INTERNATIONAL CHAMBER OF COMMERCE

IN THE PROCEEDING BETWEEN

PETER EXPLOSIVE

(Claimant)

V.

THE REPUBLIC OF OCEANIA

(Respondent)

______________________________________________

CASE NO. 28000/AC

MEMORIAL FOR RESPONDENT
### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>LIST OF AUTHORITIES</td>
<td>iv</td>
</tr>
<tr>
<td>LIST OF ABBREVIATIONS</td>
<td>xiv</td>
</tr>
<tr>
<td>STATEMENT OF FACTS</td>
<td>1</td>
</tr>
<tr>
<td>SUMMARY OF ARGUMENTS</td>
<td>4</td>
</tr>
<tr>
<td>ARGUMENTS ON JURISDICTION</td>
<td>5</td>
</tr>
<tr>
<td>I. PETER EXPLOSIVE CANNOT BE TREATED AS AN INVESTOR PURSUANT TO ARTICLE 1.2 OF THE EUROASIA BIT</td>
<td>5</td>
</tr>
<tr>
<td>A. Euroasia could not grant nationality to Peter Explosive after illegal annexation of Fairyland</td>
<td>5</td>
</tr>
<tr>
<td>B. Alternatively, even if the Tribunal finds that Peter Explosive is a Eurosian national, the effective nationality rule shows that Peter Explosive is an Eastasian national and investor</td>
<td>7</td>
</tr>
<tr>
<td>II. CLAIMANT’S FAILURE TO SUBMIT THE DISPUTE TO OCEANIAN COURTS PRECLUDES JURISDICTION OF THE TRIBUNAL</td>
<td>8</td>
</tr>
<tr>
<td>A. Recourse to courts of Oceania is an obligatory condition of its consent to arbitrate</td>
<td>9</td>
</tr>
<tr>
<td>B. In any event, Claimant had possibility to bring his claim before competent Oceanian courts</td>
<td>11</td>
</tr>
<tr>
<td>i. Claimant did not make an attempt to settle the dispute in local courts</td>
<td>11</td>
</tr>
<tr>
<td>ii. Oceanian courts have competence to adjudicate the case</td>
<td>12</td>
</tr>
<tr>
<td>III. CLAIMANT MAY NOT INVOKE DISPUTE SETTLEMENT PROVISION OF THE EASTASIA BIT BY OPERATION OF THE MFN CLAUSE OF THE EUROASIA BIT</td>
<td>13</td>
</tr>
<tr>
<td>A. Claimant’s investment is not in the same conditions as investments of investors under the Eastasia BIT</td>
<td>13</td>
</tr>
<tr>
<td>B. The MFN treatment under the Euroasia BIT shall be accorded to investments, not investor</td>
<td>14</td>
</tr>
<tr>
<td>C. The MFN clause does not contain an express extension of MFN treatment to the dispute settlement provisions of the third BIT</td>
<td>16</td>
</tr>
<tr>
<td>IV. THE CLAIMANT’S SHAREHOLDING DOES NOT ENJOY PROTECTION SINCE THE CLAIMANT FAILED TO COMPLY WITH THE “CLEAN HANDS” REQUIREMENT</td>
<td>17</td>
</tr>
<tr>
<td>A. Claimant has breached Oceanian laws</td>
<td>17</td>
</tr>
<tr>
<td>B. Claimant had committed corruption at the time of making its investment</td>
<td>18</td>
</tr>
</tbody>
</table>
i. Claimant has committed corruption .......................................................... 18

ii. Claimant’s corruption was committed at the point of making an investment .... 19

C. The evidence of corruption is sufficient .................................................. 20

CONCLUSION ON JURISDICTION .................................................................. 21

ARGUMENTS ON MERITS .............................................................................. 22

V. CLAIMANT’S INVESTMENT WAS NOT EXPROPRIATED BY RESPONDENT .. 22

VI. ALTERNATIVELY, RESPONDENT IS EXCUSED FROM ALL LIABILITY BY 
ARTICLE 9 OF THE EASTASIA BIT AND BY THE COUNTERMEASURES

DOCTRINE ...................................................................................................... 24

A. The essential security interest clause exempts Respondent from liability .......... 24

B. Respondent is entitled to perform the countermeasures ................................ 25

VII. CLAIMANT CONTRIBUTED TO THE DAMAGE SUFFERED BY ITS 
INVESTMENT .................................................................................................. 25

CONCLUSION ON MERITS .............................................................................. 25

PRAYER FOR RELIEF ...................................................................................... 28
## LIST OF AUTHORITIES

<table>
<thead>
<tr>
<th>ABBREVIATION</th>
<th>FULL CITATION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ARTICLES</strong></td>
<td></td>
</tr>
<tr>
<td><strong>BOOKS</strong></td>
<td></td>
</tr>
<tr>
<td>Dolzer, Schreuer</td>
<td>Rudolf Dolzer and Christoph Schreuer, <em>Principles of international investment law. 2nd ed.</em> (2012)</td>
</tr>
<tr>
<td><strong>Dugard</strong></td>
<td>John Dugard, <em>The Secession and Their Recognition in the Wake of Kosovo</em> (2013)</td>
</tr>
<tr>
<td><strong>Lauterpacht</strong></td>
<td>Hersch Lauterpacht, <em>Recognition in International Law</em> (1947)</td>
</tr>
<tr>
<td><strong>Llamzon</strong></td>
<td>Aloysius Llamzon, <em>Transnational corruption in international investment arbitration</em> (2014)</td>
</tr>
</tbody>
</table>

