THE INTERNATIONAL COURT OF ARBITRATION
OF
THE INTERNATIONAL CHAMBER OF COMMERCE

Case 28000/AC

PETER EXPLOSIVE

– CLAIMANT –

v.

REPUBLIC OF OCEANIA

– RESPONDENT –

______________________________

MEMORANDUM FOR RESPONDENT

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26 SEPTEMBER 2016

HSU team
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I. The annexation of Fairyland by Euroasia is unlawful and no rules on treaty succession are applicable to the present case ................................................................. 6

i. The right to self-determination cannot justify the annexation of Fairyland by Euroasia ........................................................................................................ 6

ii. The Referendum of 1 November 2013 held in Fairyland was illegal .......... 8

iii. The entrance of Euroasian armed troupes in the territory of Fairyland infringes the principles of territory integrity, non-intervention and political independence ................................................................. 9

iv. Euroasia’s support and encouragement of Fairyland’s secession violates the principles of territory integrity, non-intervention and political independence .... 10

II. CLAIMANT cannot be regarded as a national of Euroasia and therefore is not an investor pursuant to article 1 (2) of the Euroasia-Oceania BIT ......................................... 11

i. CLAIMANT’s real and effective nationality is Eastasian ..................... 11

ii. CLAIMANT is not a national of Euroasia in accordance with international public law ................................................................................................................. 13

iii. CLAIMANT is not a national of Euroasia in accordance with Euroasian law 13

iv. CLAIMANT did not possess Euroasian nationality at the relevant time of the dispute ................................................................................................................. 14

III. This Tribunal has no jurisdiction pursuant to Article 9 of the Euroasia-Oceania BIT ......................................................................................................................... 15

ii. The Tribunal lacks jurisdiction, as there is no consent to arbitrate in the absence of the pre-arbitral procedures ................................................................. 18

IV. CLAIMANT may not invoke Article 3 of the Euroasia-Oceania BIT in order to access and rely upon the dispute resolution provisions of the Eastasia-Oceania BIT. 19
V. CLAIMANT violated the Clean Hands Doctrine and must not have access to this Tribunal’s jurisdiction

i. The application of the MFN clause entails the application of the Clean Hands Doctrine

ii. CLAIMANT’s investments are not encompassed by the Article 1(1) of the Eastasia-Oceania BIT

VI. Alternatively, CLAIMANT’S claims must be considered inadmissible by this Tribunal

i. The Clean Hands doctrine is a valid and internationally accepted principle of international law

ii. This Tribunal should not disregard RESPONDENT’s prerogative to judge illegal matters occurred in its territory

B. RESPONDENT did not expropriate CLAIMANT’s investments

I. The exercise of RESPONDENT’s regulatory powers does not amount to an expropriation of CLAIMANT’s investments

i. The economic sanctions were not permanent

ii. The reserved rights clause contained in Article 9 of the Eastasia-Oceania BIT prevents the economic sanctions from being considered expropriation

C. The CLAIMANT contributed to the losses suffered by its investment

I. The losses claimed by CLAIMANT

II. The continued supply of weapons to Euroasia was a contributory fault to the losses claimed by CLAIMANT

III. This Arbitral Tribunal shall deny or, at least, reduce the compensation requested by CLAIMANT

Request for Relief

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<td>§</td>
<td>Section</td>
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<td>BIT</td>
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<td>CLAIMANT/Peter Explosive</td>
<td>Peter Explosive</td>
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<td>Comm.</td>
<td>Commentary</td>
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<td>DoJ</td>
<td>Decision on Jurisdiction</td>
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<td>Eastasia</td>
<td>Republic of Eastasia</td>
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<td>Eastasia-Oceania BIT</td>
<td>Agreement between the Republic of Oceania and the Republic of Eastasia for the Promotion and Reciprocal Protection of Investments</td>
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<td>e.g.</td>
<td><em>Exempli gratia</em>; for example</td>
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<td>Abbreviation</td>
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<td>ed./eds.</td>
<td>Editor/Editors/Edition</td>
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<td>etc.</td>
<td><em>Et cetera, “and so on”</em></td>
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<td>Republic of Eastasia</td>
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<tr>
<td>Ibid.</td>
<td><em>Ibidem, “in the same place”</em></td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>International Centre for Dispute Resolution</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>Inc.</td>
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**Lex arbitri**

The procedural law of the seat of arbitration, e.g. the place where arbitration will take place

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<td>NEA</td>
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<td>UN</td>
<td>United Nation</td>
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<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<td>v/v./vs.</td>
<td>Versus; against</td>
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STATEMENT OF FACTS

1. In February 1998, Peter Explosive (CLAIMANT), which at the time was undisputedly a national of Eastasia and resident in Fairyland, acquired the integrality of the shares of a company in the Republic of Oceania (RESPONDENT) called Rocket Bombs Ltd (the “COMPANY”), which specialized in arms production for the arms industry. The COMPANY had no environmental license at the time the investment was made, and CLAIMANT needed such license in order to resume arms production.

2. As CLAIMANT lacked the financial resources to purchase the necessary environmental-friendly technology to obtain the aforementioned license, he decided to turn to the Ministry of Environment of Oceania with a request for a subsidy to purchase such technology, under the Environment Act 1996.

3. To secure its production line and investments, as well to expedite the issuance of the environmental license, CLAIMANT had a private meeting with the President of the Oceanian National Environment Authority (“NEA”), acquiring in the same month of July 1998 the environmental license.

4. In August 1998, CLAIMANT’s subsidy request for the environmental technology was denied. CLAIMANT then approached Euroasia’s Minister of National Defence, John Defenceless, with whom he concluded a contract allowing payment advances, giving CLAIMANT the necessary funds to acquire the environmental-friendly technologies.

5. In November 2013, the authorities of Fairyland held a referendum on the secession of Fairyland from Eastasia and also on its reunification with Euroasia.

6. Although the majority of Fairyland’s population decided in favor of secession, the government of Eastasia declared the Referendum unlawful as it did not comply with Eastasian Law. In this situation, the authorities of Fairyland wrote a letter to the Minister of Foreign Affairs of Euroasia, leading to a military intervention on 1 March 2014, the date when the armed forces of Euroasia
occupied the territory of Fairyland. RESPONDENT views this as an unlawful intervention and sides with Eastasia on this issue.

7. On 23 March 2014, Euroasia officially declared Fairyland a part of the Euroasian territory and on 28 March 2014, Eastasia declared the annexation to be illegal under International Law, which led to the end of their diplomatic relationship.

8. Approximately one month before Euroasia’s armed forces invaded Eastasia (i.e., February 2014), CLAIMANT managed to conclude a new contract with the Minister of the National Defence of Euroasia for arms production. Moreover, CLAIMANT made an application for the Euroasian nationality (which does not allow for dual citizenship), without applying for the correct procedure of renunciation of the Eastasian nationality as set forth by the Eastasian Citizenship Law.

9. On 1 May 2014, RESPONDENT’s President issued an Executive Order on Blocking Property of Persons Contributing to the Situation in the Republic of Eastasia, in view of the illegalities purported against that Country. The Executive Order was aimed at key sectors of the Euroasian economy, so as to sanction the disruptive policy that such country was making in the region. One of the many affected by such measure was CLAIMANT, who in spite of the impeding political situation, decided to keep contributing to such warfare status.

10. Moreover, RESPONDENT’s General Prosecutor’s Office conducted investigations throughout 2013, which led to the final judicial conviction of the President of the NEA and other officials, under charges of bribery and corruption. Through a non-prosecution agreement with the NEA President, RESPONDENT initiated further investigative and criminal proceedings against individuals who collaborated to the corruption of RESPONDENT’s institutions, amongst who is the CLAIMANT.
SUMMARY OF ARGUMENTS

11. The Arbitral Tribunal lacks jurisdiction over the present case under the Euroasia-Oceania BIT, since the annexation of Fairyland by Euroasia was unlawful, as the entrance of Euroasian armed troupes in Fairyland’s territory – as well as Euroasia’s support and encouragement of Fairyland’s secession – violated the duty of non-intervention, the principle of territorial integrity and political independence, which are binding principles of international law.

12. The right to self-determination of the people of Fairyland cannot override the principle of territorial integrity and does not empower them to carry out an unlawful succession.

13. In addition, the Referendum of 1 November 2013 held in Fairyland by the people of Fairyland did not comply with the domestic legislation of Eastasia and it was therefore illegal as they were not entitled to external self-determination since and Eastasia had respected their right to internal self-determination.

14. Due to the unlawfulness of the annexation, the Vienna Convention on Succession of States in Respect of Treaties – which would allow CLAIMANT to rely on the Euroasia-Oceania BIT – is not applicable.

15. Moreover, even if the Euroasia-Oceania BIT was applicable to the dispute, the Arbitral Tribunal does not have jurisdiction *ratione personae* over CLAIMANT because CLAIMANT is not an investor pursuant to article 1.2 of the Euroasia.

16. The nationality requirement is not fulfilled in the present case since CLAIMANT is not a national of Euroasia either under Euroasian law or under public international law, and – due to the application of the principle of effective nationality – CLAIMANT should be considered a national of Eastasia. In the rare case the Tribunal finds that CLAIMANT can be considered a national of Euroasia, it did not have such nationality at the relevant time of the dispute.
17. In addition, CLAIMANT has not complied with the pre-arbitral steps set out in the multi-tiered dispute resolution clause provided in the Euroasia-Oceania BIT and therefore – in the rare case the Tribunal finds that such treaty is applicable – the Arbitral Tribunal does not have jurisdiction over the present dispute due to non-compliance with pre-arbitral requirements.

