INTERNATIONAL CHAMBER OF COMMERCE

INTERNATIONAL COURT OF ARBITRATION

In the Proceeding
ICC Case No. 28000/AC

between

PETER EXPLOSIVE
(Claimant)

versus

REPUBLIC OF OCEANIA
(Respondent)

MEMORIAL FOR RESPONDENT

26 September 2016
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| **UNGA Declaration on Definition of Aggression** | UN General Assembly, Resolution 3314 (XXIX), 14 December 1974 |
| **UNGA Declaration on Friendly Relations** | UN General Assembly, Resolution 2625 (XXV), 24 October 1970. |

**Treaties and BIT Models**

<p>| <strong>Austria Model BIT</strong> | Austrian Model Bilateral Investment Treaty, as updated in 2008. |
| <strong>Canada Model BIT</strong> | Canadian Model Foreign Investment Protection and Promotion Agreement, as updated in 2003. |
| <strong>GATT</strong> | General Agreement on Tariffs and Trade, entered into force on 1 January 1948. |</p>
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<td>AO</td>
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<td>Fair and Equitable Treatment</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>IEEPA</td>
<td>International Emergency Economic Powers Act</td>
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<td>MFN</td>
<td>Most favored nation</td>
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<td>NEA</td>
<td>National Environment Authority</td>
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<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<td>PCA</td>
<td>Permanent Court of Arbitration</td>
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<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNCAC</td>
<td>United Nations Convention against Corruption</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>United Nations General Assembly</td>
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<td>United Nations Security Council</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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SUMMARY OF FACTS

1. The Republic of Oceania (“Oceania” or “Respondent”), as others countries\(^1\), has introduced a system of sanctions in response to the Republic of Euroasia’s (“Euroasia”) military intervention in and subsequent annexation of Fairyland, a region belonging to the Republic of Eastasia (“Eastasia”) for nearly a century\(^2\).

2. Peter Explosive (“Claimant”) seeks compensation for being affected by such system of sanctions pursuant to Article 4 of the Euroasia-BIT\(^3\), which contains a dispute resolution provision with pre-arbitral steps\(^4\).

Peter Explosive and Rocket Bombs Ltd.

3. Claimant is the sole shareholder of Rocket Bombs Ltd. (“Rocket Bombs”), a company that produces arms suit for military use\(^5\). In 1998, when he acquired the 100% of the shares and became the company’s President, he was undisputedly a national of the Republic of Eastasia (“Eastasia”)\(^6\). Moreover, the company did not have a mandatory environmental license at the time\(^7\), which was needed to commence the arms production, because its production line did not meet the requirements contained in the Environment Act 1996\(^8\).

Environment Act and Environmental License

4. Without a license and without financial resources of his own, Claimant requested subsidy to comply with the Environment Act to the Ministry of Environment of Oceania\(^9\). In July 1998, before having received the answer for the request (which turned out to be negative), Claimant held a private meeting with the then President of the NEA, the Oceanian agency in charge of issuing the environmental licenses\(^10\). By the end of the month, he had managed to receive the license for Rocket Bombs\(^11\) even though the administrative procedures of the NEA were known for being long\(^12\) and even though Rocket Bombs’ production line had not yet

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\(^1\) Procedural Order No. 3, p. 62, ¶ 11.
\(^2\) Procedural Order No. 3, p. 61, ¶ 9.
\(^3\) Request of Arbitration, p. 6.
\(^4\) Exhibit C1, p. 44, art. 9.
\(^5\) Facts, p. 32, ¶ 2.
\(^6\) Facts, p. 32, ¶ 2.
\(^7\) Facts, p. 32, ¶ 2.
\(^8\) Facts, p. 32, ¶ 4.
\(^9\) Facts, p. 33, ¶ 5.
\(^10\) Facts, p. 33, ¶¶ 5-6.
\(^12\) Facts, p. 33, ¶ 6.
complied with the requirements set forth in the Environment Act for the possession of a license\(^{13}\).

5. The Environment Act also provided that an arms production facility could receive an unexpected visit from the NEA throughout the years, which would serve to verify if the facility still complied with the terms of the environmental license that the company possessed\(^{14}\). There is no evidence in the case record that Rocket Bombs had ever been visited. That is to say: having obtained the license without fulfilling the mandatory requirements in 1998, Rocket Bombs remained in non-compliance with the Environment Act until 2014\(^{15}\).

6. During all those years, the NEA was headed by the same official\(^{16}\), a man that, following investigations conducted by the General Prosecutor’s Office from Oceania throughout 2013\(^{17}\), was found guilty of accepting bribes\(^{18}\). After being convicted, within the context of a larger investigation\(^{19}\), the former President of the NEA expressly named Claimant as a person from whom he had received bribes and against whom he was willing to testify\(^{20}\). To date, the criminal proceedings against Claimant initiated in May 2015 are ongoing\(^{21}\).

Claimant’s personal and business relations with Euroasia

7. Irrespective of Claimant’s family “roots in Euroasia”\(^{22}\), he purportedly acquired Euroasian nationality in 2014 by virtue of an amendment to Euroasia’s Citizenship Act\(^{23}\) introduced in March 01, 2014, the day Euroasia’s armed forces entered the territory of Fairyland\(^{24}\).

8. Claimant’s business connections with Euroasia date back to 1998. On that year, he signed an arms supply contract with the Euroasian Defence Ministry\(^{25}\), which has headed by a

\(^{13}\) Procedural Order No. 2, p. 55, ¶ 1.
\(^{14}\) Procedural Order No. 3, p. 59, ¶ 1.
\(^{15}\) Facts, p. 35, ¶ 13.
\(^{16}\) Facts, p. 37, ¶ 19.
\(^{17}\) Facts, p. 36, ¶ 18.
\(^{18}\) Facts, p. 37, ¶ 19.
\(^{19}\) Facts, p. 37, ¶ 19.
\(^{20}\) Procedural Order No. 2, p. 56, ¶ 5.
\(^{21}\) Procedural Order No. 2, p. 56, ¶ 5.
\(^{22}\) Facts, p. 35, ¶ 14.
\(^{24}\) Procedural Order No. 3, p. 61, ¶ 8.
\(^{25}\) Facts, p. 34, ¶ 9.
close friend of his, Mr. John Defenceless. Through that 15-year contract, which expired on December 2013, Claimant became supplier of arms to the Euroasian military.

9. At the end of 2013, the inhabitants of Fairyland held a referendum, without authorization or consent from the Eastasian government, in which they expressed their will to become part of Euroasia. Soon after that, between the end of January and February 2014, Euroasia made public that its government was considering to invade Fairyland.

10. Amidst that scenario, Claimant concluded a new contract to supply arms to Euroasia “aiming at completing the modernization process of the equipment for the Euroasian armed forces”, in February 28, 2014. The day after, March 01, Euroasian armed forces invaded Fairyland. On March 23, Euroasia announced that it considered Fairyland as part of its territory. Eastasia did not acquiesced and declared the annexation illegal, so as substantial part of the international community, which was outraged by the annexation.

IEEPA and Executive Order

11. Following the annexation of Fairyland, the President of Oceania made use of the powers vested in her by the International Emergency Economic Powers Act (“IEEPA”) issuing an Executive Order that blocked the property of persons subject to Oceania’s jurisdiction that were contributing with Euroasia’s annexation of Fairyland.

26 Facts, p. 33, ¶ 8.
27 Facts, p. 34, ¶ 9.
30 Facts, p. 33, ¶ 15.
34 Facts, p. 36, ¶ 16.
ARGUMENTS

1. CLAIMANT DOES NOT QUALIFY AS AN INVESTOR UNDER ARTICLE 1.2 OF THE EUROASIA-BIT.

12. Claimant’s Euroasian nationality derives from the amendment to Euroasia’s Citizenship Act enacted on March 01, 2014, an act that is invalid and unlawful under international law. Its outcome, namely Claimant’s acquisition of Euroasian nationality according to Euroasia’s law, does not have effect at the international level and it is insufficient to establish jurisdiction under the Euroasia-BIT.

13. Claimant’s Euroasian nationality does not produce effects under international law because, as the ICJ reasoned in Fisheries Jurisdiction, the validity of a unilateral act with regard to other States depends upon international law. Acts that confer nationality are no different in this respect. Each State has discretion to decide who its nationals are, but nationality does not have effect at the international level if it is inconsistent with international law. For example, a given State has no power to confer nationality to residents of another State; such legislation may be permitted under its own domestic law, but it does not have any legal effect toward other States.

14. Among investment tribunals, the limited role that municipal law plays in the analysis of nationality at the international level has long been recognized. Investment tribunals consistently rejected putative investors’ arguments that the tribunal was obliged to apply only municipal law to define jurisdiction ratione personae. Instead, tribunals conduct their own analysis of nationality, which inevitably considers international law. As pointed out by the annulment committee of Soufraki v. UAE, a case in which the tribunal declined jurisdiction because claimant was not a national for the purpose of the BIT, “the arbitral tribunal was entitled to review the nationality certificate independently to determine [the investor’s] nationality at the international level.”

37 Fisheries Jurisdiction, ¶ 49.
38 Brownlie, pp. 385-386.
40 Dugan, p. 298.
41 E.g., Soufraki v. UAE, ¶ 55; Siag v. Egypt, ¶ 48 and ¶¶ 142-201.
42 Schreuer, 2015, p. 2.
15. Claimant may have long-lasting cultural and ethnic roots in Euroasia, but Euroasia itself did not consider him a national before the amendment to the Citizenship Act. Nationality is a legal relationship between a State and an individual, which entails a set of specific consequences such as reciprocal rights and duties. From a legal perspective, Claimant allegedly acquired Euroasian nationality because of the Citizenship Act, not because of also alleged (and, for the purpose of this proceeding, not relevant) ancestral root in Euroasia. Consequently, the validity and lawfulness of the Citizenship Act under international law are conditions *sine qua non* to satisfy the nationality requirement of Article 1.2 of the Euroasia-BIT.