### OTHER AUTHORITIES


### LIST OF LEGAL SOURCES

<table>
<thead>
<tr>
<th>ABBREVIATION</th>
<th>FULL CITATION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>STATUTES AND TREATIES</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Argentina – Italy BIT</strong></td>
<td>Agreement between the Republic of Italy and Republic of Argentina for the Promotion and Protection of Investments (1990)</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Montevideo Convention</td>
<td>Montevideo Convention on the Rights and Duties of States (1933), 165 LNTS 19; 49 Stat 3097</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement, 1 January 1994</td>
</tr>
<tr>
<td>UN Charter</td>
<td>Charter of the United Nations (1945), 993 U.N.T.S. 110</td>
</tr>
<tr>
<td><strong>ARBITRAL DECISIONS</strong></td>
<td></td>
</tr>
<tr>
<td>Abaclat v Argentina</td>
<td>Abaclat and Others v. Argentine Republic, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011)</td>
</tr>
<tr>
<td>Ambiente Ufficio v Argentina</td>
<td>Ambiente Ufficio S.p.A. and others v. Argentine Republic (formerly Giordano Alpi and others v. Argentine Republic), ICSID Case No. ARB/08/9 Decision on Jurisdiction and Admissibility (8 February 2013)</td>
</tr>
<tr>
<td>Casado v Chile</td>
<td>Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award (8 May 2008)</td>
</tr>
<tr>
<td>Case Title</td>
<td>Description</td>
</tr>
<tr>
<td>------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>CMS Gas Transmission Co. v Argentina</td>
<td>CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007)</td>
</tr>
<tr>
<td>Continental Casualty v Argentina</td>
<td>Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award (5 September 2008)</td>
</tr>
<tr>
<td>EDF v Romania</td>
<td>EDF (Services) Ltd v. Romania, ICSID CASE NO. ARB/05/13, Award (8 October 2009)</td>
</tr>
<tr>
<td>Esphananian v Bank Tejarat</td>
<td>Nasser Esphananian v Bank Tejarat, Iran-United States Claims Tribunal Case No. 157, Award No. 31-157-2 (29 March 1983)</td>
</tr>
<tr>
<td>Eudoro A. Olguin v Paraguay</td>
<td>Eudoro Armando Olguin v. Republic of Paraguay, ICSID Case No. ARB/98/5, Award (26 July 2001)</td>
</tr>
<tr>
<td>Fakes v Turkey</td>
<td>Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award (14 July 2010)</td>
</tr>
<tr>
<td>Feldman v Mexico</td>
<td>Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002)</td>
</tr>
<tr>
<td>İckale İnşaat v Turkmenistan</td>
<td>İckale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award (8 March 2016)</td>
</tr>
<tr>
<td>Case Title</td>
<td>Description</td>
</tr>
<tr>
<td>-----------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Impregilo v Argentina</strong></td>
<td>Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award (21 June 2011)</td>
</tr>
<tr>
<td><strong>Impregilo v Argentina (Concurring and Dissenting Opinion)</strong></td>
<td>Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern (21 June 2011)</td>
</tr>
<tr>
<td><strong>Kılıç İnşaat v Turkmenistan</strong></td>
<td>Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan, ICSID Case No ARB/10/1, Award (2 July 2013)</td>
</tr>
<tr>
<td><strong>LG&amp;E Energy Corp. v Argentina</strong></td>
<td>LG&amp;E Energy Corp., LG&amp;E Capital Corp., and LG&amp;E International, Inc . v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006)</td>
</tr>
<tr>
<td><strong>Maffezini v Spain</strong></td>
<td>Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000)</td>
</tr>
<tr>
<td><strong>Metal Tech v Uzbekistan</strong></td>
<td>Metal Tech Ltd. v. The Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award (4 October 2013)</td>
</tr>
</tbody>
</table>
| **MTD Equity v Chile** | **MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile,**  
ICSID Case No. ARB/01/7,  
Award (25 May 2004) |
|----------------------|--------------------------------------------------------------------------------|
| **Occidental v Ecuador** | **Occidental Exploration and Production Company v. The Republic of Ecuador,**  
LCIA Case No. UN3467,  
Final Award (1 July 2004) |
| **Pope & Talbot v Canada** | **Pope & Talbot Inc. v. The Government of Canada,**  
UNCITRAL,  
Interim Award (26 June 2000) |
| **RosInvestCo UK v Russia** | **RosInvestCo UK Ltd. v. The Russian Federation,**  
SCC Case No. Arb. V079/2005,  
Award on Jurisdiction (October 2007) |
| **Salini v Jordan** | **Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan,**  
ICSID Case No. ARB/02/13,  
Decision on Jurisdiction (9 November 2004) |
| **Siemens v Argentina** | **Siemens A.G. v. The Argentine Republic,**  
ICSID Case No. ARB/02/8,  
Decision on Jurisdiction (3 August 2004) |
| **Soufraki v UAE** | **Hussein Nuaman Soufraki v. The United Arab Emirates,**  
ICSID Case No. ARB/02/7,  
Award (7 July 2004) |
<table>
<thead>
<tr>
<th>Case Name</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telenor v Hungary</td>
<td>Telenor Mobile Communications A.S. v. Republic of Hungary, ICSID Case No. ARB/04/15, Award (13 September 2006)</td>
</tr>
<tr>
<td>TSA Spectrum v Argentina</td>
<td>TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award (19 December 2008)</td>
</tr>
<tr>
<td>Vivendi v Argentina</td>
<td>Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Annulment (3 July 2002)</td>
</tr>
<tr>
<td>Wintershall v Argentina</td>
<td>Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award (8 December 2008)</td>
</tr>
<tr>
<td>World Duty Free v Kenya</td>
<td>World Duty Free Company Ltd. v. The Republic of Kenya, ICSID CASE NO. ARB/00/7, Award (4 October 2006)</td>
</tr>
<tr>
<td>Yukos v Russia</td>
<td>Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, Award (18 July 2014)</td>
</tr>
<tr>
<td>Case/Cases</td>
<td>Reference</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Ambatielos case</strong></td>
<td>Ambatielos (Greece v. United Kingdom), 1953 ICJ Reports, p.10, Judgment of 19 May 1953</td>
</tr>
<tr>
<td><strong>Anglo-Iranian Oil case</strong></td>
<td>Anglo-Iranian Oil Co. case (United Kingdom v Iran), ICJ Reports 1952, Judgment (jurisdiction) of 22 July 1952</td>
</tr>
<tr>
<td><strong>ICJ Advisory Opinion on Independence of Kosovo</strong></td>
<td>Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ. Reports 2010, Advisory Opinion</td>
</tr>
<tr>
<td><strong>ICJ Advisory Opinion on Interpretation of the Peace Treaties</strong></td>
<td>Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, ICJ Reports 1950, Advisory Opinion</td>
</tr>
<tr>
<td><strong>Mgwanga Gunme v Cameroon</strong></td>
<td>Mgwanga Gunme and 13 ors v Cameroon, Merits, ACHPR 2009, Communication No 266/2003, 26th Annual Activity Report, IHRL 3261</td>
</tr>
</tbody>
</table>

**MISCELLANEOUS**

**UN G.A. RESOLUTIONS**

<table>
<thead>
<tr>
<th><strong>UN G.A. res. Declaration on the Inadmissibility of Intervention in the Domestic Affairs</strong></th>
<th>Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. res. 20/2131 (1965), A/RES/20/2131 (XX)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>OTHER LEGAL SOURCES</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Helsinki Declaration</strong></td>
<td>The Final Act of the Conference on Security and Cooperation in Europe (1975), OSCE 14 I.L.M. 1292</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
</tbody>
</table>
## LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>ABBREVIATION</th>
<th>FULL CITATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. / Arts.</td>
<td>Article / Articles</td>
</tr>
<tr>
<td><strong>BIT</strong></td>
<td>Bilateral Investment Treaty</td>
</tr>
<tr>
<td>e.g.</td>
<td>Exempli gratia</td>
</tr>
<tr>
<td><strong>Eastasia BIT</strong></td>
<td>Agreement between the Republic of Oceania and the Republic of Eastasia for the Promotion and Reciprocal Protection of Investment</td>
</tr>
<tr>
<td>ed.</td>
<td>Edition</td>
</tr>
<tr>
<td>et al.</td>
<td>Et alia (and others)</td>
</tr>
<tr>
<td><strong>Executive Order by the President of Oceania</strong></td>
<td>Executive Order of 1 May 2014 on Blocking Property of Persons Contributing to the Situation in the Republic of Eastasia</td>
</tr>
<tr>
<td><strong>Euroasia BIT</strong></td>
<td>Agreement between the Republic of Oceania and the Republic of Euroasia for the Promotion and Reciprocal Protection of Investments</td>
</tr>
<tr>
<td>i.e.</td>
<td>Id est (that is)</td>
</tr>
<tr>
<td>ibid.</td>
<td>Ibidem</td>
</tr>
<tr>
<td><strong>ICC</strong></td>
<td>International Chamber of Commerce</td>
</tr>
<tr>
<td><strong>ICJ</strong></td>
<td>International Court of Justice</td>
</tr>
<tr>
<td><strong>ICSID</strong></td>
<td>International Centre for Settlement of Investment Disputes</td>
</tr>
<tr>
<td><strong>ICSID Convention</strong></td>
<td>Convention on the Settlement of Investment Disputes between states and Nationals of other States</td>
</tr>
<tr>
<td><strong>ILC</strong></td>
<td>International Law Commission</td>
</tr>
<tr>
<td><strong>MFN</strong></td>
<td>Most Favoured Nation</td>
</tr>
<tr>
<td>No.</td>
<td>Number</td>
</tr>
<tr>
<td>p./pp.</td>
<td>Page/ pages</td>
</tr>
<tr>
<td>Para.</td>
<td>Paragraph / Paragraphs</td>
</tr>
<tr>
<td><strong>SCC</strong></td>
<td>Stockholm Chamber of Commerce</td>
</tr>
<tr>
<td><strong>USD</strong></td>
<td>US dollars</td>
</tr>
<tr>
<td><strong>UN</strong></td>
<td>United Nations</td>
</tr>
<tr>
<td>v</td>
<td>Versus</td>
</tr>
</tbody>
</table>
STATEMENT OF FACTS

1. In February 1998, Peter Explosive acquired shares in Rocket Bombs Ltd located in Oceania. He is 100% shareholder and also a president and sole member of the board of directors since 1998.

License

2. Rocket Bombs Ltd is specialized in arms production. Under the environmental laws of Oceania in order to produce arms it is necessary to obtain a license from the National Environmental Authority of Oceania containing an environmental approval. There is a special administrative procedure for obtaining such license.

3. Rocket Bombs Ltd lost its license in November 1997. Arms production may not be commenced before an arms producer obtains an environmental license. In order to commence the arms production, the enterprise needed to adjust its production line to the environmental requirements contained in the Environment Act 1996. This process is time-consuming.

4. Another obstacle was that Rocket Bombs Ltd lacked financial resources for the adjustment. In order to gain the necessary resources, Peter Explosive turned to the Ministry of Environment with a request for a subsidy for the purchase of the environmental-friendly technology.