18. The MFN clause provided in the Euroasia-Oceania BIT cannot be used by CLAIMANT in order to invoke the arbitration clause inserted in the Eastasia-Oceania BIT as a means to access ICSID arbitration. The extension of rights on the basis of MFN clauses should be limited to substantive rights with respect to investments and such clauses should only be applied to treaties of States in similar circumstances.

19. Should this Tribunal decide that the Euroasia-BIT is applicable to the present case and that CLAIMANT may rely on the MFN clause of such treaty to access the dispute resolution provision of the Eastasia-Oceania BIT, then the “clean hands clause” included in Article 1(1) of the Eastasia-Oceania BIT should also be applied to the present case.

20. By virtue of said clause, investments considered illegal should not be protected under a BIT. Since CLAIMANT’s acquisition of the environmental license necessarily for its company to operate is directly related to a testimony of corruption made by the NEA President against CLAIMANT, such investment shall be deemed as violating Article 1(1) of the Eastasia-Oceania BIT and, thus, excluded from the protection of BITs.

21. Nonetheless, even if this understands that Article 1(1) of the Eastasia-Oceania BIT cannot be accesses through the MFN clause, the Clean Hands Doctrine shall still be applied in the present case, as it is a valid and internationally accepted principle. Moreover, this Tribunal should not disregard RESPONDENT’s prerogative to judge illegal matters occurred in its territory.

22. In case this Arbitral Tribunal finds that it has jurisdiction over the present dispute, then it shall consider that RESPONDENT did not expropriate CLAIMANT’s investments. The Executive Order was a legitimate response against the illegal annexation of Fairyland, which can be deemed as an external threat to international security, and nothing in the applicable BIT shall be
construed to prevent RESPONDENT from taking measures to fulfill its obligations with respect to the maintenance of international peace and security.

23. The mere exercise of RESPONDENT’s regulatory powers cannot be deemed as an expropriation of CLAIMANT’s investments since the economic sanctions were not permanent and the reserved rights clause contained in Article 9 of the Eastasia-Oceania BIT prevents the economic sanctions from being considered expropriation.

24. Finally, the CLAIMANT has contributed to the losses it claims compensation for in these proceedings. The continued supply of weapons to Euroasia’s Ministry of Defence were the very reason sanctions were applied to Rocket Bomb’s under the Executive Order issued by the president of RESPONDENT.

25. It was foreseeable for CLAIMANT that relationships with Euroasian entities would become reprehensible amongst the international community and the specific context of the disputed territory of Fairyland should have lead CLAIMANT to know that contracting for arms supply with Euroasia right when such country was being asked to intervene in Fairyland would lead to the imposition of sanctions, and even in such position CLAIMANT negligently decided to contract with Euroasia’s Ministry of Defence.

26. In this sense, there was a proximate link between the supply of arms by CLAIMANT to Euroasia’s Ministry of Defence and the losses suffered by CLAIMANT due to the imposition of sanctions under the Executive Order and, therefore CLAIMANT incurred in a contributory fault, which should be taken into account by the Arbitral Tribunal so that it denies or at least reduces the compensation for losses sought by CLAIMANT.
ARGUMENTS

A. The Arbitral Tribunal lacks jurisdiction under the Euroasia-Oceania BIT

1. RESPONDENT submits that this Tribunal has no jurisdiction to rule on the present dispute under the Euroasia-Oceania BIT, for five reasons. Firstly, the annexation of Fairyland by Euroasia was unlawful and, thus, does not allow for the application of the Vienna Convention on Succession of States in Respect of Treaties, pursuant to which CLAIMANT would be entitled to rely on the Euroasia-Oceania BIT (Section I).

2. Moreover, CLAIMANT cannot be considered as an investor under Article 1(2) of the Euroasia-Oceania BIT, since it is not a national of Euroasia either under domestic law or under international law (Section II).

3. However, in case this Tribunal understands that the Euroasia-Oceania BIT is applicable in the present case, CLAIMANT did not comply with the pre-arbitral steps set forth in Article 9 of the Euroasia-Oceania BIT (Section III) and it may not rely on the MFN clause of such treaty in order to access the dispute resolutions provisions contained in Article 8 of the Eastasia-Oceania BIT (Section IV).

4. Finally, this Tribunal shall consider that Claimant’s investment is not protected under the BIT, since Claimant breached the ‘clean hands’ doctrine in connection with its investment (Section V).

I. The annexation of Fairyland by Euroasia is unlawful and no rules on treaty succession are applicable to the present case

5. CLAIMANT argues in its RfA that the annexation of Fairyland by Euroasia was lawful. In such a case, the Vienna Convention on Succession of States in Respect of Treaties would be applicable to the present case, allowing CLAIMANT to rely on the Euroasia-Oceania BIT to seek redress from the purported damages.

6. As will be demonstrated below, however, the annexation of Fairyland by Euroasia did not occur in conformity with international law and, specifically, with the principles of international law embodied on the Charter of the United Nations. Therefore, pursuant to article 6 of the Vienna Convention on Succession of States in Respect of Treaties, the succession of Fairyland by Euroasia falls without the scope of the convention.

i. The right to self-determination cannot justify the annexation of Fairyland by Euroasia.
7. RESPONDENT acknowledges the existence of the right to self-determination of people, in accordance with the Charter of the United Nations. However, the right to self-determination does not empower the people from Fairyland to carry out an unlawful succession.

8. Pursuant to the definition of the right to self-determination set forth in the United Nation’s Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States “all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development”.

9. In this sense, it is relevant to notice the decision of the Supreme Court of Canada in the Quebec Case, which distinguished internal and external self-determination.

10. According to the Supreme Court of Canada, the right to internal self-determination consists on the people’s right to be granted meaningfully access to government to pursue their political, economic, cultural and social development. The right to external self-determination, on the other hand, consists on the people’s right to succession, should internal self-determination be denied.

11. In Quebec Case, the Canadian Supreme Court found that Quebec could not secede from Canada because its right to self-determination was fulfilled through internal self-determination.

12. In the present case, the factual background of the population of Fairyland is very similar to that of the Quebecois. There is no evidence that the population of Fairyland has limited political rights or is victim of any cultural and social discrimination. In fact, the residents of Fairyland have been treated as any other national from Eastasia since 1918. Moreover, pursuant to the Constitution of Eastasia, the residents from Fairyland are granted the same rights as those granted to other provinces regarding the organization of regional referendum pertaining to matters within the exclusive competence of that province.

13. As the Fairyland’s people right to internal self-determination was preserved, since Eastasia imposed no restrictions on their right to freely determine their political status and to pursue their economic, social and cultural development, Fairyland cannot pursue the right to external self-determination.

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1 Quebec Case, ¶134.
2 Id., ¶¶ 4,5,6.
3 Case files, ¶61.
4 Case files, ¶55.
14. Moreover, it should be noted that, as per the United Nation’s Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, nothing in its paragraphs concerning the right to self-determination shall be construed as:

“authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples”.

15. Therefore, even if CLAIMANT alleges that Euroasia’s military intervention in the territory of Eastasia was in the name of the right to self-determination of the people of Fairyland, such allegation cannot justify the unlawful annexation of Fairyland, which was carried out in violation of Eastasia’s right to territorial integrity.

ii. The Referendum of 1 November 2013 held in Fairyland was illegal

16. Firstly, the Referendum is illegal, since, as mentioned above, the people of Fairyland’s right of internal self-determination was respected by Eastasia and, therefore, had no right to pursue external self-determination.

17. Secondly, the Eastasian Constitution allows each province to organize regional referendum only pertaining to matters within the exclusive competence of that province. Secession from the Republic is a matter of state sovereignty and as such cannot be regarded as a matter of regional competence.

18. As consistently emphasized in the practice of ICJ, territorial integrity relates to the “complete and exclusive sovereignty of a State over its territory”. Secession represents a breach on territorial integrity and has an impact on the entire nation. Therefore, it cannot be considered a matter of exclusive competence of a province, especially since the Euroasian Constitution has no provision regarding secession from the Republic.

19. In this sense, it should be noted that the General Assembly of the United Nations has issued Resolution No. 68/262, urged States, international organizations and specialized agencies not to recognize any alteration of the status of the

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5 Case files, pp. 55-56.
6 *Nicaragua v. USA*, ¶209; *Congo v. Uganda*, ¶164.
7 Case files, pp. 55-56.
Autonomous Republic of Crimea, as its secession from Ukraine was carried out based on a Referendum that was not authorized by Ukraine.

20. In view of the above, it is clear that the Referendum of 1 November 2013 is illegal, as it was not carried out in accordance with Eastasian laws. CLAIMANT, therefore, cannot justify Euroasia’s intervention based on a referendum that was illegally held by Fairyland authorities.

iii. The entrance of Euroasian armed troupes in the territory of Fairyland infringes the principles of territory integrity, non-intervention and political independence

21. The ICJ regards the principles of territory integrity, non-intervention and political independence as biding principles under customary international law. The principle of territory integrity is also enshrined in Article 2 (4) of the Charter of the United Nations, which prohibits the threat or use of force against another State. Regarding specifically use of force or threat, the ICJ held in Nicarágua v. USA that the prohibition on the use of force could be found under customary international law and as a jus cogens norm.

