FOREIGN DIRECT INVESTMENT
INTERNATIONAL ARBITRATION MOOT COMPETITION
3 - 6 NOVEMBER 2016

ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE

Peter Explosive (Claimant)

v.

The Republic of Oceania (Respondent)

ICC ARBITRATION CASE No. 28000/AC

MEMORIAL FOR RESPONDENT

September 26, 2016
TABLE OF CONTENTS

LIST OF AUTHORITIES.................................................................................................................... IV
LIST OF LEGAL SOURCES................................................................................................................ VIII
LIST OF ABBREVIATIONS ................................................................................................................ XVII
STATEMENT OF FACTS......................................................................................................................... 1
SUMMARY OF ARGUMENT .................................................................................................................... 4
ARGUMENTS .............................................................................................................................................. 5

PART ONE: JURISDICTION AND ADMISSIBILITY.................................................................................. 5

I. CLAIMANT IS NOT AN INVESTOR PURSUANT TO ART.1(2) EUROASIA BIT ............................... 5
   A. The Tribunal can and should consider Fairyland’s illegal annexation in determining its
      _ratione personae_ jurisdiction........................................................................................................ 6
   B. Fairyland’s illegal annexation violates _jus cogens_ norms embodied in the UN Charter,
      thus voiding Claimant’s exorbitant nationality................................................................................ 7
      a. Claimant is -and undisputedly remains- an Eastasian national............................................. 7
      b. Euroasia’s intervention and passportization policy, prior to the declaration of
         annexation of Fairyland, constituted nothing but a “creeping annexation” exercise....... 8
      c. Claimant’s exorbitant Euroasian nationality conferred simultaneously with
         Fairyland’s illegal annexation cannot be upheld by any international Tribunal.............. 11

II. CLAIMANT MANIFESTLY FAILED TO COMPLY WITH THE PRE-ARBITRAL STEPS SET FORTH IN ART.9 EUROASIA BIT ................................................................. 12
   A. The pre-arbitral steps included in Art.9 Euroasia BIT explicitly circumscribe Oceania’s
      consent to arbitrate.......................................................................................................................... 13
   B. Claimant manifestly disregarded these pre-arbitral steps, and hence no standing offer
      to arbitrate exists.......................................................................................................................... 14
      a. Claimant did not attempt to settle the dispute amicably “to the extent possible”............ 14
      b. Claimant unjustifiably did not refer this dispute to the domestic courts of Oceania
         prior to arbitration................................................................................................................... 15

III. CLAIMANT MAY NOT INVOKE ART.8 EASTASIA BIT PURSUANT TO THE
     EUROASIA BIT’S MFN CLAUSE ................................................................................................. 17
   A. MFN clauses can neither establish jurisdiction nor modify jurisdictional requirements
      ................................................................................................................................................... 17
   B. The MFN clause of the Euroasia BIT cannot serve as a basis for this Tribunal’s
      jurisdiction.................................................................................................................................... 18
      a. Oceania’s alleged consent to arbitrate by virtue of the MFN clause is far from being
         “clear and unambiguous”.................................................................................................... 18
      b. The scope of the MFN clause of the Euroasia BIT is rather limited to substantive
         matters..................................................................................................................................... 19

IV. CLAIMANT’S CASE IS TAINTED BY “UNCLEAN HANDS” .......................................................... 21
   A. Claimant’s investment is not protected in light of the ‘clean hands’ clause of Art.1(1)
      Eastasia BIT ................................................................................................................................ 21
   B. Claimant obtained his ‘expedited’ environmental license in a blatant violation of
      Oceania’s domestic law and transnational public policy........................................................... 22
C. The Tribunal cannot turn a blind eye to Claimant’s “unclean hands” and should rely on the relevant available evidence before it, even if circumstantial .......................................................... 24
D. At the least, the Tribunal should stay the present arbitration pending the outcome of the criminal proceedings against Claimant for bribery .......................................................... 24

PART TWO: MERITS ........................................................................................................... 26
V. RESPONDENT DID NOT EXPROPRIATE CLAIMANT’S INVESTMENT ........ .......................................................... 26
A. The imposition of the EO falls under Oceania’s regulator powers .......................... 26
   a. The imposition of sanctions served Oceania’s public policy objectives .......... 27
   b. Respondent heeded due process ..................................................................... 27
   c. The EO was issued in a non-discriminatory manner ....................................... 28
   d. The measures were proportionate to the aim sought ...................................... 29
B. The EO fulfills Oceania’s obligations with respect to international peace and security ................................................................................................................................. 31
C. The EO is a countermeasure in response to Euroasia’s unlawful conduct ............ 33

PART THREE: REMEDIES ................................................................................................. 34
VI. CLAIMANT CONTRIBUTED TO THE DAMAGE SUFFERED .......................... 34
A. Claimant acted in a negligent way ....................................................................... 34
B. Claimant’s actions led to his damage .................................................................... 35

PRAYER FOR RELIEF ......................................................................................................... 37
LIST OF AUTHORITIES

BOOKS
Amerasinghe  

Biglieri/Prati  

Bjorge  

Dimsey  

Dolzer/Schreuer  

Dörr/Schmalenbach  

Douglas  

Gansler  

Henckels  

Kreindler  

Milano  

Montt  

Newcombe/Paradell  

Oppenheim  

Shaw  
Titi

Aikaterini Titi, The Right to Regulate in International Investment Law (2014).

ARTICLES & CHAPTERS

Alland


Anderton Defence


Brownlie


Burke-White/von Staden


Crawford Secession


D’Agnone


Dae-Jung


Douglas MFN


Dunne Defence


Fioertier


Geiß

<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
</tr>
</thead>
</table>
Schreuer  
Christoph Schreuer, *Consent to Arbitration*, edited by Peter Muchlinski, Federerico Ortino, Christoph Schreuer in *The Oxford handbook of international investment law* (2008).

Shams  

Sornarajah System  

**MISCELLANEOUS**

Dawidowicz  

Georgia Report  

ICC Commentary I  

ICC Commentary II  

Kytömäki  

Okhovat  

Sköns/Dunne  

UNCTAD Expropriation  

UNCTAD Schreuer  
LIST OF LEGAL SOURCES

ARBITRAL DECISIONS

Abaclat

Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. The Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (August 4, 2011).

Abaclat Abi-Saab

Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. The Argentine Republic, ICSID Case No. ARB/07/5, Dissenting Opinion of Professor Georges Abi-Saab (October 28, 2011).

ADC

ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award of the Tribunal (October 2, 2006).

ADM

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB (AF)/04/5, Award (November 21, 2007).

AIG

AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan, ICSID Case No. ARB/01/6, Award (October 7, 2003).

Al Warraq

Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Final Award (December 15, 2014).

Ambiente

Ambiente Ufficio S.p.A. and others v. The Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (February 8, 2013).

Amco

Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction (September 25, 1983).

Amto


Anatolie Stati

Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trading Ltd v. Kazakhstan, SCC, Award (December 19, 2013).

Apotex

Apotex Inc. v. The Government of the United States of America, UNCITRAL, Award On Jurisdiction and Admissibility (June 14, 2013).

Berschader

Biwater Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008).

Cargill Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award (September 18, 2009).

CEMEX CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction (December 30, 2010).

CME CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Partial Award (September 13, 2001).

Continental Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award (September 5, 2008).

Copper Mesa Copper Mesa Mining Corporation v. Republic of Ecuador, PCA No. 2012-2, Award (Redacted) (March 15, 2016).


Daimler Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award (August 22, 2012).


Feldman Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (December 16, 2002).

Fireman's Fund Fireman's Fund Insurance Company v. The United Mexican States, ICSID Case No. ARB(AF)/02/1, Award (redacted version), (July 17, 2006).

Fraport I Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award (August 16, 2007).

GAMI Gami Investments, Inc. v. The Government of the United Mexican States, UNCITRAL, Final Award (November 15, 2004).


Gemplus Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States, ICSID Case No. ARB(AF)/04/3, Award (June 16,
Generation Ukraine  Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award (September 16, 2003).


Giovanni  Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (November 17, 2014).


Hochtief  Hochtief AG v. The Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction (October 24, 2011).


ICC 3916  Case 3916, ICC, Award (1982).

İçkale  İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award (March 8, 2016).

ICS  ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic, UNCITRAL, PCA Case No. 2010-9, Award On Jurisdiction (February 10, 2012).


Inceysa  Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (August 2, 2016).

Kardassopoulos  Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18, Award (March 3, 2010).
Kiliç
Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award (July 2, 2013).

LG&E

Loewen
Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003).

Maffezini
Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award (November 13, 2000).

Maffezini
Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award (November 13, 2000).

Maffezini Jurisdiction
Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (November 13, 2000).

Metal-Tech
Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award (October 4, 2013).

Metalpar
Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic, ICSID Case No. ARB/03/5, Award on the Merits (June 6, 2008).

Methanex
Methanex Corporation v. USA, UNCITRAL, Final Award (August 3, 2005).

Micula

MTD Annulment
MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Decision on Annulment (March 21, 2007).

Murphy
Murphy Exploration and Production Company International v. Republic of Ecuador, ICSID Case No ARB/08/4, Award on Jurisdiction (December 15, 2010).

Niko
Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case No. ARB/10/18, Decision on Jurisdiction (August 19, 2013).
Occidental II  
*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (October 5, 2012).