5. In order to secure the resumption of arms production in the factories and expedite the decision-making process, Peter Explosive arranged a private meeting with the President of National Environment Authority of Oceania in July 1998. The meeting was followed by the issuing of license on 23 July 1998.

6. Regardless of the fact that Rocket Bombs Ltd obtained a license, it still did not have the necessary financial resources and its production line remained inconsistent with the environmental requirements contained in the Environment Act 1996. Only after 15 years, by the 1 January 2014, the production line fully complied with the requirements of Oceanian laws.

Investigations

7. Throughout 2013, the General Prosecutor’s Office of Oceania was conducting an investigation regarding the corruption in the National Environment Authority of Oceania.
Oceania. The investigation was caused by an anonymous denunciation alleging that the officials of the National Environment Authority suggested to the author of the denunciation that it would be possible to expedite the issuance of an environmental license if they received a pecuniary gratification.

8. The President of the National Environmental Authority was convicted for accepting bribes. He was in the office since 1996, so Rocket Bombs Ltd obtained its license during his office. 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. He's been under criminal proceedings since 23 June 2015. The convicted President of the National Environment Authority named a number of persons, including Peter Explosive, from whom he allegedly received bribes and against whom he is willing to testify.

Contract with Euroasia

9. Peter Explosive has long lasting relationships with Republic of Euroasia. On 23 December 1998, the Ministry of the National Defence of Republic of Euroasia and Peter Explosive concluded a contract for the arms production, effective as of 1 January 1999. The contract was concluded for a period of fifteen years with a possibility for renewal. A new contract was between this parties was concluded on 28 February 2014, effective as of 1 April 2014.

Situation in Fairyland

10. In November 2013, the authorities of Fairyland held a referendum on the secession of Fairyland from Eastasia and its reunification with Euroasia. On 1 March 2014, the armed forces of Euroasia entered the territory of Fairyland.

11. Eastasia declared the referendum and secession to be illegal and sent a notification to Euroasia, breaking off diplomatic relations between the two countries.

Executive Order by the President of Oceania

12. On 1 May 2014 the President of the Republic of Oceania issued an Executive Order by the President of Oceania as part of an international response to condemn an illegal act of annexation of Fairyland by Euroasia. The Executive Order by the President of Oceania introduced a system of sanctions against the persons who were ever engaged
in certain sectors of the Euroasian economy, including those producing arms for Euroasia.

Dispute

SUMMARY OF ARGUMENTS

JURISDICTION
14. The ICC Tribunal lacks jurisdiction to decide the case. First, Peter Explosive cannot be treated as an investor pursuant to Article 1.2 of the Euroasia BIT because he has not had a Euroasian nationality before the issuance of the Executive Order by the President of Oceania and does not have the Euroasian nationality until now. An act of granting Euroasian nationality to Peter Explosive is a consequence of illegal acquisition of sovereignty over Fairyland and is against a principle of non-recognition under international law. Should the ICC Tribunal consider the secession and reunification legal and find that Euroasia could grant its nationality to Peter Explosive, the effective nationality rule shows that Peter Explosive is an Eastasian national and investor. Second, Claimant failed to submit the dispute to the Oceanian courts, which were competent to settle the dispute, and did not comply with obligatory conditions for international arbitration. Third, Claimant may not rely on MFN clause of the Euroasia BIT to avoid the requirement to recourse to the local courts because the MFN clause is not applicable to the dispute settlement provisions of the Eastasia BIT. Fourth, Claimant’s shareholding cannot be qualified as investment under Eastasia BIT because the investment was made in breach of Oceanian laws. There is substantial evidence on the record to prove that the license was obtained by Rocked Bombs Ltd as a result of corruption. Since the shareholding is not an investment, the tribunal does not have jurisdiction to resolve this dispute.

MERITS
15. If the Tribunal finds that it has jurisdiction and rules on the merits of the case, Respondent submits that, first, Claimant is not entitled to compensation since there was no expropriation. Peter Explosive’s investment was not expropriated because he did not suffer from total or substantial deprivation of its proprietary interests since he remained in control of Rocket Bombs Ltd. Alternatively, second, Claimant was entitled to issue an Executive Order relying on “essential security interest” clause or, third, the issuance of an Executive order could be qualified as lawful countermeasures in the meaning of Article 22 of ILC Draft Articles on Responsibility of States for internationally Wrongful Acts as a response to the threat to international peace and security. Fourth, Claimant contributed to the damage suffered by his investment by virtue of his own conduct according to the principle of contributory fault.
ARGUMENTS ON JURISDICTION

16. The Tribunal does not have jurisdiction over the present case. Firstly, Claimant is not an investor pursuant to Article 1.2 of the Euroasia BIT (I). Furthermore, Claimant failed to comply with obligatory pre-arbitral steps under the Euroasia BIT (II). Thirdly, Claimant may not rely on MFN clause of the Euroasia BIT to invoke the dispute settlement clause of the Eastasia BIT (III). And, finally, Claimant’s investment does not enjoy protection under Eastasia BIT since he failed to comply with the “clean hands” requirement (IV). Respondent will develop these arguments below.

I. PETER EXPLOSIVE CANNOT BE TREATED AS AN INVESTOR PURSUANT TO ARTICLE 1.2 OF THE EUROASIA BIT

17. According to Article 1.2 of the Euroasia BIT the term “natural person” is any natural person having the nationality of either Contracting Party in accordance with its laws. An investor who is a natural person must have nationality of one of the BIT member states at the time of the alleged breach of the obligation forming the basis of its claim and continuously thereafter until the time the arbitral proceedings are commenced. Peter Explosive did not meet the mentioned criteria to qualify as a Euroasian investor: he did not obtain the Euroasian nationality before the issuance of the Executive Order by the President of Oceania, allegedly in breach of the Euroasia BIT (A) or, alternatively, even if Peter Explosive obtained the Euroasian nationality, the Tribunal should not consider him as a Euroasian investor (B).

A. Euroasia could not grant nationality to Peter Explosive after illegal annexation of Fairyland

18. An act of granting Euroasian nationality to people of Eastasia is a consequence of illegal acquisition of sovereignty over Fairyland and is against a principle of non-recognition under international law.

19. Annexation is an act violating rules of international law since annexation does not constitute a legally admissible way of acquisition of territory. The reunion of Fairyland and Euroasia is an act of illegal annexation. It is well established in

---

1 Euroasia BIT, Art. 1.2.
2 Vivendi v Argentina, para. 50; Douglas [II], p. 290.
4 Happ, Wuschka, p. 248.
international law that the issue of dissolution of a state allows no external intervention. The Euroasian government, however, intervened into Eastasia’s domestic affairs when it decided to annex Fairyland to Euroasia and sent armed forces to the territory of Fairyland. Therefore, the secession of Fairyland was against rules of international law.

20. Claimant may argue that people of Fairyland were prevented from realization of their right to self-determination since the constitutional procedure for dissolution of the unit does not allow Fairyland to secede. Fully recognizing the right of the people of Fairyland to self-determination, Respondent nevertheless submits that it shall be exercised without prejudice to the territorial integrity principle, and within the framework of the existing State which is the “preferred course in the post-colonial world”. Notable examples of this approach include Quebec in Canada and Katanga in the Republic of Congo.

21. Therefore, people of Fairyland are entitled to exercise the right to self-determination in form of internal self-determination. Among possible forms of internal self-determination are local government and self-government. In the case at hand, people of Fairyland had local authorities and were not dependent in educational and cultural affairs. Therefore, the scope of autonomy granted to Fairyland was sufficient for the effective exercising of self-determination.

22. Even assuming that the referendum in Fairyland adequately demonstrated the will of its people to secede, Euroasia still was barred by norms of international law from prematurely recognizing its results and proceeding with annexation of Fairyland. Premature recognition has always been considered in international law as an illegal act, as opposed to a merely unfriendly action. Customary international law brands premature recognition as illegal intervention into state’s domestic affairs. For instance, speech of President de Gaulle of France delivered in 1967 while on an official visit to Canada that was understood as premature recognition and pledging the support of France for the secessionist movement in Quebec, was regarded as interference in Canada’s internal affairs in violation of international law. Similarly,

---

5 UN G.A. res. Declaration on Principles concerning Friendly Relations; Montevideo Convention; UN Charter; Helsinki Declaration.
7 Procedural Order No. 2, p. 55, para. 2.
8 Reference re Secession of Quebec, para 126; ICJ Advisory Opinion on Independence of Kosovo, para 85
9 Mgwanga Gumme v Cameroon, para 188; Reference re Secession of Quebec, para 43.
10 Dugard, p. 27.
11 Lauterpacht, pp. 7-9; Tomuschat, pp. 32, 35.
actions of Euroasia, namely, the avowal of Fairyland being part of the Euroasian territory,\textsuperscript{12} amounted to premature recognition that in itself constitutes the violation of international law.

