STATEMENT OF CASE (RESPONDENT)

26 September 2016
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A. The MFN clause of the Euroasia BIT is inapplicable to procedural matters
   1. MFN clauses generally do not extend to procedural matters
   2. Dispute resolution clauses of BITs do not fit the mechanism of application of MFN clauses

B. The Euroasia Bit’s MFN clause cannot replace or modify Respondent’s consent to arbitration
   1. The MFN clause in the Euroasia BIT cannot be relied upon to evidence the existence of consent of Oceania to these proceedings unless otherwise is conclusively established
   2. The intention of Oceania of MFN clause to encompass dispute settlement provisions is absent
      a) The principle of contemporaneity makes the absence of intention of Oceania to establish its consent to arbitration through the MFN clause evident
      b) The application of the MFN clause at hand to dispute settlement provisions would contradict the effet utile principle

C. In any case, the very wording of the MFN clause of the Euroasia bit does not allow to invoke the dispute settlement provisions of the Eastasia bit
   1. “Treatment” under Article 3 of the Euroasia BIT does not extend to dispute settlement issues
      a) The term “treatment” does not cover dispute settlement provisions in this case
      b) The scope of applicability of treatment does not contain dispute settlement provisions
      c) The words “in its own territory” reveal the impossibility of including recourse to international arbitration into the term “treatment”
   2. The dispute settlement mechanism of the Euroasia BIT is not less favourable in comparison with the Eastasia BIT

IV. THE EURASIA BIT DOES NOT PROTECT CLAIMANT’S INVESTMENT DUE TO HIS UNCLEAN HANDS

A. Oceania has enough evidence to prove Claimant’s corruption, which bars his investment from the applicable BIT’s protection
   1. Circumstantial evidence standard of proving corruption is applicable to the present case
   2. Circumstantial evidence in present case suffices to establish corruption by Claimant

B. Alternatively, Incompliance with the Environment Act bars Claimant’s investment from the applicable BIT’s protection
   1. Claimant deliberately violated the Environment Act
      a) Claimant was aware that operation without environmental-friendly technology is prohibited
      b) In any event, Claimant did not act in good faith
   2. Claimant’s failure to comply with the environmental requirements amounts to a fundamental violation
      a) Environmental issues are fundamental and require strict compliance
      b) Compliance with the Environment Act was essential for Claimant’s investment

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</tr>
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<td>UNCTAD on MFN</td>
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BOOKS

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**Articles**

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<td>Cremades</td>
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<td>Kunig</td>
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<tr>
<td>Salmon</td>
<td>Salmon, <em>Des manes propres comme condition de recevabilité des réclamations internationales</em>, AFDI vol. 10 (1964)</td>
</tr>
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<td>Sloane</td>
<td>Sloane, <em>Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality</em>, 1 Harward</td>
</tr>
<tr>
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<td>Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL, Decision on Jurisdiction, 30 April 2010</td>
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<td>Polish Nationality</td>
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**Miscellaneous**

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STATEMENT OF FACTS

1. Peter Explosive (hereinafter – “Claimant”) is a national of Eastasia, residing in Fairyland, and the Claimant to this dispute. Oceania (hereinafter – “Oceania” or “Respondent”) is the host state for Peter Explosive’s investment and the Respondent to this dispute.

   **Early stage of Peter Explosive’s investment**

2. Claimant acquired 100% shares of an Oceanian company Rocket Bombs Ltd. (“Rocket Bombs”). Rocket Bombs specialized in arms production. Prior to Claimant’s investment Rocket Bombs lost an environmental license and thereby authorization for its business. Suspension of arms production adversely affected province Valhalla in Oceania and resulted in mass unemployment and decline of the town.

   **Claimant’s obtainment of the environmental license**

3. For further arms production the Claimant was obliged to obtain a new license required by the Oceanian National Environment Act 1996 (“Environment Act”). Due to the lack of financial resources Claimant could not afford environmentally-friendly technology which was prerequisite for obtainment of a license. In July 1998 Claimant privately approached to the President of the National Environment Authority of Oceania (hereinafter “the NEA President”) and obtained the license in the same month.

   **Claimant’s application for subsidy**

4. Prior to the private meeting with the NEA President Claimant applied for a subsidy to cover costs of environmental-friendly technology. In August 1998 Claimant’s request was denied. The Claimant has not applied for a subsidy anymore.

   **Referendum and annexation of Fairyland**

5. Fairyland historically belonged to Eurasia but was annexed by Eastasia during the World War in 1914. The whole international community including Eurasia recognized Fairyland as a part of Eastasia. In August 2013 Fairyland decided to hold a referendum on secession from Eastasia and reunification with Euroasia. Authorities in Eastasia declared the referendum unlawful.

6. On 1 November 2013 the majority of people of Fairyland voted for secession and reunification. The national government of Eastasia declared that the referendum was unlawful and had no effect on the shape of the Eastasian territory.
8. In this situation, the authorities of Fairyland asked the Euroasian government for the intervention. The government of Euroasia decided to intervene and annex Fairyland to Euroasia. Euroasia troops entered Fairyland. On 23 March 2014, Euroasia officially declared Fairyland a part of the Euroasian territory.

Sanctions
9. The annexation divided international community in two camps. Oceania was among states which did not recognize annexation of Fairyland.
10. On 1 May 2014 Oceania’s President adopted the Executive Order of 1 May 2014 (“Order”) introducing sanctions on all legal entities and persons engaged in arms production with Euroasia. The Executive Order was prepared and published in accordance with Oceanian law.
11. As a result, Claimant and Rocket Bombs’ assets were blocked and their local counterparties refused to engage with them. Rocket Bombs’ shares were devaluated and Claimant could neither conduct nor sell his business.

Criminal proceedings
12. General Prosecutor of Oceania initiated criminal proceedings against the NEA President in November 2013. He was convicted of accepting bribes in February 2015. The NEA President confessed that he was bribed by Claimant.
13. On 1 February 2015 the President of the National Environment Authority, along with the other officials, was convicted of accepting bribes, which triggered numerous investigations by the General Prosecutor’s Office with the focus on people who bribed the NEA President and other officials.
14. On 5 May 2015 Claimant was informed that he was under investigation with regard to the environmental license obtained on 23 July 1998 for Rocket Bombs. On 23 June 2015 the General Prosecutor’s Office officially initiated criminal proceedings against Claimant.
SUMMARY OF ARGUMENTS

Jurisdiction

The present Tribunal does not have jurisdiction over the case at hand. First, Claimant does not qualify as a Euroasian investor. His Euroasian nationality is invalid under both Euroasian law and the “genuine link” principle, and the acquisition of Euroasian citizenship by Claimant contradicted international law.

Second, Claimant cannot resort directly to arbitration, since the pre-arbitral steps in the Euroasia BIT are mandatory and cannot be bypassed or waived.

Third, these pre-arbitral steps cannot be circumvented by virtue of the Euroasia BIT's MFN clause, since MFN clauses are generally inapplicable to procedural matters, the MFN clause at issue cannot substitute consent of Euroasia to arbitration and the scope of this MFN clause does not cover dispute resolution provisions.

Merits

First, Claimant violated domestic law of Oceania and acted in bad faith overall, thereby triggering application of “clean hands” doctrine to his investment. Due to this misconduct he is deprived of the Euroasia BIT’s protection.

Second, Claimant cannot be compensated for the damages suffered by its investment since Oceania’s actions do not amount to expropriation as Oceania imposed sanctions in compliance with the Euroasia BIT affecting only persons who contributed to the described unlawful situation.

Third, the amount of compensation should in any case be reduced as Claimant contributed to the damages suffered by its investment.
ARGUMENTS

I. CLAIMANT IS NOT AN INVESTOR PURSUANT TO ARTICLE 1(2) OF THE EUROASIA BIT

1. A natural person investing in the territory of a Contracting Party is considered an investor for the purposes of the Euroasia BIT only if he has the nationality of the other Contracting Party. However, Claimant is neither a national of Euroasia pursuant to its law (A) nor can he demonstrate any “genuine link” with Euroasia, even if the Tribunal finds this standard applicable (B). In any case, Claimant’s acquisition of Euroasian nationality was contrary to international law and, thus, invalid (C).

A. CLAIMANT IS NOT A NATIONAL OF EUROASIA PURSUANT TO THE EUROASIAN CITIZENSHIP ACT

2. Claimant failed to renounce his Eastasian nationality (I) and therefore his Euroasian nationality is invalid as it was obtained in violation of Euroasian law (2). Therefore, the Tribunal should disregard Claimant’s naturalization (3).

1. Claimant failed to renounce his Eastasian nationality

3. As a general rule, tribunals are guided by domestic legislation of the state whose nationality is in question in order to determine investor’s nationality.

4. Tribunals took this approach, for instance, in the cases of claimed Italian nationality of Mr. Soufraki2 and Dutch nationality of Mr. Oostergetel,3 and in Champion Trading, where the claimants relied on their U.S. nationality and tribunals analyzed whether they have second Egyptian nationality based on Egyptian law.4

5. Therefore, in order to decide whether Claimant preserved his Eastasian nationality the Tribunal should resort to provisions of the Eastasian Citizenship Law.

6. Pursuant to the Eastasian Citizenship Law termination of Eastasian nationality happens upon submission of renunciation in legally prescribed form and becomes effective after its acknowledgement by the President. However, Claimant only sent an e-mail to the President on 2

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1Schreuer Nationality, 521; SCHREUER, MALINTOPPI, 265; WISNUR, 928; DUGAN, 296.
2Soufraki, ¶ 55.
3Oostergetel, ¶¶ 119-125.
4Champion Trading, ¶ 37.
March 2013, declaring the renunciation of his Eastasian nationality.⁵ Therefore, Claimant did not comply with the provisions of the Eastasian Citizenship Law, and his renunciation of Eastasian nationality is invalid.

7. Since Eastasia allows holding dual citizenship⁶ and Claimant failed to renounce his nationality, he is still a national of Eastasia.