Oostergetel  

Pan American  

Philip Morris  

Plama  
*Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (February 8, 2005).

Rompetrol  
*The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (May 6, 2013).

Rusoro  
*Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (August 22, 2016).

S.D. Myers  

Saluka  
*Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (March 17, 2006).

Siag Jurisdiction  

Soufraki  
*Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award (July 7, 2004).

Soufraki Annulment  
*Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the application for the annulment of Mr. Soufraki (June 5, 2007).

ST-AD  
Suez

Tecmed
Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003).

TECO
TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Award (December 19, 2013).

Teinver

Telenor
Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15, Award (September 13, 2006).

Tulip
Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Award (March 10, 2014).

Vanessa Ventures
Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)04/6, Award (January 16, 2013).

WDF
World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award (October 4, 2006).

Wintershall
Wintershall Akteingesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award (December 8, 2008).

Yukos
Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Award (July 18, 2014).

Yukos Expert
Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, Expert Opinion of Professor Rudolf Dolzer (October 20, 2015).

INTERNATIONAL AND DOMESTIC COURT CASES

Air Service Agreement
Case concerning the Air Service Agreement of 27 March 1946 (United States of America v. France), Decision (December 9, 1978).

Barcelona Traction
Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), ICJ, Judgement (February 5, 1970).

Corfu Channel
The Corfu Channel Case (United Kingdom v. Albania), ICJ,
Merits, Judgment (April 9, 1949).

**Flegenheimer**  
*Flegenheimer case, (Italy v. The United States of America)*,  

**German Interests**  
*Case concerning certain German interests in Polish Upper Silesia*,  
PCIJ, Judgement (August 25, 1925).

**James and Others**  
*James and Others v. United Kingdom*, European Court of Human Rights, Judgment (February 21, 1986).

**Katangese v. Zaire**  

**Namibia**  

**Nicaragua**  
*Case Concerning the Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. The United States of America)*,  
ICJ, Judgement (June 27, 1986).

**Nottebohm**  

**Palestine**  
*Legal Consequences of the construction of a wall in the occupied palestinian territory*, ICJ, Advisory Opinion (July 9, 2004).

**Quebec**  
*Reference Re Secession of Quebec*, Supreme Court of Canada,  
Case No. 25506 (August 20, 1998).

**Soleimany**  

**Sporrong**  
*Sporrong and Lönroth v Sweden*, ECHR, Judgement (September, 23, 1982).

**Sudan**  

**Westacre**  
*Westacre Investments Inc. v. Jugoimport-SDPR Holding Co Ltd*,  
Court of Appeal, Civil Division (May 12, 1999).

**TREATIES**
<table>
<thead>
<tr>
<th>Description</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>UN Charter</td>
<td>Charter of the United Nations (June 26, 1945).</td>
</tr>
<tr>
<td>MISCELLANEOUS</td>
<td></td>
</tr>
<tr>
<td>Canada Measures Russia</td>
<td>Special Economic Measures against Russia, Regulations (2014).</td>
</tr>
<tr>
<td>Hague Convention</td>
<td>Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (October 18, 1907).</td>
</tr>
<tr>
<td>ILA Resolution</td>
<td>International Law Association, Resolution No. 1/2006 (June 4-8, 2006).</td>
</tr>
</tbody>
</table>
| ILC Com. MFN                                    | International Law Commission, Draft Articles on Most-Favored-
<table>
<thead>
<tr>
<th>Document Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>US EO South Sudan</td>
<td>United States Executive Order 13664, Sanctions Against Persons Contributing to the Conflict in South Sudan (2015).</td>
</tr>
</tbody>
</table>
LIST OF ABBREVIATIONS

¶/¶¶ Paragraph(s)
Art(s). Article(s)
BIT Bilateral Investment Treaty
CA Citizenship Act
Eastasia BIT Oceania-Eastasia Bilateral Investment Treaty
EO Executive Order on 1 May, 2014 on Blocking Property of Persons Contributing to the Situation in the Republic of Eastasia
EU European Union
Euroasia BIT Oceania-Euroasia Bilateral Investment Treaty
Facts Statement of Uncontested Facts
ICC International Chamber of Commerce
ICC Court Letter Letter from the Counsel Secretariat of the ICC
ICC Rules International Chamber of Commerce Arbitration Rules 2012
ICJ International Court of Justice
ICSID International Center for Settlement of Investment Disputes
IEEPA International Emergency Economic Powers Act
IIA International Investment Agreement
ILC International Law Commission
MFN Most Favored Nations
NEA National Environment Authority
NPM Non-Precluded Measures
p/pp. Page(s)
PCIJ Permanent Court of International Justice
PO2 Procedural Order No.2
PO3 Procedural Order No.3
Request Request for Arbitration
Response Answer to the Request for Arbitration
UNCITRAL United Nations Commission on International Trade Law
UNSC United Nations Security Council
US United States
VCLT Vienna Convention on the Law of Treaties

xvii
STATEMENT OF FACTS

1. Peter Explosive (Claimant) is a national of the Republic of Eastasia (Eastasia) and a resident of Fairyland, who has invested in the arms industry in the Republic of Oceania (Respondent).¹ For almost a century, Fairyland has been a province of Eastasia, internationally recognized via the Peace Treaty of 1918.² However, in August 2013 the local authorities in Fairyland decided to hold a referendum in order to leave Eastasia and become a part of the Republic of Euroasia (Euroasia),³ contrary to the Eastasian Constitution that does not contain a relevant provision.⁴

2. The referendum was held on November 1, 2013⁵ and its result was in favour of leaving Eastasia and reuniting with Euroasia.⁶ The Eastasian authorities rushed to condemn this outcome.⁷ However, unimpressed by Eastasia’s condemnation, Euroasian armed forces audaciously invaded Fairyland on March 1, 2014.⁸

3. This decision was preceded by the letter sent by the local authorities of Fairyland asking for intervention on January 23, 2014, while it was not a secret that Euroasia has always been advocating for Fairyland’s reunification.⁹ As if this was not enough, on March 23, 2014 Euroasia declared Fairyland as part of its own territory, followed by Eastasia’s proclamation of the illegality of the annexation on March 28, 2014.¹⁰

4. What is more, Euroasia amended its Citizenship Act (CA) on the exact day of the unlawful invasion in Fairyland, on March 1, 2014, allowing all residents of Fairyland to become Euroasian citizens.¹¹ Indeed, on March 23, 2014 Claimant was recognized as a Euroasian national,¹² after rather humorously attempting to denounce his Eastasian nationality via email on March 2, 2014.¹³

¹ Facts, ¶2.
² PO3, ¶9.
³ Facts, ¶14.
⁴ PO2, ¶2.
⁵ PO2, ¶2.
⁶ PO3, ¶7.
⁷ Facts, ¶14.
⁸ Facts, ¶14.
⁹ Facts, ¶14; PO2, ¶3.
¹⁰ Facts, ¶14.
¹¹ PO2, ¶4.
¹² PO2, ¶4.
¹³ PO3, ¶2.
5. Oceania could not have remained idle. Rather, in response to Euroasia’s illegal actions, it issued an Executive Order (EO) on May 1, 2014. The EO restricted all persons and entities in strategic sectors of the Oceanian economy that could potentially contribute to the situation in Fairyland. This practice was followed by other States as well, which also imposed sanctions, denouncing the annexation and exercising pressure on Euroasia.

6. As regards Claimant’s investment activities in Oceania, in February 1998 he acquired the shares of a deteriorating arms company in the territory of Oceania, by the name Rocket Bombs Ltd. (Rocket Bombs). The company had lost its environmental licence in November 1997, since it did not meet the criteria set forth in the 1996 Environment Act.

7. However, this did not stop Claimant from pursuing his objectives in unconventional, or even borderline illegal, ways. He managed to get a private meeting with the President of the National Environment Authority (NEA) in July 1998, so as to expedite the re-issuance of a license. Although not adhering to the law provisions and not going through the designated process of verifications and on-site visits, Claimant secured the coveted license in less that 30 days, on July 23, 1998. In fact, it was not until January 1, 2014 that Claimant complied with the law.


9. On February 1, 2015, the NEA President and other officials were convicted for receiving bribes in return for the issuance of licenses. Claimant found himself under investigation as well, given the suspicious circumstances under which he acquired his license and criminal proceedings.