23. Moreover, since Eastasia has not ceased its claims over Fairyland,\textsuperscript{13} the recognition of the results of the referendum by Euroasia constituted intervention in Eastasia’s internal affairs and the violation of the principle of territorial integrity.\textsuperscript{14} Even if the Court finds that Fairyland’s population was entitled to hold referendum, still it does not justify the Euroasia’s attempt to intervene in Eastasia’s domestic affairs, which fall within exclusive competence of Eastasia.\textsuperscript{15} Euroasia's actions constitute a violation of international law which makes the granting of the Euroasian nationality to Peter Explosive illegal as well.

24. Therefore, since Euroasia could not grant its nationality to Peter Explosive he does not have a Euroasian nationality and cannot be treated as a Eurosian investor and rely on the provisions of the Euroasia BIT.

B. Alternatively, even if the Tribunal finds that Peter Explosive is a Eurosian national, the effective nationality rule shows that Peter Explosive is an Eastasian national and investor

25. Formal requirements of the notice of the renunciation of one’s citizenship are established in Eastasia.\textsuperscript{16} These formal requirements were not met by Peter Explosive,\textsuperscript{17} therefore he still has the Eastasian nationality. Even if the Tribunal decides that the Euroasian Citizenship Act is applicable to Peter Explosive, still the Tribunal is not bound by the formal requirements of the Euroasian law and is empowered to decide the issue of nationality when the jurisdiction of the tribunal turns on that issue.\textsuperscript{18}

26. The Tribunal should apply the test of effective nationality in order to determine Peter Explosive’s nationality, which favors the Eastasian nationality of Claimant. The effective nationality is the nationality of the state in which an individual either has his

\begin{footnotesize}
\begin{itemize}
\item[13] Ibid.
\item[14] Dugard, pp. 75, 160.
\item[16] Procedural Order No. 3, p. 59-60, para. 2.
\item[17] Ibid.
\item[18] Soufraki v UAE, para. 55
\end{itemize}
\end{footnotesize}
habitual residence or has closer ties; this rule is established in the practice of arbitral tribunals. The Tribunal should follow this approach, not the one which shows that for the Tribunal to have jurisdiction over the case it is enough to find any link, not only effective, in the case of dual nationals. In the present case Peter Explosive during his whole life was an Eastasian national, members of his family also were and are Eastasian nationals, Peter Explosive always lived in Fairyland being part of Eastasia – all these facts show that by no means Peter Explosive had any connections with Euroasia before the annexation took place. Not to apply the effective nationality test in the circumstances for the Tribunal means to unjustly encourage an investor who by happy coincidence happens to have a dual nationality and meets the requirements to be viewed as an investor by several states. In that case the investor would have a chance to choose the most favourable BIT, hence, that would lead to the undesired situation of treaty shopping by natural persons.

27. Therefore, even if it is established that Peter Explosive is a national of two states, according to the effective nationality rule Peter Explosive should be viewed as an Eastasian national and investor, not the Euroasian one.

28. Therefore, Peter Explosive did not meet the established requirements to be treated as a Euroasian investor. Peter Explosive does not have standing to bring the present claim, as he did not meet both requirements: he did not have the relevant nationality at the time of the alleged breach of the obligation forming the basis of its claim and continuously thereafter until the time the arbitral proceedings were commenced.

29. Therefore, the Tribunal does not have jurisdiction over the present case and Claimant is not an investor pursuant to Article 1.2 of the Euroasia BIT.

II. CLAIMANT'S FAILURE TO SUBMIT THE DISPUTE TO OCEANIAN COURTS PRECLUDES JURISDICTION OF THE TRIBUNAL

30. Claimant failed to submit the dispute to competent administrative or judicial courts of Oceania. In the light of this, Respondent submits that the present tribunal lacks jurisdiction to decide the present case because the recourse to local courts is an obligatory condition for arbitration (A), and, in any event, the Oceanian courts were competent to settle the dispute (B).

19 Convention on Certain Questions Relating to the Conflict of Nationality Law, Art. 5; Casado v Chile, paras. 254-60.
20 Esphananian v Bank Tejarat, paras. 167-168; Fakes v Turkey, pp. 55-79
21 Eudoro A. Olguín v Paraguay, para. 62; Micula v Romania, para. 101.
22 Procedural Order No. 2, p. 56, para. 4.
A. Recourse to courts of Oceania is an obligatory condition of its consent to arbitrate

31. Parties agreed that the recourse to domestic courts under arbitration clause of the Euroasia BIT is an obligatory condition of the host state's consent to arbitrate. The rationale of prior submission of the dispute to local courts is to give the host state an opportunity to settle the dispute on national level and to correct the governmental actions, if needed.

32. The State may not be compelled to submit its disputes to arbitration without its consent. A state’s consent is not to be presumed, but must be established by an express declaration or by actions that demonstrate consent. The ICJ in the Advisory Opinion on the Interpretation of the Peace Treaties expressly supported the view that the only possible way of settlement the dispute is the way which the parties agreed to use. The tribunal in Teinver v Argentina called the consent to jurisdiction of the State a “fundamental requirement”.

33. The correct intention of the parties to give consent to arbitrate is expressed in the dispute settlement clause of the investment treaty. Dispute settlement provision in Article 9 of the Euroasia BIT reads as follows:

“1. Any dispute regarding an investment between an investor of one of the Contracting Parties and the other Party, arising out of or relating to this Agreement, shall, to the extent possible, be settled in an amicable consultations between the parties to the dispute.
2. If the dispute cannot be settled amicably, it may be submitted to the competent judicial or administrative courts of the Contracting Party in whose territory the investment is made.
3. Where, after twenty four months from the date of the notice on the commencement of proceedings before the courts mentioned in paragraph 2 above, the dispute between an investor and one of the Contracting Parties has not been resolved, it may be referred to international arbitration.”

34. This provision suggests three mandatory prerequisites for international arbitration. First, the parties shall to the extent possible settle the dispute amicably (1); if amicable settlement failed, the dispute may be submitted to the local courts of the host state (2); then, if after 24 months (3) no settlement is reached, the dispute may be referred to international arbitration.

35. Article 9.2 provides that the dispute between an investor and state may be submitted to competent local courts. Under Article 31.1 of VCLT the terms of the treaty:

23 Advisory Opinion on the Interpretation of the Peace Treaties.
24 Teinver v. Argentina, para. 176.
"shall be interpreted in accordance with the ordinary meaning to be given to the terms in their context in the light of its object and purpose".

36. The context of international treaty in accordance with Article 31.2 of VCLT is primarily the text of the whole treaty together with its preamble and annexes. The immediate context of the provision of Article 9.2 includes provision of Article 9.3 which provides that the dispute "may be referred to international arbitration".

37. It expressly follows from Article 9.3 that in order to refer to international arbitration investor shall primarily bring his claim to the local courts of the host state and comply with 24-months period. Article 9.3 contains the immediate condition for international arbitration:

"Where, after twenty-four months from the date of the notice on the commencement of proceedings before the [domestic] courts, the dispute […] has not been resolved, it may be referred to international arbitration". This provision does not contain any other conditions for situation where no proceeding in local courts took place before the arbitration. Therefore, the recourse to competent local courts is a mandatory condition precedent to arbitration which shall be satisfied by investor prior to bringing his claim before the international arbitration.

38. The interpretation of the word "may" in its ordinary meaning suggests only that investor may choose whether to submit the dispute to domestic courts or to continue the process of amicable settlement. But this precludes investor from bringing the proceeding before international tribunal without recourse to domestic courts for the period of 24 months.