2. **Claimant obtained Euroasian nationality in violation of Euroasian law**

8. Nationality is within the domestic jurisdiction of every state.⁷ Therefore, a state is entitled to regulate acquisition and loss of its nationality as well as the respective consequences⁸ as it finds appropriate. For instance, jurisdictions which do not allow holding dual nationality generally condition naturalization by renunciation of the former nationality as it was in cases of Messrs. Micula⁹ and Mr. Binder.¹⁰

9. The Euroasian Citizenship Act provides for opportunity for inhabitants of Fairyland to apply for Euroasian nationality and at the same time prohibits dual nationality.¹¹ This position is straightforward and it would be unreasonable to assume that there was any implicit exception for Fairyland.

10. In violation of Euroasian law Claimant retained his Eastasian nationality due to its failure to comply with the renunciation procedure envisaged in the Eastasian Citizenship Law. His naturalization is, therefore, invalid.

3. **The Tribunal should disregard Claimant’s formal naturalization**

11. In case an investor’s nationality is challenged, the tribunal is competent to adjudicate that matter and even disregard the decision of domestic authorities.¹² As was mentioned in Soufraki Annulment case, when jurisdiction of a tribunal depends on interpretation of domestic law “the state does not have the last word”.¹³ The mere fact that domestic authorities recognized an
investor as a national and issued respective documents is also not decisive.\textsuperscript{14} For instance, issuance of certificate of nationality to Mr. \textit{Soufraki} did not prevent the tribunal from declaring that investor was not an Italian national.\textsuperscript{15} Similarly, the \textit{Ambiente} tribunal found that certificates of nationality could not suffice for "any jurisdictional issues".\textsuperscript{16}

12. Moreover, tribunals tend to accept only naturalizations which were granted after a careful examination.\textsuperscript{17} Naturalizations which obviously resulted from omissions of domestic authorities are normally disregarded.\textsuperscript{18}

13. Claimant obtained Euroasian nationality in violation of Euroasian law which explicitly prohibits dual nationality. It was most likely an omission of Euroasian authorities which suddenly had to process thousands of applications from Fairyland inhabitants. Therefore, the Tribunal should disregard Claimant’s Euroasian nationality, although Claimant can provide official documents.

14. \textit{Ergo}, Claimant failed to renounce his Eastasian nationality and could not validly naturalize in Euroasia as its legislation prohibits holding dual nationality. Therefore tribunal is entitled to disregard Claimant’s erroneous naturalization in Euroasia and treat him as a national of Eastasia.

B. \textbf{IF RELEVANT, CLAIMANT DOES NOT HAVE A “GENUINE LINK” WITH EUROASIA}

15. Apart from provisions of domestic law tribunals sometimes analyze whether an individual has “genuine link” with the state of his nationality. However, this standard is inapplicable in the case at hand (\textit{I}). Even if the Tribunal applies it, Claimant cannot demonstrate the required “link” with Euroasia (\textit{2}).

\textbf{1. The “genuine link” standard is inapplicable to Claimant’s case}

16. Tribunals tend to decline application of the “genuine link” standard\textsuperscript{19} mainly since it “cannot overcome treaty provisions defining nationality”\textsuperscript{20} unless otherwise provided by the

\textsuperscript{14}\textit{Soufraki Annulment, ¶ 28, Siag, ¶ 151-153, Micula, ¶ 94-95, Ambiente, ¶ 319, Flutie, 10; Schreuer, Malintoppi, 268; Dugan, 299.}

\textsuperscript{15}\textit{Soufraki, ¶ 68.}

\textsuperscript{16}\textit{Ambiente, ¶ 319.}

\textsuperscript{17}\textit{Micula, ¶ 94.}

\textsuperscript{18}Ibid.

\textsuperscript{19}Feldman, ¶¶ 31-33; Siag, ¶¶ 197-199; Olguin, ¶¶ 60-63; Micula, ¶¶ 101-105; Champion Trading, ¶ 58; Nelson, 119-123.

\textsuperscript{20}Schreuer Nationality, 522.
BIT. Otherwise, application of the “genuine link” standard “would...involve the illegitimate revision of the terms of the BIT" and municipal law.

17. The Euroasia BIT does not contain any wording implying application of “genuine link” standard to investor’s nationality. Therefore, it cannot cure Claimant’s invalid naturalization in Euroasia.

2. **If “genuine link” is applied, Claimant still does not qualify as a Euroasian national**

18. Should the Tribunal follow the minority view and apply the “genuine link” standard, it is not satisfied since Claimant has no “genuine link” with Euroasia. Claimant and his family have always been Eastasian nationals and all Claimant’s personal and business interests are connected solely with Fairyland which is part of Eastasia.

19. Ergo, even if the Tribunal disregards the predominant position in case law and rules in favor of “genuine link” standard, Claimant will fail to demonstrate sufficient link with Euroasia.

C. **CLAIMANT’S ACQUISITION OF EUROASIAN NATIONALITY WAS CONTRARY TO INTERNATIONAL LAW**

20. If the Tribunal decides that Claimant’s Euroasian nationality is effective under domestic law, it is still invalid under international law. Namely, Eastasian naturalization policy violated international law (1) and illegal conduct of Euroasia cannot serve as a ground for naturalization of Eastasian nationals (2).

1. **Euroasia’s naturalization policy violated international law**

21. Since the referendum in Fairyland was illegitimate (a) and could not result in Fairyland’s secession from Eastasia (b), naturalization of inhabitants of Fairyland violated Eastasia’s sovereignty (c).

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21 Siag, ¶ 201; Micula, ¶ 101; Oostergetel, ¶ 130; Saba Fakes; ¶¶ 64-70.
22 Siag, ¶ 201.
23 Saba Fakes, ¶ 77; Nottebohm, 23; Nelson, 105-108; Schreuer, Malintoppi, 267.
25 See Part C, ¶¶ 39 et seq.
a) The referendum in Euroasia was illegitimate

Any referendum on secession should “respect the rights of others”\textsuperscript{26}, namely other provinces, the central government and all nationals of the state.\textsuperscript{27} For this purposes referenda are normally coordinated with the central government (e.g. the Referendum on independence of Scotland\textsuperscript{28}) or even can be organized by the UN (e.g. United Nations Mission in East Timor).\textsuperscript{29} The Eastasian Constitution does not envisage the right to secession and allows referenda in provinces only regarding matters within their exclusive competence.\textsuperscript{30} Fairyland authorities decided to hold a referendum on independence even without contacting the central government. Therefore, this referendum was illegitimated as it violated the rights of other interested parties.

b) Fairyland did not secede from Eastasia

The right to “remedial secession” has not yet become customary international law\textsuperscript{31} and has failed to go beyond scholarly writings.\textsuperscript{32} Even the authorities supporting remedial secession recognize such right only in case of severe\textsuperscript{33}, and systematic\textsuperscript{34} human rights abuses, which the central government does not purport to stop and no legal remedy for which is envisaged.\textsuperscript{35} Moreover, secession is justifiable only after exhaustion of all settlement attempts\textsuperscript{36} when there is no “realistic prospect” to find a solution within a state.\textsuperscript{37}

Since 1914 Eastasia has never abused the rights of inhabitants of Fairyland, they were treated as any other nationals of Eastasia.\textsuperscript{38} There is also no indication that Fairyland has ever made any attempt to find an internal solution and exercise its right to self-determination within Eastasian boundaries. Therefore, the secession of Fairyland is definitely beyond the high threshold for “remedial secession” and thus illegitimate.

\begin{itemize}
\item \textsuperscript{26} Quebec, ¶151; Marxen, 13, 16.
\item \textsuperscript{27} Quebec, 151; Marxen, 13.
\item \textsuperscript{28} Scottish Referendum.
\item \textsuperscript{29} SC Resolution 1246.
\item \textsuperscript{30} Procedural Order No. 2, ¶2.
\item \textsuperscript{31} Fact-Finding Georgia, ¶11; Oeter, ¶36.
\item \textsuperscript{32} Ibid.
\item \textsuperscript{33} Murswiek, 26.
\item \textsuperscript{34} CASSESE, 119; THÜRER, BURRI, ¶8.
\item \textsuperscript{35} Murswiek, 26.
\item \textsuperscript{36} Yusuf, ¶16; RAČ, 326.
\item \textsuperscript{37} RAČ, 367.
\item \textsuperscript{38} Procedural Order No. 3, ¶9.
\end{itemize}
c) Naturalization policy of Euroasia violated Eastasia’s sovereignty

26. According to the general rule of *Nationality Decrees Issued in Tunis and Morocco*, questions of nationality acquisition are within the “reserved domain” of each state.\(^39\) However, the freedom of states to regulate naturalization is limited,\(^40\) namely, by notions of human rights and rights of states.\(^41\) Therefore, naturalization cannot encroach upon another state’s sovereignty.\(^42\) Otherwise, such actions amount to intervention in the internal affairs of a sovereign state.\(^43\)

27. Euroasia violated Eastasia’s sovereignty by introducing naturalization policies with respect to Eastasian nationals residing in Fairyland.\(^44\) Only Eastasia is entitled to regulate nationality of its citizens residing in its sovereign territory. Therefore Euroasia’s suggestion of mass naturalization is definitely an invasion in the ambit of Eastasia’s internal affairs.