14 Facts, ¶16.
15 Facts, ¶16.
16 PO3, ¶11.
17 Facts, ¶2.
18 Facts, ¶3.
19 Facts, ¶¶2,4.
20 Facts, ¶6.
21 PO2, ¶1; PO3, ¶1.
22 Facts, ¶6.
23 Facts, ¶13.
24 Facts, ¶9.
25 Facts, ¶15.
26 Facts, ¶19.
against him were officially commenced on **June 23, 2015**. Not surprisingly, the NEA President is now willing to testify against him, corroborating the General Prosecutors case.
SUMMARY OF ARGUMENT

10. Respondent respectfully contests the Tribunal’s jurisdiction, since, first and foremost, Claimant is not an investor under the provisions of the Euroasia BIT. Second, Claimant failed to abide by the mandatory pre-arbitral steps set forth in Art.9 of the Euroasia BIT, and third, he unsubstantially attempts to activate the MFN provision of the Euroasia BIT in order to make the leap to the dispute settlement provision of the Eastasia BIT. Fourthly, and in the unlikely event that the Tribunal finds jurisdiction, it should not exercise it due to Claimant’s unclean hands. (Part One)

11. In any event, if this Tribunal were to assume and exercise jurisdiction, Respondent asserts that its measures were not expropriatory, but rather a manifestation of Oceania’s regulatory power, observing the State’s public policy objectives, due process, as well as the principles of non-discrimination and proportionality. What is more, the EO served Oceania’s obligations as regards international peace and security, being a countermeasure in response to Euroasia’s unlawful conduct. (Part Two)

12. Finally, if the Tribunal were to accept Claimant’s unmeritorious allegations, the compensation due must be substantially diminished, due to Claimant’s contributory fault, given that it was the investor’s own negligence that led to his damage. (Part Three)
ARGUMENTS

PART ONE: JURISDICTION AND ADMISSIONIBILITY

13. Oceania, the Respondent in the present matter, respectfully submits that this Tribunal lacks, and in any event should not exercise, jurisdiction, contrary to the misplaced and unmeritorious assertions of Claimant, Mr. Explosive. In particular, Claimant is not a protected investor under Art.1(2) Euroasia BIT, since he is not a Euroasian national (I); and even if the Euroasia BIT were somehow to be found applicable, this Tribunal would still lack jurisdiction, since pursuant to Art.9 of the respective BIT, Claimant is restricted from directly resorting to ICC arbitration (II). Moreover, Claimant may not invoke Art.8 Eastasia BIT by virtue of the MFN clause of the Euroasia BIT (III); and in any event, the claims presented are inadmissible since Claimant’s case is tainted with ‘unclean hands’ (IV).

I. CLAIMANT IS NOT AN INVESTOR PURSUANT TO ART.1(2) EUROASIA BIT

14. Oceania asserts that Claimant does not satisfy the nationality requirement of Art.1(2) Euroasia BIT. This Tribunal should remain unimpressed by Claimant’s nationality ‘labelling’ solely based on a Euroasian identity card and passport, since these alone are ostensibly insufficient grounds for the establishment of this Tribunal’s *ratione personae* jurisdiction;

“[f]or, if everything were to depend on characterisations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the compétence de la compétence…”

15. It is perhaps mindful and cognizant of considerable jurisdictional issues in the present claim, that the ICC Secretariat, resorted to the, otherwise long-abandoned *prima facie* procedure before the ICC Court for the continuance of the proceedings, instead of referring them directly to this Tribunal, as it was actually entitled to pursuant to Art.6(3) ICC Rules. *Ergo*, and despite the ICC Court’s *prima facie* satisfaction that a binding arbitration agreement between the parties may exist here, Respondent submits that this Tribunal is indeed vested with the exclusive competence to ascertain its own jurisdiction, according to Art.6(3) ICC Rules, furthermore enjoying a wide discretion concerning the weight given to any evidence presented pursuant to Art.19 ICC Rules. Moreover, the International Law Association (ILA) Committee on International Commercial Arbitration in its *Interim Report On Public Policy as A Bar To Enforcement of International Arbitral Awards* succinctly described “transnational public policy”

29 PO2, ¶4.
30 *Pan American*, ¶50.
31 ICC Commentary I, p.8,9.
33 ICC Court Letter, p.24.
34 ICC Commentary II, p.271(fn.207).
or “truly international public policy” as a principle of universal application in international arbitration,

“comprising fundamental rules of natural law, principles of universal justice, jus cogens in public international law, and the general principles of morality accepted by what are referred to as “civilised nations.” 35

16. Hence, this Tribunal’s compétence-compétence regarding Claimant’s standing is in no way circumscribed by the mere existence of a Euroasian identity card and passport;36 rather, this Tribunal should consider transnational public policy when deciding its ratione personae jurisdiction.

17. In this vein, Respondent will establish that the determination of Claimant’s nationality requires this Tribunal’s consideration over Fairyland’s illegal annexation (A), since the Euroasian nationality was conferred to Claimant in violation of jus cogens norms and transnational public policy thus, preventing its international recognition (B).

A. The Tribunal can and should consider Fairyland’s illegal annexation in determining its ratione personae jurisdiction

18. In stark contrast with other cases, such as the Soufraki37 and Siag,38 where nationality disputes could be settled exclusively under the domestic law, in the present case Art.1(2) Euroasia BIT is incapable of shedding light over Claimant’s nationality. According to Oppenheim, an international adjudicative body cannot turn a blind eye to the voidness of a nationality, when it is conferred in violation of international law.39 Instead, it has the power –and it is expected to exercise it- to investigate the nationality invoked for international purposes.40

19. In the present case, the Tribunal is called to examine the source and origin of Claimant’s nationality, namely the amendment and the implementation of the Euroasian CA, in light of international law. As the PCIJ has eloquently established in German Interests in Polish Upper Silesia:

“The Court is certainly not called upon to interpret the Polish law as such ; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.”41

36 Siag Jurisdiction, ¶153; Flegenheimer, ¶¶25,38; Soufraki Annulment, ¶76.
37 Soufraki, ¶55.
38 Siag Jurisdiction, ¶153.
39 Oppenheim, p.856.
40 Oppenheim, p.855.
41 German Interests, p.19.
20. Therefore, as a matter of incidental jurisdiction, the Tribunal cannot disregard the ICJ’s position in Nottebohm’s naturalization, where it was established that it is impossible to ignore the circumstances under which nationality is conferred. International jurisprudence has reaffirmed that the adjudicative bodies’ *compétence-compétence* empowers them to proceed to all the necessary findings in order to establish -or not- their jurisdiction.

21. In *casu*, as elucidated by Art.9(7) Euroasia BIT, the Tribunal is competent to decide upon the arisen dispute in full accordance with “the applicable principles of international law”. Adding to that, pursuant to Art.1(3) Euroasia BIT the definition of ‘territory’ over which the Contracting Parties exercise their sovereignty is entirely dependent upon the rules of international law.

22. Indeed, a conferral of nationality that severely contradicts international law principles, such as the territorial integrity of States, is generally viewed as an “exorbitant nationality”.

23. Respondent thus, submits that Claimant is solely an Eastasian national (a). Any allegation of dual nationality cannot be upheld, since the CA constituted part of Euroasia’s unlawful interference in the territory of Eastasia (b). Furthermore, Claimant’s exorbitant nationality was conferred to Claimant in the context of Fairyland’s annexation (c).

a. Claimant is -and undisputedly remains- an Eastasian national

24. Above all, Respondent submits that Claimant is -and undisputedly remains- an Eastasian national. In fact, the e-mail that Claimant addressed to the President of the Republic of Eastasia on March 2, 2014 can hardly lead to a valid renunciation of the Eastasian citizenship. Not only

---

42 Amerasinghe, p.119
43 Nottebohm, p.24.
44 Sudan, ¶649.
45 Grant Dispute, p.29.
46 Peters, p.709.
47 Micula, ¶87.
did it lack the required legal form, but in the absence of any acknowledgement by the President of Eastasia, it also never became effective.

25. Moreover, the Eastasian nationality is the only effective nationality, with the meaning attributed to it by international law. Claimant has been residing in Eastasian territory throughout his whole life, while both his parents and grandparents lived and died as Eastasian nationals. However, notwithstanding the fact that Eastasia recognizes dual nationality, Claimant cannot seek to rely on an alleged cumulative existence of the Euroasian nationality. The mere possession of Euroasian travel documents cannot prevail over the international deficiency of Claimant’s nationality.

b. Euroasia’s intervention and passportization policy, prior to the declaration of annexation of Fairyland, constituted nothing but a “creeping annexation” exercise

26. Respondent submits that Claimant’s Euroasian citizenship is tainted with such gross violations of international law norms that it cannot enjoy this Tribunal’s recognition.

27. Conveniently enough, the Fairyland’s unlawful referendum aiming at the dismemberment of Eastasia, was followed by an armed intervention and a naturalization procedure, the combination of which paved the way for the unlawful annexation of the region by Euroasia. Furthermore, it is no coincidence that Euroasia amended its CA so as to allow all residents of Fairyland to become Euroasian nationals on the exact same day of its military intervention in the region, i.e. on March 1, 2014. Correspondingly, it is not at all surprising that Claimant acquired the Euroasian citizenship on March 23, 2014, when Euroasia officially declared Fairyland’s annexation.

28. In light of the above, Respondent asserts that Euroasia’s passportization policy constitutes a prohibited interference with Eastasia’s domestic affairs. Since the referendum never altered Fairyland’s status, which remains an integral part of the Eastasian territory (1), Euroasia’s invasion and the drafting of the amendment are internationally illegal acts performed by an occupying power (2).