39. Such interpretation of the word "may" contained in dispute resolution clauses with the same wording was supported by investment tribunals. For example, the tribunal in the Impregilo v Argentina case interpreted the following wording of the Argentina-Italy BIT which is similar to the wording of Article 9.3 of the Euroasia BIT:

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

Where, after eighteen months from the date of notice of commencement of proceedings before the courts mentioned in paragraph 2 above, the dispute between an investor and one of the Contracting Parties has not been resolved, it may be referred to international arbitration."25

The tribunal concluded that:

---

25 Argentina-Italy BIT, art. 8.2.
"[this provision] should be considered to set out a general condition that must be complied with by the investor who wishes to submit the dispute to international arbitration."²⁶

40. Tribunals in the *Maffezini v Spain*,²⁷ *TSA Spectrum v Argentina*²⁸ and *Wintershall v Argentina*²⁹ cases came to the similar conclusions during interpretation of the wording "may" of dispute settlement clauses.

41. Moreover, the mandatory requirement of domestic proceeding is not subject for the futility exception, because parties of the Euroasia BIT specifically agreed on such provision, and no futility rule was included in the text of the treaty. Application of this exception would amount to re-writing the BIT.

42. Therefore, the correct interpretation of dispute settlement clause expressly provides the obligatory nature of recourse to local courts, and this requirement cannot be avoided on the basis of an alleged futility of domestic judicial proceeding.

B. In any event, Claimant had possibility to bring his claim before competent Oceanian courts

43. If the Tribunal finds futility exception applicable to the requirement to recourse to local courts, Respondent submits that the Oceanian domestic proceeding would not be futile.

i. Claimant did not make an attempt to settle the dispute in local courts

44. In order to rely on the futility exception Claimant has to prove the inefficiency of the local courts to adjudicate the subject matter of the dispute. The well-established rule of presenting evidence that the burden of proof lies with the party alleging the fact, was confirmed inter alia by the tribunal in the *Saipem v. Bangladesh* case.³⁰

45. In the present case it is Claimant who shall prove the futility of domestic proceeding. This principle of presenting evidence on inefficiency of local courts is supported by practice of investment tribunals.

46. For instance, the tribunal in the *Kılıç İnşaat v Turkmenistan* case considered that:

   “if a party to proceedings such as these is to make a futility argument, it has the onus of showing that recourse to the Contracting State’s courts would be futile or ineffective, and that requires the tendering of probative evidence that goes to the specificity of the issue in dispute.”³¹

---

²⁶ *Impregilo v Argentina*, para. 90.
²⁷ *Maffezini v Spain*, para. 37.
²⁸ *TSA Spectrum v Argentina*, paras. 98, 107.
²⁹ *Wintershall v Argentina*, para. 160.
³⁰ *Saipem v. Bangladesh*, para. 113.
³¹ *Kılıç İnşaat v Turkmenistan*, para. 8.1.10.
47. No sufficient evidence of inadequacy and inefficiency of the legal system could be found without an attempt of Claimant to bring the dispute before the local courts. The tribunal in the İçkale İnşaat v Turkmenistan case was consistent with the this view and stated:

“All any claim arising out of the alleged inadequacy of the local legal system would have to be pursued as a denial of justice claim, which does allow a party to dispense with the requirement to exhaust local remedies in circumstances in which recourse to such remedies would be demonstrably futile. [...] There can be no denial of justice where there has been no legal process in the first place.”32

48. In the circumstances at hand Claimant did not make a single attempt to settle the dispute in accordance with national judicial proceeding, and is not able to prove the futility of the domestic proceeding in Oceania. For the foregoing reasons, futility exception does not applicable to the present situation.

ii. Oceanian courts have competence to adjudicate the case

49. Recourse to the Oceanian courts would be an effective remedy for Claimant because the Oceanian Constitutional Tribunal is competent to decide the case.

50. Claimant alleges that Respondent had expropriated his investment by virtue of the Executive Order by the President of Oceania.33 Therefore, the subject matter of the dispute is the alleged effect of the Executive Order by the President of Oceania on Claimant’s business.

51. Judicial system of Oceania provides opportunity to set aside any legal act including executive orders by President of Oceania.34 The Oceanian Constitutional Tribunal has competence to find any legal document unconstitutional. Therefore, Claimant had an effective remedy on the local level to change the situation and to stop an alleged violation of his rights by the host state. He had possibility to bring his request to find the Executive Order by the President of Oceania unconstitutional to the Oceanian Constitutional Tribunal which would have had such jurisdiction.

52. The fact that Oceanian courts are not entitled to adjudicate claims brought directly under international treaty 35 does not influence competence of the Oceanian Constitutional Tribunal to decide the case concerning measures implemented be the Executive Order by the President of Oceania. The dispute which would be decided by

32 İçkale İnşaat v Turkmenistan, para 260.
33 Request for Arbitration, p. 5.
34 Procedural Order No. 3, p. 60, para. 6.
35 Procedural Order No. 3, p. 60, para. 5.
the Constitutional Tribunal is not the dispute under international treaty but rather a dispute based on the national legislation, including Constitution of Oceania, and national regulatory measures. Therefore, Claimant had an effective remedy to litigate essential aspects of the dispute by the domestic proceeding but he failed to take advantages of this opportunity.

53. Claimant may not claim futility of proceeding in the Oceanian Constitutional Tribunal relying on the average length of proceeding which is 3 or 4 years. It is only possible length of the process; and nothing prevents Constitutional Tribunal to decide the case during shorter period. The possibility of quick proceeding is increased in the light of the fact that the Executive Order by the President of Oceania has a narrow subject matter and the decision on its consistency with the Constitution of Oceania would be rendered in a comparatively short period of time.

54. However, Claimant did not bring his claim before competent courts of Oceania and, hence, did not comply with the mandatory provision prior to bringing the claim in the present arbitration. In light of this, Claimant’s failure to comply with pre-arbitral steps under the Euroasia BIT precludes jurisdiction of the Tribunal.

III. CLAIMANT MAY NOT INVOKE DISPUTE SETTLEMENT PROVISION OF THE EASTASIA BIT BY OPERATION OF THE MFN CLAUSE OF THE EUROASIA BIT

55. Claimant may attempt to rely on MFN clause in Article 3.2 of the Euroasia BIT to avoid obligatory conditions for international arbitration by invocation of dispute settlement provision of Article 9 of the Eastasia BIT. Respondent submits that Claimant may not rely on the MFN clause to submit the dispute to arbitration because Claimant is not equal to investor under the Eastasia BIT in accordance with ejusdem generis principle (A); in any event, the MFN treatment shall be accorded to investments, not investor (B), and the MFN clause at hand does not contain an express extension of MFN treatment to the dispute settlement provisions of the Eastasia BIT (C).

A. Claimant’s investment is not in the same conditions as investments of investors under the Eastasia BIT

56. Claimant may not rely on the MFN clause to invoke the arbitration clause of the Eastasia BIT because the Eastasia BIT does not contain the MFN clause.
57. The principle of *ejusdem generis* precludes treatment of investments or investors not less favourable than investments or investor of the third state if the subjects of treatment (investments or investors) are in different conditions.\textsuperscript{36} The *ejusdem generis* rule is a generally recognized by international courts and tribunals.\textsuperscript{37} The ILC in the commentary to ILC Draft Articles on MFN Clauses confirmed the importance of this principle:

“No writer would deny the validity of the *ejusdem generis* rule which, for the purposes of the most-favoured nation clause, derives from its very nature. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a *certain matter, or class of matter*, can attract the rights conferred by other treaties (or unilateral acts) only in regard to the *same matter or class of matter*.”\textsuperscript{38} [emphasis added]

That means that a MFN clause may only extend to matters belonging to the same subject matter or the same category of subject as to which the clause relates.\textsuperscript{39}

58. Claimant’s investment is not equal to investment of investor under the Eastasia BIT because of the absence of MFN clause in the Eastasia BIT. That means that by operation of the MFN clause Claimant shall be accorded not the same treatment as an investor under the Eastasia BIT, but he shall be accorded an inexistent favourable treatment. He would be able to bring his claim directly to international arbitration but at the same time he would be entitled to use MFN clause of the Euroasia BIT, while investor under the Eastasia BIT is precluded from opportunity to use the MFN clause. That means that Claimant would have the best of both treaties, but this would not correspond to any real situation under any treaty.

59. In light of this, the MFN treatment shall not extend to the Eastasia BIT because the Eastasia BIT does not contain the MFN clause on its turn.

B. **The MFN treatment under the Euroasia BIT shall be accorded to investments, not investor**

60. The MFN clause Claimant relied on to submit the dispute to international arbitration cannot be applied to the arbitration clause of the Eastasia BIT.