2. Illegal conduct of Euroasia cannot justify naturalization

28. Following the Latin maxim “*ex injuria jus non oritur*”\(^45\), naturalization of Fairyland’s inhabitants cannot be legal if the ground for this naturalization, namely, reunion of Fairyland and Euroasia, was illegal. In the case at hand, Euroasia intervened in Eastasian territory without proper invitation (\(a\)) and used force to annex Fairyland (\(b\)).

a) Euroasian armed forces intervened in Eastasian territory without proper invitation

29. Pursuant to the rule of customary international law\(^46\) put forward by ICJ in *Nicaragua* case, intervention “bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely”\(^47\) is strictly prohibited. Therefore, if intervention occurs upon invitation of a sovereign government, it complies with international law\(^48\) but intervention requested by “opposition” to the government can never be legitimized.\(^49\)

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\(^39\) *Tunis and Morocco*, 24; *Polish Nationality*, 17; *Sloane*, 2.
\(^40\)*Heilbronner*, 55; *Dörr*, ¶ 4.
\(^41\)*DADP*, Article 4 (6).
\(^42\)*BROWNLEE FORCE*, 376.
\(^43\)*Kunig*, ¶ 1-2.
\(^44\) See Part C.2, 3.
\(^45\)*Burdeau*, 21.
\(^46\)*Kunig*, ¶ 2.
\(^47\)*Nicaragua*, ¶ 205.
\(^48\)*Nolte*, ¶ 19; *Fox*, 877.
\(^49\)*Nicaragua*, ¶ 246.
In the case at hand, Fairyland invited Euroasian troops by an official letter to Euroasian Government. However, Fairyland was and still is merely a province of Eastasia. Therefore, intervention of Euroasian armed forces violated Eastasia’s sovereignty without its consent and breached the principle of non-intervention.

b) Euroasia annexed Fairyland by use of force

UN member states are obliged to respect the principle of non-use of force enshrined in Article 2(4) of the UN Charter. The most serious and dangerous acts of use of force are listed in the Definition of Aggression and aimed at violation of sovereignty or territorial integrity of a state. Article 3(a) of this document states that any invasion of armed forces, military occupation or annexation qualifies as aggression, and thus is an act of illegal use of force. Force also is deemed to be used even if the state does not resist presence of armed forces in its territory.

Thus, Euroasia breached its obligation under the UN Charter by invading and annexing the Eastasian province Fairyland. The actions of Euroasia violated territorial integrity of Eastasia and contradicted the principle of non-use of force, albeit the invasion was bloodless.

Consequently, naturalization of Eastasian nationals violated international law as it affected Eastasia’s sovereign power to regulate nationality of its citizens. Moreover, Euroasia’s aggressive conduct cannot serve as basis for naturalization. Therefore, Claimant did not legitimately become a Euroasian national.

Ergo, Claimant is not an investor under Article 1(2) of the Euroasia BIT as he still retains Eastasian nationality, which precluded him from becoming a Euroasian national and exercising rights under the Euroasia BIT. This conclusion is not changed by reference to the genuine link standard, which is neither inapplicable nor satisfied in the case at hand. Moreover, Claimant could not legitimately obtain Euroasian nationality as naturalization of Fairyland inhabitants was contrary to international law.

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50 Statement of Uncontested Facts, ¶ 14; Procedural Order No. 2, ¶ 3.
51 UN Charter, Article 2 (4).
52 Dörr Force, ¶ 20.
53 BROWNLEE FORCE, 365.
55 Ibid.
II. ALTERNATIVELY, THE TRIBUNAL LACKS JURISDICTION OVER THIS CASE DUE TO CLAIMANT'S NON-COMPLIANCE WITH THE PRE-ARBITRAL STEPS UNDER ARTICLE 9 OF THE EUROASIA BIT

35. Even if the Tribunal recognizes its jurisdiction *ratione personae* over the dispute at hand, it still cannot hear this case as the preconditions to arbitration have not been met, since, *first*, Claimant had a duty to submit the dispute to Oceanian local courts prior to arbitration under Article 9(3) of the Euroasia BIT (A), and *second*, non-compliance with the pre-arbitral steps cannot be excused (B).

A. CLAIMANT HAD A DUTY TO SUBMIT THE DISPUTE TO OCEANIAN LOCAL COURTS PRIOR TO ARBITRATION UNDER ARTICLE 9(3) OF THE EUROASIA BIT

36. Article 9(3) of the Euroasia BIT provides for litigation in domestic courts as a compulsory precondition to arbitration. Mandatory nature of the pre-arbitral steps is evident from the language and the structure of Article 9 of the Euroasia BIT (I) as well as from the purpose of the respective provision (2).

1. **Mandatory nature of the pre-arbitral steps is evident from the language and the structure of Article 9 of the Euroasia BIT**

37. *First*, the use of *may* instead of *shall* or *must* does not express the possibility to choose between a two-step dispute resolution procedure and direct resort to arbitration. Lack of mandatory language does not permit to characterize pre-arbitral steps as merely permissive. The predominant case law regards such steps as compulsory regardless of the use of *may* or *shall*. Thus, the *Impregilo* and *Giovanni Alemanni* tribunals ruled that the context of an identical dispute resolution clause as in the case at hand left no doubts about the mandatory nature of dispute resolution in local courts as a precondition to arbitration.

38. *Second*, Article 9 of the Euroasia BIT sets forth a clear sequence of steps, which once again demonstrates that recourse to arbitration is available only if the previous stage, in the case at hand domestic litigation, is completed.

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56 *Impregilo*, ¶¶ 87-88; *Maffezini*, Decision on Objections to Jurisdiction, ¶¶ 34-35.
57 *Murphy*, ¶¶ 144-149; *Georgia v. Russia*, ¶¶ 133-135; *Ambiente*, ¶¶ 591-593
58 *Impregilo*, ¶ 81.
59 *Impregilo*, ¶ 90; *Giovanni Alemanni*, ¶ 301.
60 *Daimler*, ¶ 182; *Wintershall*, ¶ 121; *Giovanni Alemanni*, ¶ 305; *Philip Morris*, ¶ 139; *Abaclat*, ¶ 578.
Thus, the language of Article 9 of the Euroasia BIT indicates that the pre-arbitral steps are obligatory.

2. **Mandatory nature of the pre-arbitral steps is evident from the purpose of the respective provision**

40. The purpose of Article 9(2) of the Euroasia BIT is to give the host state a chance to resolve the dispute locally, which is widespread in international practice. According to this provision a different meaning would deprive it of its sense and effectiveness and, therefore, contradict the principle of *effet utile.*

41. Furthermore, Article 9(2) is closely connected with Article 9(3) of the Euroasia BIT. If litigation was merely an option and the parties purported to provide direct access to arbitration, the inclusion of Article 9(2) would be superfluous. Therefore, the pre-arbitral steps should be interpreted as mandatory in light of their purpose.

42. Consequently, Claimant was obliged to attempt resolving the dispute in Oceanian domestic courts before resorting to arbitration.

**B. NON-COMPLIANCE WITH THE PRE-ARBITRAL STEPS CANNOT BE EXCUSED**

3. There are no grounds permitting Claimant to bypass the mandatory pre-arbitral steps prescribed by the Euroasia BIT, since, this requirement is jurisdictional and cannot be dismissed (*I*), or, in the alternative, cannot be circumvented for the reasons of futility (*II*).

1. **The requirement to comply with the pre-arbitral steps is jurisdictional and cannot be dismissed**

43. The jurisdiction of a tribunal depends on the fundamental principle of consent. A State’s consent to investment arbitration may be conditioned upon fulfilment of certain requirements set forth in treaties, for instance, compliance with pre-arbitral steps.

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61 *Impregilo*, ¶ 88; *Maffezini*, Decision on Objections to Jurisdiction, ¶ 35; *Philip Morris*, ¶ 142; *Burlington*, ¶¶ 312, 315; *Murphy*, ¶ 151; *Teinver*, ¶ 135; *Bayindir*, ¶ 98; *Abaclat*, ¶ 581; Amerasinghe, p. 240.
63 AAPL, ¶ 40; *Murphy*, ¶ 147; *Urbaser*, ¶ 131.
64 *Eureko*, ¶ 248; *Ambiente*, ¶ 593.
65 *Wintershall*, ¶ 155.
66 *Giovanni Alemanni*, ¶ 305; *Tulip*, ¶ 135.
67 *Armed Activities*, pp. 39, 87; *Georgia v. Russia*, ¶ 131.
44. The requirement to resort to local courts prior to arbitration constitutes a part of the State’s offer to arbitrate and is regarded as jurisdictional. Unlike procedural ones, jurisdictional requirements cannot be set aside by an arbitral tribunal, their non-observance deprives a tribunal from jurisdiction.

45. For these reasons, the precondition to comply with pre-arbitral steps as any other jurisdictional requirement is considered to be fundamental and cannot be set aside by an arbitral tribunal.

46. In the case at hand, the parties to the Euroasia BIT agreed to arbitration on the condition that the dispute is litigated in domestic courts prior to arbitration, which, as a procedural requirement, cannot be bypassed by Claimant.

47. *Ergo*, Claimant’s non-compliance with the pre-arbitral steps cannot be excused and leads to this Tribunal’s lack of jurisdiction to adjudicate the case at hand.

2. **Alternatively, the requirement to comply with the pre-arbitral steps cannot be excused for the reasons of futility**

48. The requirement to approach local courts prior to arbitration is mandatory and under all circumstances must be fulfilled by the investor.

49. As the tribunal in *Urbaser* mentioned, the Contracting States to a BIT include preconditions to arbitration in full awareness of all the difficulties an investor would encounter in domestic courts. Therefore, if there is no express intention in the text of the BIT allowing to skip dispute resolution in local courts, the investor cannot do so.

50. Even though some tribunals allow circumventing pre-arbitral steps for the reasons of futility, the practice is not consistent. Thus, the *Ickale* tribunal refused to recognize futility as grounds for bypassing pre-arbitral steps if the BIT did not contain such an exception and pointed out that the appropriate reason would be due process, which applies only where an investor at

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69 *Hochtief*, ¶ 92; *Wintershall*, ¶ 115; *Giovanni Alemanni*, ¶ 305; *Dede*, ¶ 222.

69 *Urbaser*, ¶ 114; *ICS*, ¶ 262; *Giovanni Alemanni*, ¶ 305.

70 COLLIER, LOWE, p. 155; PAULSSON, p. 5; *Daimler*, ¶ 192-194; *Enron*, Decision on Jurisdiction, para 88; *Burlington*, ¶ 315; *Urbaser*, ¶ 125.

71 *Teinver*, ¶ 194.

72 Fitzmaurice, 203 et seq.; Paulsson in ICC, p. 17; *Burlington*, ¶ 315; *Murphy*, ¶ 147; *ICS*, ¶ 262.

73 *Teinver*, ¶ 194; *Murphy*, ¶ 151.

74 *Siemens*, ¶ 104.


76 *Urbaser*, ¶ 138; *TSA*, ¶ 70.