16. Oceania hereafter shows why the amendment to the Citizenship Act does not have effects at the international level due to a lack of a fundamental condition of validity [I.1] and to the impossibility, under international law, of having a legal act arising out of an unlawful situation [I.2].

### 1.1. The Citizenship Act lacks a fundamental condition of validity.

17. As international adjudication is mostly oriented toward reparation and responsibility of the injuring State, only a handful of cases dealt with the question of nullity of domestic acts under international law. All decisions, though, reinforce the conclusion espoused by Prof. Guggenheim: invalid and unlawful acts are null under international law; they do not produce legal effects.

18. Alongside the *Fisheries* case, in which the ICJ held that regulations concerning Fishery Limits unilaterally promulgated by Iceland “are not opposable to the Government of the United Kingdom”\(^\text{45}\), the ICJ examined the effects of domestic acts at the international level in *Barcelona Traction*. At that case, Judge Fitzmaurice concluded that the bankruptcy proceedings “were for excess of jurisdiction, null and void *ab initio* and without effect on the international place”\(^\text{46}\).

\(^{43}\) Nottebohm, p. 23
\(^{44}\) Guggenheim, pp. 256-258.
\(^{45}\) Fisheries Jurisdiction, ¶ 67.
\(^{46}\) Barcelona Traction, Separate Opinion of Judge Fitzmaurice, p. 107.
19. The Citizenship Act is invalid because it lacks an essential element: proper object. That is to say, its object is manifestly defective because Euroasia offered to bestow Euroasian nationality to the residents of Fairyland when Fairyland was, uncontestably, not part of its territory. The Citizenship Act’s amendment of March 01, 2014, which allowed people to apply for Euroasian nationality, was enacted twenty-two days before Euroasia itself had declared Fairyland as part of its territory. Irrespective of the subsequent events, Euroasia had no legitimacy to confer its nationality by the *jus soli* criterion to residents of a place which was not within its sovereignty.

20. According to Beckman and Butte, such act configures a manifest violation of the other State’s sovereignty because it is an exclusive right to exercise supreme political authority over a defined territory, and no State has formal authority within another. Therefore, Euroasia had no power to confer nationality to residents of Fairyland, who ultimately were residents of Eastasia as well. Such legislation may be permitted under Euroasia’s own municipal law, but it is manifestly void and has no effects under international law. Also, as Professor Dörr has well written, if a state naturalizes a considerable number of people from another state, which is exactly what Euroasia has done in the present case, it amounts to a violation of the rights of that other state under international law.

1.2. **No lawful act arises out of an unlawful situation.**

21. No legal system can admit that “an unlawful act, or its immediate consequences, may become *suo vigore* a source of legal right for the wrongdoer.” What Sir Lauterpacht has reasoned is that law cannot be grounded on unlawfulness (*ex iniuria jus non oritur*). Therefore, unlawful acts and its direct consequences, such as Claimant’s purported Euroasian nationality, shall not be recognized by this Tribunal for establishing its jurisdiction.

22. Under international law, the prohibition of applying “military force as a means of coercion” against another State is a norm of peremptory character, repeatedly acknowledged.

47 Guggenheim, p. 256.
48 Procedural Order No. 3, p. 61, ¶ 8.
49 Dörr, 2006, ¶ 5.
50 Beckman and Butte, p. 2; Brownlie, p. 292.
51 Fisheries Jurisdiction, ¶ 49; Brownlie, pp. 385-386.
52 Dörr, 2006, ¶ 5.
53 Lauterpacht, p. 421.
54 Dorr, 2015, ¶ 18.
by the ICJ and by the international community as a whole as part of customary law. In the present case, a territory was taken from Eastasia to become part of Euroasia through the use of force, configuring an annexation. Annexation is an unlawful mode of acquisition of territory because it departs from the use of force.

23. Article 2.4 of the UN Charter states that the mere threat or use of force in any form constitutes an internationally wrongful act from which no rights may be derived:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

24. Moreover, there is considerable case law endorsing how the UN Charter has prohibited the threat or use of force among inter-State relations and banned annexation as a mode of acquisition of territory. In Guyana v. Suriname, the ICJ considered that the mere order given by two naval patrol vessels to a drilling ship and its support vessels out of disputed waters claimed by both countries constituted threat of use of force. In the recent annexation of Crimea by Russia, on March 2014, many states declared their non-recognition due to the use of force.

25. Declarations of non-recognition with respect to unlawful situations are in accordance with the ILC Articles on State Responsibility, which states that the prohibition of the use of force renders every act of armed forces covered by it a violation of international law. In that same sense, the ICJ addressed the duty of non-recognition in the Construction of a Wall Advisory Opinion “when it held that as a corollary of the prohibition of the use of force any territorial acquisition resulting from the threat or use of force was illegal and must be treated as such by other States.”

55 Nicaragua v. United States, ¶¶ 187-190; Israeli Wall AO, ¶ 87; UNGA Declaration on Friendly Relations, Art. 1; UNGA Declaration on Definition of Aggression, Art. 1; UNGA Resolution 3314, Art. 5.2; Dörr, 2015, ¶ 15.
56 UN Charter, Art. 2.4.
58 Dörr, 2015, ¶ 8.
59 UN Charter, Art. 2.4.
60 Hofmann, ¶ 14.
62 Dörr, 2015, ¶ 32.
63 ARSIWA, Arts. 31-39 and 49-54.
64 Israeli Wall AO, ¶ 87.
65 Dörr, 2015, ¶ 32.
26. In the present case, Euroasian forces entered into Eastasian territory and Euroasia took control of it without Eastasia’s authorization. By force of the ex injuria jus non oritur principle, every act of Euroasia associated with the annexation of Fairyland is illegal under international law, being the amendment to the Citizenship Act one of these acts. Residents of Fairyland were allowed to apply for Euroasian nationality because of the upcoming annexation whose planning was likely on advanced stage when the legislation was altered. Allowing residents of a certain foreign territory to apply for Euroasian nationality would not be an option if the annexation of that territory was not being planned. That same rationale applies to the specific conferment of nationality to Claimant: he would not be considered a national of Euroasia had the annexation not happened.

27. Therefore, in accordance with the principle of non-recognition of use of force in international law, Claimant is not a national of Euroasia. This Tribunal shall not recognize his purported Euroasian nationality, since it is grounded on an annexation.

28. Moreover, any option of nationality made by Claimant has no effects under this matter for the same reason: the lawfulness of a territorial change is precondition for the rules on State Succession. The very VCSS, Article 6, and the Draft Articles on Nationality, Article 3, expressly recognize that annexations have no effects on nationality of individuals under international law. Thus, any expression of intent by Claimant regarding option of nationality has no effect.

29. IN CONCLUSION, Claimant does not qualify as a national for the purpose of Article 1.2 of the Euroasia-BIT because Euroasia’s municipal law, upon which his nationality is based, is unlawful and invalid under international law, and this Tribunal shall not recognize it as valid in the present case.

2. CLAIMANT SHOULD HAVE COMPLIED WITH THE PRE-ARBITRAL STEPS.

30. This proceeding is a bypass of mandatory provisions of the Euroasia-BIT that conditioned the constitution of the arbitration to the fulfillment of a pre-arbitral stage. In this

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68 Lauterpacht, pp. 420-421; Israeli Wall AO, ¶ 87.
69 VCSS, Art. 6.
70 Draft Articles on Nationality, Art. 3.
sense, first, the Tribunal lacks grounds for declaring jurisdiction because no arbitration agreement is formed [2.1]. Second, the claim lacks admissibility [2.2]. Third, the requirements for the Tribunal seisin are not met [2.3].

2.1. **There is no agreement to arbitrate.**

31. “Like any form of arbitration, investment arbitration is always based on an agreement”\(^71\), which underpins the tribunal’s jurisdiction. When the dispute departs from a BIT, as is the case, consent to arbitration (*ratione voluntatis*) has to be constructed “from the standing consent given by the State by treaty, and the subsequent consent given by the investor at the time the claim is submitted to arbitration”\(^72\). In the present case, there is no agreement to arbitrate because Claimant’s Request for Arbitration does not match with Oceania’s prior treaty-based offer to arbitrate\(^73\).

2.1.1. **Oceania’s treaty-based offer to arbitrate requires pre-arbitral steps.**

32. As noted by Schreuer, States are free to add limitations to their consent to international arbitration\(^74\). Euroasia-BIT, in its dispute resolution provision, enlists two conditions that are part of the Contracting Parties’ consent to arbitrate, namely the requirements of amicable consultation\(^75\) and of trying domestic courts before proceeding to international arbitration\(^76\).

33. That dispute resolution provision, as the *Amco Asia v. Indonesia* tribunal reasoned, “is to be construed in a way which leads to find out and to respect the common will of the parties”\(^77\), also “taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged”\(^78\). In this case, the Contracting Parties’ common will was consent to international arbitration as a complementary stage of adjudication. They reasonably and legitimately envisaged amicable consultations and domestic litigation as preferable remedies to solve disputes pertaining the Euroasia-BIT, enlisting them as requirements for providing the offer to arbitrate to foreign investors\(^79\). Said differently, the steps contained in Article 9 are terms of the offer to arbitrate that Oceania has made. In this sense,

\(^{71}\) Muchlinski, Ortino and Schreuer, p. 831.

\(^{72}\) McLachan, Shore and Weiniger, p. 257.