48 PO3, ¶2.
49 PO3, ¶2.
50 Nottebohm, p.22.
51 PO2, ¶4.
52 PO3, ¶2.
53 PO2, ¶4.
54 PO2, ¶4; Facts, ¶14.
(1) Fairyland never legally seceded from Eastasia

29. Despite the 100 years under the peaceful Eastasian administration,\(^{55}\) on November 1, 2013 the residents of Fairyland held an unlawful referendum concerning their secession from Eastasia.\(^{56}\) Unlike the referendum recently held in Scotland, to which the central UK government had explicitly consented,\(^{57}\) in casu, Fairyland residents’ decision not only lacked any constitutional foundation,\(^{58}\) but also Eastasia’s approval. In fact, the government of Eastasia specifically declared that the referendum was illegal, producing no legal effects upon the territorial status of the country.\(^{59}\)

30. One cannot disregard that in the absence of the parent State’s consent to the territorial alteration, a region’s unilateral secession is wholly incompatible with the territorial integrity of the State and the inviolability of its boundaries.\(^{60}\) As underlined by the Supreme Court of Canada when examining the secession of Quebec, the right of self-determination is exclusively delimited to its internal aspect,\(^{61}\) thus, not justifying secession. In fact, the only secessionist movements that have been reluctantly recognized, despite their unilateral character, are those related to extreme cases of extensive violations of human rights,\(^{62}\) such as the atrocities in the case of Bangladesh.\(^{63}\)

31. However, the people of Fairyland, had no reason or right to unilaterally secede. Similarly to the Quebecois people,\(^{64}\) there is no indication that they were victims of any human rights violations or any kind of political oppression. On the contrary, Eastasia treated all of its people equally and fairly.\(^{65}\) Even more so, the Eastasian Constitution specifically provided each of its provinces, including Fairyland, with significant autonomy regarding exclusively regional matters.\(^{66}\) Hence, the residents of Fairyland were able to freely pursue their political, economic and social interests, and in that respect, their secessionist movement is not recognizable under international law.

32. Interestingly enough and despite the irrationality of the separatist claims that sought to imperil Eastasia’s sovereignty, Euroasia, as a third State, did not remain neutral. In

---

\(^{55}\) PO3, ¶9.

\(^{56}\) Facts, ¶14; PO2, ¶2.

\(^{57}\) Geiß, p.439.

\(^{58}\) PO2, ¶2.

\(^{59}\) Facts, ¶14.

\(^{60}\) Badinter Commission, Opinion No.2; Katangese v. Zaire, ¶5.

\(^{61}\) Quebec, ¶¶126,130.

\(^{62}\) Quebec, ¶133.

\(^{63}\) Crawford Secession, p.95.

\(^{64}\) Quebec, ¶130.

\(^{65}\) PO3, ¶9.

\(^{66}\) PO2, ¶2.
contradistinction, it was continuously advocating in favor of Fairyland’s secession to the
detriment of Eastasia. According to Professor Crawford, such political support and
couragement towards a secessionist group, constitutes a severe interference with the State’s
domestic affairs. More importantly, due to the equality and community of values between
democratic sovereign States, this kind of interference cannot be excused under the pretext of
self-determination.

(2) The Amendment to the Euroasian CA is an invalid Act issued by an occupying power

33. Moreover, not only did the Euroasian authorities for the longest time methodically
attempt to deprive Eastasia of its sovereignty over Fairyland, but they also invaded Eastasia on
March 1, 2014. Despite the *jus cogens* prohibition of any threat or use of force enshrined in
Art.2(4) of the UN Charter, Euroasia once again disregarded its international obligations.

34. In fact, Euroasia militarily intervened in Fairyland, responding to the local authorities’
request for assistance in favor of their secessionist goals. However, the only competent
authority that can validly invite foreign armed forces in its territory is the central government of
the State concerned. In *casu*, Eastasia never did so. Under similar circumstances, in the case of
Katanga, the Belgian forces that supported the secessionist groups of the region were severely
condemned by the international community. Their presence in the territory of Congo was
considered as a pure violation of both the principle of non-interference and the territorial integrity
of the State.

35. Hence, in the absence of the State’s valid consent, military occupations are undisputedly
unlawful and, thus, no legal title can be invoked by the occupying force. For this reason, as
mandated by the principle *ex injuria ius non oritur*, (“an illegal act cannot give birth to a right in

---

67 PO2, ¶3.
68 Crawford Secession, p.87.
69 Oppenheim, p.125.
70 UNGA Friendly Declaration.
71 Facts, ¶14.
72 Shaw, p.126.
73 Facts, ¶14.
74 Facts, ¶14.
75 *Nicaragua*, ¶246.
76 Congo Resolution 143.
77 Congo Resolution 145.
78 Hague Convention, Art.42; Geneva Convention IV, Art.2.
79 Brownlie, p.11; Naftali/Gross/Michaeli, p.570.
the ICJ in Namibia firmly declared the voidness of the occupant’s acts due to their connection with the illegal regime of occupation.

36. Even more so, acts that aim at the establishment and entrenchment of the occupant’s power, such as naturalization procedures, are internationally unlawful themselves. Such actions are viewed as hostile and tantamount to an infringement of the State’s sovereignty. This chain of invalidity and lack of international effect was reaffirmed by the UNSC in the case of Golan Heights, where it specifically condemned Israel for applying its own laws and regulations on the occupied territory.

37. Therefore, the amendment to Euroasia’s CA on March 1, 2014 can produce no legal effects, since it was enacted by an occupying state, with the sole purpose of extending its personal jurisdiction over the occupied territory of Fairyland.

c. Claimant’s exorbitant Euroasian nationality conferred simultaneously with Fairyland’s illegal annexation cannot be upheld by any international Tribunal

38. Respondent further submits that the bestowal of the Euroasian citizenship to Claimant lacks any international legal standing due to its inseparable connection with Fairyland’s unlawful official annexation.

39. Claimant acquired the Euroasian nationality on March 23, 2014, i.e. on the exact same date that Euroasia declared the already occupied region of Fairyland as part of its territory. This declaration sealed the breach of the 1918 Peace Treaty and the inviolability of the borders as agreed by all the signatories, including Euroasia.

40. However, as firmly established by the ICJ in the Nicaragua and Palestine cases, any acquisition of territory realized in violation of jus cogens norms, cannot be recognized by international law. Accordingly, Eastasia, stricken by Euroasia’s blatantly unlawful conduct, immediately declared the annexation to be illegal and broke-off diplomatic relations. Not surprisingly, half of the international community sided with Eastasia and condemned Fairyland’s
outrageous annexation. In that respect, Euroasia neither acquired sovereign rights over the territory of Fairyland nor had it any legitimate right to confer its nationality to the affected residents.

41. The ILC Articles on Nationality of Natural Persons in case of a Succession of States further consolidate this point. Pursuant to Art.3 ILC, the successor State’s right to massively attribute its nationality, is solely activated when the succession has occurred in conformity with the principles of international law, as enshrined in the UN Charter. Undeniably, the case of Fairyland falls outside the scope of application of all the relevant provisions.

42. In fact, the situation bears strong resemblance with the passportization policy followed by Russia in the context of Crimea’s annexation which undeniably produces no legal international effects. Even in the cases of South Ossetia and Abkhazia, where Russia without annexing the territories, proceeded to a massive passportization of the Georgian nationals, the acquired nationality was not internationally recognized, since it was perceived as part of Russia’s interference with Georgia’s domestic affairs.

43. Similarly, the conferral of the Euroasian citizenship to Claimant is a clear indication of Euroasia’s strategy to ‘weaponize’ its nationality, so as to establish its dominance over the residents of Fairyland. Especially with regard to Claimant, the bestowal of the citizenship was realized within the very short period of less than twenty days during which the region was under the military control of the Euroasian forces.

44. In light of these considerations, Claimant’s alleged nationality cannot be disassociated from the jus cogens norms violations on behalf of Euroasia. Consequently, Respondent requests the Tribunal to abstain from vesting Claimant’s Euroasian nationality with international acceptance and recognition, and deny jurisdiction upon the present dispute.

II. CLAIMANT MANIFESTLY FAILED TO COMPLY WITH THE PRE-ARBITRAL STEPS SET FORTH IN ART.9 EUROASIA BIT

45. Even if the Euroasia BIT were to be found applicable ratione personae, Respondent submits that this Tribunal still lacks jurisdiction ratione voluntatis. More precisely, Respondent will demonstrate that first the dispute settlement clause of Art.9 contains mandatory pre-arbitral
steps that shape its conditioned consent to ICC Arbitration (A) and second that due to Claimant’s noncompliance, Respondent’s arbitration ‘offer’ was essentially rejected (B).

A. The pre-arbitral steps included in Art.9 Euroasia BIT explicitly circumscribe Oceania’s consent to arbitrate

46. This Tribunal’s power to adjudicate upon the present dispute derives solely from the Parties’ explicit consent,\(^96\) as delimited in the dispute settlement clause,\(^97\) i.e. Art.9 Euroasia BIT. On these grounds, Respondent submits that its conditioned consent should be respected by the investor in its entirely.\(^98\)

47. Specifically, Art.9 was clearly drafted so as to create a multi-layered dispute settlement mechanism consisting of three requisite sequential steps; the engagement in amicable consultations, followed by domestic court litigation, while arbitration is indeed considered as the last resort. In light of so many other arbitral tribunals,\(^99\) Daimler underscored this interconnection and aptly stated that the existence of pre-arbitral steps:

“does not provide a menu of dispute settlement options available to disputing parties on an a la carte basis.”\(^100\)

48. This drafting interrelation is clearly mirrored in Art.9 Euroasia BIT, rendering the interpretation suggested by Claimant irreconcilable with the rule enshrined in Art.31(1) of the VCLT. Arbitral tribunals have established that the ordinary meaning of the terms ‘shall’\(^101\) and ‘may’\(^102\) -both introducing the two pre-arbitral steps of Art.9- are not meant to provide for mere formalities. In the same vein, the term ‘may’, introducing domestic litigation, cannot be read in isolation from Art.9(4) Euroasia BIT, which reflects the Parties’ certainty that arbitration proceedings would be initiated solely after the submission of the dispute to the domestic courts.