77 *ELSI*, ¶¶ 49-50; *Ickale*, ¶ 260.
least attempted to resolve the dispute in local courts.\textsuperscript{78} However contingent and theoretical these remedies may be, an attempt to resort to them has to be made.\textsuperscript{79}

51. In the case at hand nothing in Article 9 of the Euroasia BIT provides for any possibility to deviate from the prescribed procedure and bypass the pre-arbitral steps, therefore, there are no grounds that would give Claimant the right to submit the dispute directly to arbitration.

52. Even if futility can excuse an investor from any attempts at litigation, in light of the host State’s special interest in the opportunity to resolve the dispute in its domestic courts\textsuperscript{80} the standard of proof is very high.\textsuperscript{81} Futility can be recognized only if there is sufficient evidence demonstrating that recourse to the State’s court is unavailable or the investor would not have been treated fairly.\textsuperscript{82}

53. Thus, if there is any chance that resort to local courts could settle a dispute or at least narrow the issues in controversy, the futility excuse does not apply.\textsuperscript{83} The decision rendered by local courts is designated to serve these aims. However, it cannot be anticipated by an international tribunal and therefore ignored by investors.\textsuperscript{84} It is also insufficient if domestic litigation is unlikely, difficult or costly.\textsuperscript{85}

54. In the case at hand, futility excuse is inapplicable, since the dispute could have been resolved via the Constitutional Tribunal (\textit{a}) and the duration of domestic proceedings does not allow to establish futility (\textit{b}).

\textit{a) The dispute could have been resolved via the Constitutional Tribunal}

55. Oceanian legislation allowed Claimant to challenge the Executive Order which imposed the sanctions before the Constitutional Tribunal.\textsuperscript{86} Although this is not an ordinary remedy, constitutional courts are frequently included in the notion of local remedies.\textsuperscript{87} Moreover, the

\textsuperscript{78}Ickale, ¶ 260.
\textsuperscript{79}Apotex, ¶ 86.
\textsuperscript{80}Impregilo, ¶ 88; Maffezini, Decision on Objections to Jurisdiction, ¶ 35; Philip Morris, ¶ 137.
\textsuperscript{81}Philip Morris, ¶ 137.
\textsuperscript{82}KilicInsaat, ¶ 8.1.4.
\textsuperscript{83}Hochtief, Separate and Dissenting Opinion of J. Christopher Thomas, Q.C., ¶ 7.
\textsuperscript{84}Interhandel, ¶ 87.
\textsuperscript{85}DADP, Article 15, ¶ 4.
\textsuperscript{86}Procedural Order No. 3, ¶ 6, p. 60.
\textsuperscript{87}Amerasinghe, p. 315.
local remedies rule does not require the same form or arguments in domestic proceedings as in arbitration if the essence of a claim and its ultimate goal remain the same.\textsuperscript{88}

56. The proceedings in the Constitutional Tribunal could result in the recognition of the Executive Order as unconstitutional and give rise to a claim for damages under Oceanian domestic law, which can be heard by local courts, thus ultimately leading to Claimant’s compensation without the need of recognition and enforcement of the decision, which would be necessary in case of an arbitral award.\textsuperscript{90}

57. Thus, since this way of domestic dispute resolution was available to Claimant, the threshold to establish futility is not met.

\textit{b) The duration of domestic proceedings does not allow to establish futility}

58. The fact that proceedings in the Constitutional Tribunal might take longer than the term envisaged by the Euroasia BIT does not permit Claimant to disregard this period, since the Euroasia BIT does not require the dispute to be resolved within the said timeframe in order to submit the dispute to arbitration.\textsuperscript{91}

59. Thus, Claimant cannot bypass the pre-arbitral steps in Oceanian courts, since domestic litigation would not have been futile.

60. In light of the above arguments, Claimant is not excused from complying with the pre-arbitral requirements under Article 9(2) of the Euroasia BIT.

61. \textit{Ergo}, the Tribunal lacks jurisdiction over the case at hand due to Claimant’s disregard of pre-arbitral steps in Oceanian courts that constitute a mandatory precondition to arbitration under Article 9(2) BIT and cannot be circumvented for the reasons of futility.

\textsuperscript{88}ELSI, ¶ 59.
\textsuperscript{89}Teinver, ¶ 132.
\textsuperscript{90}REDFERN, p. 430.
\textsuperscript{91}Daimler, ¶ 191.
III. CLAIMANT IS NOT ALLOWED TO INVOKE THE MFN CLAUSE TO CIRCUMVENT THE PRE-ARBITRAL STEPS OF THE EUROASIA BIT

62. Contrary to Claimant’s allegations, Claimant cannot bypass the pre-arbitral steps by virtue of the Euroasia BIT’s MFN clause, which is inapplicable to procedural matters (A) and, alternatively, cannot replace or modify Respondent’s consent to arbitration (B). Furthermore, the very wording of the MFN clause of the Euroasia BIT does not allow to invoke the dispute settlement provisions of the Eastasia BIT (C).

A. THE MFN CLAUSE OF THE EUROASIA BIT IS INAPPLICABLE TO PROCEDURAL MATTERS

63. The MFN clause of the Euroasia BIT cannot be used to circumvent the preconditions for arbitration set forth in Article 9 of the Euroasia BIT, since MFN clauses generally do not extend to procedural matters (I), which are also unsuitable for the very mechanism of how MFN clauses operate (2).

1. MFN clauses generally do not extend to procedural matters

64. The rules actually providing any rights to investors under BITs should be distinguished from the ones being mandatory restrictions of access to such rights92, namely, *ratione personae*, *ratione materiae*, *ratione temporis* as well as *ratione voluntatis* (consent of a state to be sued on the international level)93. Hence, the dispute settlement provisions of the Euroasia BIT constitute a condition for possible enjoyment of rights under this BIT.

65. These conditions cannot be modified by virtue of MFN clauses, as they relate to the specifically negotiated “core of matters”, which are not included into the subject matter of a BIT, but rather serve to identify the “protection regime applicable to the foreign investor”94.

66. Therefore, the MFN clause of the Euroasia BIT cannot be applied to dispute settlement provisions as *ratione voluntatis* condition regardless of the particular language and the scope of application of this clause.

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92*Impregilo*, Dissenting Opinion, ¶ 47; Ustor, 415.
93*Impregilo*, Dissenting Opinion, ¶ 51; ST-AD, ¶ 397; Schill, 261.
94For *ratione personae* and *ratione materiae* conditions see *Société Générale*, ¶ 41; *Impregilo*, Dissenting Opinion, ¶¶ 64, 67; ILC on MFN, Article 10; for *rationet emporis* see *Tecmed*, ¶ 69.
2. **Dispute resolution clauses of BITs do not fit the mechanism of application of MFN clauses**

67. The application of MFN clauses envisages that, if an MFN treatment is provided to any third party, it gives rise to an obligation to provide the same treatment to another party to a treaty. Hence, a breach of an MFN clause does not lead to incorporation of more favourable treatment to a basic treaty or otherwise automatically modify its provisions.

68. This concept is apparently not applicable to allegedly more favourable dispute settlement provisions. In order to obtain more favourable treatment, an investor has to file a claim for it with a competent tribunal. In our case, however, it can do so only on the terms stipulated in the BIT, i.e. observe all preconditions to arbitration, otherwise a tribunal would lack jurisdiction over a dispute.

69. In other words, Claimant has no right even to appear before the Tribunal and to adduce MFN arguments if he had not satisfied these conditions, since it must, using the ICJ language, “be in position to invoke” the basic treaty containing the MFN clause, i.e. fulfill the preconditions to arbitration. The alleged breach of MFN clause does not authorise the present Tribunal to create itself jurisdiction to proceed with this claim.

70. **Ergo**, the MFN clause of the Euroasia BIT is inapplicable to dispute settlement provisions of this BIT, since the mechanism of providing MFN treatment requires the Tribunal to have jurisdiction under both basic and third party BITs to award MFN treatment, which is not the case here.

B. **The Euroasia BIT’s MFN clause cannot replace or modify Respondent’s consent to arbitration**

71. The requirement of state’s consent to arbitration is not fulfilled by reference to the MFN clause without clear evidence stating otherwise. Accordingly, the MFN clause may be invoked to underlie the Tribunal’s jurisdiction only when the contracting states intended the MFN clause to have such effect, which is not proven in present case.

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95ILC on MFN, Article 4.
96Rights of Nationals of the USA, 192; Thulasidhass, 6; Cole, 564.
98Daimler, ¶ 200.
99Anglo-Iranian Oil Co., 20.
100ST-AD, ¶ 398.
1. **The MFN clause in the Euroasia BIT cannot be relied upon to evidence the existence of consent of Oceania to these proceedings unless otherwise is conclusively established**

72. It is a general principle of international law that international courts and tribunals can exercise jurisdiction over a state only with its consent.\(^{101}\) Presumed consent is insufficient, and since non-consent is a default rule, affirmative evidence must be presented.\(^{102}\)

73. As stated above,\(^{103}\) the requirement for Claimant to spend 24 months in Oceanian courts contained in the Euroasia BIT is an indispensable condition for Oceania consenting to any arbitration proceedings against Euroasian investor. Hence, due to supremacy of principle that a state could not be compelled to any binding proceedings without its consent, deriving from such cornerstone of international law as state sovereignty\(^ {104}\), this offer can be either accepted on the stipulated terms or refused, but not modified anyhow.\(^ {105}\)

74. For these reasons, arbitral jurisprudence provides that states cannot be deemed to have consented to arbitration through a MFN clause unless a language of a clause itself states otherwise, as it does not reach the “clear and unambiguous consent” threshold required.\(^ {106}\) The MFN clause itself is insufficient to undoubtedly ascertain the consent of Oceania to present proceedings, as usually MFN clause does not operate in that manner.\(^ {107}\) In addition, the consent of Oceania set out in “carefully crafted” and specially negotiated Article 9 of the Euroasia BIT cannot be overridden by general language of Article 3 of this BIT.\(^ {108}\)

75. Therefore, the consent of Oceania to these proceedings cannot be established by MFN clause per se, unless an intention of Oceania evidencing otherwise is shown.