\(^{73}\) Exhibit C1, p. 44, Art. 9.

\(^{74}\) Schreuer, 2009, ¶540.

\(^{75}\) Exhibit C1, p. 44, Art. 9.1.

\(^{76}\) Exhibit C1, p. 44, Art. 9.2.

\(^{77}\) Amco Asia v. Indonesia, ¶ 14(i).

\(^{78}\) Amco Asia v. Indonesia, ¶ 14(i).

\(^{79}\) Impregilo v. Argentina, Opinion of Professor Brigitte Stern, ¶ 53.
once Claimant has not performed any of the pre-arbitration requirements, the offer to arbitrate by Respondent does not exist.

2.1.2. The Request for Arbitration does not match Oceania’s treaty-based offer.

34. In the investment treaty context, the Request for Arbitration is the acceptance of a treaty-based offer to arbitrate. Whether the offer and the acceptance result in an agreement to arbitrate depends on whether the Request fulfills the terms of the treaty-based offer. In the present case, Claimant’s Request for Arbitration is out of the scope of the consent given by Oceania through the Euroasia-BIT for two reasons.

35. Firstly, Claimant did not try an amicable settlement. He notified the Oceanian authorities of his dispute on February 2015, which is far from configuring an amicable consultation under the terms of Article 9.1. Secondly, Claimant did not take the dispute to litigation at Oceania’s national courts. Soon after sending the notification of dispute, he filed a claim at the ICC.

36. Claimant may try to characterize the pre-arbitral steps established in Article 9 as pointless. Apart from the fact that this devalues the Contracting Parties’ policy choice expressly manifested in the Euroasia-BIT, amicable consultations pursued in good faith are far from pointless. This is shown through the widespread presence of clauses of hardship among commercial contracts and through tribunal’s denial to acknowledge jurisdiction when the obligation to pursue an amicable settlement in good faith is not fulfilled.

37. In sum, because Claimant’s Request for Arbitration does not match the terms of the treaty-based offer made by Oceania, there is no agreement to arbitrate and this Tribunal lacks jurisdiction.

2.2. The claim lacks admissibility.

38. Even if the Tribunal considers that it has jurisdiction, the latter shall not be exercised because the claim is not admissible. That interpretative approach to the nature of compliance with pre-arbitral steps has been adopted by ICC Arbitrators. The assessment of admissibility differs from the one regarding jurisdiction as the latter refers to the tribunal, whilst the former

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80 Hochtief v. Argentina, Opinion of J. Christopher Thomas, ¶ 17.
81 Procedural Order No. 3, p. 60, ¶ 4.
82 Murphy v. Ecuador, ¶ 137.
83 Figueres, p. 71
refers to the claim itself. In that sense, for the claim to be admissible, it is necessary to inquire "whether the terms of the stipulation were obligatory or optional, and in the former case whether the procedure had been attempted"\textsuperscript{84}.

39. In the present case, is unequivocal that attempting amicable settlement before resorting to arbitration is an obligatory stipulation under Article 9 of the Euroasia-BIT. Article 9 establishes that the parties \textit{shall} firstly seek consultation. The word ‘shall’ indicates mandatory obligation\textsuperscript{85}. When this obligation is not followed, the claim does not have admissibility before, which ultimately bars the proceedings before this Tribunal.

40. Claimant failed to comply with the obligatory stipulation of amicable consultation. For that reason, the claim is not admissible and this Tribunal is precluded from exercising jurisdiction.

\textbf{2.3. The requirements for the Tribunal seisin are not met.}

41. Even if there was consent, it would not produce legal effects. The pre-arbitral steps, consisting of different modes of dispute settlement, represent an affirmative duty prior to the seisin of the Tribunal\textsuperscript{86}. This is because, even in the case that the compliance with pre-arbitral steps is not considered an element of jurisdiction itself, it can be regarded as a relevant condition in the process of attribution of jurisdiction to the tribunal, so that the consent to arbitrate has legal effects for the tribunal to seisin the claim.

42. Whilst the lack of standing offer refers to the relation between parties, the impossibility of seisin by the courts occurs under the perspective of the Tribunal due to the lack of legal consent provided by the parties that will arbitrate, as it is conditioned to fulfillment of the steps prescribed\textsuperscript{87}. The absence of such effects compromises the continuity of the proceedings, as any decision rendered without this requirement would very likely find itself difficult to be enforced in any country, due to its essential shortcoming\textsuperscript{88}.

43. On the present case, the alternative to have the dispute heard by an ICC Tribunal is attached to Respondent’s consent in accordance to the Euroasia-BIT. As already mentioned,

\textsuperscript{84} Paulsson, p. 613.
\textsuperscript{85} Philip Morris v. Uruguay, ¶¶ 140–141.
\textsuperscript{87} Wintershall v. Argentina, ¶122.
\textsuperscript{88} New York Convention, Art. 5.1.
such consent is not unconditional nor fully given to the present Tribunal. It has its legal effects suspended by the fulfillment of prior steps (i.e. attempt of negotiation and litigation before national courts). Non-compliance with the latter prevents the consent provided in the Euroasia-BIT to produce legal effects, which therefore removes a condition for the ICC Tribunal to hear the claim. The impossibility of seisin results in the lack of jurisdiction.

44. IN CONCLUSION, Claimant should have complied with the pre-arbitral steps. His failure to do so, depending on this Tribunal’s interpretation, results in lack of jurisdiction for absence of agreement to arbitrate; in lack of admissibility for non-compliance with the procedural requirements; or in lack of this Tribunal’s seisin to hear the claim.

3. THE MFN CLAUSE DOES NOT EXTEND TO JURISDICTIONAL ISSUES

45. Claimant cannot bypass the pre-arbitral steps by invoking the dispute resolution provision of the Eastasia-BIT\(^9\) through Article 3 of Euroasia-BIT\(^9\) because most-favoured nation (MFN) treatment does not extend to jurisdictional issues. First, the rationale used to extend the MFN clause to jurisdictional issues misinterpreted precedents from the ICJ, incurring in a serious error in judicando [3.1]. Second, dispute settlement provisions are not the same as substantive obligations [3.2]. Third, applying the MFN treatment to establish jurisdiction is a logical impossibility [3.2]. Fourth, the pre-arbitral steps do not alter the MFN treatment offered by Respondent [3.4]. Fifth, Article 3 of the Euroasia-BIT has to be interpreted accordingly [3.5].

3.1. Extension of the MFN clause to jurisdiction resulted from an error in judicando.

46. Until recently, the MFN clause had not brought about any discussions that led to the conclusion that it is extendable to jurisdictional matters\(^9\). On the contrary, all of the discussions had concluded the exact opposite. The now often cited Maffezini was the first to extend the scope of a MFN clause to dispute resolution and that happened mostly because the tribunal in Maffezini incurred in an error in judicando when misinterpreted ICJ’s decision in the Ambatielos case\(^9\). This incorrect interpretation consists of the fact that in Ambatielos the

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\(^9\) Exhibit R1, p. 49, art. 8.
\(^9\) Exhibit C1, p. 41, art. 3.
Commission of Arbitration stated that “there is no general principle preventing a MFN clause being applied to matters relating to the administration of justice”\(^93\).

47. Unfortunately, the tribunal in *Mafezzini* was not able to detect that the Commission of Arbitration, when using the expression ‘administration of justice’, was referring to “the substantive obligation to provide foreign nationals with ‘free access’ to the national courts of each contracting state to the treaty of commerce and navigation” \(^94\), and not to the jurisdiction of the tribunal. Actually, the issue regarding the tribunal’s jurisdiction had not been evoked in that case at all.

48. Subsequent tribunals expressly referred to that misinterpretation in their reasoning on why the MFN clause cannot be extended to jurisdictional issues. The *Salini v. Jordan* tribunal noted that the *Ambatielos* ruling “relates to provisions concerning substantive protection […] It does not relate to the import of dispute resolution provisions of another treaty into the basic treaty”\(^95\). In *Plama v. Bulgaria* the tribunal reasoned – referring to the MFN problem – that in *Maffezini* “the tribunal relied on *Case Concerning Rights of Nationals of America in Morocco, Anglo-Iranian Oil Co. Case*, and *Ambatielos Claim*. However, the foregoing review of those decisions shows that they do not provide a conclusive answer to the question”\(^96\).

49. Moreover, the strain of cases that followed *Mafezzini* framed the question on whether the MFN clause could be extended to jurisdictional issues in the following terms: are dispute resolution arrangements inextricably related to the protection of foreign investors\(^97\)? An example may be of use to demonstrate how that question is rhetorical and leads to inconsistent results\(^98\). If a BIT entries into force after the date upon which the investor alleges the contracting party breached a substantive obligation under the BIT (e.g., obligation to accord FET), the investor cannot use the MFN clause to expand the jurisdiction *ratione temporis* of the tribunal. In fact, that was the conclusion in *Tecmed v. Mexico*\(^99\). The critical question, as summed up by Douglas, is whether the Contracting Parties permitted derogation from the dispute settlement

\(^93\) Ambatielos, pp. 52-53.
\(^94\) Douglas, 2011, p. 102.
\(^95\) Salini v. Jordan, Decision on Jurisdiction, ¶ 215.
\(^96\) Plama v. Bulgaria, Jurisdiction, ¶ 215.
\(^97\) Maffezini v. Spain, ¶ 30.
\(^99\) Tecmed v. Mexico, ¶ 153-169.
mechanism by the inclusion of a MFN clause in the basic treaty\textsuperscript{100}. Hereafter, Oceania demonstrates why the answer to that question must be \textit{no}.

3.2. There is a fundamental distinction between provisions on the jurisdiction of the Tribunal and on the protection of the investment.