61. Jurisprudence is not fully consistent on deciding whether the MFN clause could apply to investor-state dispute settlement provisions. There is variety of cases supporting the

\begin{itemize}
\item \textsuperscript{36} Dolzer, Shreuer, p. 207.
\item \textsuperscript{37} Anglo-Iranian Oil Co., p. 9; Ambatielos, p. 19.
\item \textsuperscript{38} ILC Draft Articles on MFN clause, p. 30, para. 10.
\item \textsuperscript{39} OECD om International Investment Law, p. 142.
\end{itemize}
opposite views: Salini v Jordan\textsuperscript{40} and Plama v Bulgaria\textsuperscript{41} denied the applicability of MFN clauses to dispute resolution clause. Tribunals led by the Maffezini v Spain\textsuperscript{42} tribunal confirmed the possibility of application of the MFN to arbitration clause of the BITs. Respondent submits that the MFN clause at hand does not extend to dispute settlement provision of the Eastasia BIT.

62. The MFN clause in Article 3.1 of the Euroasia BIT reads as follows:

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

63. Article 31 of the VCLT requires a treaty to be interpreted:

> “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purposes.”

64. The ILC in its ILC Draft Articles on MFN clause stated that “a MFN clause is a treaty provision whereby a state undertakes an obligation towards another state to accord MFN treatment in an agreed sphere of relations”\textsuperscript{43}. Further the ILC highlighted that the beneficiary of the MFN clause acquires “only those rights which fall within the limits of the subject matter of the clause.”\textsuperscript{44}

65. The sphere of relations is expressly provided by the very wording of MFN clause. The clause of the Euroasia BIT relates:

> “to investments made by investors of the other Contracting Party, to the income and activities related to such investments and to such other investment matters regulated by this Agreement”. [emphasis added]

Therefore, the Contracting Parties agreed to accord most favorable treatment to investments and investment matters, not investors.

66. There is a significant difference between rights relating to investment and rights relating to investor. Rights relating to investment are property rights whereas the right to invoke arbitration is a personal right of investor.\textsuperscript{45} Treatment of investments suggest

---

\textsuperscript{40} Salini v Jordan, para. 119.
\textsuperscript{41} Plama v Bulgaria, para. 184.
\textsuperscript{42} Maffezini v Spain, para. 64; Siemens v Argentina, para. 109.
\textsuperscript{43} ILC Draft Articles on MFN clause, art. 4.
\textsuperscript{44} ILC Draft Articles on MFN clause, art. 9.
\textsuperscript{45} Douglas (II), p. 344.
only substantive rights related to the property while rights of investors include right to submit the dispute to international arbitration.

67. The rationale to divide substantive and procedural rights is in the different legal nature of them: substantive rights are the rights themselves while procedural rights grant the access to the right or allow to protect the substantive rights.\(^{46}\) Therefore, these two types of rights are fundamentally different, and the *ejusdem generis* principle prevents these two types of rights to be equal and the MFN clause to be applied to dispute settlement provisions.\(^{47}\)

68. The distinction between treatment of investor and treatment of investment is widely supported by investment tribunals. The tribunal in *Telenor Mobile v. Peru* stated:

"[…] the ordinary meaning of ‘investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State’ is that the investor’s substantive rights in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State."\(^{48}\)

69. Besides it, the tribunal in *RosInvestCo UK v. Russia* made a conclusion that the “treatment of investment” does not include the protection by an arbitration clause, stating:

“while the protection by an arbitration clause covering expropriation is a highly relevant aspect of that ‘treatment’ … it does not directly affect the "investment"."\(^{49}\)

70. The sphere of the MFN application agreed by the parties is the treatment of investments, and, therefore, that most favoured nation treatment of investments does not include procedural rights of investors.

C. The MFN clause does not contain an express extension of MFN treatment to the dispute settlement provisions of the third BIT

71. The MFN clause does not incorporate provisions relating to the jurisdiction of arbitral tribunal unless there is an unequivocal provision to that effect.\(^{50}\)

72. Zachary Douglas wrote that “a negative answer must be given to this question as a matter of general principle.”\(^{51}\) This view was supported in a number of cases. Investment tribunal in *Salini v. Jordan*\(^ {52}\) rejected the jurisdiction by virtue of the MFN

\(^{46}\) *Douglas [II]*, p. 104.
\(^{47}\) *Impergilo v Argentina (Concurring and Dissenting Opinion)*, para. 10.
\(^{48}\) *Telenor v Hungary*, para. 92
\(^{49}\) *Telenor v Hungary*, para. 92
\(^{50}\) *RosInvestCo UK v Russia*, para. 128.
\(^{51}\) *Douglas [II]*, p. 344.
\(^{52}\) *Salini v. Jordan*, para. 119.
clause, noting that the MFN clause cannot apply to procedural obligations and cannot override the clear intent of the Parties to a BIT. The similar view was expressed by tribunal in *Telenor v. Hungary*. 53

73. The MFN clause of the Euroasia BIT provides that the treatment shall be accorded to:
   “investments made by investors of the other Contracting Party, to the income and activities related to such investments and to such other investment matters regulated by this Agreement.”

There is no express provision on the dispute settlement provisions of the third BIT to be invoked by virtue of the clause.

74. Therefore, the MFN clause at hand does not extend to the dispute settlement provisions of the Eastasia BIT.

75. For these reasons, the Respondent submits that this tribunal has no jurisdiction to hear the case since the parties did not expressly provide the possibility to invoke the arbitration clause by virtue of MFN clause and the MFN clause of Article 3 of the Euroasia BIT relates only to substantive rights of investors, not to the dispute settlement provision.

IV. THE CLAIMANT’S SHAREHOLDING DOES NOT ENJOY PROTECTION SINCE THE CLAIMANT FAILED TO COMPLY WITH THE “CLEAN HANDS” REQUIREMENT

76. Claimant’s investment should not enjoy protection under Art 1.1. of the Eastasia BIT, because Claimant has failed to comply with the “clean hands” requirement. Claimant has breached Oceanian laws (A) and committed a corrupt act that affected the process of decision making on environmental license, which forms part of investment making process (B). This is exhaustedly proven by the facts of the case (C). Therefore, this tribunal lacks jurisdiction as the corruption places investment outside the protection of the Eastasia BIT.

A. Claimant has breached Oceanian laws

77. Oceanian laws provide that the license can be issued only when a producing line meets the requirements of Environmental Act 1996. 54 In order to obtain a license, a company has to adjust its production to the environmental requirements contained in Environmental Act 1996. Rocket Bombs Ltd lacked financial resources for the

54 *Procedural Order No. 2*, p. 55, para. 1.
adjustment.\footnote{Statement of Uncontested Facts, p. 32, para.4.} The license was issued immediately after the meeting, as the meeting took place in July, while the license was granted on the 23 July 1998.\footnote{Statement of Uncontested Facts, p. 33, paras. 6-7.} It is worth noting that the production line of Rocket Bombs Ltd only fully complied with the legal requirements by 1 January 2014.\footnote{Statement of Uncontested Facts, p. 35, para. 13.} This means that Claimant was producing arms with the license for more than 15 years without satisfying the requirements of Environmental Act 1996 for granting such a license.

78. Moreover, Oceanian laws provide a procedure that has to be followed when making a decision on granting a license.\footnote{Statement of Uncontested Facts, p. 33, para. 6.} There is no information that such procedure provides for private meetings. Thus, the private meeting with the President of the National Environmental Authority was itself a breach of Oceanian laws.

79. Thus, the Claimant was in breach of Oceanian laws, thus, its investment should not be granted protection under Eastasia BIT.

B. Claimant had committed corruption at the time of making its investment

80. Respondent claims that Peter Explosive committed corruption at the stage of obtaining an environmental license (i) and that stage can be classified as one of the stages of making an investment (ii).

i. Claimant has committed corruption

81. The word ‘corruption’ has a broad meaning and can include bribery, embezzlement, theft and fraud, extortion, abuse of discretion, favoritism, nepotism and clientelism, conduct creating or exploiting conflicting interests, and improper political contributions.\footnote{UN Anti-Corruption Toolkit, p. 6-10.}

82. Aloysius P Llamzon in the work dedicated to corruption in investment arbitration defines corruption as “\textit{knowing application or refusal to apply laws in a manner that benefits private demands at the expense of public needs,}”\footnote{Llamzon, p. 23} The author also draws the line between corruption and so-called “permitted inducement”, which is especially useful for the case at hand.