22. RESPONDENT submits that Euroasia has breached the principles of territory integrity, non-intervention and political independence in the moment its armed forces entered into the territory of Fairyland, on 1st March 2014. Fairyland’s annexation by Euroasia is a direct consequence of such military intervention, as only after such intervention, did Euroasia declare Fairyland as a part of Euroasian Territory, on 23 March 2014.

23. It is important to stress that the referendum on the secession of Fairyland from Eastasia and on its reunification with Euroasia was held on 1 November 2013 and declared unlawful by the national government of Eastasia. Euroasia, in turn, only declared Fairyland a part of its territory, three months later, with the military intervention.

24. In light of international customary law, no territorial acquisition resulting from the threat or use of force shall be recognized as legal.

25. In Nicarágua v. USA, the ICJ categorized the use of force under customary law as grave use of force and less grave use of force. A grave use of force demands

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8 A/RES/68/262.
9 Nicarágua v. USA, ¶¶192, 193.
10 Case files, ¶14, p. 34.
11 Id.
12 Id.
13 Buchanan, ¶335; Sharf, p. 381; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶87.
an armed attack. For a less grave use for force, the ICJ sustained that no armed attack is deemed necessary and the violation to principles of territoriality and non-interference arises out of the threats to use force. In the *Palestine Case*, ICJ defined an armed attack as any action by regular armed forces across an international border, as well as frontier incidents carried out by regular forces.\(^\text{14}\)

26. As it is undisputed that Euroasian armed forces crossed the international border of Eastasia on 1 March 2014\(^\text{15}\) to assist the population of Fairyland with the annexation, it is clear that such action constitutes an armed attack under the definitions set forth by the ICJ, in clear breach of international customary law.

27. However, even if this Tribunal understands there was no armed attack, RESPONDENT submits that the annexation of Fairyland resulted from the threat to use force by Euroasia (less grave use of force), materialized on the entrance of its armed forces in Fairyland.

28. In fact, even though the annexation was bloodless, the entrance of Euroasian armed forces on Fairyland characterizes a serious threat of armed conflicts, amounting to a violation of the principles of territory integrity and non-intervention.

iv. *Euroasia’s support and encouragement of Fairyland’s secession violates the principles of territory integrity, non-intervention and political independence*

29. Notwithstanding the arguments above, it is also important to note that Euroasia took a series of measures to support the annexation before 1\(^\text{st}\) March 2014\(^\text{16}\). Euroasia long advocated for the self-determination of the inhabitants of Fairyland\(^\text{17}\). Prior to Fairyland’s annexation, on 1 March 2014 Euroasia introduced an amendment to its Citizenship Act, which allowed all residents of Fairyland to apply for Euroasian nationality\(^\text{18}\).

30. In this sense, RESPONDENT submits that Euroasia’s encouragement to the actions of the secessionist movement, by itself, also amounts to a violation of the territorial integrity of Eastasia. In fact, the encouragement by third States to actions of secessionist movements is considered a violation of the territorial integrity of the

\(^{14}\) Case Concerning Oil Platforms and the advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory .

\(^{15}\) Case files, ¶14, p. 34.

\(^{16}\) Case files, ¶14, p. 34.

\(^{17}\) Case files, ¶14, p. 34.

\(^{18}\) Case files, p. 56.

\(^{19}\) Id.
parent State, as affirmed by multiple Security Council Resolutions\(^{19}\) and other documents\(^{20}\).

31. Consequently, by all manners, the annexation occurred in violation of international customary international law and shall be deemed illegal.

II. CLAIMANT CANNOT BE REGARDED AS A NATIONAL OF EUROASIA AND THEREFORE IS NOT AN INVESTOR PURSUANT TO ARTICLE 1 (2) OF THE EUROASIA-OCEANIA BIT.

32. Pursuant to Article 1 (2) of the Euroasia-Oceania BIT, the term investor shall mean any “natural or legal person of one Contracting Party who invests in the territory of the other Contracting party”. A natural person, on the other hand, is defined as “having the nationality of either contracting party in accordance with its laws”.

33. RESPONDENT submits that CLAIMANT is not a natural person of Euroasia in accordance with the laws of Euroasia, nor in accordance with international public law. Therefore, CLAIMANT cannot be considered an investor pursuant to Article 1 (2) of the Euroasia-Oceania BIT and may not rely on such treaty to assert its claims.

   i. CLAIMANT’s real and effective nationality is Eastasian

34. Nationality is a legal status that embraces a set of mutual rights and obligations towards a political entity\(^{21}\). According to the preamble of the Draft Articles on Nationality of Natural Persons in relation to the Succession of States, issued by the United Nations, international public law plays an important role when it comes to nationality.

35. The applicable rules of public international law recognize the right of States to determine the rules for granting nationality to a person in their domestic laws. However, international law limits the weight that tribunals should accord to the decisions of national institutions to their domestic laws\(^{22}\).

36. A state’s grant of nationality to a person under its own laws is not determinative within international disputes\(^{23}\). International tribunals retain the right


\(^{20}\) Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, p. 27-28; Report of the Secretary-General on the Situation in the Federal Islamic Republic of the Comoros.

\(^{21}\) Hailbronner, p. 1, ¶4.

\(^{22}\) Dugan et. al., p. 298.

\(^{23}\) Schreuer, p. 524.
to independently examine the issue of nationality in accordance with international public law.

37. In *Liechtenstein v Guatemal*, the ICJ refused to recognize the naturalization of a person by Guatemala, even though such person was recognized as a national in accordance with Guatemalan law, on the ground that nationality “place[s] itself on the plane of international law”\(^{24}\). In this case, the ICJ set forth an important criterion to assert nationality in accordance with international public law. In this case, the ICJ asserted that nationality should be determined in light of the ties between the person concerned and the state whose nationality is involved:

“The real and effective nationality, based on stronger factual ties between the person concerned and one of these States whose nationality is involved”.\(^{25}\)

38. The criterion relies on the fact that the nationality “should not be based on formality or artifice, but on a real connection between the individual and the State”\(^{26}\). Nationality, therefore, should be asserted with regards to the social fact of attachment, the genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties between the person and the political entity\(^{27}\).

39. In this sense, RESPONDENT submits that CLAIMANT is strongly attached to Eastasia and therefore should be deemed as an Eastasian national. CLAIMANT was born in Eastasia and opted to be a resident of Fairyland, a province that until 2013 was undisputedly a territory thereof\(^{28}\). Its parents were born on the territory of Eastasia and remained in Eastasia until their deaths. Its grandparents, in turn, relinquished their Euroasian nationality to become Eastasian nationals on 1918, demonstrating the family’s ties to Eastasia\(^{29}\).

40. CLAIMANT’s only bonds to Euroasia, on the other hand, are the unlawful annexation of Fairyland and the fact that Fairyland once belonged to Euroasia. Such bonds shall not be regarded as indicating a real connection between the individual and the State.

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\(^{24}\) Nottebohm Case, p. 2.
\(^{25}\) Id.
\(^{26}\) Rezek, p. 357.
\(^{27}\) Dugan et. al., p. 291, Nottebohm Case, p. 23, ¶4
\(^{28}\) Case files, p. 32.
\(^{29}\) Case files, p. 56.
41. Therefore, pursuant to international public law, CLAIMANT’s real and effective nationality is Eastasian and CLAIMANT cannot be considered as an investor pursuant to article 1(2) of the Euroasia-Oceania BIT.

ii. CLAIMANT is not a national of Euroasia in accordance with international public law.

42. CLAIMANT’s alleged acquisition of Euroasian nationality is also grounded on the Euroasia’s Citizenship Act. However, RESPONDENT submits that the Citizenship Act, suspiciously enacted precisely on the day Euroasian armed forces entered in Fairyland’s territory, is an illegal mechanism to encourage secession by people of Fairyland.

43. As previously stated, Euroasia’s encouragement of the secessionists actions through its Citizenship Act is considered a violation of the principles of non-intervention and territorial integrity and therefore illegal in accordance with international public law.

44. When asserting CLAIMANT’s nationality, this Tribunal shall take into account that it was allegedly acquired based exclusively on an unlawful act, enacted with the sole purpose to support and encourage Fairyland’s annexation.

iii. CLAIMANT is not a national of Euroasia in accordance with Euroasian law

45. Should this Tribunal uphold that domestic law is applicable to assert CLAIMANT's nationality, CLAIMANT cannot be considered a national of Euroasia in accordance with Euroasian laws.

46. This Tribunal is empowered to interpret and apply the relevant domestic law to make its own decision as to the existence of an individual’s claimed nationality. When making its own decision as to the existence of an individual’s claimed nationality, this Tribunal has the power to reject the probative value of certificate of nationality.

47. Even though CLAIMANT was issued an Euroasian identity card and passport, this Tribunal should grant no probative value thereto, as nationality was granted in breach of Euroasian law.

48. CLAIMANT is a national of Eastasia, as it failed to comply with the requirements to relinquish its Eastasian nationality. The electronic e-mail sent by CLAIMANT to the President of the Republic of Eastasia, however, does not attend

30 Id.
31 Id.
32 Soufraki v. United Arab Emirates, ¶68
the requirements to renunciation set forth by Eastasian law. Therefore, according to Eastasian law, CLAIMANT is still an Eastasian national.

49. Euroasian law, on the other hand, does not allow Euroasian nationals to possess dual nationality. As CLAIMANT is still a national of Eastasia, it cannot rely on the Citizenship Act to assert its Euroasian nationality.