50. As noticed by Professor Stern, “the core reason why a MFN clause cannot apply to dispute settlement is intimately linked with the essence of international law”\textsuperscript{101}. That conclusion is built upon the fundamental distinction between the \textit{substantive obligations} and the \textit{jurisdictional provisions} embedded in an international legal instrument such as the Euroasia-BIT.

51. Substantive obligations of investment protections are addressed to the Contracting Parties; treaty provisions on jurisdiction, which confer adjudicative power, are addressed primary to the tribunal\textsuperscript{102}. These are not rules of the same kind (\textit{ejusdem generis}).

52. As defined by the ILC, the MFN clause is “a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations”\textsuperscript{103}. In the investment treaty context the sphere of relations in which that substantive obligation exists is the protection of investments. Jurisdictional provisions, on the other hand, refers to the adjudicative powers conferred to the tribunal to resolve disputes arising out of the legal instrument\textsuperscript{104} – on the present case, the Euroasia-BIT.

53. The \textit{Plama v. Bulgaria} tribunal noted that in the \textit{Anglo-Iranian Oil Company} case, in which the United Kingdom unsuccessfully invoked the MFN clause to establish ICJ’s jurisdiction, the ICJ concluded that “the MFN provisions in the Iran-United Kingdom treaties ‘had no relation whatsoever to jurisdictional matters’ between those two States”\textsuperscript{105}.

54. Hence, Claimant cannot try to reshape the MFN clause arguing Respondent has not offered him the accorded treatment, as the MFN clause itself does not relate to the discussion of the (expansion of the) jurisdiction of this Tribunal.

\textsuperscript{100} Douglas, 2009, p. 357.
\textsuperscript{101} Impregilo v. Argentina, Opinion of Professor Brigitte Stern, ¶ 16.
\textsuperscript{102} Douglas, 2011, p. 104.
\textsuperscript{103} Draft Articles on MFN, Art 4.
\textsuperscript{104} Douglas, 2011, p. 102.
\textsuperscript{105} Plama v. Bulgaria, Jurisdiction, ¶ 214.
3.3. Applying the MFN clause to establish jurisdiction is a logical impossibility.

55. How could a tribunal apply the MFN clause to establish its own jurisdiction if the mere act of applying a clause requires jurisdiction? That question led the tribunal in *Daimler v. Argentina* to note, relying on the *Anglo-Iranian Oil* case, that if the claimant has not satisfied the necessary conditions that precedes the State’s consent to international arbitration, “[the claimant’s] MFN arguments are not yet properly before the Tribunal”\(^{106}\). For that reason, the tribunal held that the MFN can only be invoked if a tribunal first has jurisdiction to entertain a claim\(^{107}\).

56. A different understanding departs from the premise that the MFN clause *in itself* is capable of supplying the tribunal with the necessary jurisdiction, which is impossible because it would mean *importing the consent* given in another treaty to establish jurisdiction. According to Steingruber\(^{108}\), consent is considered the “foundation stone” of international arbitration. That consent requirement, therefore, belongs to the spectrum of necessary factors for jurisdiction to exist. Oceania and Euroasia have not, at any time, provided any consent to have disputes pertaining their BIT *initiated* in arbitration.

57. There is no way to automatically incorporate Article 8 of the Eastasia BIT into the basic treaty at the same time Claimant files his claim. That is, Claimant had to establish a valid arbitration agreement according to the terms of the Euroasia-BIT, which cannot be altered or amended retroactively at his will.

58. Finally, this ratio is also compatible with the *Kompetenz-Kompetenz* principle. As Emmanuel Gaillard defines, *Kompetenz-Kompetenz* is “a rule of pure chronological priority”\(^{109}\). Even considering that this Tribunal has the competence to decide upon the scope of its own jurisdiction, that is not possible if there is no consent to go to arbitration. On the present case, considering the chronological priority mentioned, it is impossible for this Tribunal to establish jurisdiction.

59. In sum, the tribunal cannot not apply the MFN clause to establish its own jurisdiction because doing that already requires jurisdiction.

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\(^{106}\) *Daimler v. Argentina*, ¶ 200.

\(^{107}\) *Daimler v. Argentina*, ¶ 281.1.

\(^{108}\) Redfern, p. 131.

\(^{109}\) Gaillard, p. 128.
3.4. The necessary pre-arbitral steps do not alter the MFN treatment offered by Respondent.

60. The Euroasia-BIT is not per se a barrier to take the dispute to arbitration, as the pre-arbitral steps do not remove the right to seek dispute resolution through arbitration. The pre-arbitral steps accord a treatment that is only formally different from the one accorded through the Eastasia-BIT.

61. Claimant has been accorded the right to take the dispute resolution to arbitral tribunals, but the process that might eventually lead to it is different when comparing both BITs. Nevertheless, this difference is only important in the formal or procedural sphere. That is, the fact that Claimant has to go through the pre-arbitral steps when applying the Euroasia-BIT does not represent a different substantial treatment. Hence, this does not originate an alleged right to expand the MFN clause to alter its shape and, consequently, alter its purpose and use.

62. On the present case, Claimant cannot justify expanding the MFN clause to jurisdictional matters by ignoring the difference between substantial and procedural matters.

3.5. Article 3 of the Euroasia-BIT has to be interpreted accordingly.

63. If this Tribunal considers that MFN treatment might extend to jurisdictional issues depending on the way the article was drafted in the treaty, a further analysis of Article 3 will show that the Contracting Parties made a strict choice of words that makes it impossible to extend Article 3 to jurisdictional issues.

64. Article 3.1 refers to a treatment that is no less favourable “to investments made by investors”\textsuperscript{110}. Not to “activity in connection with investments”, as in article 3.2 of the German 1998 Model Treaty\textsuperscript{111}, nor to “all matters subject to this Agreement”, as in Maffezini\textsuperscript{112}. Most tribunals that said that the MFN treatment could be extended to jurisdictional issues ruled based on treaties which had a MFN clause with broader formulation and expressly relied on that broader formulation in their reasoning\textsuperscript{113}. For instance, the tribunal in Gas Natural said that “Article 3(2) speaks of ‘treatment of activities related to investments… (sic) granted to the nationals and companies of third states’”\textsuperscript{114}. Following the same strain of thought, given the

\textsuperscript{110} Exhibit C1, p. 41, art. 3.
\textsuperscript{111} German Model Treaty, art. 3.2.
\textsuperscript{112} Maffezini v. Spain, ¶ 38.
\textsuperscript{113} E.g., Gas Natural v. Argentina.
\textsuperscript{114} Gas Natural v. Argentina, ¶ 43.
limited scope of Article 3, one can only conclude that it does not encompass jurisdictional issues, but solely substantive treatment accorded to investments.

65. Alternatively, Claimant might invoke an *ejusdem generis*-like argument saying that jurisdictional matters have not been expressly carved out of the MFN coverage. Therefore, the MFN clause would encompass jurisdiction. Understanding why this argument is inaccurate requires placing the debate over the purpose of the MFN clause in perspective. As noted by Christopher Thomas, the MFN clause was extended to dispute settlement for the first time in 2000 and

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\text{it is entirely plausible that the Contracting Parties did not specifically exclude the conditions for gaining access to dispute settlement under (the MFN provision) because it did not occur to them that the MFN clause could be used to modify (the dispute resolution) stipulations.}^{115}
\]

66. Euroasia-BIT entered into force in 1995. At that time, “drafters needed not exclude matters addressed in another article of a treaty from the MFN obligation if they [did] not think that there [was] a relationship between the two articles”\(^{116}\). The Contracting Parties could not have foreseen that a putative investor could try to disavow the conditions attached to Article 9 treaty-based offer to arbitration through the MFN clause.

67. Moreover, Contracting States cannot be simply presumed to have agreed that dispute resolution arrangements can be enlarged by incorporating provisions from other treaties negotiated in an entirely different context.\(^{117}\) That means Respondent cannot be presumed to have automatically agreed to enlarge the MFN clause in question.

68. Finally, interpreting the BIT causing the expansion of a clause to give it a broader effect violates the principle of effective interpretation. That means that expanding the MFN clause to the jurisdictional matters would also violate the effectiveness principle, as Article 3 of the Euroasia BIT never includes anything regarding jurisdiction or dispute settlement.

69. IN CONCLUSION, the extension of the MFN clause to jurisdictional matters, as a historical result of an *error in judicando*, is not possible. Furthermore, the dispute settlement provisions accorded through the BIT are not the same as the substantive obligations related to

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115 Hochtief v. Argentina, Opinion of J. Christopher Thomas, ¶ 53.
116 Hochtief v. Argentina, Opinion of J. Christopher Thomas, ¶ 54.
117 Plama v. Bulgaria, Jurisdiction, ¶ 207.
it. Even further, applying the MFN clause is, in this case, a logical impossibility. And last, Article 3 of the Euroasia-BIT shall be interpreted accordingly.

4. CLAIMANT HAS NOT MADE A PROTECTED INVESTMENT.

70. “He who comes to equity for relief must come with clean hands”\textsuperscript{118}. This notion of clean hands, sometimes referred to through its Latin counterpart \textit{tu quoque}\textsuperscript{119}, embeds a fundamental principle of equity, which is part of customary international law\textsuperscript{120}. In the modern investment treaty context, it means that BITs do not protect investments tainted by corruption.

71. In view of Procedural Order No. 1\textsuperscript{121}, Oceania will address the clean hands doctrine as a question of merits\textsuperscript{122} and show why Claimant’s investment is not a \textit{protected} investment.