83. In the case at hand, informal communication and illegal means of influencing official decision was the only way Claimant could obtain environmental license. From the
facts, analyzed above in paras. 77-79, it appears that Claimant’s production line did
not satisfy the requirements of Oceanian Environmental Act of 1996 for 15 years and
still obtained a license.

84. Moreover, the National Environmental Authority has a right to unexpectedly and
randomly visit the arms production site after an environmental license is granted in
order to verify whether it still complies with the requirements set under the
Environmental Act 1996.\textsuperscript{61} However, there is no information in the file that would
show that it did visit Rocket Bomb Ltd to check its compliance with the requirements.

85. Although it is unknown what were the exact actions of Peter Explosive on his meeting
with the President of the National Environmental Authority, it is apparent from the
facts of the case that during this meeting the decision on the license was illegally
affected. The granting of license was based on some sort of preference to Peter
Explosive that allowed him to get the license without complying with the requirements
of Environmental Act 1998, which would not have been possible in the normal
circumstances.

86. Thus, factual background of the present case falls within the definition of corruption,
because by the virtue of Claimant’s actions Environmental Act was not applied when
making a decision on license in order to benefit private interests of Rocket Bombs Ltd
and Peter Explosive.

ii. Claimant’s corruption was committed at the point of making an investment

87. Art 1.1. of the Eastasia BIT provides that the asset should be invested in accordance
with laws and regulations of the host state. The moment, when the compliance with
host state laws is estimated and can affect the protection of an investment, is the
moment of making an investment.

88. In the case at hand, Claimant breached Oceanian law at the moment of making an
investment, because obtaining a license was part of this process.

89. In economic terms, an important category for making an investment is “initial
investment”. Initial investment is the amount required to start a business or a project.\textsuperscript{62}

90. In the case at hand, obtaining a license was an essential part of investment making,
because Peter Explosive aimed at obtaining an operative and effective arms production
company to manage as the result of his investment. When he acquired shares in
Rocket Bombs Ltd it was a decrepit company with no license, where arms production

\textsuperscript{61} Procedural Order No. 3, p. 59, para. 1.
\textsuperscript{62} Brealey, Myers, and Allen, p. 193.
was suspended. Without a license the company would not be able to produce and sell arms and the business would not start.

91. Thus, the process of obtaining the license should be regarded by the tribunal as part of investment making.

C. The evidence of corruption is sufficient

92. In the case at hand facts provided by Respondent and given in the Statement of Uncontested Facts are sufficient for this tribunal to find that Claimant’s actions were corrupt. Thus, Claimant’s investment should not be granted protection under Art 1.1. of the Eastasia BIT.

93. The problem of evidence in the corruption cases and its treatment in investment arbitration is highly controversial. The doctrine and case law provide two possible approaches regarding evidence standards for corruption allegations raised in the investment arbitration proceedings.

94. According to the first approach the evidentiary standard should be very high. The second approach takes into account the specificity of situations, where corrupt acts occur. Scholars and practitioners, who follow this approach admit circumstantial evidence as sufficient.

95. As A. Llamzol states:

“In the majority of cases where corruption may attend the investment, however, arbitrators will be faced with the question of how to ascertain whether or not corruption did occur on the basis of imperfect, episodic, and often contradictory evidence, with little aid from national authorities.”

96. Respondent invites the tribunal to follow the latter approach due to the fact that since the meeting with the President of the National Environmental Authority was private, it is very likely that it resulted in no documentation or protocol. Moreover, as long as it was private, there were no witnesses that could testify the fact of corruption.

97. On the other hand, the fact that Claimant did not meet the requirements of of Environmental Act 1998 when the license was issued is uncontested. As well as the fact that the private meeting with the President has occurred and was followed by the speedy issuing of license.

---

63 Statement of Uncontested Facts, p. 32, para. 4.
65 Metal Tech v Uzbekistan, para. 243.
66 Llamzol, p. 227.
68 Statement of Uncontested Facts, p. 32, para. 4.
69 Statement of Uncontested Facts, p. 33, paras. 6-7.
The corruption allegations are supported by the fact that the President of the National Environment Authority of Oceania named a number of persons, including Peter Explosive, from whom he allegedly received bribes.

Therefore, the tribunal should find that circumstantial evidence in the case at hand is sufficient to find that corruption occurred in breach of Oceanian laws.

To conclude, the tribunal has the power to settle disputes concerning investments under the Eastasia BIT. The definition of an investment under the Eastasia BIT includes a requirement that the investment is made in accordance with laws and regulations of a host state.

As the Claimant have breached Oceanian laws, the shareholding in Rocket Bombs Ltd cannot be qualified as an investment under Art 1.1. of the Eastasia BIT, and, hence, it does not fall within the scope of the Eastasia BIT. Therefore, the tribunal should find that it has no jurisdiction upon this dispute.

CONCLUSION ON JURISDICTION

For the foregoing reasons, Respondent respectfully requests that the Tribunal find that it lacks jurisdiction to decide the present case because, first, Claimant may not be treated as an investor; second, Claimant failed to comply with mandatory pre-arbitral steps under the Euroasia BIT; third, Claimant may not rely on MFN clause to invoke the dispute settlement clause of the Eastasia BIT, and, finally, Claimant's investment does not enjoy protection under the Eastasia BIT because it is not in accordance with "clean hands" requirement.

---

70 Eastasia BIT, Art 7.1.
71 Eastasia BIT, Art 1.1.
ARGUMENTS ON MERITS

103. Claimant’s investment was not expropriated by Respondent since it remains in control of its investment (V). Alternatively, Respondent is exempted from liability by “essential security clause”, or, sanctions imposed by Respondent can be justified as countermeasures (VI). Moreover, Claimant contributed to the damage, suffered by its investment (VII).

V. CLAIMANT’S INVESTMENT WAS NOT EXPROPRIATED BY RESPONDENT

104. It is generally accepted that indirect expropriation can only be found when there is a total or substantial deprivation of proprietary interest. The complex approach is followed in understanding substantial deprivation. One of the compulsory indications of such deprivation, alongside with the loss of use and enjoyment, is loss of control over investment by an investor.

105. Schreuer in relation to the issue of investor’s control over an investment stated that “continued control of an enterprise by the investor strongly militates against a finding that an indirect expropriation has occurred”.72

106. Case law provides guidelines and indications that can be useful, when finding whether the investor lost control over an investment.

107. In Feldman v. Mexico the tribunal found that indirect expropriation did not occur since the claimant remained in control of its investment. As it was stated in the award:

“The Claimant is free to pursue other continuing lines of business activity, such as exporting alcoholic beverages or photographic supplies, as in the past, or other products... Of course, he was effectively precluded from exporting cigarettes... However, this does not amount to Claimant’s deprivation of control of his company”.73

108. In Pope & Talbot v. Canada, the tribunal made a negative finding on the existence of indirect expropriation, however, it explained and illustrated the consequences, which could indicate that the loss of control over investment occurred. The standard represented in this case was further followed by other tribunals when deciding indirect expropriation cases.74 In Pope & Talbot v. Canada the tribunal asserted that:

“the Investor remains in control of the Investment, it directs the day-to-day operations of the Investment, and no officers or employees of the Investment have

72 Dolzer, Schreuer, p. 119.
73 Feldman v. Mexico, para. 142.
been detained by virtue of the Regime. Canada does not supervise the work of the officers or employees of the Investment, does not take any of the proceeds of company sales (apart from taxation), does not interfere with management or shareholders' activities, does not prevent the Investment from paying dividends to its shareholders, does not interfere with the appointment of directors or management and does not take any other actions ousting the Investor from full ownership and control of the Investment.”

109. None of the above has happened in the case at hand either. Peter Explosive remained in control of his investment. He was not just the only shareholder of Rocket Bombs Ltd, he was also the president and sole member of the board of directors of the company. All the decision-making process and management of Rocket Bombs Ltd was in his hands and he was by no means precluding from exercising its powers.

110. First, Rocket Bombs Ltd can continue its business activity by finding other suppliers. Claimant asserts that the Executive Order by the President of Oceania caused a complete standstill in arms production, as all suppliers of Rocket Bombs Ltd were operating within the territory of Oceania.\(^76\) The prohibition in the Executive Order by the President of Oceania to engage professionally only extends to those enterprises, which are situated in Oceania.\(^77\) Thus, the Claimant is in a position to control its investment and keeping the enterprise afloat by choosing suppliers from other countries.