50. In this scenario, CLAIMANT is not a national pursuant to Euroasian law and, consequently, not an investor pursuant to article 1(2) of the Euroasia-Oceania BIT.

iv. CLAIMANT did not possess Euroasian nationality at the relevant time of the dispute

51. Even if this Tribunal understands that CLAIMANT legally acquired Euroasian nationality on 23 March 2014, it is REPONDENT’s submission that CLAIMANT did not possess Euroasian nationality at the relevant time of the dispute and therefore may not rely on the Euroasia-Oceania BIT.

52. CLAIMANT’s attempt to obtain the protection of a BIT *ex post facto* (after the facts giving rise to the dispute) cannot prevail, as the treaty will not apply retroactively. Protection under the Euroasian-Oceania BIT is available only prospectively and not retroactively.

53. In fact, the dispute concerns two main acts from CLAIMANT that took place before 23 March 2014 (i.e., before CLAIMANT’s alleged acquisition of Euroasian nationality). The first act from CLAIMANT that gave rise to the dispute occurred on 28 February 2014, when CLAIMANT concluded a contract with the Minister of National Defense of the Republic of Euroasia for arms production.

54. CLAIMANT, as a resident of Fairyland, had knowledge about the illegal referendum and the political and military consequences thereof by the time it negotiated the contract with John Defenseless.

55. The deliberations of the Euroasian Parliament on the Government’s proposal to intervene militarily were broadcasted on Euroasian public television before the contact the army production contract was concluded. Military intervention took place on 1 March 2014, a day after CLAIMANT concluded the contract for arms production on a private meeting with his long-term friend John Defenseless, who happens to be Euroasian Minister of National defense.

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33 Id.
34 Id.
35 Schreuer, p. 527.
36 Case files, p. 5.
37 Case files, p. 5.
56. Therefore, when CLAIMANT concluded the contract with John Defenseless, on 28 February 2014, CLAIMANT knew about Euroasian intentions and took active steps to profit from the illegal annexation of Fairyland. RESPONDENT’s sanctions upon Rocket Bomb Ltd. and CLAIMANT were trigged by the conclusion of the contract for arms production, performed by CLAIMANT before he allegedly acquired the Euroasian nationality.

57. The second fact of major importance to the dispute concerns the legality of CLAIMANT’s investments in Oceania, specifically the circumstances in which CLAIMANT secured an environmental licensee back in 1998, when CLAIMANT was undisputedly a national of Eastasia.

58. CLAIMANT’s attempt to change nationality occurred after all facts described above occurred. In Phoeniz v. Czech Republic, when facing similar circumstances, the arbitral tribunal found it had no jurisdiction *ratione temporis*, as most of disputed facts had occurred and the dispute was in swing when the Czech investor acquired a convenient nationality to pursue its claims38.

59. CLAIMANT’s attempt to change its nationality is driven by the application of a more convenient treaty. In fact, CLAIMANT has a strong motivation for treaty shopping, as the Eastasian BIT contains a clean-hands clause that prevents its investments from protection, as RESPONDENT will further demonstrate.

60. In this regard, CLAIMANT’s actions constitute an abusive manipulation of the system of international investment protection. CLAIMANT cannot change its nationality in order to bypass the clean-hands clause cause contained on the Eastasia BIT39.

61. As most of the disputed facts had occurred before CLAIMANT acquired Euroasian nationality, this Tribunal has no jurisdiction *ratione temporis* over the case.

III. THIS TRIBUNAL HAS NO JURISDICTION PURSUANT TO ARTICLE 9 OF THE EUROASIA-OCEANIA BIT

62. In case this Arbitral Tribunal understands that the Euroasia-Oceania BIT is applicable in the present case – which RESPONDENT does not expect it will for the reasons demonstrated above – RESPONDENT submits that the applicable dispute resolution provision is the one included in Article 9 of the Euroasia-Oceania BIT. As CLAIMANT has not followed the pre-arbitral steps set forth on

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38 Phoeniz v. Czech Republic.
39 Banro v. DR Congo.
such article, this Tribunal should find that it has no jurisdiction over the present dispute.

63. Article 8 of the Euroasia-Oceania BIT ("Dispute Resolution Clause") establishes that, if the dispute cannot be amicably settled by an investor and a Contracting State, the competent courts of the contracting party in whose territory the investment was made (Oceania) shall be granted an opportunity to decide such dispute. Only in case the competent courts fail to settle the dispute within 24 months from the date of notice of commencement of the proceedings, can the dispute be referred to international arbitration.

64. In the present case, however, CLAIMANT did not refer the dispute to Oceania’s competent courts prior to requesting the commencement of this arbitration\textsuperscript{40}.

65. CLAIMANT may argue that the local litigation requirement in the Dispute Resolution Clause does not constitute a requirement to arbitrate. In this sense, CLAIMANT may allege that referring the parties to court litigation may lead to unnecessary delay and expenses. That is because the dispute would most likely not cease with a decision by the competent domestic courts. If one of the parties is unhappy (and one of them will always be unhappy) with the outcome on domestic courts, the dispute will ultimately be decided by international arbitration\textsuperscript{41}.

66. CLAIMANT’s submission, however, would be inconsistent with the rules on interpretation of treaties set forth by the Vienna Convention on the Law of Treaties. The Dispute Resolution Clause must be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties ("VCLT")\textsuperscript{42}, which provides that a treaty is 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 purpose".

67. Good faith is not only the leading principle to interpret the provisions of an international treaty in accordance with the VCLT, but also the most widely accepted principle of interpretation applied to arbitration agreements\textsuperscript{43}.

68. By applying the principle of good faith to interpret an extremely similar dispute resolution agreement in \textit{Maffezini v. Spain}, an ICSID tribunal decided that:

\begin{quote}
"(…) while it is true that the parties would be free to seek international arbitration after the expiration of the eighteen-month\n\end{quote}

\begin{flushleft}
\textsuperscript{40} Case files, pp. 3-4.
\textsuperscript{41} Case files, p. 43.
\textsuperscript{42} \textit{Maffezini v. Spain}, ¶27; \textit{Dede and Elhüseyni v. Romania} ¶198.
\textsuperscript{43} Foucahrd et. all., p. 447.
\end{flushleft}
period, regardless of the outcome of the domestic court proceeding, they are likely to do so only if they were dissatisfied with the domestic court decision. Moreover, they would certainly not do so if they were convinced that the international tribunal would reach the same decision.  

69. The ICSID tribunal decided that an interpretation in accordance with the good faith principle could not deprive the contracting State from the opportunity to vindicate the international obligations guaranteed in the BIT. On the contrary, it should allow the contracting parties to retain for domestic courts an opportunity to solve the dispute within the time period set forth by the dispute resolution clause, placing arbitration as the last recourse should the dispute continue.

70. Moreover, the ICSID tribunal upheld that, if the parties were allowed to go directly to arbitration, the dispute resolution clause would be deprived of its meaning, “a result that would not be compatible with generally accepted principles of treaty interpretation, particularly those of the Vienna Convention on the Law of Treaties.”

71. Similarly, in the present case, CLAIMANT’s interpretation would deprive the Dispute Resolution Clause of its meaning and would not allow domestic courts to play the role the Contracting Parties to the Euroasia-Oceania BIT intended the courts to play. Such interpretation is not compatible with generally accepted principles of treaty interpretation, particularly those of the VCLT and shall not be accepted by this Tribunal.

72. It is worth noticing that, in Maffezini v. Spain, the Tribunal upheld its jurisdiction based on an MFN clause that is distinguishable from the one contained on the Euroasian-Oceania BIT, as RESPONDENT will demonstrate hereunder. However, it expressly stated that the investor could not commence arbitral proceedings without complying with the pre-arbitral requirements in case the MFN clause was not applicable.

73. Moreover, while in BG Group PLC v. Republic of Argentina, the arbitral tribunal found admissible claims brought by an investor that failed to comply with the litigation requirements, the decision was based exclusively on the fact that the host State unilaterally hindered recourse to domestic courts and, by doing so, deprived the local litigation requirement of meaning.

74. In fact, in that specific case, Argentina issued a decree providing for a stay of all suits related to the subjected matter in dispute. When facing such factual

44 Maffezini v. Spain, ¶27
45 Id. ¶27.
background, the arbitral tribunal concluded that Argentina’s actions made it “absurd and unreasonable” to read the dispute resolution clause to require an investor to bring its grievance in a domestic court, before arbitrating.\footnote{Id., p. 17/19.}

75. No similar circumstance is found in the current dispute and, as a consequence, CLAIMANT must comply with the litigation requirement before arbitrating. Therefore, this Tribunal lacks jurisdiction based on the Dispute Resolution Agreement, as CLAIMANT failed to comply with the litigation requirement.

\textit{ii. The Tribunal lacks jurisdiction, as there is no consent to arbitrate in the absence of the pre-arbitral procedures}

76. Consent is the cornerstone principle of international arbitration.\footnote{Hunter et. all., p. 235} More specifically, within the field of investment arbitration, consent to arbitration by a host state is an indispensable requirement for a tribunal’s jurisdiction.\footnote{Dolzer/Schreuer, p. 254.}

77. In the present case, this Tribunal is not properly vested with consensual jurisdiction, as CLAIMANT does not agree with all terms of the Dispute Resolution Clause (\textit{i.e.}, submitting the dispute first to the domestic court). On the other hand, there is no consent from RESPONDENT to arbitrate in the absence of such pre-arbitral requirements.