72. In the present case, there is evidence that Claimant’s investment is tainted by corruption [4.1]. For that reason, the requirements to apply the clean hands doctrine are met and his investment is not protected, regardless of the Tribunal’s ruling in the jurisdictional phase [4.2]. Also, Oceania is not estopped from invoking the clean hands doctrine [4.3].

4.1. Claimant’s investment is tainted by corruption.

73. Claimant bribed a government official to obtain Rocket Bombs’ environmental license. Plenty of red flags\textsuperscript{123} points to Claimant’s act of corruption:

(i) Rocket Bombs obtained an environmental license without fulfilling the \textit{mandatory} requirements\textsuperscript{124} set forth in the Environment Act\textsuperscript{125};

(ii) Claimant held a suspicious private meeting with the President of the NEA shortly before obtaining the aforementioned license in an unusual expedite manner; that same official was later found guilty of accepting bribes\textsuperscript{126};

\textsuperscript{118} Fitzmaurice, p. 119.

\textsuperscript{119} Wieacker, p. 67.

\textsuperscript{120} Continental Shelf, ¶ 71.

\textsuperscript{121} Procedural Order No. 1, p. 30.

\textsuperscript{122} Hulley v. Russia, ¶ 435.

\textsuperscript{123} Metal-Tech v. Uzbekistan, ¶ 293.

\textsuperscript{124} Procedural Order No. 2, p. 55, ¶1.

\textsuperscript{125} Facts, p. 35, ¶ 13.

\textsuperscript{126} Facts, p. 33, ¶ 6.
(iii) For more than 15 years, Claimant conveniently remained immune from NEA in loco visits to verify Rocket Bombs’ compliance with the requirements set under the Environment Act127;

(iv) The president of the NEA named Claimant as a person from whom he received bribes and against whom he is willing to testify128. Consequently, the General Prosecutor’s Office of Oceania has initiated criminal proceedings against Claimant129.

74. Worth remarking that “regardless of the standard of proof, any allegation may be proven through circumstantial evidence”130. As the Oostergetel tribunal reasoned, “[f]or obvious reasons, it is generally difficult to bring positive proof of corruption”131. It was also reasoned in Metal-Tech that “corruption is by essence difficult to establish”132 and, in view of this obstacle, inherent to the modus operandi of the act, “is thus generally admitted that [corruption] can be shown through circumstantial evidence”133. Both tribunals determined that there was no reason to heighten the standard of proof. In other words, instead of requiring Oceania to present direct evidence to establish bribery, the establishment of circumstantial facts is “considered, by law, sufficient for a conclusion that the material fact at which the evidence is directed is reputedly established as well”134.

75. In Metal-Tech, relying on red flags as evidence, the tribunal shifted the burden of proof to claimant, who had not presented any reasonable explanation for the suspicious facts135. Furthermore, as Professor Bin Cheng explains, any condemnation may be well-founded on indirect evidence136. Hence, in view of the evidence Oceania has presented, that rationale applies to the present case.

128 Procedural Order No. 2, ¶ 5.
130 Lamm, p. 338.
131 Oostergetel v. Slovakia, ¶ 303.
132 Metal-Tech v. Uzbekistan, ¶ 243.
133 Metal-Tech v. Uzbekistan, ¶ 243.
134 Sayed, p. 94.
135 Metal-Tech v. Uzbekistan, ¶ 243.
136 Cheng, p. 322.
76. The *res ipsa loquitur* principle, used by the *Fraport I* tribunal\(^ {137}\), is also applicable to the present case. Plenty of red flags indicates that Rocket Bombs could not have obtained its environmental license lawfully, and that Claimant played a fundamental role in that process, as the president of the company and sole member of its board of directors\(^ {138}\). Following that same strain of though, Cheng remarked that prima facie evidence and the adverse presumption arising from the non-production of counter-evidence are sufficient proof of a fact\(^ {139}\).

77. Finally, as Sandifer explained, several tribunals “decided in favor of the alleging party based on prima facie evidence as a result of the other party’s failure to introduce rebuttal evidence”\(^ {140}\). Claimant has not presented any reasonable explanation regarding the issuance of Rocket Bombs’ environmental license in an unusual expedite manner regardless of the company’s non-compliance with the mandatory requirements for such license. Therefore, Oceania has proven that Claimant bribed a government official to obtain Rocket Bombs’ environmental license.

4.2. **The clean hands doctrine applies to Claimant’s investment.**

78. The obligation to make investments in accordance with the laws and regulations of the host country is “implicit even when not expressly stated in the relevant BIT”\(^ {141}\). As reasoned in *Plama*, even if a treaty does not have a provision requiring the conformity of the investment with the law, it does not mean its protections cover all kinds of investments, including those contrary to domestic or international law\(^ {142}\). Whenever a legality clause is contained in the BIT, “it may be understood to imply that investments made in violation of national laws are not covered by the treaty”\(^ {143}\). Even if jurisdiction is based on the *existence* of an investment, the “substantive protections of the [treaty] cannot apply to investments that are made contrary to law”,\(^ {144}\) an understanding later restated by many tribunals. Indeed, the *Yukos* tribunal, for instance, remarked that “investment treaties seek to encourage legal and *bona fide* investments”\(^ {145}\).

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\(^ {137}\) Fraport I v. Philippines, ¶ 399.

\(^ {138}\) Facts, p. 32, ¶ 2.

\(^ {139}\) Cheng, pp. 323-4.

\(^ {140}\) Sandifer, pp. 125-6.

\(^ {141}\) Phoenix v. Czech Republic, ¶ 101.

\(^ {142}\) Plama v. Bulgaria, Merits, ¶ 138.

\(^ {143}\) Dolzer and Schreuer, p. 93.

\(^ {144}\) Plama v. Bulgaria, Merits, ¶ 139.

\(^ {145}\) Yukos v. Russia, ¶ 1.352.
79. When an investment is made through acts contrary to both domestic and international law, as in the case of corruption, the rationale underlying the conclusion that the investment does not enjoy the protections of the treaty is striking. As the World Duty Free tribunal summed up, “bribery is contrary to the international public policy”\textsuperscript{146}. An act of corruption thus not only breaches the host country national law, which itself would be a reason for not being protected, as it also violates “an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora”\textsuperscript{147}. Corruption threatens the stability and security of societies, undermines the institutions and values of democracy, ethical values and justice, and jeopardizes sustainable development and the rule of law\textsuperscript{148}. It is such a relevant concern to public policy that even if corruption is widespread within the host country, which is not the case, “such facts do not alter in any way the legal consequences dictated by the prohibition of corruption”\textsuperscript{149}.

80. The clean hands doctrine shall be applied whenever an investment is not made in accordance with the host state’s law\textsuperscript{150}.

4.3. **Respondent is not estopped from invoking the clean hands doctrine.**

4.3.1. **The President of the NEA’s act is not attributable to Oceania.**

81. For Diez-Picazo, one is estopped from making an allegation that contradicts its previous allegation or conduct\textsuperscript{151}. He defines estoppel as a sanction imposed to someone due to one’s self-accountability for its previous conducts in which other has relied on\textsuperscript{152}. In the present case, estoppel would require Respondent’s international responsibility for the President of the NEA’s conduct\textsuperscript{153}, which it does not exist.

82. International law recognizes “the autonomy of persons acting on their own account and not at the instigation of a public authority”\textsuperscript{154}. Article 5 of the ARSIWA provides that the conduct of a person empowered to exercise governmental authority is not attributable to the

\textsuperscript{146} World Duty Free v. Kenya, ¶ 157.
\textsuperscript{147} World Duty Free v. Kenya, ¶ 139.
\textsuperscript{148} UNCAC, Preamble, p. 5.
\textsuperscript{149} World Duty Free v. Kenya, ¶ 156.
\textsuperscript{150} Plama v. Bulgaria, Merits, ¶ 139.
\textsuperscript{151} Diez-Picazo, p. 62.
\textsuperscript{152} Diez-Picazo, p. 66.
\textsuperscript{153} ARSIWA, p. 38.
\textsuperscript{154} ARSIWA, p. 38.
State unless the person is acting in that capacity in the particular instance. Therefore, only “to the extent that the conduct of such person […] is carried out in the context of the exercise of such governmental authority, it is to be treated as being act of the State”\textsuperscript{155}. Article 7 of the ARSIWA complements that rule, stating that the conduct of a person empowered to exercise governmental authority is attributable to the State even if that person had acted in \textit{excess of authority}, but the President of the NEA has not merely exceeded his authority. He acted in a strictly private capacity when he took Claimant’s bribe.

83. Had the President of the NEA mistakenly issued a license to a company that did not fulfill the Environment Act requirements, Oceania would arguably be responsible. However, he did not mistakenly issued a license to Rocket Bombs. Claimant bribed the President of the NEA in order to obtain Rocket Bombs’ environmental license, and accepting bribery is completely outside the scope of a government’s official authority. As explained in \textit{World Duty Free v. Kenya}, bribes normally are covert. In that case, the bribe was received not by the Government, but by an individual, the then President of Kenya, “and accordingly its receipt is not legally imputed to Kenya itself”\textsuperscript{156}; “if it were otherwise, the payment would not be a bribe”\textsuperscript{157}. In that same sense, Diez-Picazo explains that acts falling outside the scope of both real and apparent authority are not performed by virtue of official capacity\textsuperscript{158}.

84. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been “carried out by persons cloaked with governmental authority”\textsuperscript{159}. There are cases “where the conduct is so removed from the scope of their [agent’s] official functions that it should be assimilated to that of private individuals, not attributable to the State”\textsuperscript{160}. When the footnote of ARSIWA mentions that “one form of \textit{ultra vires} conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction”,\textsuperscript{161} it does not mean that the State whose official has been bribed is responsible towards the corrupting person. Holding that conclusion would be a misinterpretation of that footnote, which expressly states that “[t]he question of the responsibility of the State whose official had been

\textsuperscript{155} BIICL, p. 61.
\textsuperscript{156} World Duty Free v. Kenya, ¶ 169.
\textsuperscript{157} World Duty Free v. Kenya, ¶ 169.
\textsuperscript{158} ARSIWA, p. 46.
\textsuperscript{159} Petrolane v. Iran, p. 64.
\textsuperscript{160} ARSIWA, p. 46.
\textsuperscript{161} ARSIWA, p. 46.
bribed could hardly arise, but there could be issues of its responsibility towards a third party [...]162. There is no room for the interpretation that the State is responsible towards the corrupting person who was aware that the government’s official was “acting on their own account and not at the instigation of a public authority”163.

85. As Claimant did not obtain Rocket Bombs’ environmental license by a mistake of the President of the NEA, but by means of corruption, he did not act within his official capacity, and his act therefore is not attributable to Oceania.

4.3.2. Claimant’s bribery act is not a trivial fault.

86. In the present case, (i) the corrupt act was central to the profitability of the investment164, (ii) Claimant’s misconduct preceded his allegation of breach of law165, and (iii) Oceania did not overlook the violations of its own law166.

87. First, Rocket Bombs was a decrepit company at the time Claimant acquired the shares,167 and only became able to operate and be profitable due to Claimant’s violations of law.168 The issuance of the environmental license was therefore central to the profitability of the investment. According to Dolzer and Schreuer, economic science often assumes that a direct investment involves: (a) transfer of funds, (b) longer term project, (c) purpose of regular income, (d) participation of the person transferring the funds, at least to some extent, in the management of the project, and (e) business risk.169 When Claimant acquired Rocket Bombs’ shares, the only element present was (a) the transfer of funds. Before Rocket Bombs’ obtained its environmental license, there was no (b) realistic long-term project, (c) predictable regular income, (d) participation in the management of the project by Claimant, or (e) business risk, once there was no business at all. It is therefore undisputable that the issuance of Rocket Bombs’ environmental license was a fundamental step of Claimant’s investment.

88. Second, there is no relation between Claimant’s acts of corruption and the sanctions applied to Rocket Bombs by virtue of the Executive Order. Claimant bribed a government’s

162 ARSIWA, p. 46.
163 ARSIWA, p. 38.
164 Fraport I v. Philippines, ¶ 396.
165 Yukos v. Russia, ¶ 1.355.
166 Fraport I v. Philippines, ¶ 346.
167 Facts, p. 32, ¶ 2.
169 Dolzer and Schreuer, p. 60.
official in order to obtain Rocket Bombs’ environmental license, whereas the sanctions were applied to him by virtue of his contribution to the situation in Eastasia\textsuperscript{170}. Therefore, Claimant will not be denied to make his case before this Tribunal based on the same facts that introduced the sanctions, which legality he challenges.

89. Third, Oceania only recently found out about the conduct of the President of the NEA\textsuperscript{171}, who had remained in office since the introduction of the Environment Act\textsuperscript{172}, and immediately initiated criminal proceedings\textsuperscript{173}. In no way had Oceania knowingly overlooked the corruption activity.

90. IN CONCLUSION, Claimant’s investment is not subject to the substantive protections of the Euroasia-BIT. Once there is evidence that Claimant’s investment is tainted by corruption, the requirements to apply the clean hands doctrine are met, Oceania is not estopped from invoking it.

5. CLAIMANT’S INVESTMENT HAS NOT BEEN EXPROPRIATED.

91. Claimant alleges that the implementation of the Executive Order of 01 May 2014 has resulted in the expropriation of his investment. That claim is meritless. First, the Executive Order is a permitted measure according to Article 10 of the Euroasia-BIT. Second, the Executive Order is a non-compensable exercise of police powers. Third, the effects of the Executive Order are not equivalent to an expropriation.

5.1. The Executive Order is within the scope of Article 10 of the Euroasia-BIT.

92. The Executive Order is within the scope of Article 10 of the Euroasia-BIT, which states that nothing in the treaty prevents the Contracting Parties from fulfilling their “obligations with respect to the maintenance of international peace or security”\textsuperscript{174}. Article 10 is a non-precluded measure provision that “limits the applicability of investor protections under the BIT in exceptional circumstances”\textsuperscript{175}. A measure taken for the purpose of Article 10 therefore does not breach any provision of the BIT.

\textsuperscript{170} Facts, p. 36, ¶¶ 16-17.
\textsuperscript{171} Facts, p. 36, ¶ 18.
\textsuperscript{172} Facts, p. 37, ¶ 19.
\textsuperscript{173} Facts, p. 36, ¶ 18.
\textsuperscript{174} Exhibit C1, p. 45, art. 10.
\textsuperscript{175} Burke-White and Staden, p. 311.

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93. Being a provision of implicit self-judging nature, Article 10 gives Oceania considerable discretion to determine what is in its own sphere of obligations toward international peace and security and which measures are necessary to fulfill it. This type of discretion is subject only to the obligation of good faith prescribed in the VCLT.\(^{176}\)

94. The Executive Order also satisfies the requirements of Article 10 if this Tribunal consider that they have to be met. Oceania was obliged under international customary law not to render aid or assistance to maintain the situation in Fairyland and to act to bring it to an end.\(^{177}\)

95. The prohibition of applying “military force as a means of coercion”\(^{178}\) in inter-State relations is a customary norm of peremptory character\(^{179}\) and Euroasia committed a serious breach of international law within the meaning of Article 40 of ARSIWA when deployed its military personnel into Eastasia’s territory with the purpose of annexing Fairyland. The central government of Eastasia, the sole competent authority that could have consented to a foreign intervention into a sovereign country's internationally recognized borders\(^{180}\), had not done that.

96. Serious breaches within the meaning of Article 40 of ARSIWA endanger international community keystones and pose a threat to international peace and security. Unsurprisingly, all States, irrespective of whether they are individually affected by a serious breach, have obligations in face of it. Article 41 of ARSIWA describes these obligations: cooperate to bring it to an end, not recognize the unlawful situation created by the breach, and to not render aid or assistance to maintain that situation. The Executive Order was issued to fulfill them. Oceania had to block the property of private persons subject to its jurisdiction that were supplying strategic resources for Euroasia, otherwise it would assist with Euroasia’s wrongful conduct.

97. Not only was Oceania obliged not to assist Euroasia, but also it risked attracting international responsibility for complicity had the Executive Order not been issued. Customary

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\(^{176}\) Djibouti v. France, ¶ 145; VCLT, art. 26.
\(^{177}\) ARSIWA, art. 41.
\(^{178}\) Dorr, ¶ 18.
\(^{179}\) Nicaragua v. United States, ¶ 190.
\(^{180}\) Nicaragua v. United States, ¶ 246.
law is unmistakable: a State that renders aid or assistance to those already engaged in committing an unlawful act commits a breach of international law itself.\footnote{ARSIWA, art. 16.}

98. Military assistance to an injuring State is not restricted to furnishing military materiel free of charge.\footnote{Aust, p. 129.} Rocket Bombs was supplying arms to Euroasia. Private arms sales may not have a direct involvement of the company’s host-State, but that could have attracted international responsibility for complicity to Oceania as well, especially considering that the sector is licensed in Oceania and tightly regulated in general due to its sensitive nature. International practice shows that stopping export of arms to a State responsible for a violent act contrary to international law is a recurrent practice grounded on the commonly held opinion that acting otherwise is complicity.\footnote{Aust, pp. 130-136.}

99. A final remark is due. If the intention of the Contracting Parties was to narrow the scope of Article 10 only to obligations resulting from their United Nations’ membership, they would have expressly said so. In fact, there are international agreements that favored this path including provisions such as “nothing in this agreement shall be construed […] to prevent […] obligations under the United Nations Charter for the maintenance of international peace and security”\footnote{GATT, art. XXI; Austria Model BIT, art. 3; Canada Model BIT, art. 10.4.}

100. Euroasia-BIT has a different scope and encompasses Contracting Parties’ obligations with respect to international peace and security arising out of customary law. Ad argumentandum tantum, in the following section Oceania demonstrates why the Executive Order, examined in its substance, is not a measure tantamount to expropriation.

\section*{5.2. The Executive Order is non-compensable.}

101. The Executive Order is a valid exercise of Oceania’s police power. Interference with foreign property in the valid exercise of police power does not configure expropriation under Article 4 of the Euroasia-BIT.\footnote{Restatement Third, § 712(g); Harvard Convention, art. 10.5; OECD WP, p. 5; UNCTAD Report, p. 78; Brownlie, p. 532.}

\footnotesize
\begin{itemize}
\item \textsuperscript{181} ARSIWA, art. 16.
\item \textsuperscript{182} Aust, p. 129.
\item \textsuperscript{183} Aust, p. 129 citing Stefan Oeter, Neutralität und Waffenhandel.
\item \textsuperscript{184} Facts, p. 32, § 4.
\item \textsuperscript{185} Aust, pp. 130-136.
\item \textsuperscript{186} GATT, art. XXI; Austria Model BIT, art. 3; Canada Model BIT, art. 10.4.
\end{itemize}
5.2.1. The concept of police power is relevant and applicable to the case.

