out in the decision of the Permanent Court of International Justice in the *Chorzów Factory case*\(^\text{168}\), and later formulated in Article 31 of the *ILC Articles*. The *Chorzów case* held that:

“The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”

A. **The Claimant must be made good for its losses through Restitution, indemnification, compensation or other valuable consideration.**\(^\text{169}\)

156. Further Article 4.1 states that such compensation must be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or other measures publicly known.

B. **Arguendo, if the Expropriation is deemed to be legal, compensation must be prompt, adequate, and effective.**

157. Article 4.1 of the BIT states that the expropriation shall be carried out under due process of law, on a non-discriminatory basis and shall be accompanied by the provisions for the payment of prompt, adequate and effective compensation.\(^\text{170}\)

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\(^{168}\) *The Factory at Chorzów case*, at p. 47.

\(^{169}\) Article 4.2, Agreement between the Republic of Oceania and the Republic of Euroasia for the Promotion and Reciprocal Protection of Investments (1 January, 1995).

\(^{170}\) Moot Proposition, p. 41.
158. Peter Explosive became unable to sell his shares in Rocket Bombs and value of share reduced almost to zero. The executive order caused a complete standstill in the arms production. As a result claimant suffers the loss. The Claimant was a going concern but for the acts of the Respondent. The Claimant’s loss of investment is wholly attributable to the Respondent which must be made good. The *damnum emergens* and *lucrum cessans* must be made good to the Claimant.\(^{171}\)

159. The performance of the Claimant as a Company has been appreciable and therefore extrapolation of past performances must be permitted.\(^{172}\) The Claimant’s invested had been in operation for many years prior to the annexation and sanctions thereof. Therefore, the Claimant must be compensated in fair market value for his legitimate expectation.\(^{173}\)

160. Article 31 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts states that “(a) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act and (b) Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”

161. Pursuant to the above, the claimant is to be awarded compensation in value no less than 120,000,000 USD with interest as of the date of issuance of the award

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\(^{171}\) *Kuwait Petroleum Corporation*

\(^{172}\) *AMCO v. Republic of Indonesia*

\(^{173}\) *Quasar de Valores SICA SA and Ors v. Russian Federation.*
PRAYER FOR RELIEF

The Claimant respectfully asks that the Tribunal find that:

1. That the claimant is an investor pursuant to Article 1.2 of the Euroasia BIT.
2. That the Claimant is not required to fulfil the Pre Arbitral steps in Article 9 of the Euroasia BIT
3. That the Claimant can invoke Article 8 of the Eastasia BIT pursuant to Article 3 of the Euroasia BIT
4. That the Claimant made a legal investment that has been illegally expropriated.
5. That the Respondent must pay Restitution to the tune to 120,000,000 USD to the Claimant.

Team Sepulveda

On behalf of Claimant

Peter Explosive