78. A dispute resolution clause within an investment treaty constitutes a standard and unique offer by the contracting states.\footnote{Dede and Elhüseyni v. Romania, ¶190} For a binding agreement to be concluded, an eligible investor must accept all of its terms. Any attempt to modify the stand offer placed on the investment treaty constitutes a counter-offer that, unless accepted by the contracting state, cannot create a binding agreement to arbitration. Consequently, the treaty’s local litigation requirement is a condition on consent to arbitrate.\footnote{Justice Kennedy and Chief Justice Roberts dissenting opinions on \textit{BG Group PLC v. Republic Of Argentina (Court Decision)}, p. 11.}

79. In this sense, in \textit{BG Group PLC v. Republic of Argentina (Court Decision)}, while the majority of USA Supreme Court’s Justices did not address the issue regarding the local litigation requirement, the opinions from Justice Kennedy and Chief Justice Roberts emphasized that a treaty’s local litigation requirement...
“constitutes in effect a unilateral offer to arbitrate, which an investor may accept by complying with its terms.”

80. In Dede and Elhüseyni v. Romania, an ICSID tribunal decided that the issue as to whether or not the local litigation requirement is mandatory is a matter of consent. In this sense, if a dispute resolution provision contained in a BIT provides for the local litigation requirement, the host state’s consent to arbitrate is conditioned thereby. As the investor failed to comply with the local litigation requirement, the tribunal found there was no consent to the state’s standing offer to arbitrate and therefore it did not possess jurisdiction to hear the claims.

81. It is undisputed that CLAIMANT failed to comply with the local litigation requirement set forth in the Dispute Resolution Clause. Therefore CLAIMANT did not adhere to the terms set forth by the Dispute Resolution Clause, but rather made an implicit counter-offer, which was not accepted by RESPONDENT. In this scenario, there is no consent to arbitrate and, therefore, this Tribunal has no jurisdiction over the case.

IV. CLAIMANT MAY NOT INVOKE ARTICLE 3 OF THE EUROASIA-OCEANIA BIT IN ORDER TO ACCESS AND RELY UPON THE DISPUTE RESOLUTION PROVISIONS OF THE EASTASIA-OCEANIA BIT.

82. In addition to the arguments above, if this Arbitral Tribunal understands that the Euroasia-Oceania BIT is applicable in the present case, RESPONDENT submits that CLAIMANT may not invoke the MFN clause included in such BIT to access the dispute resolution provision of the Eastasia-BIT.

83. Pursuant to Article 9 of the ILC’s Draft Articles on Most-Favoured-Nation clauses, which have codified the definition, the scope and the rules governing the MFN clause, said clause can only cover those rights which fall within the limits of the subject matter of the clause itself (ejusdem generis principle).

84. In the present case, the MFN clause contained in Article 3 of the Euroasia-Oceania BIT indicates that the rights that fall within its scope are limited to “the income and activities related to such investments and to such other investment matters regulated by this Agreement”:

“(…) each Contracting Party shall, within its own territory, accord to investments made by investors of the other

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52 Id.
53 Id. ¶245
54 ILC’s Draft Articles on Most-Favoured-Nation clauses, Article 9(1).
55 Radi, p. 758.
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”.56

85. According to the general rules of treaty interpretation set forth in Article 31 of the VCLT, a treaty should 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 purpose”57.

86. In the absence of evidence indicating otherwise, RESPONDENT submits that the ordinary meaning of “income and activities related to such investments and to such other investment matters regulated by this Agreement” is that the investor’s substantive rights with regard to their investments are to be treated no less favorably than under a BIT concluded by the Contracting Parties and a third State.

87. If the Contracting Parties intended to extend the MFN clause of the Euroasia-Oceania BIT to dispute resolution provisions or procedural matters, they could have expressly included this possibility in the text of the MFN clause, as the United Kingdom has done in some of its BITs58, or they could have, at least, drafted a broad MFN clause indicating that it covers all matters governed by the BIT, as was the case of the Spain-Argentina BIT59.

88. Instead, the Contracting Parties to the Euroasia-Oceania BIT have clearly chosen to limit the application of the MFN clause included in such BIT by a substantive standard. The clause does not apply to all matters covered by the treaty, but rather to “such investment matters regulated by this Agreement”.

89. Although some few arbitral tribunals have allowed the extension of MFN clauses with similar wording to that of Article 3 of the Euroasia-Oceania BIT (“... subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable …”60 or “... a less favorable treatment of activities related to investments than granted to its own national... ”)61 to dispute resolution provisions, this should not be the conclusion reached by this Tribunal.

56 Case Files, p. 41.
57 VCLT, Art. 31(1)
58 UK-Bosnia/Herzegovina BIT, Article 3; UK-Armenia BIT, Article 3.
59 Spain-Argentina BIT, Article IV(2).
60 Garanti Koza LLP v. Turkmenistan, ¶ 19.
61 Siemens v. Argentina ¶ 82.
90. Contrary to the clauses analyzed by the tribunals mentioned above, the MFN clause contained in Article 3 of the Euroasia-Oceania BIT clearly indicates that what should be understood by “such investment matters regulated under this Agreement” are substantive matters and not procedural ones. By establishing that the MFN clause applies to the income (substantive matter), to activities related to such investments (i.e., income) and to other such investment matters (i.e., income), the Contracting Parties have unambiguously determined that the scope of such clause is limited to substantive rights.

91. In this sense, it is worth noticing that the vast majority of arbitral tribunals that allowed the use of the MFN clause to access dispute resolution provisions, analyzed broadly drafted clauses, which is not the case of Article 3 of the Euroasia-Oceania BIT.  

92. Moreover, RESPONDENT submits that the MFN clause cannot be used to replace the Contracting Parties’ consent to arbitration. As mentioned in section III (ii) above, consent to arbitration by a host state is an indispensable requirement for a tribunal’s jurisdiction.

93. In the case at hand, RESPONDENT has consented to submit disputes arising from the Euroasia-Oceania BIT to arbitration only if the disputes are first submitted to judicial courts. It has not, however, consented to submit such disputes to the dispute resolution provisions specifically negotiated for the Eastasia-Oceania BIT.

94. Therefore, RESPONDENT’s consent to a specific dispute resolution provision cannot be widened by a MFN clause unless RESPONDENT had expressly indicated such a possibility, which was not the case. As was decided by the ICSID Tribunal in Plama v. Bulgaria:

“Dispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context”.

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62 Ambatielos case; Maffezini v. Argentina; Gas Natural v. Argentina.
63 Dolzer/Schreuer, p. 254.
64 Plama v. Bulgaria, ¶ 207.
95. To reach another conclusion would be to expose RESPONDENT to a disruptive treaty-shopping, through which CLAIMANT would be able to select from an infinite number of dispute resolution provisions - negotiated with other States and in other circumstances – creating a clause wide enough to cover disputes that were not intended to be covered by the dispute resolution clause in the base treaty.\(^{65}\)

96. Such a conclusion would also violate the preamble of the Euroasia-Oceania BIT, in which the Contracting Parties have agreed that a “stable framework for investment will maximise effective utilization of economic resources and improve living standard”\(^{66}\). Pursuant to the understanding of the Arbitral Tribunal in Telenor v. Hungary, the extension of the MFN clause to dispute resolution provisions would generate both uncertainty and instability, since “in one moment the limitation in the basic BIT is operative and at the next moment it is overridden by a wider dispute resolution clause in a new BIT”.\(^{67}\)

97. This understanding has been supported by several arbitral tribunals and scholars, which have concluded against the application of a MFN clause to dispute settlement clauses in the absence of specific evidence indicating otherwise.\(^{68}\)

98. In view of the above, it is RESPONDENT’s submission that MFN clause contained in Article 3 of the Euroasia-Oceania BIT is only applicable to substantive matters and, thus, cannot be extended to the dispute resolution provision included in Article 8 of the Eastasia-Oceania BIT, as intended by CLAIMANT.

V. CLAIMANT VIOLATED THE CLEAN HANDS DOCTRINE AND MUST NOT HAVE ACCESS TO THIS TRIBUNAL’S JURISDICTION

i. The application of the MFN clause entails the application of the Clean Hands Doctrine

27. As already addressed above, CLAIMANT’s attempts to wrongly use the Euroasia-Oceania BIT to support its claims in this arbitration. Moreover, CLAIMANT tries to use the MFN clause contained in the Euroasia-Oceania BIT to trespass the pre-arbitral steps set in the same BIT and go straight to the arbitration forum provided in the Eastasia-Oceania BIT.

\(^{65}\) McLachlan/Shore/Weiniger, pp. 256-257.

\(^{66}\) Case Files, p. 40.

\(^{67}\) Telenor v. Hungary, ¶¶ 93-95.

28. In the event this Tribunal finds that the Euroasia-BIT is applicable to the present case and that CLAIMANT may rely on the MFN clause of such treaty to access the dispute resolution provision of the Eastasia-Oceania BIT, then the “clean hands clause” included in Article 1(1) of the Eastasia-Oceania BIT should also be applied to the present case.

29. As each BIT is carefully constructed to encompass procedural and substantive rights related to the foreign investors relationship to the host country, this Tribunal must find inadmissible CLAIMANT’s attempts to select specific clauses to fit its claims as it pleases, without due consideration to the full framework set-out by each BIT, thereby avoiding (i) the legality clause present in the Eastasia-Oceania BIT, clause 1(1) and (iv) avoid any responsibility whatsoever for corruptive actions, with or without a legality clause, either from clause 1(1) of the Eastasia-Oceania BIT or clause 1(1) of the Euroasia-Oceania BIT.