2. **The intention of Oceania of MFN clause to encompass dispute settlement provisions is absent**

76. In order to find out whether there was a common intention of the parties to the Euroasia BIT to expand the MFN clause to dispute settlement provisions, the relevant provisions of the

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\(^{101}\) *Eastern Carelia*, 27; *Garanti Koza*, ¶ 21; Dugan, 219.
\(^{102}\) *Wintershall*, ¶ 160; *Daimler*, ¶ 175.
\(^{103}\) Supra, ¶ 56.
\(^{104}\) *Daimler*, ¶ 168.
\(^{105}\) *Wintershall*, ¶ 160; *ICS*, ¶ 272; *Kiliç*, ¶ 6.2.1; Schreuer, 30.
\(^{106}\) *Plama*, ¶ 200; Berschader, ¶ 181.
\(^{107}\) *Wintershall*, ¶ 167; *MCLACHLAN*, 256.
\(^{108}\) *Plama*, ¶ 209; *Tza Yap Shum*, ¶ 216; *ST-AD*, ¶ 402.
Euroasia BIT must be interpreted objectively and in good faith to show that the parties agreed to arbitration on such terms.\textsuperscript{109} In our case, the MFN clause in the Euroasia BIT could not be interpreted as providing consent of Oceania to current proceedings, as it contradicts the well-established principles of treaty interpretation, such as principle of contemporaneity (\textit{a}) and \textit{effet utile} principle (\textit{b}).

\textit{a) The principle of contemporaneity makes the absence of intention of Oceania to establish its consent to arbitration through the MFN clause evident}

77. First, due to the principle of contemporaneity international treaties should be interpreted in light of legal concepts and linguistic usage which existed at the time of conclusion of a treaty.\textsuperscript{110} In 1995, when the Euroasia BIT came into force, there was not even a sight doubt that MFN clauses are not applicable to dispute settlement provisions, as the first decision manifesting otherwise and therefore creating ambiguity as to this question was rendered in 2000.\textsuperscript{111} This also could be inferable from the fact that many treaties were amended with a special provision prohibiting the application of MFN clauses to dispute settlement provisions of these treaties after the \textit{Maffezini} award had been rendered.\textsuperscript{112}

78. Therefore, it becomes evident that the drafters of the Euroasia BIT did not envisage the possibility to use the MFN clause to replace the dispute settlement provisions, hence, in such circumstances the consent to arbitrate could not be established.

\textit{b) The application of the MFN clause at hand to dispute settlement provisions would contradict the effet utile principle}

79. Second, the opposite result would contradict the effet utile principle. This principle declares that the meaning which is somehow feasible should be chosen rather than the one which deprives a clause from having any sense at all.\textsuperscript{113} In our case, Oceania entered into the Euroasia BIT three years after the Eastasia BIT.\textsuperscript{114} It is thus evident that Oceanian authorities surely took into account, or at least were aware of, one BIT while entering into another.

\textsuperscript{109}Schreuer, 33; \textsc{Newcombe, Paradel}, 216.
\textsuperscript{110}\textit{Daimler}, ¶ 263, \textit{ICS}, ¶ 289; \textit{Wintershall}, ¶ 128; Fitzmaurice, 212.
\textsuperscript{111}\textit{ICS}, ¶ 290; Douglas 101.
\textsuperscript{112}\textit{ST-AD}, ¶ 390; \textsc{Newcombe, Paradel}, 223.
\textsuperscript{113}\textit{Wintershall}, ¶ 165; \textit{ICS}, ¶ 315; \textit{Daimler}, ¶ 263; \textit{Kiliç}, ¶ 3.3.39; \textit{Maffezini}, ¶ 36.
\textsuperscript{114}Statement of Uncontested Facts, ¶ 1.
80. Therefore, if Oceania intended to bestow to the MFN clause of the Euroasia BIT the ability to invoke jurisdiction of international fora on the basis of the Eastasia BIT, that would result in the dispute settlement mechanism of the Euroasia BIT being void *ab initio*, as it would be superseded by the relevant provisions of the Eastasia BIT right after entry into force. Such interpretation, leaving no logic behind the inclusion of the dispute settlement mechanism of the Euroasia BIT different to the one of the Eastasia BIT, is undoubtedly unreasonable and contradict to the *effet utile* principle.\(^{115}\)

81. *Ergo*, the intent of Oceania was to agree on specific dispute resolution mechanism as to Euroasian investors, and Oceania did not intend the MFN clause in the Euroasia BIT to encompass dispute resolution provisions of this BIT.

C. **IN ANY CASE, THE VERY WORDING OF THE MFN CLAUSE OF THE EUROASIA BIT DOES NOT ALLOW TO INVOCExE THE DISPUTE SETTLEMENT PROVISIONS OF THE EASTASIA BIT**

82. Even if, *arguendo*, MFN clauses could encompass dispute resolution *per se*, the wording of the Euroasia BIT’s MFN clause does not allow its application to invoke the Eastasia BIT’s dispute settlement mechanism. *First*, “treatment” under Article 3 of the Euroasia BIT does not extend to dispute settlement issues (*I*). *Second*, the dispute settlement provisions of the Eastasia BIT are not more favorable (*2*).

1. **“Treatment” under Article 3 of the Euroasia BIT does not extend to dispute settlement issues**

83. The treatment as specified in Article 3 of the Euroasia BIT does not encompass procedural matters, as, *first*, dispute resolution is not generally included in the notion of treatment (*a*). *Second*, treatment in respect to pre-arbitral steps does not take place “within its own territory” requirement of the treatment (*b*). *Third*, the scope of matters included into this treatment does not comprise the procedural ones (*c*).

   a) **The term “treatment” does not cover dispute settlement provisions in this case**

84. Although international law contains no definition of treatment, there is no universal agreement that treatment as such extends to dispute resolution. For instance, World Bank Guidelines on the Treatment of Foreign Direct Investment address the issues related to treatment

\(^{115}\) *Daimler*, ¶ 264; *ICS*, ¶ 317; *Kiliç*, ¶ 3.3.43.
of investors and dispute settlement issues in different paragraphs.\textsuperscript{116} This demonstrates that at the time of the adoption of this document, which coincides with the conclusion of the Euroasia BIT, procedural aspects of foreign investment were deemed to be beyond the scope of the term “treatment”.\textsuperscript{117}

85. Moreover, the obligation to provide MFN treatment national treatment are coupled in Article 3 of the Euroasia BIT,\textsuperscript{118} However, dispute settlement provisions of the BIT do not extend to Euroasian domestic investors, so the term “treatment” as such, which has to be interpreted consistently throughout the Article, cannot in this contextual perspective be deemed to include procedural rights.\textsuperscript{119}

86. Therefore, “treatment” is not presumed to extend to dispute settlement matters in the absence of evidence to the contrary.

\textbf{b) The scope of applicability of treatment does not contain dispute settlement provisions}

87. Alternatively, the language of Article 3 of the Euroasia BIT shows that the scope of applicability of MFN treatment is limited and does not include dispute settlement provisions.

88. Article 3 of the Euroasia BIT gives an approximate list of matters subject to MFN treatment.\textsuperscript{120} None of them extends beyond substantive issues: the meaning of words “investment” and “activities” is clear in light of the definition of investment given in Article 1 of the Euroasia BIT, which does not deal with procedural matters at all.\textsuperscript{121} The substantive nature of the term “income” is also evident.

89. As regards “such other investment matters”, the words “such other” indicate that the matters in question should be similar to the ones described above, which, as already mentioned, are of substantive nature. Consequently, the matters which parties wanted to define by embedding this phrase do not comprise dispute settlement, but rather imply some more “traditional” substantive matters.

90. Moreover, it is evident that the wording “such other investment matters” is not equal to “all matters”, which was the most common ground for tribunals to include dispute settlement

\begin{footnotesize}
\textsuperscript{116}World Bank Guidelines, 8.
\textsuperscript{117}Daimler, ¶ 223; ICS, ¶ 295; Kiliç, ¶ 3.3.31.
\textsuperscript{118}Euroasia BIT, Article 3(1).
\textsuperscript{119}Söderlund, 1127.
\textsuperscript{120}Euroasia BIT, Article 3(1).
\textsuperscript{121}Euroasia BIT, Article 1(1).
\end{footnotesize}
provisions within the scope of MFN treatment.\textsuperscript{122} Any other wordings of MFN clauses usually left doubt as to whether they comprise procedural matters or not.\textsuperscript{123}

91. However, even should the Tribunal decide that these two wordings are basically the same, this would not avail Claimant, as the “all matters” wording itself may not be sufficient.\textsuperscript{124} As persuasively argued by scholars and the Berschader tribunal, the “all matters” wording should not be construed literally, as some treaty provisions, such as preamble, definitional clause, emergency exceptions etc., are obviously not subject to MFN treatment.\textsuperscript{125} These provisions do not relate to the subject matter of the BIT\textsuperscript{126} and, as stated above\textsuperscript{127}, dispute settlement provisions are among them.

92. Therefore, the scope of MFN treatment set out in Article 3 of the Euroasia BIT does not comprise dispute settlement provisions.

c) \textit{The words “in its own territory” reveal the impossibility of including recourse to international arbitration into the term “treatment”}

93. The provisions of Article 3 of the Euroasia BIT accord MFN treatment only within the territory of the Contracting Party.\textsuperscript{128} The proper interpretation of this limitation of treatment does not permit to include recourse to arbitration into the ambit of such treatment.

94. Literal interpretation of this provision shows that it limits the scope of MFN treatment to activities conducted within the territory of the state. As international arbitration proceedings usually take place outside the state, the right to initiate international arbitration proceedings does not lie within the scope of the term “treatment”.\textsuperscript{129}

95. Moreover, this limitation indicates that such treatment is associated with the state exercising its sovereign rights, which are limited to its territory as defined in Article 1 of the Euroasia BIT.\textsuperscript{130}

\textsuperscript{122}Uchkunova, Temnikov, 418-427.
\textsuperscript{123}Ibid.
\textsuperscript{124}Wintershall, ¶ 186.
\textsuperscript{125}Berschader, ¶¶ 185-192, Thulasidhass, 20.
\textsuperscript{126}Ibid.
\textsuperscript{127}Supra, ¶107.
\textsuperscript{128}Euroasia BIT, Article 3(1).
\textsuperscript{129}Daimler, ¶ 228; ICS, ¶ 306.
\textsuperscript{130}Euroasia BIT, Article 1(3).
beyond its control, it is per se an area which should not be included into the list of activities conducted within the territory of the state.\footnote{Daimler, ¶ 228; ST-AD, ¶ 394.}

Therefore, the issue of pre-arbitral steps, due to the extra-territorial concept of international arbitration, cannot be included into the treatment which is expressly limited to the territory of Oceania.