Police power is a legally actionable “expression of sovereignty”\(^\text{188}\). As written in one of the most well-known paragraphs in the jurisprudential history of police regulation, police power is

the power […] to make, ordain, and establish all manner of wholesome and reasonable laws, status, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same.\(^\text{189}\)

Arbitral practice recognizes police power as a matter of international customary law\(^\text{190}\). As the ICJ famously held in the *Nicaragua v. United States* case, a customary norm exists and is applicable at its own; it does not have to be incorporated in a treaty to produce legal effects\(^\text{191}\). In fact, Euroasia-BIT has to be interpreted *in the light of* Oceania’s police powers. The *Philip Morris v. Uruguay* tribunal voiced how that operates: every article in a treaty has to be interpreted with reference to “relevant rules of international law applicable in the relations between the parties”\(^\text{192}\), which includes the police power fundamental rule of customary law\(^\text{193}\). A different understanding would be at odds with the VCLT rule of interpretation and with the principle that limitations of sovereignty are not presumed\(^\text{194}\).

Many countries have included provisions explicitly incorporating the police power doctrine in their recent (mid 2000 onwards) BITs\(^\text{195}\). Euroasia-BIT was concluded in 1995\(^\text{196}\) and does not have such explicit language. However, as the *Philip Morris v. Uruguay* reasoned, the provisions in recent trade and investment treaties are evidence that the position under general international law is that State measures adopted for relevant public purposes in a non-discriminatory manner are in the realm of non-compensable police power\(^\text{197}\).

\(^{188}\) Viñuales, p. 325.

\(^{189}\) Commonwealth v. Alger, p. 85.

\(^{190}\) Viñuales, p. 328; e.g., Saluka v. Czech Republic, ¶ 255, 260, 262; Chemtura v. Canada, ¶ 266; Methanex v. United States, Part IV, Ch. D, page 4, ¶ 7; Philip Morris v. Uruguay, ¶ 300-301.

\(^{191}\) Nicaragua v. United States, ¶ 177-179.

\(^{192}\) VCLT, art. 31.3.c.

\(^{193}\) Philip Morris v. Uruguay, ¶ 290.

\(^{194}\) Lotus, p. 18.

\(^{195}\) UNCTAD Series; p. 71; e.g., Canada’s Model BIT (2004); Canada-China BIT, Annex B.10 (2012); India-Saudi Arabia BIT, art. 4.2 (2006); Japan-Peru BIT, Annexes 3 and 4 (2008); South Korea-Uruguay BIT, Annex (2009); United States-Uruguay BIT, Annex B (2005).


\(^{197}\) Philip Morris v. Uruguay, ¶ 300-301.
105. It may be argued that police power cover only general (e.g., regulations) and not targeted measures (e.g., the Executive Order), but this could not be more wrong. As Viñuales cautioned, “it is necessary not to conflate the type of interference (general or targeted) with the concept of police powers”\(^{198}\). Disputes involving general measures may be more common, but investment tribunals that applied the police power doctrine made no distinction based on the type of interference. For instance, the *Chemtura v. Canada* tribunal applied the police power doctrine to dismiss a claim against a targeted measure, the suspension and subsequent cancellation of certain authorizations held by the claimant\(^{199}\). Similarly, in older practice the exercise of police power encompassed a variety of targeted measures\(^{200}\).

106. The theoretical point of police power being a norm of customary international law, which operates distinctly and autonomously from treaty law\(^{201}\), has one noteworthy procedural implication for this case. Claimant has the burden of proving that the Executive Order has not met the requirements of relevant public purpose, non-discrimination, and so on that configure a valid exercise of police power\(^{202}\). That is a logical precondition to examine Claimant’s submission under Article 4 of the Euroasia-BIT: being a valid exercise of police power, the Executive Order does not give rise to compensation regardless of its effects.

5.2.2. The Executive Order is a valid exercise of police power.

107. Although the burden of proving that the Executive Order is *not* a valid exercise of police power lies with Claimant, Oceania hereafter details why the Executive Order is a reasonable, non-arbitrary, non-discriminatory, and in accordance with due process of law targeted measure.

108. The President of Oceania, pursuant to the laws of the country\(^{203}\), issued the Executive Order to cope with the threat to Oceania’s national security posed by the situation in Fairyland.

109. National security. Preserving national security is the quintessential manifestation of a State’s police power. Being a political notion by definition, States have broad autonomy to decide what is relevant to its national security, as well as what poses a threat to it. Nonetheless,

\(^{198}\) Viñuales, p. 334.
\(^{199}\) Chemtura v. Canada, ¶¶ 32-34.
\(^{200}\) Harvard Convention, art. 10.5; Too v. Greater Modesto, p. 378; Viñuales, p. 335.
\(^{201}\) Nicaragua v. United States, ¶ 177.
\(^{202}\) Viñuales, p. 338; UNCTAD Report, p. 95.
\(^{203}\) Procedural Order No. 2, p. 56, ¶ 7.
the underlying rationale of Oceania’s decision to consider the situation in Eastasia as a threat to its national security is worth emphasizing.

110. Far from being defined only in military terms\(^{204}\), “there is a consensus that it [security] implies freedom from threats to core values”\(^{205}\). The most cherished values of a country are part of its national interests\(^{206}\) and a threat to them is therefore a threat to national security. As the preamble of the Executive Order makes clear, Oceania considered that the annexation of Fairyland threatened many of its core values: stability of the international order, democratic processes and institutions, sovereign equality, territorial integrity, and the prohibition of use of force.

111. *Reasonableness*. Used as a normative yardstick, the reasonableness test (sometimes referred to as means/ends or suitability test) is satisfied in the present case. As the *Saluka v. Czech Republic* tribunal summed up, reasonable measures bear relationship to rational policies\(^{207}\). Consequently, the relevant inquiry is whether the Executive Order (means) is suitable to achieve the objective pursued by Oceania (ends).

112. Oceania’s objective was to protect its national security, threatened by the situation in Eastasia; to achieve that, it froze the assets of persons under its jurisdiction that were contributing to that situation, which is the same as saying that Oceania applied a *targeted economic sanction*.

113. It is not by chance that targeted sanctions are also called smart sanctions\(^{208}\). Designed to overcome the unintended consequences of the comprehensive sanctions imposed in the 1990s over civil society, this type of measure is “directed against the policymakers most directly responsible for reprehensible policies and the elites who benefit from and support them”\(^{209}\). Its effectiveness in terms of foreign policy is acclaimed among academic literature\(^{210}\) and evident from its growing presence at State practice. As in the *Methanex v. United States*\(^{211}\) and

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\(^{204}\) Ullman, p. 129.
\(^{205}\) Baylis, p. 177.
\(^{206}\) Nye, n.p.
\(^{207}\) Saluka v. Czech Republic, ¶ 307.
\(^{208}\) Cortright and Lopez, p. 1.
\(^{209}\) Biersteker, p. 2.
\(^{210}\) Cortright and Lopez; Interlaken Report.
\(^{211}\) Methanex v. United States, Part III, Ch. A, p. 61, ¶ 101.
Chemtura v. Canada\textsuperscript{2} cases, which dismissed compensation claims because the challenged measures were, \textit{inter alios}, backed by scientific evidence, the Executive Order is grounded on a bulky of scholarly evidence about the adequacy and effectiveness of targeted economic sanctions as an instrument of foreign policy.

114. The targeted economic sanction implemented through the Executive Order had a twofold utility with respect to Oceania’s national security. First, it attached a cost\textsuperscript{213} to Euroasia’s act of annexing Fairyland by targeting the persons who were contributing to the situation in Eastasia, which is essential to make Euroasia change its behavior. Second, it signaled\textsuperscript{214} Oceania’s commitment to uphold the international law principles of sovereign equality, territorial integrity and prohibition of use of force to both domestic constituency and international community. In sum, it served to reinforce a stable and governed by law international order for inter-State relations, which is necessary to safeguard Oceania’s own national security in short- and long-term.

115. Because of its effectiveness, targeted sanctions have been increasingly used at both multilateral and unilateral level; as the \textit{ADF v. United States} tribunal reasoned, if a measure is to be found in the practice of many States, “[it] cannot be characterized as idiosyncratic or aberrant and arbitrary”\textsuperscript{215}. In fact, it is quite the contrary. One might even say that targeted sanctions are the precision-guided munitions of economic statecraft.

116. \textit{Non-arbitrary}. Claimant, himself a crony to Euroasia’s government, is no ordinary businessmen when it comes to the events discussed in this case and his company was not targeted by the Executive Order arbitrarily. Claimant is a close friend to the Euroasian Defense Minister\textsuperscript{216}, which in the past easily secured him a long-term contract for arms supply\textsuperscript{217} when Rocket Bombs had barely obtained a license approving the commencement of its operations and had no independent financial resources to effectively do that\textsuperscript{218}. One might even assume that his friendship with Mr. Defenceless allowed him privileged information related to the Ministry as well. What is most important, by the time the Executive Order was issued, his

\textsuperscript{212} Chemtura v. Canada, ¶¶ 154-155.  
\textsuperscript{213} Giumelli, p. 34.  
\textsuperscript{214} Giumelli, p. 35.  
\textsuperscript{215} ADF v. United States, ¶ 188.  
\textsuperscript{216} Facts, p. 33, ¶ 8.  
\textsuperscript{217} Facts, p. 34, ¶ 9.  
\textsuperscript{218} Facts, p. 33, ¶ 7.
company had just entered into a 6-year contract to supply the hostile foreign country with modern military equipment\(^{219}\), a strategic resource to maintain the situation that Oceania deemed as threatening to its national security.

117. The abovementioned arms-supply contract was signed on February 2014, when the government of Euroasia had already publicly given conclusive signs that it considered annexing Fairyland\(^{220}\). Claimant could not argue that he was not aware, or at least suspicious, as any reasonable man should be, that he was assisting with Euroasia's plans concerning the territory of Eastasia by the time he entered into that contract. Given the sensitivity of the arms sector, defense contractors are particularly acute of political turmoil, not to mention Claimant's personal ties with Mr. Defenceless and Fairyland itself. For all these reasons, Claimant's company designation as a blocked person under the Executive Order, given the scope and purpose of the measure, do not “shock or surprise any sense of juridical propriety”\(^{221}\) to be considered arbitrary.