30. Consequently, the application of the MFN clause must also bring the application of the legality clause, once they cannot be separated from their very essence, which is the host state’s will to arbitrate. The legality clause is an indissoluble part of the dispute resolution clause contained in the Eastasia-Oceania BIT, once it refers to the State intent to limit the scope of the issues and matters that it is willing to arbitrate.69

31. A conclusion of the Tribunal allowing CLAIMANT to take advantage of certain of benefits of the dispute resolution clause, leaving aside the conditions attached therewith, i.e., the objective scope of the BIT set forth in clause 1(1), would be against logic, justice and equity: benefits must be accompanied by their corresponding responsibilities.70

32. Therefore, should this Tribunal understand that the Euroasia-Oceania BIT would apply to the present case and that the MFN clause in such treaty can be used by CLAIMANT to access the dispute resolution clause of the Eastasia-Oceania BIT, then this Tribunal should also apply the legality clause contained in Article1(1) of the Eastasia-Oceania BIT and, consequently, find that it has no jurisdiction over the present dispute, as CLAIMANT’s investments are not encompassed by such article’s definition of investment.

ii. CLAIMANT’s investments are not encompassed by the Article 1(1) of the Eastasia-Oceania BIT

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69 Dumberry, p. 233; Salini v. Morocco, DoJ, ¶46
70 Thulasidhass, p. 7
33. Article 1(1) of the Eastasia-Oceania BIT determines that the term “investment” comprises every kind of asset directly or indirectly invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter. In the present case, CLAIMANT’s investment was not carried out in accordance with Oceania’s legislation and therefore cannot be considered a protected investment for the purposes of the Eastasia-Oceania BIT\(^{71}\).

34. CLAIMANT’s investments lack the substantive requirement of legality present in clause 1(1) of the Eastasia-Oceania BIT, since the acquisition of the environmental license is directly related to a testimony of corruption made by the NEA President against CLAIMANT. While still ongoing, the criminal charges against CLAIMANT in Oceania have substantive grounds deriving from a non-prosecution agreement made with the NEA President to investigate corruption scandals in Oceania\(^{72}\).

35. In this sense, it should be noted that there is no requirement that the legality clause has to be observed only when the investment is made. Rather, the wording of clause 1(1) encompasses the whole duration of the investment by providing for “every kind of asset directly or indirectly invested”\(^{73}\). As the environmental license is a necessary step for the arms production in Oceania, it should be considered an asset of Rocket Bombs and, thus, should have observed Oceania’s laws.

36. Several authors and arbitral tribunals have discussed the applicability of the legality clause to the investment during the course of time, many reaching the conclusion that the investor has a continuing duty to observe the laws of the host state, regardless of the wording of the BIT\(^{74}\). As a matter of fact, the wording of the BIT is understood to only modify the kind of defense to be raised during arbitration: if a legality clause is present, as it is in this case, there may be grounds to challenge jurisdiction. Since such investments cannot enjoy protection from the BIT, and are already being investigated by RESPONDENT’s General Prosecutor’s Office, this Tribunal lacks jurisdiction over claims related to such investments\(^{75}\), and, thus, must reject all claims brought by CLAIMANT.

\(^{71}\) Hamester v. Ghana, ¶125; Saba Fakes v. Turkey, ¶114; Metal-Tech Ltd v. Uzbekistan, ¶127

\(^{72}\) PO2, p. 56, ¶5

\(^{73}\) Case Files, p. 45

\(^{74}\) Llamazon & Sinclair, p. 508; Schill, p. 313; Phoenix v. Czech Republic, ¶101; Hamester v. Ghana, ¶¶123-124; Young Chi Oo Trading v. Myanmar, ¶58; Fraport II v. Philippines, ¶328; SAUR v. Argentina, ¶306

VI. ALTERNATIVELY, CLAIMANT’S CLAIMS MUST BE CONSIDERED INADMISSIBLE BY THIS TRIBUNAL

37. Should this Tribunal (a) ascertain its jurisdiction under the Eastasia-Oceania BIT, or (b) reject it in deference for the Euroasia-Oceania BIT, RESPONDENT submits that the claims brought by CLAIMANT must be considered inadmissible, as the Clean Hands Doctrine is a valid and internationally accepted principle (Section I) and this Tribunal shall not disregard RESPONDENT’s prerogative to judge illegal matters carried out in its territory (Section II).

i. The Clean Hands doctrine is a valid and internationally accepted principle of international law

38. Many scholars and Tribunals have already debated over the validity of the Clean Hands Doctrine as an international law principle, especially since the Yukos awards were published in 2014. Recent awards have been impliedly\textsuperscript{76} or expressly dealing, accepting and using the Clean Hands Doctrine (“a rule of international law and a well-established international principle”)\textsuperscript{77}, and scholars\textsuperscript{78} seem supportive to its application as well, going as far as to state that:

“The clean hands doctrine is an important principle of international law that has to be taken into account whenever there is evidence that an applicant State has not acted in good faith and that it has come to court with unclean hands.”\textsuperscript{79}

39. Even those cases which try to fend off the Clean Hands Doctrine ended up analyzing it and, finally, recognizing it, even if indirectly\textsuperscript{80}.

40. As stated by the Arbitral Tribunal in Salini v. Morocco: “the primary objective of this provision [legality clause] is to prevent the BIT from protecting investments that should not be protected, particularly because they would be illegal.”\textsuperscript{81}

41. Therefore, the Clean Hands Doctrine should be applied in the present case as a valid and accepted international principle in light of the overwhelming evidence that Claimant’s investment was made in violation of RESPONDENT’s

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\textsuperscript{76} Inceysa v. El Salvador, ¶229; Plama v. Bulgaria, ¶141
\textsuperscript{77} Niko v. Bangladesh; Al-Warraq v. Indonesia, ¶648; Frapport II v. Philippines, ¶328 & 332
\textsuperscript{78} Dumberry, p. 259; Alba, p. 324
\textsuperscript{79} ILC 57th session, ¶236;
\textsuperscript{80} Dumberry, p. 255; Guyana v Suriname, ¶481
\textsuperscript{81} Salini v. Morocco, ¶46
laws and, under such doctrine\textsuperscript{82}, this Tribunal must determine the inadmissibility of the claims presented by CLAIMANT.

\textit{ii. This Tribunal should not disregard RESPONDENT’s prerogative to judge illegal matters occurred in its territory}

42. Finally RESPONDENT submits that national efforts to prosecute corruption cannot be disregarded by the international community. As determined in\textit{ Niko v. Bangladesh}, national authorities are better placed to gather evidence and establish the necessary proof of corruption\textsuperscript{83}, and recent experience even proves that they might be contrary to a State’s defense\textsuperscript{84}.

43. RESPONDENT has been actively investigating illegal actions related to its public officials in the past few years. As of 1 February 2015, judicial authorities in Oceania have concluded criminal proceedings against the President of the NEA and other officials, culminating in their conviction for bribery\textsuperscript{85}. As of 23 June 2015, CLAIMANT was notified of official criminal proceedings initiated against him, under testimony made by the NEA President accusing CLAIMANT of active corruption\textsuperscript{86}.

44. Moreover, RESPONDENT’s actions to conclude a non-prosecution agreement with the National Environment Authority President is fully supported by the UN Corruption Convention as an effective promotion of cooperation to authorities against corruption\textsuperscript{87}.

45. These facts must be taken into account by this Tribunal as a serious response to repulse illegal activities inside RESPONDENT’s territory. As a consequence, RESPONDENT submits that this Tribunal shall consider that - in view of due process standards and in order to avoid conflicting results - the Oceanian authorities are best placed to investigate and collect proof of corruption relevant to the present case and, thus, dismiss CLAIMANT’s allegations\textsuperscript{88}.

\textbf{B. \hspace{1em} RESPONDENT did not expropriate CLAIMANT’s investments}

46. In case this Arbitral Tribunal understands that it has jurisdiction over the present dispute, it is RESPONDENT’s submission, that it has not expropriated CLAIMANT’s investments.

\textsuperscript{82} Llamazon & Sinclair, p. 515; \textit{Metal-Tech v. Uzbekistan}, ¶110; \textit{Fraport II v. Philippines}, ¶210; \textit{Al-Warraq v. Indonesia}, ¶¶163-164
\textsuperscript{83} \textit{Niko v. Bangladesh}, DoJ, ¶425
\textsuperscript{84} \textit{Fraport I v. Philippines}
\textsuperscript{85} Case Files, p. 36, ¶19
\textsuperscript{86} \textit{Id.; PO2}, p.56, ¶5
\textsuperscript{87} UN Corruption Convention, Art. 37(2)(3)
\textsuperscript{88} \textit{Niko Resources v. Bangladesh}, DoJ, ¶425; \textit{Fraport II v. Philippines}
47. RESPONDENT, in response to the unlawful annexation of Fairyland by the Euroasia, subsequently imposed sanctions on all entities operating within its territory that had any contractual relationship with the Euroasia. Sanctions were imposed on Rocket Bombs Ltd and on CLAIMANT.

48. CLAIMANT argues that by enacting economic sanctions, RESPONDENT caused a substantial impact in the value of CLAIMANT’s shares in the aforementioned company and the conduction of CLAIMANT’s business. This allegedly would amount to an expropriation of CLAIMANT’s investments and consequently to a breach of the Euroasia-Oceania BIT.