2. The dispute settlement mechanism of the Euroasia BIT is not less favourable in comparison with the Eastasia BIT

96. Should the Tribunal decide that the Euroasia BIT’s MFN clause comprises dispute settlement provisions, it still cannot be invoked to import the Eastasia BIT’s dispute resolution mechanism. An MFN clause applies only if the third-party BIT (the Eastasia BIT) provides objectively more favorable treatment in comparison with the basic treaty (the Euroasia BIT).\footnote{UNCTAD on MFN, 24; Daimler, ¶ 243; ICS, ¶ 319.}

97. In the case at hand, the Eastasia BIT, though allowing straight recourse to arbitration, does not grant more favorable treatment.

98. First of all, the idea of arbitration being a priori more favorable to investors than domestic litigation is contested in modern doctrine, which points out a lack of rigorous comparison between two fora preventing any unequivocal conclusion, as well as that it would be “invidious” for tribunals to presume superiority of international arbitration over state adjudication.\footnote{Kurtz, 880; McLACHLAN, 257.}

99. Furthermore, the dispute resolution provisions contained in the Euroasia and Eastasia BITs are incomparably different. Article 9 of the Euroasia BIT provides for yet conditional, but choice to refer to either local courts or international arbitration, enabling an investor to seek relief once before the domestic courts and again before an international arbitral tribunal.\footnote{Daimler, ¶ 244.} Under the Eastasia BIT, by contrast, an investor has to choose either domestic or international dispute resolution and therefore receives only one chance to obtain a satisfactory outcome. Therefore, a mechanism providing for two fora cumulatively (yet not simultaneously) cannot be unambiguously held less favorable that the one envisaging one forum only to the prejudice of others.\footnote{Impregilo, Dissenting Opinion, ¶ 11
100. Furthermore, the application in a way desired by Claimant leads to manifestly improper and unfair result. What Claimant practically purports to do is to eliminate preconditions for arbitration under Article 9(3) of the Euroasia BIT and at the same time to retain the possibility to litigate the dispute (as Article 9(2) of the Euroasia BIT is not subject of Claimant’s plea for MFN treatment and thus would remain applicable). Should it succeed in doing so, the treatment granted to Claimant would include a free possibility to choose between local Oceanian courts as well as international arbitration. However, such treatment would not constitute the MFN treatment, but rather a *sui generis* “inexistent favorable treatment”\(^{136}\), which is obviously inconsistent with the very nature and purpose of MFN clauses.

101. Therefore, Claimant cannot invoke the MFN clause, since the Eastasia BIT does not provide more favorable treatment.

102. *Ergo*, Claimant cannot bypass the pre-arbitral steps by virtue of the Euroasia BIT’s MFN clause since it is inapplicable to dispute resolution provisions, cannot substitute Respondent’s consent to arbitration and its very wording does not allow its application for the purposes sought by Claimant.

\(^{136}\) *Impregilo*, Dissenting Opinion, ¶ 12.
IV. THE EURASIA BIT DOES NOT PROTECT CLAIMANT’S INVESTMENT DUE TO HIS UNCLEAN HANDS.

103. As a general principle of law, good faith does not allow claims from a party which itself acted with unclean hands. Tribunals unconditionally apply the “clean hands” doctrine in cases of corruption or deliberate breaches of host state’s laws.

104. Even if the Eurasia BIT’s definition of investment lacks the “in accordance with law” clause it applies implicitly and substantive protection will not be granted to Claimant’s investment made contrary to the law. In no case have tribunals tolerated investor’s benefit from the absence of “in accordance with law” clause, since compliance with the host state laws is a reasonable requirement and “no legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them”.

105. Therefore, Claimant cannot rely on BIT’s protection due to obtainment of the environmental license through bribery (A) and (or) due to operation of Rocket Bombs in violation of the Environment Act (B). Moreover, Oceania is not estopped from invoking the “unclean hands” defense (C).

A. OCEANIA HAS ENOUGH EVIDENCE TO PROVE CLAIMANT’S CORRUPTION, WHICH BARS HIS INVESTMENT FROM THE APPLICABLE BIT’S PROTECTION

106. Corruption constitutes a grave violation of both domestic laws and international public policy, thereby automatically precluding investor’s good faith. For this reason an investment with elements of corruption deserves no protection.

107. Due to the covertness of bribery episodes and the absence of uniform applicable standard of proof tribunals accept circumstantial evidence to prove corruption.

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137 Black’s Law Dictionary, 268.
138 Moloo, 6.
139 World Duty Free, ¶157; Metal-Tech, ¶165.
140 Fraport, ¶125.
141 Mamidoil Jetoil Greek, ¶293; Phoenix Action, ¶101; Hamester, ¶¶123-124.
142 Plama, ¶138, Phoenix, ¶101.
143 Alasdair, ¶58.
144 Inceysa, ¶244.
145 World Duty Free, ¶157; Cremades, 785.
146 World Duty Free, ¶157; Douglas, 180; Sadowski, 21.
147 Cremades, 785.
148 World Duty Free, ¶157; Douglas, 180; Sadowski, 21; Kreindler, 317.
149 Edf Limited v Romania, ¶221; Metal-Tech, ¶228
Abundant facts of the present case point to corruption by Claimant. Thus, Claimant’s investment was made with “unclean hands” and does not enjoy protection.

1. **Circumstantial evidence standard of proving corruption is applicable to the present case**

108. Criminal proceedings against Claimant concerning corruption of the NEA President are now pending.\(^\text{152}\) Nevertheless, it should not preclude this Tribunal from establishing the fact of corruption.

109. No clear-cut standard for proving corruption exists\(^\text{153}\) as demonstrated by *Inceysa*,\(^\text{154}\) *World Duty Free*\(^\text{155}\) and a number of ICC cases\(^\text{156}\) where no explicit test was mentioned. Tribunals should rather assess the facts of the case, than attempt to apply particular standards of proof.\(^\text{157}\) This approach is called circumstantial evidence test and enjoys wide support.\(^\text{158}\) For instance, in *Metal-Tech*\(^\text{159}\) the Tribunal admitted circumstantial evidence when regarded the absence of documentary evidence of the services rendered as an indication of corruption.\(^\text{160}\)

2. **Circumstantial evidence in present case suffices to establish corruption by Claimant**

110. Circumstantial evidence approach with respect to corruption means that tribunals exercise “free evaluation of evidence”\(^\text{161}\) and look for *serious indices*.\(^\text{162}\) Notably, their force of these *indices* enhances when an investor cannot explain circumstances “redolent of” corruption.\(^\text{163}\) For example, in *ICC case No 8891* the arbitral tribunal regarded short performance of the consultancy agreement and failure of the consultant to produce evidence of his activity as conclusive of corruption.\(^\text{164}\)

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\(^{150}\) Redfern, 52.

\(^{151}\) *Oostergretel*, ¶303

\(^{152}\) Procedural Order No 2, ¶5.


\(^{154}\) *Inceysa*, ¶118.

\(^{155}\) *World Duty Free*, ¶166.


\(^{157}\) *Oostergretel*, ¶303

\(^{158}\) AAPL, ¶56.

\(^{159}\) *Metal-Tech*, ¶337-352.

\(^{160}\) *Metal-Tech*, ¶352.

\(^{161}\) *Metal-Tech*, ¶231.

\(^{162}\) *ICC Case No. 8891*, at 1079.


\(^{164}\) *Infra* 26
111. Analogous facts of the present case vividly demonstrate that Claimant bribed the NEA President. *First*, the President named Claimant among the bribe givers in his confession. 165 *Second*, Claimant managed to obtain the license somehow literally within days after the private meeting with the President 166 - a process generally lasting “very long”. 167 *Third*, the fact that Claimant concedes he lacked financial resources to comply with the Environment Act 168 wipes out any remaining suggestions in his favor.

112. *Moreover*, Claimant failed to refute the suspicions around the connection between his meeting with the President and issuing of a license. 169 Such inability to explain circumstances “redolent of” corruption lowers the threshold of proving it. 170

113. Thus, circumstantial evidence is sufficient to prove Claimant’s involvement in bribery, which deprives its investment of protection.

**B. ALTERNATIVELY, INCOMPLIANCE WITH THE ENVIRONMENT ACT BARS CLAIMANT’S INVESTMENT FROM THE APPLICABLE BIT’S PROTECTION**

114. The requirement of investment’s compliance with the law is implicit in all BIT’s 171 and tribunals follow this approach 172 irrespective of when the violation happened. Therefore, Claimant’s attitude that after lawful initiation of investment the investor can freely violate domestic legislation without losing BIT's protection contradicts not only the relevant jurisprudence 173, but also common sense.

115. The invocation of the “clean hands” doctrine in respect to violations after acquiring investment requires two main cumulative conditions: the deliberate violation of domestic law should be proven 174(1) and it should concern its fundamental provision 175(2). Both were met in this case.