49. Even more so, in the present case, the compulsory meaning of the terms is further elucidated by their context.\(^103\) The following phrases “if the dispute cannot be settled amicably”\(^104\) and “where, after twenty four months […] the dispute […] has not been resolved”,\(^105\) clearly provide that each step is entirely dependent upon the realization of the previous ones. Accordingly, the Impregilo Tribunal, when examining an almost identical provision,

\(^96\) Douglas, p.74; Schreuer, p.831; D’Agnone, p.363.
\(^97\) UNCTAD Schreuer, p.31.
\(^98\) Douglas, p.360.
\(^99\) Ambiente, ¶589; Abacal, ¶578; ICS, ¶244; Kılıç, ¶6.2.6.
\(^100\) Daimler, ¶182.
\(^101\) Wintershall, ¶119; Philip Morris, ¶140; Daimler, ¶180; ICS, ¶247.
\(^102\) Ambiente, ¶591; Giovanni, ¶306.
\(^103\) VCLT, Art.31(1).
\(^104\) Euroasia BIT, Art.9(2).
\(^105\) Euroasia BIT, Art.9(3).
emphatically held that in case that these imperative requirements are disregarded, the Tribunal’s jurisdiction is inevitably barred.\textsuperscript{106}

50. Besides, had Art.9 Euroasia BIT been interpreted differently, the interpretation would be incompatible with the \textit{effet utile} principle, which finds expression in Art.31 VCLT.\textsuperscript{107} International jurisprudence has applied this principle by giving precedence to the interpretation that enables a provision to produce its full meaning and effect.\textsuperscript{108} Indeed, both the amicable settlement and the domestic litigation would not have been included in a jurisdictional clause if simply meant to be optional.\textsuperscript{109} Detaching them from the imperative realm would equal to the total invalidation of the provision.\textsuperscript{110}

51. Consequently, under the fundamental principle \textit{pacta sunt servanda},\textsuperscript{111} Claimant’s access to international arbitration would have been unhindered only if it had abided by the pre-arbitral steps. This is clearly not the case here.

\textbf{B. Claimant manifestly disregarded these pre-arbitral steps, and hence no standing offer to arbitrate exists}

52. In corroboration with the aforementioned and according to the view unequivocally supported by academia, when the investor overrides the pre-conditions of the dispute settlement clause, the Respondent State’s provided consent is ‘imperfect’.\textsuperscript{112} Erroneously, Claimant requests this Tribunal to find jurisdiction, although he neither effectively attempted to settle the dispute amicably (a), nor did he recourse to the domestic courts of Oceania for a period of 24 months prior to arbitration (b).

\textbf{a. Claimant did not attempt to settle the dispute amicably “to the extent possible”}

53. The amicable settlement stage, provided in Art.9(1) Euroasia BIT, sets an indispensable requirement for the Parties to at least engage in amicable consultations. Although examining a more lenient wording, the \textit{Murphy} Tribunal noticed that:

\textquote{"To determine whether negotiations would succeed or not, the parties must first initiate them."}\textsuperscript{113}

\textsuperscript{106} \textit{Impregilo}, ¶94.
\textsuperscript{107} Dörr/Schmalenbach, pp.539-540.
\textsuperscript{108} \textit{CEMEX}, ¶114; \textit{Ambiente}, ¶593; \textit{Corfu Channel}, p.24.
\textsuperscript{109} \textit{Ambiente}, ¶593.
\textsuperscript{110} Hugues, p.474.
\textsuperscript{111} VCLT, Art.26.
\textsuperscript{112} Douglas, p.258; UNCTAD Schreuer, p.30.
\textsuperscript{113} \textit{Murphy}, ¶135.
54. However, in *casu*, negotiations were never initiated since Claimant completely failed to abide by the obligation of “*best efforts*.” The copies of the same letter that he addressed only once on February 23, 2015 to the Oceanian authorities were only typical in nature. Accordingly, in the absence of any sincere willingness to pursue a productive exchange of views towards the resolution of the dispute, Claimant’s notification letters could not have been the starting point for an amicable settlement. In essence, they merely expressed his intention to directly initiate arbitral proceedings, lacking any mention of recourse to the domestic courts of Oceania.

55. Furthermore, the phrase “*to the extent possible*” by no means weakens the binding character of the amicable consultation stage; instead, it creates a duty to use every means available in order to reach an extrajudicial settlement. Be that as it may, the insufficiency of Claimant’s letters is apparent when compared to the multiple attempts of the claimants in the *Generation Ukraine* and *Biwater* cases, where the Tribunals could not but recognize the investors’ repeated mediation and negotiation attempts before several governmental authorities.

b. Claimant unjustifiably did not refer this dispute to the domestic courts of Oceania prior to arbitration

56. Claimant admits that he completely disregarded the domestic litigation rule included in Art.9(2) Euroasia BIT. As the *Philip Morris*, *Loewen* and *Abaclat* Tribunals have acknowledged, the rationale behind the domestic litigation rule is the State’s true concern not to be held internationally responsible for an allegedly unlawful act, before it is given the chance to resolve it domestically. Claimant has, thus, completely deprived Oceania from the fair opportunity to protect its sovereign rights.

57. In that respect, arbitral jurisprudence has consistently denied jurisdiction in cases where the investor has defied its obligation to pursue domestic remedies prior to arbitration. Especially when expropriation claims are under examination, it is the investor’s failure to submit

---

114 Teinver, ¶108; Abaclat Abi-Saab, ¶26.
115 PO3, ¶4.
116 Amto, ¶57.
117 Request, p.4.
118 Euroasia BIT, Art.9(1).
119 Ambiente, ¶¶578,579.
120 Ambiente, ¶580.
121 *Generation Ukraine*, ¶14.4; Biwater, ¶340.
122 *Philip Morris*, ¶137; Abaclat, ¶581; Loewen, ¶156.
123 Daimler, ¶194; ICS, ¶¶247,251; Wintershall, ¶118.
the dispute to the domestic courts that essentially excludes any possibility of receiving just compensation.\textsuperscript{124} In the words of the \textit{Generation Ukraine} Tribunal:

\begin{quote}
“the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable - not necessarily exhaustive - effort by the investor to obtain correction.”\textsuperscript{125}
\end{quote}

58. Claimant not having abided by the domestic remedies rule, cannot raise a futility objection in order to dispense with its treaty obligations. Under similar circumstances, numerous tribunals, including the most recent in the \textit{İçkale} case,\textsuperscript{126} have firmly stated that in the absence of express words in the treaty text having that effect, the local remedies rule is not subject to any exception.\textsuperscript{127}

59. In the present case, a supposed futility hardly finds any echo in the text of Art.9 Euroasia BIT. As the \textit{ICS} and \textit{Tulip} Tribunals have emphasized, interpretation should be used exclusively in order to decipher a meaning; not in order to create a new one, so as to cure any inconveniences.\textsuperscript{128} Hence, Claimant’s effort to ‘plant’ such an exception constitutes an unacceptable misuse of the interpretation techniques.

60. However, even if a futility exception were to be implied in Art.9, the present case does not satisfy the high threshold of a “\textit{clear and insuperable}” futility.\textsuperscript{129} According to the findings of the \textit{Apotex} Tribunal, a mere estimation regarding the prospect of success is not sufficient to abrogate the availability of the remedy.\textsuperscript{130}

61. Applying this consideration in the case at hand, Respondent underscores that what has rarely happened\textsuperscript{131} cannot be equated with something that is impossible to happen. Any sensitivity displayed by the Constitutional Tribunal regarding foreign policy considerations, does not vest such measures with immunity; on the contrary, they remain justiciable.\textsuperscript{132} Thus, Claimant was never released from its obligation to at least submit the dispute to the Oceanian Constitutional Tribunal.

62. Similarly, time assessments regarding the length of the procedure to be followed are equally inadequate to render the procedure before the Constitutional Tribunal futile. As the \textit{ICS} and \textit{Philip Morris} Tribunals have firmly stated, the futility exception can hardly be established

\textsuperscript{124} Dae-Jung, p.192.
\textsuperscript{125} \textit{Generation Ukraine}, ¶20.30.
\textsuperscript{126} \textit{İçkale}, ¶260.
\textsuperscript{127} \textit{Impregilo}, ¶89; \textit{Daimler}, ¶183; \textit{ICS}, ¶267.
\textsuperscript{128} \textit{ICS}, ¶267; \textit{Tulip}, p.36(fn90).
\textsuperscript{129} \textit{ST-AD}, ¶364.
\textsuperscript{130} \textit{Apotex}, ¶¶287,288.
\textsuperscript{131} PO3, ¶6.
\textsuperscript{132} PO3, ¶6.
upon the allegation that a decision might not be rendered in the time-frame provided in the
dispute settlement clause. Consequently, Claimant cannot rely on the allegedly lengthy
procedure of the Constitutional Court in order to escape the local remedies provision, and as a
result, this Tribunal inevitably lacks jurisdiction.