49. As previously demonstrated, RESPONDENT does not recognize the unlawful annexation of the territory of Fairyland by Euroasia. Furthermore, CLAIMANT is not an Euroasia national according to its domestic laws. Thus, CLAIMANT cannot rely on the Euroasia-Oceania BIT. The applicable treaty in this case is the Eastasia-Oceania BIT, which determines, in Article 3, that investments by investors of either contracting party may not be directly or indirectly expropriated.

50. Direct expropriation is generally defined as a clear action by the state that transfers title of the project from the investors to the state and as such provides clear grounds for the deprived investors to seek compensation from the state. Indirect expropriation, on the other hand, occurs when a state’s actions have the same effect as an expropriation, rendering the economic viability of the investment null, although no transfer of title is verified.

51. Although CLAIMANT alleges that the economic sanctions imposed by RESPONDENT significantly impacted its investments, it cannot be considered a case of indirect expropriation for: (i) RESPONDENT’s measures were taken in the legitimate exercise of its regulatory powers (Section I); (ii) the measures were introduced were not permanent; (Section II); and (iii) the economic sanctions may be classified as countermeasures according to the ILC Articles (Section III).

I. THE EXERCISE OF RESPONDENT’S REGULATORY POWERS DOES NOT AMOUNT TO AN EXPROPRIATION OF CLAIMANT’S INVESTMENTS

52. As stated above, indirect expropriation is characterized by a state interference with the investor’s property that deprives the investor of a substantial amount of the value of such investment. Nevertheless, under international law, not

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89 Case Files, p. 36, ¶¶16-17
90 Case Files, p. 5, ¶4
91 Expropriation2, p. 314
92 OCDE, pp. 3-4
all state measures that interfere with investments in such a way are considered expropriation. Measures taken by the State in a lawful exercise of its sovereignty or regulatory power may affect foreign investments substantially, without amounting to expropriation\(^93\). Cases such as taxation, environmental regulation and legal reforms are non-compensable takings since they fundamental to the efficient functioning of the state\(^94\).

53. If any and all state measures that considerably affect foreign investments are regarded as indirect expropriations, governments would be forced to compensate investors for exercising their most basic powers, such as introducing new restrictive legislation in the interest of the public. Public resources would function as an insurance policy to foreign investors, who could seek damages for any and all measures that affect their investments, even if the act of the state was not wrongful\(^95\).

54. In the present case, RESPONDENT has the right, as a sovereign state, to perform sanctions against other states that have committed an internationally wrongful act. The measures taken by RESPONDENT were based on legitimate concerns about international security and peace.

55. States have historically adopted economic sanctions to deal with international aggressions in order to avoid the use of armed forces in securing international peace. The use of sanctions is recognized by Article 41 of the UN Charter, which establishes sanctions as a means to enforce its decisions without resorting unnecessary military conflicts.

56. The annexation of Fairyland, as previously States, was unlawful and threatened international peace and security. In virtue of this act of aggression purported by Euroasia, RESPONDENT was entitled to pursue the legitimate public policy of enacting legislation destined to coerce Euroasia into ceasing its wrongful conduct. The economic sanctions targeted any person that operated within certain sectors of the Euroasian economy such as arms production and prohibited business operations with such individuals. Thus, they were not enforced in a discriminatory manner, but targeted a whole section of the economy\(^96\).

57. Moreover, CLAIMANT, as a company dedicated to arms production, should have reasonably expected that providing arms to a nation that illegally

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\(^94\) Expropriation 3, page 464

\(^95\) Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic, Award of Tribunal of November 21, 2000.

\(^96\) Case Files, p. 36, ¶16
annexed another state’s territory by military occupation would have economic consequences for its investments elsewhere.

58. It is clear in this case that RESPONDENT enacted economic sanctions in the pursuit of a legitimate policy goal, by exercising its powers in a reasonable and non-discriminatory manner. The economic sanctions, thus, should be considered a legitimate exercise of its regulatory power, not amounting to an expropriation of CLAIMANT’s investments.

i. The economic sanctions were not permanent

59. The duration of the measure enacted by the state is essential in analyzing whether an expropriation has, in fact, occurred. Tribunals have determined that an expropriation must have a permanent effect on the investment. The measures imposed by the State cannot have a merely temporary nature.

60. RESPONDENT’s actions did not annihilate CLAIMANT’s investment permanently. Firstly, economic sanctions are lifted once the situation that gave rise to their enactment ceased to exist. Therefore, if Euroasia is coerced into returning the unlawfully annexed territory, the sanctions will be lifted. They do not have a permanent character.

61. Secondly, the economic sanctions established by Executive Order No 1 prohibited companies from RESPONDENT to contract with CLAIMANT. Even though CLAIMANT’s present contracts, including the contract with the Euroasia for the supply of weapons, may have been affected, CLAIMANT still has control over its investment. CLAIMANT could have looked for other suppliers outside of Oceania, rendering its business viable once more.

62. Therefore, the temporary nature of the economic sanctions, along with the temporary effect they have on CLAIMANT’s investment, demonstrate that the economic sanctions did not amount to expropriation.

ii. The reserved rights clause contained in Article 9 of the Eastasia-Oceania BIT prevents the economic sanctions from being considered expropriation.

63. In accordance with article 9 of the Eastasia-Oceania BIT: “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”.

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97 LG&E v Argentina, Decision on Liability, 3 October 2006
98 TECMED v Mexico, award, 29 May 2003; Generation Ukraine v Ukraine, Award, 16 September 2003; Azurix v Argentina, Award, 14 July 2006
99 Executive Order Section I (b)
64. The clause, prima facie, might appear overly broad. In interpreting the meaning and reach of such provision, the Tribunal must take into consideration the Vienna Convention on the Law of Treaties, which codifies the interpretative techniques to be used by Tribunals in such situations.

65. Article 31 of the Vienna Convention on the Law of Treaties determines the following:

“1. A treaty shall 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 purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
   (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

66. Since no additional instrument or agreement was concluded between Oceania and Eastasia regarding the relevant BIT, the interpretation of Article 9 must take into consideration the relevant rules of international law applicable to the relations between the parties.

67. The ILC Articles provide a compendium of the most relevant international rules regarding state responsibility for internationally wrongful acts. The ILC Articles have been used in innumerous occasions to interpret reserved rights clauses in BITs in order to determine whether or not a breach of the treaty had occurred.

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100 ILC Articles, p. 31
a) The ILC Articles provide for the preclusion of wrongfulness of countermeasures in response to wrongful acts by other States

68. Article 22 of the ILC Articles establishes that:

“the wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State (…).”

69. According to this provision, even if measures taken by a State constitute a breach of an international treaty, the wrongfulness will be precluded if the measures are taken to be a response to a breach of an international obligation by another State\textsuperscript{102}.

70. According to article 49 of the ILC Articles, countermeasures encompass the non-performance of international obligations of the States enacting such measures towards the responsible state in order to induce that state to comply with its obligations.

71. In certain circumstances, the commission by one State of an internationally wrongful act may justify another state in taking countermeasures in order to achieve the cessation of the wrongful act\textsuperscript{103}.

72. The measures taken by RESPONDENT, even if considered tantamount to expropriation, were precluded of wrongfulness since they were enacted as countermeasures against the illegal annexation of Fairyland by Euroasia. In order to promote international peace and security and prevent Euroasia from incorporating another State’s territory through an illegal military occupation without further consequences, RESPONDENT was entitled to enforce economic sanctions, even if this affected the value of the investment of some individuals.

73. Moreover, RESPONDENT was entitled to invoke the responsibility of Euroasia even if the annexation was not directly harmful to the former. Article 50 of the ILC Articles provides the following:

“This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.”

\textsuperscript{102} ILC Articles, p. 75, ¶1-4
\textsuperscript{103} ILC Articles, p. 75, ¶1
74. Article 48 of the ILC Articles specifically establishes that any other state other than the injured state is entitled to invoke the responsibility of another state if the obligation breached is owed to the international community as a whole.

75. Since the illegal annexation of Euroasia violated articles 2(1), 2(4) and 2(7) of the UN Charter and Oceania, Eastasia and Euroasia are all members of the UN, RESPONDENT is obviously entitled to invoke Euroasia’s responsibility.

b) The procedural rules set forth in article 52 were met

76. Article 52 of the ILC Articles determines the following:

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;

(b) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) the internationally wrongful act has ceased; and

(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

77. The procedural steps set forth in this provision were met in the present case. On 23 March 2014, Euroasia officially declared Fairyland a part of the Euroasian territory. A few days later, on 28 March 2014, Eastasia declared the annexation to be illegal and in the light of the public international law, on 1 April 2014, it sent a notification to Euroasia, breaking off diplomatic relations between the two countries. Still, Euroasia did not return the territory to Eastasia. Furthermore, the media reported on the preparation of the Executive Order that provided for the sanctions before it was actually published and entered into force, giving Euroasia an opportunity to become aware of the sanctions to be imposed and cease its actions or negotiate with RESPONDENT.

C. The CLAIMANT contributed to the losses suffered by its investment

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104 Case Files, p. 35, ¶14
105 PO2, p. 57, ¶7
78. RESPONDENT submits that CLAIMANT’s behavior contributed to the losses suffered by its investment in RESPONDENT’s territory (Section I).

79. In accordance with article 39 of the ILC Articles:

“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”.

80. That is precisely the present case, especially considering that CLAIMANT’s continued supply of arms to Euroasia’s Ministry of Defence was a negligent act that materially contributed to the damage claimed by CLAIMANT in these proceedings (Section II).