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165 Procedural Order No 2, ¶ 5
166 Statement of Uncontested Facts, ¶ 6
167 Ibid.
168 Statement of Uncontested Facts, ¶ 4
169 Request for Arbitration, p. 4
170 Bjorklund, 405
171 Phoenix, ¶ 101; Saluka, ¶ 204
172 Plama, ¶ 138;
173 Hamester ¶127; Douglas, 175.
174 World Duty Free, ¶ 339; Fraport, ¶ 180.
175 Desert Line, ¶¶104-105; Lorz, Busch, 577; Kriebaum, 307.
1. **Claimant deliberately violated the Environment Act**

116. Consistent judicial practice indicates that investor’s deliberate violation provides sufficient ground for declaration of “unclean hands”°. Nevertheless, violations could be justified if investor acted in good faith.° Nevertheless, violations could be justified if investor acted in good faith.°

117. This is not the case, since Claimant was aware that operation without environmentally-friendly license is prohibited a) and did not act in good faith b). Thus, Claimant came to the Tribunal with “unclean hands” and deserves no protection of its investment.

   a) **Claimant was aware that operation without environmentally-friendly technology is prohibited**

118. *First*, Claimant explicitly acknowledges that it continuously violated the Environment Act for 15 years.° This is analogous to the attitude of the investor in *Fraport* who consciously proceeded with investment despite being aware of its illegality under Philippine law.°

119. By analogy, in *Plama* the investor deliberately concealed through his investment a cover for an individual with limited financial resources.° The Tribunal considered this as a “flagrant violation” of both Bulgarian and international law.°

120. Like investors in *Fraport* and *Plama*, Claimant operated his business contrary to Oceanian domestic law deliberately. Therefore, he likewise cannot claim accidental violation of Oceanian laws and thus is deprived of the BIT’s protection.

   b) **In any event, Claimant did not act in good faith**

121. *Second*, last resort for investor to escape the “clean hands” doctrine invocation is unintentional, mistaken violations while acting in good faith.° In *Fraport* the Tribunal decided that insignificant violation caused by the ambiguity of laws constitutes good faith.°

122. A *contrario*, the Environment Act unambiguously requires investor to use environmentally-friendly technology.° Moreover, Claimant demonstrated bad faith in all aspects

° *Fraport*, ¶401; *Plama* ¶135.
177 *Fraport*, ¶396
178 *Ibid*, ¶396
180 *Fraport*, ¶315.
181 *Plama*, ¶133, 135.
183 Mirzayev, 96.
184 *Fraport*, ¶ 396.
of his investment. *First,* Claimant’s obtainment of the license is at least questionable. *Second,* Claimant’s disrespect of Environment Act’s requirements lasted 15 years. *Third,* Claimant did not even wait for the decision concerning request for subsidy and approached the NEA President directly. *Finally,* Claimant did not attempt to apply for a subsidy although he could twice after failure in 1998.

123. Claimant did not act in good faith and cannot justify its conduct by the allegedly unclear requirements of the Oceanian domestic law. *Hence,* its investment should not be protected.

2. **Claimant’s failure to comply with the environmental requirements amounts to a fundamental violation**

124. Oceania does not dispute that only a „significant“, „fundamental“ and „non-trivial“ violation of domestic laws by the investor triggers the application of the „clean hands“ doctrine. Fundamentality of violation is considered by tribunals on case-by-case basis. Moreover, tribunals may regard a violation as fundamental violation if it was essential for profitability of investment.

125. Oceania submits that Claimant’s failure to comply with Environment Act amounts to fundamental violation a) and was essential for profitability of its investment b).

a) **Environmental issues are fundamental and require strict compliance**

126. Operation without required environmental-friendly technology amounts to a “breach of fundamental principles of host state’s law.”

127. Environmental regulations go to the very core of the investment and are relevant for determining its legality. Since tribunals confirm the lawfulness of terminating the investments on environmental grounds, there is no reason to assume that an investment violating a clear-cut provision of the environmental law should be tolerated.

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185 Statement of Uncontested Facts, ¶1.
187 Procedural Order No 2, ¶1.
188 Statement of Uncontested Facts, ¶4.
189 SpA v People’s Democratic Republic of Algeria, ¶83.
190 Tokios Tokeles, ¶86; LESI, ¶83; Desert Line, ¶104.
191 Desert Line, ¶117; Fraport, ¶396.
192 Douglas, 156.
193 Vihuales, 99.
b) **Compliance with the Environment Act was essential for Claimant’s investment**

128. The second question in establishing the fundamentality of the investor’s violation is whether it substantially affects the investment’s profitability.\(^{195}\) Following the *Fraport* approach only those investors whose violations are not “central to the profitability” may claim protection of the investment.\(^{196}\) The facts of the present case are diametrically opposed.

129. Pursuant to the Environment Act environmental-friendly technology was a mandatory precondition for obtaining the license and resuming arms production.\(^{197}\) Therefore, without it Claimant’s business would not be possible let alone profitable.

130. Analysis of relevant law and facts revealed that Claimant violated the fundamental provisions of Oceanian law and no exceptions are applicable to it. Hence, claim for protection of its investment is unsubstantiated.

C. **OCEANIA IS NOT ESTOPPED FROM INVOKING THE “UNCLEAN HANDS” OF CLAIMANT**

131. Although Oceania did not prevent violations of Claimant for long it is not estopped from invoking “clean hands” doctrine (1). Alternatively, Claimant cannot invoke estoppel due to his own bad faith (2).

1. **Temporary tolerance of Claimant’s violations does not constitute estoppel of Oceania**

132. Conscious acceptance or tolerance of a particular investor’s violation by the state may constitute estoppel and preclude the state from invoking the “clean hands” doctrine.\(^{198}\) Nevertheless there is a separating line between violations known and unknown to the government.

133. Oceania’s failure to prosecute Claimant’s violations and estoppel from invoking “clean hands” for two reasons: Claimant concealed his violations a), and Oceania used the first practicable option to prosecute Claimant b).

   a) **Claimant concealed his violation**

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\(^{195}\) Kriebaum, 322.
\(^{196}\) *Fraport*, ¶396.
\(^{197}\) *Incexsa*, ¶230.
\(^{198}\) *SwemBalt*, ¶34-35; *Kardassopoulos*, ¶185-194.
“Covert” acts by their nature unknown to the state cannot be the basis of estoppel. In Fraport the Tribunal denied invocation of estoppel since the respondent state could not prosecute investor “for violations that it had concealed”. Tribunal reached the same conclusion in in Kenya when stated that “a party cannot waive a right which he does not know to exist”. Thus, only “knowingly overlooked” violations may be the basis for the estoppel defense. Moreover, the tribunal in World Duty Free stressed that since the bribe to the President was paid directly and covertly it is not imputable to the state.

In the present case Claimant covertly obtained the license in circumvention of due proceedings through bribing the President. Thus, Oceania did not knowingly overlook the lack of Claimant’s entitlement to conduct his business.

b) Oceania used the first practicable option to prosecute Claimant

Neither does Oceania’s failure to prosecute Claimant within fifteen years constitute estoppel. Oceania used the first practicable opportunity to prosecute Claimant’s violation, since it became aware of the illegal acts committed by Claimant only after criminal proceedings were initiated.

Thus, Claimant’s allegations of Oceanian unwillingness to prosecute continuing violations of the law are not credible and should fail.

1. NEA President's private arrangements with Claimant are not attributable to Oceania

In World Duty Free the bribe to the President was not regarded imputable to the state because it was paid directly and covertly. Likewise, the NEA President acted in personal capacity when meeting with Claimant in private.

Thus, Oceania as a state cannot be deprived of its right to invoke the "clean hands" doctrine due to clandestine actions of on one corrupt office-holder.

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199 Fraport, ¶347; SHAW, 423.
200 Fraport, ¶387.
201 World Duty Free, ¶184.
202 Fraport, ¶146-147.
203 World Duty Free, ¶¶ 169, 178
204 Statement of Uncontested Facts, ¶6.
205 Procedural Order No 2, ¶5
206 World Duty Free, ¶¶ 169, 178
2. **Bad faith of Claimant precludes his resort to estoppel defense**

141. Alternatively, even if this Tribunal establishes estoppel of Oceania, Claimant’s investment still does not deserve protection since he did not act in good faith.

142. Being supreme principle good faith in investor’s acts represent favorable secure for his investment.\(^{208}\) That is why tribunals do not unconditionally uphold investor’s resort to estoppel if he acted in bad faith.\(^{209}\) In *Fraport* the tribunal rejected investor’s invocation of estoppel since investor concealed his violations and could not consider endorsement of the government as investor acting in good faith.\(^{210}\) Bad faith of Claimant was demonstrated above.\(^{211}\)

143. *Ergo*, evidence of particular violations of Oceanian law and bad faith of Claimant overall is present. For this reason Claimant came to this tribunal with „unclean hands“ and the BIT does not protect his investment.

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\(^{208}\) *Inceysa*, ¶230

\(^{209}\) *Kriebbaum*, 326

\(^{210}\) *Fraport*, ¶387

\(^{211}\) *See Section B, 1b*)
V. OCEANIA DID NOT EXPROPRIATE ROCKET BOMBS.

144. Foreign investment protection is not unqualified and states are allowed to deviate from their obligations in certain situations. In this case Oceania did not expropriate Rocket Bombs by imposing sanctions, but rather exercised its rights under article 10 of the Euroasia BIT (A). Alternatively, the sanctions qualify as permissible non-compensable regulatory measures (B).

A. OCEANIA'S SANCTIONS ARE EXEMPT UNDER ARTICLE 10 OF THE EURASIA BIT

145. Article 10 of the Euroasia BIT, agreed upon by both parties, explicitly allows either of them to take "measures to fulfill its obligations with respect to the maintenance of international peace or security". Notably, past tribunals did not regard analogous provisions as applicable only in cases of "military action and war". Moreover, they should be applied as lex specialis, eliminating the need to establish the state of necessity under customary international law.

146. When Euroasia annexed Fairyland thereby encroaching upon the most fundamental principles of international law — the non-intervention duty and respect for territorial integrity of any State, customary international law norms required Oceania to participate in the international reaction aimed at condemning Euroasia's illegal annexation of Fairyland in order to maintain international peace and security.

147. It is against this background that Oceania imposed sanctions directed against those who had contributed to the described unlawful situation. Claimant was among them, since it is undisputed that even after Euroasia’s plans were disclosed in the media Claimant supplied it with arms which could be used during the invasion.

148. Therefore, although Oceania's sanctions affected Claimant's investment they are exempt under Article 10 of the Eurasia BIT as part of the international response to maintain international

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212 LG&E, ¶238.
213 Continental Casualty, ¶ 167; CMS, Annulment ¶ 131-32.
215 UN Charter, Article 2; Friendly Relations Declaration
216 Namibia, p. 16; Wall, ¶ 87; ARSIWA, Art. 41.
217 Procedural Order No 3, ¶ 11.
218 Answer to Request for Arbitration.
219 Procedural Order No 2, ¶3.
220 Statement of Uncontested Facts, ¶15.
221 Statement of Uncontested Facts, ¶14.
peace and security. By *reductio ad absurdum*, requiring Oceania to compensate Claimant who virtually acted as Euroasia's accomplice would render the said measures worthless.