118. *Non-discriminatory.* The Executive Order subjected all similar investments, namely, all persons operating in the targeted sectors that were contributing with the situation in Eastasia, to sanctions\(^{222}\). The fact that Rocket Bombs was the only targeted company in the arms sector is circumstantial: Rocket Bombs was, in fact, the only company involved in arms trade with Euroasia\(^{223}\). Likewise, the designation of blocked persons under the Executive Order is rationally related to the purpose of the measure: targeting is important because it enables the sender country to achieve the purpose of the measure without causing hardship to persons who are not involved with the threat to its national security.

119. *Due process of law.* “Due process requires, first and foremost, compliance with local law”\(^{224}\) and the Executive Order was issued in accordance with Oceanian law\(^{225}\). Moreover, Claimant could have requested administrative reconsideration of the decision that included him among the blocked persons list\(^{226}\) and common law courts, in which the due process doctrine is

\(^{219}\) Facts, p. 35, ¶ 15.
\(^{220}\) Procedural Order No. 2, p. 56, ¶ 3.
\(^{221}\) ELSSI, ¶ 128.
\(^{222}\) Procedural Order No. 3, p. 61, ¶ 10.
\(^{223}\) Procedural Order No. 2, p. 56, ¶ 6.
\(^{224}\) Newcombe and Paradell, p. 376.
\(^{225}\) Procedural Order No. 2, p. 56, ¶ 7.
\(^{226}\) Procedural Order No. 3, p. 61, ¶ 10.
most developed, have long recognized that post-deprivation remedies satisfy the due process in situations where it is for the State to act fast. In the case at hand, much more arms and strategic resources would be fueled into Euroasia if the Executive Order had been preceded by notice, rendering the measure useless, so the post-deprivation remedies available to Claimant satisfy the due process.

120. Even if the Executive Order is not considered as a valid exercise of police power, and thus fall under Article 4 of the Euroasia-BIT, which is for Claimant to show, still it does not tantamount to an expropriation.

5.3. The effects of the Executive Order are not equivalent to an expropriation.

121. The Executive Order has some adverse effects on the blocked persons; these effects are far from configuring an indirect expropriation under Article 4 of the Euroasia-BIT though. Claimant has to prove that the Executive Order has effects equivalent to expropriation. That is to say, that irrespective of its scope, the measure was not proportional to Oceania’s competing public interests at stake, that it has rendered his investment virtually without value, and that such effect is permanent. None of that happened in the case at hand.

122. A compensable indirect expropriation departs from a disproportional restriction of property, compared to the competing public interest protected by the State through the challenged measure. Therefore, the higher the public interest at stake, the broader the permitted restriction of property is. In the present case, Claimant’s actions had threatened Oceania’s national security, which justified an extraordinary response. From an abstract standpoint, the Executive Order might seem too harsh. However, proportionality requires a case-by-case analysis and the record shows that Claimant had been supplying arms to a hostile foreign State, with which high-ranking officials he maintained long-time and close relations. His conduct, not merely his contract with Euroasia, posed a threat to Oceania. In view of Claimant’s threat to national security, blocking Claimant’s property is a proportional measure.

227 Hudson v. Palmer, pp. 533-534.
228 Exhibit C1, p. 42, art. 4.
229 Pope v. Canada, ¶ 104.
230 Kingsbury and Schill, p. 93; Tecmed v. Mexico, ¶¶ 122 and 136.
231 Kingsbury and Schill, pp. 85-88.
123. Moreover, as the *Glamis v. United States* tribunal pointed out, partial deprivation of property rights is not expropriation\(^{232}\). There is no evidence that the decrease in value of Claimant’s shares deprived his investment of all or substantially all its value; neither there is reason for that. Shares’ value depends not only on the company’s ability to generate income, but also on its physical assets\(^{233}\), which were not affected by the Executive Order.

124. Most important, “in order to constitute an expropriation, the measure should be definitive and permanent”\(^{234}\). Executive Order’s interference with Claimant’s property is of a transitional nature. Rocket Bombs’ property *is* blocked, not taken. Claimant’s legal title to the property was not affected and his company can resume its activities as soon as Euroasia undoes its breach of law, paving the way for Oceania to lift the sanctions. Decisions of domestic courts dealing with the same subject matter of the case at hand came to that same conclusion: “blockings under Executive Orders are temporary deprivations that do not vest the assets in the Government. Therefore, blockings do not, as a matter of law, constitute takings”\(^{235}\).

125. On the top of all, for an expropriation to occur the State must derive economic benefit from the measure that adversely affected the investor. As the *Olguín v. Paraguay* tribunal summed up, “whoever performs those actions will acquire, directly or indirectly, control, or at least the fruits of the expropriated property”\(^{236}\). The Executive Order did not bring any economic benefit for Oceania.

126. **IN CONCLUSION**, Claimant is not entitled to any compensation for expropriation under the Euroasia-BIT.

6. **CLAIMANT HAS CONTRIBUTED TO THE DAMAGES.**

127. As noted by the Annulment Committee in the *MTD v. Chile*, “[t]here is no reason not to apply the same principle of contribution to claims for breach of treaty brought by individuals”\(^{237}\). When an investor contributes to his own injury, total damages should be reduced to take this into consideration\(^{238}\). Therefore, in the event this Tribunal deems that

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\(^{232}\) *Glamis v. United States*, ¶ 357

\(^{233}\) UNCTAD Report, p. 66-67.

\(^{234}\) UNCTAD Report, p. 69.


\(^{236}\) *Olguín v. Paraguay*, ¶ 84.

\(^{237}\) *MTD v. Chile*, Annulment, ¶ 99.

\(^{238}\) Ripinsky and Williams, p. 314.
Claimant’s investment is entitled to compensation under Article 4 of the Euroasia-BIT, Oceania respectfully requests the Tribunal to consider Claimant’s contributory fault in the valuation.\(^{239}\)

128. Many tribunals have done the same under similar circumstances.\(^{240}\) For example, in *MTD v. Chile* the tribunal determined that the investor would bear 50% of the damage it had suffered because it had failed to undertake *adequate due diligence* of the Chilean law at its own\(^{241}\).

129. Contributory negligence, as the *Gemplus v. Mexico* tribunal summed up, relying on Article 39 of ARSIWA, is “a fault by the claimant which has caused or contributed to the injury which is the subject-matter of the claim”\(^{242}\). In the present case, the subject matter of the claim is the Executive Order, which only affected Claimant’s investment because he willfully continued to supply arms to Euroasia amidst an international political turmoil.

130. It is worth emphasizing that a conduct does not have to be illegal under domestic law to contribute to the damages. The key aspect for a finding of contribution is the *causal role*\(^{243}\) between Claimant’s behavior and the injury for which he seeks compensation. In the present case, if compensable damages exists, it results of a cumulative cause. It was the convergence of the Executive Order and of Claimant’s conduct (neither of which could have caused the injury by itself) that produced the injury\(^{244}\). Had Claimant not decided to renew his company’s arms supply contract with Euroasia, after Euroasia had given conclusive signs that it considered annexing Fairyland, he unlikely would have been targeted under the Executive Order.

131. A reasonable investor, especially one of the arms sector, would have awaited, perhaps sought dialogue with the host Government to have a clear sight of where Oceania’s foreign policy stood with respect to the situation in Eastasia. Instead, Claimant chose a reckless behavior. His company was not merely performing a contract for long in place with Euroasia when the sanctions were imposed; his company *renewed* its contract with Euroasia to supply

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\(^{239}\) ARSIWA, art. 39.

\(^{240}\) Ripinsky and Williams, p. 316-319; e.g., Occidental v. Ecuador, ¶ 678; MTD v. Chile, ¶¶ 242-243; Genin v. Estonia, ¶ 361.

\(^{241}\) MTD v. Chile, ¶ 242.

\(^{242}\) Gemplus v. Mexico, ¶ 11.12.

\(^{243}\) Moutier-Lopet, p. 639.

\(^{244}\) Moutier-Lopet, p. 643.
arms for six more years after Euroasia broadcasted on national television its parliamentary discussions regarding the intervention in a portion of another sovereign country’s territory.  

132. It would be naïve to believe that the unfolding events in Eastasia would not trigger reactions among the international community, being economic sanctions against the persons contributing to that situation one of the most likely. Moreover, if Claimant ignored Euroasia’s intention to annex Faiyland at the time they renewed the contract, which we consider merely for the sake of argument given how naïve that idea is, he has acted with manifest lack of due care and contributed to the loss by negligence.  

133. IN CONCLUSION, the fact that Claimant brought the economic sanctions upon himself must be taken into account, proportionally reducing the valuation of the alleged damages.

245 Procedural Order 2, ¶ 2.
246 ARSIWA, art. 39, commentary 5.
134. For all the above mentioned reasons, Respondent requests this Tribunal to declare that:

(a) The Tribunal does not have jurisdiction over the present dispute; or

(b) The Tribunal cannot exercise jurisdiction.

135. If this Tribunal finds that it has jurisdiction and can exercise it, Respondent submits that:

(c) Claimant’s investment is not subject to the substantive protections of the Euroasia-BIT; and

(d) Claimant’s investment was not expropriated.

136. If this Tribunal finds that Claimant is entitled to compensation for expropriation, Respondent submits that:

(e) The amount of compensation shall be reduced in view of Claimant’s contribution for the damages.

Respectfully submitted on 26 September 2016 by

Team Elias

On behalf of the Republic of Oceania