III. CLAIMANT MAY NOT INVOKE ART.8 EASTASIA BIT PURSUANT TO THE
EUROASIA BIT’S MFN CLAUSE

63. It is Respondent’s submission that this Tribunal’s adjudicative power cannot be
established by virtue of the MFN clause under Art.3 Euroasia BIT. For this purpose, Respondent
invites this Tribunal to deny jurisdiction since its finding through a substantive standard would
inevitably lead to a ‘vicious circle’ (A), while the MFN clause at hand does not constitute fruitful
ground for establishing jurisdiction (B).

A. MFN clauses can neither establish jurisdiction nor modify jurisdictional requirements

64. Respondent underlines that by their nature, MFN clauses are primarily connected with
substantive rights and privileges, and as such they cannot operate in the jurisdictional field.
This is particularly true since the invocation of an MFN clause -being itself a standard of
protection- presupposes that the Tribunal has jurisdiction to decide on the treatment that
Claimant may receive. Unless the investor has satisfied the threshold of jurisdictional
requirements, an MFN clause cannot be ex ante activated.

65. This approach is accurately illustrated by the ST-AD Tribunal which firmly held that
before examining whether the investor is entitled to a more favorable treatment, the Tribunal
should already be satisfied that it has jurisdiction ratione personae, ratione materiae, ratione
temporis as well as ratione voluntatis. All the abovementioned do not constitute rights that an
investor may enjoy, but rather they are the conditions under which an investor enjoys substantive
rights. More precisely, an investor cannot claim that it has the right to be an investor; either it
is or it is not.

---

133 ICS, ¶269; Philip Morris, ¶137.
134 Telenor, ¶92; Wintershall, ¶168.
135 Douglas, p.344.
136 ICS, ¶288.
137 Sornarajah System, p.49.
138 Douglas MFN, p.97,104.
139 ST-AD, ¶397.
140 Impregilo Stern, ¶47.
141 UN MFN Report, ¶105.
66. Thus, in line with the non-applicability of an MFN clause to provisions relating to the personal, \textsuperscript{142} material \textsuperscript{143} and temporal \textsuperscript{144} jurisdictional premises of a BIT, the \textit{Daimler} Tribunal concluded that the respondent State’s consent to arbitration is a precedent condition for the investor’s access to international arbitration. \textsuperscript{145}

67. In that respect, requesting the Tribunal to alter the jurisdictional requirements by virtue of a substantive provision that it is not yet competent to pronounce, is similar to “\textit{putting the cart before the horse.}” \textsuperscript{146}

\textbf{B. The MFN clause of the Euroasia BIT cannot serve as a basis for this Tribunal’s jurisdiction}

68. Contrary to Claimant’s unduly expansive use of the MFN clause, Respondent submits that Art.3 of the Euroasia BIT has an extremely limited scope. In particular, the MFN clause at hand does not extend to dispute settlement provisions either explicitly (a) or implicitly (b).

\ a. Oceania’s alleged consent to arbitrate by virtue of the MFN clause is far from being “\textit{clear and unambiguous}”

69. Even entertaining the assumption that the MFN clause may extend to procedural matters, arbitral jurisprudence has emphatically held that a State’s consent to arbitration cannot be lightly presumed or taken for granted. \textsuperscript{147} Indicatively, the \textit{Plama} and \textit{Berschader} tribunals have set a rather high threshold of certainty requiring for a “\textit{clear and unambiguous}” intention of the parties to be reflected in the MFN provision. \textsuperscript{148} For instance, the Austria- Kazakhstan BIT, perfectly fits the bill when stating that:

\begin{quote}
\textit{“Each Party shall accord to investors of the other Party and to their investments or returns, treatment no less favourable […] with respect to the […] dispute settlement of their investments or returns.”}\textsuperscript{149}
\end{quote}

70. In contradistinction, Art.3(1) Euroasia BIT does not \textit{expressis verbis} incorporate procedural matters in the scope of the MFN clause. Instead, it merely provides that: the more

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{142} \textit{HICEE}, ¶149.
  \item \textsuperscript{143} \textit{Vanessa Ventures}, ¶133; \textit{Metal-Tech}, ¶145.
  \item \textsuperscript{144} \textit{Tecmed}, ¶74.
  \item \textsuperscript{145} \textit{Daimler}, ¶204.
  \item \textsuperscript{146} \textit{Hochtief Thomas}, ¶81.
  \item \textsuperscript{147} \textit{Wintershall}, ¶160; \textit{ICS}, ¶280; \textit{Telenor}, ¶95; \textit{Daimler}, ¶175.
  \item \textsuperscript{148} \textit{Plama}, ¶200; \textit{Berschader}, ¶172.
  \item \textsuperscript{149} Austria-Kazakhstan BIT, Art.3(3).
\end{itemize}
\end{footnotesize}
favorable treatment accorded to ‘investments’ and to ‘the income and activities related to investments’.\textsuperscript{150}

71. Hence, it can neither be viewed as an offer to arbitrate, nor can it substitute Respondent’s delimited agreement to international arbitration. This view is widely adopted by arbitral tribunals,\textsuperscript{151} such as the \textit{Kiliç}\textsuperscript{152} and \textit{Wintershall},\textsuperscript{153} which have strongly opposed to the displacement of a State’s conditioned consent and the creation of jurisdiction where none exists. Such practice would ultimately result in a State being obliged to arbitrate,\textsuperscript{154} which lies in complete contradiction with the principle of deliberate consent.\textsuperscript{155}

72. Furthermore, one should never forget that arbitral tribunals,\textsuperscript{156} such as the \textit{Maffezini}\textsuperscript{157} and \textit{Siemens},\textsuperscript{158} which have unreasonably over-emphasized the protection of the investor to the detriment of the host-State, have been severely criticized for allowing investors to randomly and unilaterally alter the pre-defined and specifically negotiated procedural rules.\textsuperscript{159} Such a perception would reduce the MFN clause to a self-judging provision, applied solely on the basis of the investor’s convenience.\textsuperscript{160}

\textbf{b. The scope of the MFN clause of the Euroasia BIT is rather limited to substantive matters}

73. Respondent further submits that the MFN clause at hand not only lacks any explicit reference to procedural matters, but what is more, no such intention can be inferred from its interpretation either.\textsuperscript{161} More precisely, Art.3(1) Euroasia BIT which reflects the Contracting Parties’ will, provides that:

\begin{quote}
"Each Contracting Party shall, within its own territory, accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments and to such other investment matters regulated by this Agreement, a treatment that is no less favourable [...]" (emphasis added)
\end{quote}

74. Nevertheless, Claimant quite conveniently disregards the limited scope of the clause, and interprets it as it sees fit. In particular, with sheer indifference towards the \textit{ejusdem generis}
principle\textsuperscript{162} and the purely conventional character of the MFN treatment,\textsuperscript{163} it attempts to avail itself of a more favorable procedural treatment regardless of whether it falls “within the limits of the subject-matter of the clause”.\textsuperscript{164}

75. More precisely, in light of Art.31(1) VCLT, the ordinary meaning of the phrase ‘income and activities related to such investments’ is the benchmark of the substantive character of the MFN clause. Indeed ‘income’ relates to economic matters such as the capital flow and the profits gained, while ‘activities’ generally refer to the day-to-day conduct of business.\textsuperscript{165} The self-evident substantive meaning of the term ‘activities’ was reaffirmed by the Wintershall Tribunal, which held that the term, even in its widest interpretation, still remains irrelevant to dispute settlement mechanisms.\textsuperscript{166}

76. Hence, from a contextual aspect, the phrase ‘such other investment matters’ specifically refers to the ‘income and activities’ of the investment, inevitably limiting its meaning to matters of the same nature as the aforementioned. Indeed, the Maffezini, Suez and Impregilo tribunals that ultimately allowed the expansion of the MFN treatment to procedural matters heavily relied on the wide wording of the MFN, specifically mentioning ‘all other matters’ governed by the treaty.\textsuperscript{167}

77. Besides, had Art.3 Euroasia BIT been interpreted differently, it would lead to an interpretative result that severely contravenes the good faith principle,\textsuperscript{168} as enshrined in Art.31(1) VCLT. More precisely, the Amco Tribunal has underlined that the interpretative process of an MFN clause is ultimately in search of what the parties “reasonably and legitimately envisaged”.\textsuperscript{169} In light of the contemporaneity principle,\textsuperscript{170} as early as 1995, when the Euroasia BIT was concluded,\textsuperscript{171} the distinction between substantive and procedural matters was well-established and the non-applicability of the MFN to procedural matters was uncontroversial.\textsuperscript{172} Indeed, it was not until the issuance of the Maffezini award in 2000 that “the floodgates of this controversy” were opened.\textsuperscript{173} Consequently, the parties could not have possibly intended to

\textsuperscript{162} Wintershall, ¶162; Garanti Koza, ¶54.
\textsuperscript{163} UNCTAD MFN, p.22.
\textsuperscript{164} ILC Com. MFN, Art.10(1).
\textsuperscript{165} UNCTAD MFN, p.32.
\textsuperscript{166} Wintershall, ¶¶170,171.
\textsuperscript{167} Maffezini Jurisdiction, ¶60; Suez, ¶55; Impregilo, ¶99.
\textsuperscript{168} Bjorge, p.69.
\textsuperscript{169} Amco, ¶14.
\textsuperscript{170} Berschader, ¶175; ICS, ¶289.
\textsuperscript{171} Facts, ¶1.
\textsuperscript{172} ICS, ¶290; Daimler, ¶221,224.
\textsuperscript{173} Impregilo Stern, ¶6.
extend the applicability of the MFN to procedural matters, nor could they have considered an explicit exception as necessary.\textsuperscript{174}

78. In light of the the preceding interpretative process, it is Respondent’s unyielding stance that this Tribunal lacks jurisdiction, since the MFN clause of the Euroasia BIT can under no circumstances be interpreted so as to expand its scope of application to procedural matters.