**B. ALTERNATIVELY, OCEANIA'S SANCTIONS CONSTITUTED NON-COMPENSABLE REGULATION, NOT EXPROPRIATION OF ROCKET BOMBS**

149. It is undisputable that certain considerations of public safety, order, welfare, etc. allow states to take steps which may negatively affect investments but are not regarded as a "taking". However, the separating line between indirect expropriation and non-compensable regulatory measures is vague and tribunals determine it on a case-by-case basis by analyzing two main factors: the proportionality of the interference to the aims sought and the character of the measure.

150. In the present case, contrary to Claimant's allegations, Oceania's economic sanctions constituted non-compensable regulatory measures, not indirect expropriation, because their effect was proportionate to their goal (1) and they were of non-discriminatory, reversible and temporary character (2).

1. **The burden imposed on Rocket Bombs by sanctions was proportionate to the aim of ceasing Eastasia's egregious violations of international peace and security**

151. “A reasonable relationship of proportionality between the charge of weight imposed to the foreign investor and the aim sought” by the measure in question should be established. The purpose and context of the restrictions are important for this assessment.

152. Unlike many arbitration cases dealing with issues of domestic character (*ex.* public health, social equality, environmental protection, etc.) where plausible degree of interference was limited, the circumstances of the present case are truly extraordinary. The gravity of Euroasia's violations of the core international law principles warranted a more extensive response.

153. Thus, although sanctions of Oceania negatively affected Claimant's investment, they were reasonably proportionate to the aim sought and thus were justified as the most effective of the civilized ways to compel Euroasia to cease its unlawful conduct. Therefore, Oceania's measures constituted non-compensable regulation despite their substantial degree of interference.

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222 *Saluka*, ¶ 255; *Suez*, ¶ 128; Christie, 338; Restatement of the Law, , §712, commentary g.
224 *Tecnicas*, ¶ 122.
225 Dolzer, 79.
154. The rationale behind this is to provide an effective enforcement mechanism in cases of violations of fundamental international law norms. By ruling otherwise this tribunal would set a negative precedent which would virtually diminish the leverage of the international community over states egregiously violating international law and posing a serious threat to international peace and security.

2. The sanctions were non-discriminatory, reversible and temporary

155. Tribunals consider the character of the measures to determine whether they amount to expropriation. Non-compensable regulations are characterized by their non-discriminatory, temporary, and reversible nature. In Methanex the tribunal held that "a non-discriminatory regulation for a public purpose, [...] enacted [in] due process and [affecting a foreign investment] is not deemed expropriatory and compensable". 227

156. Likewise, Oceania's sanctions were imposed by the Executive Order, and are non-discriminatory, since they affect companies in several Euroasian economic sectors. 228 Therefore, it is irrelevant that in the arms production sector only Rocket Bombs happened to meet the relevant criteria. Additionally, the sanctions are reversible and can be subject to reconsideration proceedings according to the Oceanian Code of Administrative Procedure. 229 Moreover, they are temporary and hinge on cessation of Euroasia's continuing violation of international law. 230 Notably, similar sanctions were imposed by other states. 231

157. Ergo, even in these extreme circumstances Oceania took reversible, temporary and targeted measures affecting only persons who contributed to the described unlawful situation. Since such actions do not amount to expropriation Claimant's compensation argument should fail.

227 Methanex, ¶ 7.
228 Statement of Uncontested Facts, ¶ 16; Procedural Order No 3, ¶ 10.
229 Procedural Order No 3, ¶ 10.
230 Exhibit C2, 52
231 Procedural Order No 3, ¶ 11.
VI. CLAIMANT CONTRIBUTED TO THE DAMAGE SUFFERED BY HIS INVESTMENT BY VIRTUE OF HIS OWN CONDUCT

158. The Claimant in his prayer asks for compensation in the amount not less than 120,000,000 USD plus accrued interest. \(^{232}\) Even if this Tribunal finds the occurrence of expropriation, Claimant compensation is subject to reduction since he contributed to the damage suffered by his investment.

159. Once an investor has wilfully or negligently \(^{233}\) contributed to his own damage, the compensation can either be denied \(^{234}\) or reduced \(^{235}\). This principle is called “contributory fault”, \(^{236}\) originating \(^{237}\) from Article 39 of ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (“ARSIWA”).

160. An investor is deemed to have contributed to his damage if two criteria are met simultaneously: \(^{238}\) (1) an investor’s conduct is “blameable”; \(^{239}\) (2) an investor’s fault shall be “material or significant”. \(^{240}\)

161. In the present case the amount of due compensation should be reduced since Claimant’s conduct was blameable (A); Claimant’s fault was sufficiently “material or significant” (B).

A. CLAIMANT’S CONDUCT IN RELATION TO HIS CONTINUE OF WEAPONS SUPPLY TO EURASIA WAS BLAMEABLE

162. Doctrine or jurisprudence have not produced a clear-cut definition of “blameable conduct”. \(^{241}\) Nevertheless, according to the interpretation of Article 39 of ARSIWA blameable conduct covers negligence. \(^{242}\) Tribunals establish negligence through “reckless” \(^{243}\) or

\[^{232}\] Request for Arbitration, 5.
\[^{233}\] Hulley, ¶1599; Sabahi, Duggal, 288.
\[^{234}\] BOLLECKER-STERN, 310
\[^{235}\] Sabahi, Duggal, Birch, 1120; Gill QC, Gupta, 93.
\[^{236}\] Ibid., Crawford, 240.
\[^{237}\] Copper Mesa, ¶6.91; Gemplus, ¶11.13; MTD, Award, ¶99; Occidental, ¶¶665-687; Gill QC, Gupta, 93.
\[^{238}\] Ibid., 103.
\[^{239}\] Hulley, ¶1599; Sadowski, 1; RIPINSKY, WILLIAMS, 312.
\[^{240}\] Occidental, ¶670; MTD, Annulment, ¶101; Hulley, ¶1600; Gill QC, Gupta, 103; RIPINSKY, WILLIAMS, 312.
\[^{241}\] Sadowski, 2.
\[^{242}\] Salmon, 240.
\[^{243}\] Occidental, ¶662.
“commercially imprudent”\textsuperscript{244} behaviour. As it was well put by Bederman “...what international tribunal might consider as imprudent conduct...” is “...entirely factual inquiry”.\textsuperscript{245} 

163. Factual circumstances of the present case demonstrate that Claimant’s behaviour with respect to Rocket Bombs was commercially imprudent. \textit{First}, Claimant acquired shares in Rocket Bombs although it lacked financial resources for compliance with environmental requirements and lost its environmental license. Therefore, Claimant did not pass the test of „wise investor“ discussed in \textit{MTD}\textsuperscript{246}.

164. \textit{Second}, Claimant continued his arms supply to Eurasia even when Eurasian plans concerning intervention in Fairyland were broadcasted.\textsuperscript{247} Likewise investor in \textit{Azurix} Claimant acted in a way contrary to the acts of „well-informed“ investor.\textsuperscript{248} Such conduct of Claimant is blameable since it is “inconsistent with the pattern expected from him in the specific circumstances”.\textsuperscript{249} Claimant, could avoid his contribution by terminating the contract upon Eastasia declaration secession of Fairyland to be illegal. However, Claimant failed to do so.

165. \textit{Therefore}, Claimant had at least \textit{two} practicable chances avoid contribution to the loss of his investment. He did not take any of them though. \textit{Thus}, based on contributory fault principle the amount of compensation should be reduced.

\section*{B. \textbf{Claimant’s Fault was sufficiently „material or significant“}}

166. Apart from investor’s conduct tribunals investigate the severity of its contribution. In other words, the amount of due compensation will be reduced if investor’s contribution to its damage is “material and significant”.\textsuperscript{250}

167. In \textit{Hulley} the Tribunal considered participation in „sham-like“ tax structure material contribution consisting 25\% of the injury.\textsuperscript{251} In present case contribution was more severe. Claimant entered into a contract for modernisation the equipment of Euarasian armed forces\textsuperscript{252} that eventually resulted in its inability to operate business or sale shares.\textsuperscript{253}

\textsuperscript{244} \textit{MTD}, Award, \textsuperscript{242-243}.
\textsuperscript{245} Bederman, 355.
\textsuperscript{246} \textit{MTD}, Award, \textsuperscript{242-243}.
\textsuperscript{247} Procedural Order No 3, \textsuperscript{3}.
\textsuperscript{248} \textit{Azurix}, \textsuperscript{426}.
\textsuperscript{249} Bollecker-Stern, 303; Sadowski, 2.
\textsuperscript{250} \textit{Occidental}, \textsuperscript{670, 687}; \textit{MTD}, \textit{Annulment}, \textsuperscript{101}; \textit{Hulley}, \textsuperscript{1600}.
\textsuperscript{251} Sadowski citing \textit{Hulley}, 8.
\textsuperscript{252} Statement of Uncontested Facts, \textsuperscript{16}.
\textsuperscript{253} \textit{Ibid}, \textsuperscript{17}.
168. Therefore, Claimant was the “author of his misfortune”\textsuperscript{254} since it “materially and significantly” contributed to the loss suffered by its investment.

169. \textit{Ergo, the amount of compensation requested by Claimant is subject to reduction.}

\textsuperscript{254} Vöcklinghaus, ¶134.
PRAYER FOR RELIEF

For all the reasons stated above, the Respondent requests the present Tribunal to find that:

I. it has no jurisdiction over the case at hand under the Agreement between the Republic of Oceania and the Republic of Euroasia for the Promotion and Reciprocal Protection of Investments dated 1 January 1995;

II. even if the Tribunal finds jurisdiction, Claimant’s investment is not protected under the BIT due to Claimant’s breach of the ‘clean hands’ doctrine in connection with its investment;

III. Claimant’s investment was not expropriated by Respondent and;

IV. Claimant is not entitled to full compensation as Claimant contributed to the damage suffered by its investment.

Respectfully submitted on 26 September 2016 by LADREIT

On behalf of Respondent the Republic of Oceania