111. Second, Executive Order by the President of Oceania bears negative consequences for persons, operating in arms production services of Euroasian economy.\(^78\) Rocket Bombs Ltd was supplying arms to Euroasia during the annexation.\(^79\) However, the Executive Order by the President of Oceania only creates obstacles for the Claimant’s activity in Euroasian market. The Claimant is free to act in the market of any other country and receive income from selling arms to other clients.

112. Very similar situation happened in *Pope & Talbot case*, decided under Article 1110 NAFTA, which is identical to provisions of Article 3 of the Eastasia BIT and Article 4 of the Euroasia BIT. In *Pope & Talbot* the tribunal found that indirect expropriation did not occur because the deprivation was not total or substantial since the claimant “continued to export substantial quantities of softwood lumber to the U.S. and to earn

\(^{75}\) *Pope & Talbot v. Canada*, para. 100.
\(^{76}\) *Request for Arbitration*, p. 5.
\(^{77}\) *Executive Order by the President of Oceania*, p. 52, Section 1(a).
\(^{78}\) *Executive Order by the President of Oceania*, p. 52, Section 1(a)(i).
\(^{79}\) *Statement of Uncontested Facts*, p. 36, paras. 15-16.
substantial profits on those sales”.\textsuperscript{80} This is exactly what the Claimant in the present case is able to do – sell its products in other markets in other countries and receive income.

113. To conclude, there was no indirect expropriation committed by Respondent by virtue of introduction of the Executive Order by the President of Oceania since Claimant did not lose control over its investment, hence, there was no total or substantial deprivation of proprietary interest.

VI. ALTERNATIVELY, RESPONDENT IS EXCUSED FROM ALL LIABILITY BY ARTICLE 9 OF THE EASTASIA BIT AND BY THE COUNTERMEASURES DOCTRINE

A. The essential security interest clause exempts Respondent from liability

114. The actions that Respondent took after the annexation of Fairyland by Euroasia were necessary to protect its essential security interests and to maintain “international peace and security” as envisioned by Article 9 of the Eastasia BIT, which provides:

“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.”\textsuperscript{81}

115. The security interest clause is the distinct and primary rule, that excludes liability under BIT. This rule was established by many investment arbitration cases.\textsuperscript{82}

116. The essential security provision is applicable for a broader array of state actions than customary law, maintaining that the provision “shift[s] the costs of state action in exceptional circumstances from states to investors”.\textsuperscript{83}

117. In \textit{Oil Platforms (Iran v US)} the court informed its understanding of the essential security provisions by looking to the right to self-defense of ‘armed attack’ under international law.\textsuperscript{84} In the case at hand there was an unusual and extraordinary threat to the national security and foreign policy of Claimant. The actions and policies of the Government of the Republic of Euroasia, including its annexation of Fairyland and its use of force in the Republic of Eastasia, continue to undermine democratic processes and institutions in the Republic of Eastasia; threaten its peace, security, stability,

\textsuperscript{80} Pope & Talbot v. Canada, para. 101.
\textsuperscript{81} Eastasia BIT, Art. 9.
\textsuperscript{82} Continental Casualty v Argentina, para. 160; LG&E Energy Corp. v Argentina, para. 258; CMS Gas Transmission Co. v Argentina, para. 130.
\textsuperscript{83} Burke-White, Staden, p. 400.
\textsuperscript{84} Oil Platforms (Iran v US), para 78.
sovereignty, and territorial integrity; and contribute to the misappropriation of its assets. All these facts constitute the sufficient grounds for Claimant to invoke the essential security interest clause to exempt its liability.

**B. Respondent is entitled to perform the countermeasures**

118. In the case at hand Respondent’s measures (the issuance of an Executive Order by the President of Oceania) could be qualified as lawful countermeasures in the meaning of Article 22 of *ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts*, and the status of these measures as countermeasures preclude their wrongfulness.

119. In the case at hand the President of the Republic of Oceania was competent to introduce the Executive Order on the basis of the International Emergency Economic Powers Act 1992, which authorizes the President to declare the existence of an unusual and extraordinary threat to, among others, national and / or international security which in whole or substantial part originates outside the Republic of Oceania.

120. The Executive Order by the President of Oceania was issued in response to the internationally wrongful act committed by the Republic of Euroasia and the President was fully entitled to issue it.

**VII. CLAIMANT CONTRIBUTED TO THE DAMAGE SUFFERED BY ITS INVESTMENT**

121. The commentary to Article 31 of *ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts* notes that even when another party’s conduct combines with a state action to cause harm

> “international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault.”

Therefore, the commentary to Article 31 of *ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* has identified contributory fault as a potential basis for excluding or at least limiting the state’s liability.

---

85 *Executive Order by the President of Oceania*, p. 51.
86 Paparinskis
87 *Procedural Order No. 2*, p. 56, para. 7.
Moreover, Article 39 of ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that

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

Thus, a damages award against a state may be reduced to the extent that the injured party itself is an “intervening” or “joint” cause of the harm. The contributory fault doctrine serves to calibrate the extent of liability and to avoid the punishment of the defendants in cases where the harm was caused by the actions of the claimants.

Contributory fault principles have been frequently applied in investor-state disputes. As famously expressed by the tribunal in Maffezini v. Spain, “bilateral investment treaties are not insurance policies against bad business judgments.” This statement contains the principle that an investor must undertake a certain degree of risk, and may suffer losses for reasons not attributable to the host state’s conduct. In cases in which investors have failed properly to account for or mitigate risk, or even augmented such risk through ill-advised action damaging to the investments’ prospects, tribunals have rejected or limited their claims under the doctrine of contributory fault.

In the case at hand, Claimant committed willful and negligent actions and omissions and, thus, substantially contributed to the damage suffered by its investment.

Claimant should have known of Euroasia’s intention to incorporate Fairyland into its territory by direct military intervention. Firstly, the issue of sending the Euroasian armed forces was frequently discussed. Thus, authorities of Fairyland wrote an official letter to the Minister of Foreign Affairs of Euroasia, asking for an intervention. After receiving this letter there was a long debate on this issue and, finally, the government of Euroasia decided to intervene and annex Fairyland to Euroasia. Therefore, people of Fairyland and Euroasia should have known about the considering and preparing of the military intervention. Secondly, Peter Explosive and John Defenceless, who is a Minister of National Defence of Euroasia, both had studied at the East Dot University in Oceania and since that time they remained close friends. John Defenceless has already disclosed to Peter Explosive information connected with the Ministry of National Defence of Euroasia. Namely, John Defenceless revealed to Peter Explosive that the contract between the Ministry of National Defence acting on behalf of

90 Maffezini v. Spain, para. 114.
91 Answer to Request for Arbitration, p. 16.
Euroasia and Super Missiles Ltd. for the arms production would expire on 31 December 1998 and promised that a new contract for the arms production will be concluded with Rocket Bombs.\textsuperscript{92} Finally, the contract was concluded between the Ministry of National Defence and Rocket Bombs Ltd. Therefore, there was a high chance that Claimant should have known about the intention of Euroasia to annex the Fairyland.

127. Despite knowing this, Claimant continued the supply of weapons to Euroasia. It led to imposition of sanctions on Rocket Bombs Ltd and financial difficulties suffered by Claimant.

128. Investment tribunal in \textit{MTD Equity v Chile} stated that “the Claimants should bear the consequences of their own actions as experienced businessmen”.\textsuperscript{93} In the case at hand Claimant, as an “experienced businessman”, should bear the risk of supplying the weapons for the purposes, which constitute a threat to the national security and foreign policy of the Republic of Oceania.

**CONCLUSION ON MERITS**

129. For the foregoing reasons we respectfully ask the tribunal to find that Claimant’s investment was not expropriated and no compensation should be awarded.

\textsuperscript{92} \textit{Statement of Uncontested Facts}, p. 34, para. 9.
\textsuperscript{93} \textit{MTD Equity v Chile}, para. 178.
PRAYER FOR RELIEF

For the foregoing reasons, Respondent respectfully asks the Tribunal to find that:

1. The Tribunal lacks jurisdiction as to the Claimant’s submissions and all claims are inadmissible;

2. The implementation of the sanctions and introduction of the Executive Order by the President of Oceania do not amount to expropriation of the Claimant’s investment;

3. No compensation shall be awarded to Claimant.

Respectfully submitted on 26 September 2016

by Alfaro

On behalf of the Respondent

The Republic of Oceania