IV. CLAIMANT’S CASE IS TAINTED BY “UNCLEAN HANDS”

79. In the unlikely event that this Tribunal finds jurisdiction, Respondent submits that Claimant’s requests are inadmissible, due to his ‘unclean hands’. The Tribunal cannot disregard the shadowy circumstances under which Claimant procured the environmental licence for Rocket Bombs.\textsuperscript{175} Arbitral jurisprudence\textsuperscript{176} and especially the recent \textit{Copper Mesa} Tribunal, has established that the admissibility of the investor’s requests is directly affected by malfeasances after the acquisition of the investment.\textsuperscript{177}

80. Therefore, Respondent will establish that not only did Claimant breach the clean hands clause of the Eastasia BIT (A), but it has also violated international public policy (B). For this reason, the evidence brought before this Tribunal suffices to deprive Claimant of his protection (C). In any event, the Tribunal should suspend the arbitral proceedings until Oceania’s criminal courts reach a final decision (D).

A. Claimant’s investment is not protected in light of the ‘clean hands’ clause of Art.1(1) Eastasia BIT

81. It is Respondent’s submission that since the dispute settlement clause is part of a composite system of interdependent provisions specifically negotiated in a ‘uniform scheme’,\textsuperscript{178} by borrowing it, Claimant also imports the conditions of its application, as prescribed under Art.1(1) Eastasia BIT. Viewing the dispute resolution mechanism in isolation would severely disrupt the \textit{quid-pro-quo rationale} adopted by the Contracting Parties.\textsuperscript{179}

82. By arguing otherwise, Claimant conveniently disregards the purpose of the MFN clause, which is to provide its beneficiaries with ‘no less favourable’ rather than ‘more favourable’

\textsuperscript{174} \textit{ICS}, \S\S 313.
\textsuperscript{175} Facts, \S 6.
\textsuperscript{176} \textit{Al Warraq}, \S 646; \textit{Fraport I}, \S 345.
\textsuperscript{177} \textit{Copper Mesa}, \S 5.62.
\textsuperscript{178} Kinnear, pp.46,47.
\textsuperscript{179} Shams, pp.221,222.
treatment.\footnote{Euroasia BIT, Art.3(1).} Hence, Claimant cannot acquire access to international arbitration unrestricted by both the pre-arbitral steps of the Euroasia BIT and the clean hands clause of the Eastasia BIT.

83. Similarly, the \textit{Hochtief} Tribunal held that the investor cannot use the MFN clause in order to avail himself of a protection “\textit{to which no State’s nationals would be entitled}”;\footnote{\textit{Hochtief}, ¶98.} the opposite would result to the so-called ‘\textit{Frankenstein}’ treaty which comprises of different benefits extracted from different BITs, ending up a mere takeoff of the basic treaty.\footnote{Bjorklund, p.179.}

84. Even if there was no such explicit reference, Respondent submits that Claimant’s requests would still be inadmissible due to the “clean hands” doctrine, which qualifies as a general principle of international law according to Professors Dolzer and Kreindler.\footnote{Yukos Expert, ¶309; Kreindler, p.393.} In the same vein, arbitral jurisprudence,\footnote{Plama Award, ¶139; Fraport II, ¶328.} reaffirms this position, while the recent award in \textit{Rusoro} firmly declares that “\textit{claimants with “dirty hands” have no standing in investment arbitration}”.\footnote{\textit{Rusoro}, ¶492.}

85. Consequently, either under the legality requirement of Art.1(1) Eastasia BIT or under the clean hands doctrine as a general principle of law, the legality of Claimant’s conduct must be examined.

\textbf{B. Claimant obtained his ‘expedited’ environmental license in a blatant violation of Oceania’s domestic law and transnational public policy}

86. Observing the timeline of Claimant’s actions, one can only wonder how a company meeting none of the conditions of the Environment Act 1996\footnote{PO2, ¶1.} was legitimized to operate. After a suspicious private meeting with the -now convicted of accepting bribes-\footnote{Facts, ¶19.} President of the NEA in July 1998,\footnote{Facts, ¶6.} Claimant artfully managed to ensure the coveted environmental license on July 23, 1998.\footnote{Facts, ¶6.} Such a rapid issuance cannot but reiterate bribery suspicions over the meeting in the exact same way that the Tribunal in the ICC case \textit{No.3916} considered the fast conclusion of a contract as valid evidence of bribery.\footnote{\textit{ICC 3916}, ¶509.}
87. Claimant somehow managed to bypass the issuance process. Not only did he not adjust the production line to the environmental requirements and provide the NEA with the necessary evidence, but also no site visit and no subsequent verification of compliance has ever been issued. In fact, despite Oceania’s examination system that provided random and unexpected visits by the NEA for the affirmation of the compliance to the prerequisites, Claimant’s production line has never been examined throughout its 15-year operation.

88. In essence, it is highly improbable that Claimant’s charisma alone could produce such an outcome for Rocket Bombs. Given that not only the President of the NEA, but multiple officials were convicted during the corruption scandal of 2013, probabilities indicate and reality verifies that Claimant bribed his way through the system via the necessary monetary gratification. The same conclusion can also be drawn in light of the “balancing of probabilities” test as applied by the Rompetrol Tribunal.

89. On May 5, 2015 the General Prosecutor’s investigations focused on Claimant and eventually, on June 23, 2015, criminal proceedings were initiated against him. Furthermore, Claimant is far from being in the clear, since the former President of the NEA is willing to testify against him. Claimant’s involvement can only be reaffirmed considering that the President qualifies as an ‘insider’ to the scandal and his testimony as highly ironclad. Contrary to the findings of Oostergetel, where corruption allegations were rejected in lack of a sufficient nexus between the charges and the Slovak courts’ corrupt system, in casu a relevant connection is present and compelling.

90. Given the above, the role of Claimant’s illegality for the operation of his business gives rise to corruption issues, which are contrary to international public policy. Indeed, it is not just Oceania that condemns corruption and takes active steps to abolish it, but rather the international community as a whole. The necessity to confront corruption is exemplified further by the UN Convention against Corruption, to which -among others- Eastasia, Euroasia and Oceania are signatories.

192 PO3, ¶1.
193 Facts, ¶19.
194 Rompetrol, ¶183.
195 Facts, ¶19.
196 PO2, ¶5.
197 Oostergetel, ¶303.
198 WDF, ¶157; Inceysa, ¶252; Niko, ¶433.
199 PO3, ¶3.
C. The Tribunal cannot turn a blind eye to Claimant’s “unclean hands” and should rely on the relevant available evidence before it, even if circumstantial

91. Arbitral jurisprudence has underlined that corruption, and especially bribery, repudiates international public policy, while any award not taking into account such a malfeasance, raises issues of enforecability. One should not disregard that, an award that cannot be enforced, is according to the blunt phrasing of Professor Kreindler, “not worth the paper it is written on.”

92. In knowledge of the above, this Tribunal ought to take into consideration Claimant’s conduct. Pursuant to Art.34(2(b)(ii)) UNCITRAL Arbitration Law applicable to the seat of the arbitration, Braluft, Silverige, an award contradicting transnational public policy is likely to be set aside and probably unenforceable. Hence, this Tribunal’s explicit duty to act in a manner that safeguards the enforceability of any possible award, pursuant to Art.41 ICC Rules, renders the examination of Claimant’s conduct a matter of crucial importance.

93. In this regard, especially due to the existence of a veil of secrecy that renders corrupt behaviors “notoriously difficult” to prove, recent jurisprudence has set a rather low threshold for the establishment of corruption, accepting circumstantial evidence as sufficient grounds. For instance, the Metal-tech Tribunal, acknowledging this difficulty, found bribery based on the unreasonably high fees paid to consultants with no technical expertise, but rather with connections to the Uzbek government.

94. It is apparent that Claimant’s conduct is wrongful, contradicting any notion of clean hands beyond recall. Inescapably, thus, the Tribunal must acknowledge that the acquisition of the license by the investor is a product of illegality, depriving himself of BIT protection and his claims of their alleged admissibility.

D. At the least, the Tribunal should stay the present arbitration pending the outcome of the criminal proceedings against Claimant for bribery

95. In the unlikely event that this Tribunal deems the evidence before it insufficient, Respondent asks for the stay of proceedings until Oceania’s criminal courts reach a final decision, regarding Claimant’s conduct. In fact, it is upon the discretion of this Tribunal to find

---

200 WDF, ¶157; Inceysa, ¶252.
201 Soleimany, ¶¶29, 43; Westacre, ¶14.
202 Kreindler, p.435.
203 PO1, ¶1.
204 Fiortier, p.375.
205 Oostergetel, ¶303; Metal-Tech, ¶243; Rompetrol, ¶178.
206 Metal-Tech, ¶243.
207 Metal-Tech, ¶299.
that the current proceedings ought to be suspended, following Recommendation 6 of ILA Resolution 1/2006, so as to avoid conflicting decisions.