81. The content and effects of the Executive Order on Blocking Property of Persons Contributing to the Situation in the Republic of Eastasia (“Executive Order”) issued by RESPONDENT were foreseeable by CLAIMANT at the time CLAIMANT started negotiations with John Defenceless in February 2014. That was exactly when an armed intervention was being discussed between the authorities of Fairlyland and the Minister of Foreign Affairs of Euroasia, because the national government of Eastasia declared that the referendum on the secession was unlawful and that it had no effect on Eastasian territory.

82. Therefore, Claimant is not entitled to compensation for losses related to its investments in RESPONDENT’s territory since CLAIMANT’s actions caused such losses (Section III).

I. THE LOSSES CLAIMED BY CLAIMANT

83. Under Article 4 of the Eastasia-Oceania BIT (which has the same wording of Article 5 of the Euroasia-Oceania BIT), where investments of investors suffer losses owing to states of emergency, such investors shall be entitled to treatment as regards to restitution, indemnification, compensation or other settlement, not less favorable than that which accorded to the Contracting State’s own investors or to investors of any third state.

84. The Executive Order was introduced by the President of RESPONDENT on the basis of the International Emergency Economic Powers Act 1992, which allows for the declaration of existence of unusual and extraordinary threat to

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106 ILC Articles with commentaries, p. 110
108 Lauder v. Czech Republic.
109 Euroasia–Oceania BIT, Article 5; Eastasia-Oceania BIT, Article 4.
national or international security which in whole or substantial part originates outside the Republic of Oceania.\textsuperscript{110}

85. CLAIMANT alleges that some of its company’s contracts were affected by the sanction provided in Section 1 (b) of the Executive Order,\textsuperscript{111} which CLAIMANT claims to have ceased the effects of all such contracts and released all contracting parties of CLAIMANT from their contractual obligations, causing losses to CLAIMANT’s investments in RESPONDENT’s territory.

86. CLAIMANT might even argue that even in cases where the injury was effectively caused by a combination of factors, where only one of which is to be ascribed to the responsible State (i.e., the Executive Order issued by the president of RESPONDENT) the practice leads to not reducing or attenuation of reparation for concurrent causes. However, there is one exception to such case, which allows the reduction of compensation – in the present case, that of Article 4 of the Eastasia-Oceania BIT\textsuperscript{112} – which is when there has been a contributory fault by the victim claiming the loss\textsuperscript{113} – in the present case, CLAIMANT.

87. The losses claimed by CLAIMANT are not entirely within the hypothetical provided by Article 5 of the Euroasia-Oceania BIT. Therefore, in the rare case the Tribunal finds that the Executive Order was an international wrongful act that caused harm to CLAIMANT, when awarding the damages it should take into account how CLAIMANT contributed to such loss in order to finally reduce the compensation eventually owed by RESPONDENT, as in accordance with article 39 of the ILC Articles.

II. THE CONTINUED SUPPLY OF WEAPONS TO EUROASIA WAS A CONTRIBUTORY FAULT TO THE LOSSES CLAIMED BY CLAIMANT

88. CLAIMANT’s continued supply of weapons to Euroasia amounted to a contributory fault to the losses claimed by CLAIMANT since such actions by CLAIMANT contributed to the losses it suffered in a demonstration of negligent action by the CLAIMANT.\textsuperscript{114}

89. RESPONDENT submits that the Tribunal should apply the proximate causation doctrine in order to find that the supply of weapons by CLAIMANT to

\textsuperscript{110} Case Files, p. 9, ¶7
\textsuperscript{111} Executive Order, Section 1(b).
\textsuperscript{112} Or Article 5 of Euroasia-Oceania BIT.
\textsuperscript{113} ILC Articles with commentaries, p. 93
\textsuperscript{114} El Paso, ¶ 684.
Euroasia suffices as a direct link to the harms caused to its investment by virtue of application of sanctions provided by RESPONDENT’s Executive Order.

90. Under such doctrine, one can only be held liable for the harm if they could or should have reasonably anticipated that their action would lead to that particular kind of harm.\(^{115}\)

91. In the present case, the circumstances involving Fairyland’s disputed territory\(^{116}\) should be deemed sufficient for CLAIMANT to ought to have known of Euroasia’s intention to incorporate Fairyland into its territory by direct military intervention if necessary.

92. In addition, the issuance of the Executive Order by the president of RESPONDENT constituted a mere compliance with RESPONDENT’s obligations with respect to the maintenance of international peace and security, which cannot be used against RESPONDENT on the basis of the provisions for compensation for losses under the applicable BIT. As per Article 9 of the Eastasia-Oceania BIT:

> “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 and security”.

93. Even though the contract was signed before the Euroasian armed forces entered Fairyland,\(^{117}\) CLAIMANT could have foreseen the losses resulting from the application of sanctions, since at the time CLAIMANT concluded the contract for arms production with Euroasia’s Minister of National Defence, it was reasonable to presume that relationships with Euroasian State entities would become reproachable in the international community.

94. Even in such scenario – of clear political instability – CLAIMANT decided to supply weapons to Euroasia regardless of a potential (and very likely) armed intervention. CLAIMANT’s decision was a result of a business judgement and it cannot now rely on the BIT to force RESPONDENT to bear the losses caused by its own conduct. As decided in MTD\(^{118}\):

> “BITs are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen.”

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\(^{115}\) Alexandrov & Robbins, p. 320.

\(^{116}\) Case Files, p. 35, ¶14.

\(^{117}\) Case Files, p. 35, ¶15.

\(^{118}\) MTD, ¶ 178.
95. CLAIMANT was the one that failed to adequately protect itself against regulatory risk thus incurred in contributory fault.\textsuperscript{119} It is not reasonable for investors to seek compensations for losses they suffered on making speculative or not very prudent decisions.\textsuperscript{120}

96. The continued supply of weapons was a contributory cause of the damage suffered by CLAIMANT because a causal connection exists between the contract signed between CLAIMANT and Euroasia’s Ministry of Defence and the CLAIMANT’s damage.\textsuperscript{121}

97. In determining the casual link between a determined action and the losses suffered by the investor, the Tribunal should evaluate the position of the actor in the sense that for the casual link to exist there must be proximate cause between the actions and the losses.\textsuperscript{122} In other words, the test of causation is whether there is sufficient link between the actions taken by a party and the damages suffered by the investment.\textsuperscript{123}

98. Since CLAIMANT acted negligently in a way that it contributed to the occurrence of damage, it freed RESPONDENT from its obligations to compensate the losses due to the effects of the Executive Order at least in the proportion that such losses were concurrently caused by CLAIMANT’s conduct.

III. THIS ARBITRAL TRIBUNAL SHALL DENY OR, AT LEAST, REDUCE THE COMPENSATION REQUESTED BY CLAIMANT

99. The application of the principle of contributory negligence should lead this tribunal’s decision to an outright denial of the damages claim presented by CLAIMANT or, at least, in a reduction of such claim.\textsuperscript{124}

100. A reduction in the compensation for losses owed by a State is possible when the action or omission represents negligent and reproachable behavior (“the action or omission must represent negligent and reproachable behaviour”),\textsuperscript{125} which is exactly the case at hand, precisely for the reasons set forth in Section II above.

\textsuperscript{119} MTD annulment, ¶39.
\textsuperscript{120} Olguín, p. 186.
\textsuperscript{121} El Paso, ¶687.
\textsuperscript{122} El Paso annulment, ¶259.
\textsuperscript{123} El Paso, ¶682.
\textsuperscript{124} Alexandrov & Robbins, p. 321.
\textsuperscript{125} Marboe, p. 121; Winthrop; ILC Articles with commentaries, p. 93
The most important grounds for the reduction of damages are contributory negligence and violation of the duty to mitigate damages. (...) If the injured party has acted negligently and thereby contributed to the occurrence of damage, the obligation to pay damages can be reduced, or even offset.”

101. Since there was contributory negligence by CLAIMANT, RESPONDENT requests that the Tribunal denies all claims for losses requested by CLAIMANT. Alternatively, CLAIMANT submits there should be a reduction in the award of damages, which were not solely caused by the Executive Order, in the proportion that CLAIMANT contributed to such losses.

126 Marboe, p. 121.
REQUEST FOR RELIEF

102. In light of the above submissions, RESPONDENT respectfully requests this Tribunal to declare that:

I. The Tribunal has no jurisdiction to decide the dispute hereby submitted under the Euroasia-Oceania BIT, as:
   (i) Euroasia’s annexation of Fairyland was unlawful;
   (ii) CLAIMANT is national of Euroasia and, thus, can be considered as an investor under Article 1(2) of the Euroasia-Oceania BIT;

II. If Tribunal understands that the Euroasia-Oceania BIT is applicable to the present case, this Tribunal still has no jurisdiction over the present dispute, as:
   (i) CLAIMANT was required to fulfill the pre-arbitral steps set forth in the Dispute Resolution Clause of the Euroasia-Oceania BIT;
   (ii) CLAIMANT is not entitled to rely on the MFN clause of the Euroasia-Oceania BIT to access the dispute resolution provision included in Article 8 of the Eastasia-Oceania BIT;
   (iii) CLAIMANT’s investment are not protected under the Clean Hands doctrine

103. In case it decides this Tribunals decides it has jurisdiction, RESPONDENT requests this Tribunal to find that:

III. RESPONDENT has not expropriated CLAIMANT’s investment by the implementation of sanctions and the introduction of the Executive Order; and

IV. CLAIMANT has contributed to its losses and therefore compensation should be denied or, alternatively, reduced.

26 September 2016