96. In fact, all prerequisites of ILA Recommendation 6\textsuperscript{208} are met in the case at hand. More specifically, there is no legal impediment for this Tribunal to stay the proceedings, while the enforceability of the arbitral award is dependent on the outcome of the criminal trial.

97. On the same wavelength, no material prejudice towards Claimant can be asserted. On the contrary, the reason for staying the proceedings is to avoid the potentiality of non-recognition or non-enforcement of an award,\textsuperscript{209} in the event that the Oceanian criminal courts find Claimant guilty for bribery.

98. Hence, a temporary stay of proceedings, if not a dismissal of the case, should be regarded as the bare minimum for preserving the future enforceability of this Tribunal’s award.

\textsuperscript{208} ILA Resolution.

\textsuperscript{209} ILA Report on Public Policy, pp.6-7.
PART TWO: MERITS

V. RESPONDENT DID NOT EXPROPRIATE CLAIMANT’S INVESTMENT

99. Even if this Tribunal were to accept that Claimant made a protected investment under the Euroasia BIT, Respondent submits that it has consistently upheld its international obligations. Claimant’s unmeritorious allegations concerning the violation of Art.4 Euroasia BIT by Oceania, should leave this Tribunal utterly unconvinced, since they lack both factual and legal basis.

100. Considering that the BIT regime promotes and protects the beneficial economic cooperation between sovereign States, it cannot be viewed in isolation from any political, social, or economic changes.\(^\text{210}\) Evidence of this perception is also found in the Preamble of the Euroasia BIT, where the Parties explicitly provide that the investment objectives may only be pursued “\textit{in a manner consistent with the protection of health, safety and the environment}”, which are amongst the fundamental regulatory interests of any given State.\(^\text{211}\)

101. On these grounds, Respondent submits that its abidance by its obligation not to recognize or assist unlawful situations, namely the violation of Eastasia’s sovereignty,\(^\text{212}\) cannot be ‘tantamount to expropriation’.\(^\text{213}\) Hence, it is Respondent’s contention that the EO was implemented in absolute accordance with Oceania’s police powers (A). Be that as it may, Respondent adopted the EO to fulfill its obligations with respect to international peace and security (B). In any event, Oceania’s conduct is a justified exercise of its right to recourse to countermeasures (C).

A. The imposition of the EO falls under Oceania’s regulator powers

102. On May 1, 2014, Oceania issued the disputed EO in response to Euroasia’s policies that threatened Eastasia’s security, stability and sovereignty.\(^\text{214}\) Despite Claimant’s groundless accusations, Respondent ensured that the basic principles of fair regulation, as established by arbitral jurisprudence,\(^\text{215}\) would not be infringed. In specific, the EO was not only serving Oceania’s public policy objectives (a), but it was also issued with respect to due process of law (b), lacking any discrimination incentives (c), and adhering to the principle of proportionality (d).

\(^{210}\) Feldman, ¶112.
\(^{211}\) Titi, p.116.
\(^{212}\) Facts, ¶14.
\(^{213}\) Euroasia BIT, Art.4(1).
\(^{214}\) EO, Preamble.
\(^{215}\) Methanex, Part IV(D)¶7; TECO, ¶491.
a. The imposition of sanctions served Oceania’s public policy objectives

103. Respondent submits that when it comes to public policy matters, States can regulate in the interest of public welfare,\textsuperscript{216} without being held responsible for any inconvenience created for private entities,\textsuperscript{217} a conclusion consistently upheld by arbitral jurisprudence.\textsuperscript{218} What is more, pursuant to the \textit{James and Others} case, when legislating, the State has a wide margin of appreciation, being principally capable to determine its own public policy interests.\textsuperscript{219}

104. In fact, foreign policy matters are not the exception, but rather one of the most essential state interests.\textsuperscript{220} In \textit{casu}, Respondent, being an active member of the international community, could not have remained unaffected by the unlawful situation in Fairyland. It is true that when States fail to abide by their \textit{erga omnes} obligations, such as the prohibition of use of force, the international legal order is severely destabilized as a whole.\textsuperscript{221} In that respect, Oceania, along with half of the international community, immediately and decisively condemned Euroasia’s severe aberration from peremptory norms.\textsuperscript{222}

105. Unquestionably, the imposition of the EO serves a legitimate public purpose of Oceania, since the State was aiming at protecting both the security of its people, as well as the international balance, thus precipitating any relevant shaky point brought by Claimant.

b. Respondent heeded due process

106. Despite the fact that the situation in Fairyland required an immediate confrontation, the EO was issued in adherence to all due process requirements. As the AIG Tribunal highlighted, due process is followed when the adoption of a measure takes place in accordance to the State’s domestic legislation.\textsuperscript{223}

107. In \textit{casu}, Oceania, in 1992 adopted the IEEPA, which vests the President of the Republic with the competence to declare the existence of an extraordinary and unusual threat to international or national security, as well as to impose measures to combat it.\textsuperscript{224} It was precisely in accordance with the said Act that the Oceanian President imposed the disputed EO, evidently abiding by the domestic legislation of the State.

\textsuperscript{216} Dolzer/Schreuer, p.120.
\textsuperscript{217} Montt, p.7.
\textsuperscript{218} Feldman, ¶103; Telenor, ¶64; S.D. Myers, ¶281; Saluka, ¶262; Continental, ¶276.
\textsuperscript{219} James and Others, ¶46.
\textsuperscript{220} Nicaragua, ¶205.
\textsuperscript{221} Barcelona Traction, ¶33.
\textsuperscript{222} Facts, ¶16.
\textsuperscript{223} AIG, ¶10.5.1.
\textsuperscript{224} PO2, ¶7.
108. Additionally, as further held by arbitral jurisprudence, due process is undeniably satisfied when the host-State provides the investor with an opportunity to contest the measures in question. Especially in the case of sanctions, due process is respected, only in the event that the body reviewing them is the one vested with the competence to repeal them.

109. In fact, Oceania granted persons and entities affected by the imposed measures with the chance to oppose them. In particular, the Oceanian Code of Administrative Procedure provides for reconsideration proceedings before the issuing authority for every administrative decision. In the case of the EO, the issuing authority is the President of Oceania, who obviously and unequivocally possesses the necessary decisive power.

110. Additionally, the affected entities could also challenge the EO on a judicial level; the Oceanian Constitutional Tribunal is competent to decide upon the constitutionality of the Oceanian measures. Hence, the investor cannot complain about a lack of his chance to voice its discomfort. Any claim for non-observance of due process raised by the Claimant, is utterly unmeritorious.

**c. The EO was issued in a non-discriminatory manner**

111. Despite Respondent’s prudence as regards the EO, Claimant somehow erroneously alleges that the imposition of the measure happened in a discriminatory manner. However, this is far from accurate, since they were enacted and implemented in full accordance with the non-discrimination principle, while Claimant fails to provide evidence indicating the opposite, as he should.

112. Respondent would like to draw the Tribunal’s attention to the findings of the *Crystallex* Tribunal, which concluded that even the officials’ derogatory comments regarding the targeting of ‘transnational’ companies by the State’s legislation did not suffice as evidence establishing discrimination. Even more so, in the present case, the sole criterion for the application of the sanctions is that the affected entity or person has ties to “property and interests in property that are in the Republic of Oceania”. Thus, the EO is obviously divorced from any nationality-based considerations.

---

225 ADC, ¶435; Kardassopoulos, ¶¶395,396,404.
226 UNCTAD Expropriation, p.40; Newcombe/Paradell, pp.375,376.
227 Grant Dispute, p.71.
228 PO3, ¶10.
229 PO3, ¶6.
230 Crystallex, ¶715.
231 Crystallex, ¶715.
232 EO, ¶1(a).
113. Furthermore, the different treatment accorded to the chosen sectors cannot be deemed expropriatory or unreasonable, when economic or security policies are at stake.\textsuperscript{233} The GAMI Tribunal embraced this position by stating that the host-State did not act in a discriminatory manner when dealing with the sugar industry, since it served a “legitimate goal” in the context of its national economy.\textsuperscript{234} This perception has been consistently upheld in recent jurisprudence, such as the\textit{ El Paso} and\textit{ Metalpar}, where it was affirmed that, in pursuit of its public interests, the host-State may provide different treatment to certain sectors in light of their inherent characteristics.\textsuperscript{235}

114. In\textit{ casu}, the different treatment served a legitimate governmental policy of national security and, as such, it is by no means unreasonable. The EO aimed at delimiting the transfer of financial and material resources related to warfare from Oceania to Euroasia.\textsuperscript{236} Evidently, the measures relied on the single condition of contribution to the Euroasian economy,\textsuperscript{237} since the sectors affected, namely\textit{ inter alia} energy, financial services, metals, mining and arms,\textsuperscript{238} were crucial for the perpetuation of the illegal occupation of Fairyland.\textsuperscript{239}

115. Claimant was one of those entities, and -by default- could not but be affected, regardless of whether it was the only operating industry in one of the arms sectors.\textsuperscript{240} Consequently, Claimant groundlessly invokes a legal mishandling on behalf of Respondent that signifies discrimination, let alone expropriation.

\textbf{d. The measures were proportionate to the aim sought}

116. As far as the impact of the EO is concerned, Respondent submits that the measures imposed on the entities of the said sectors, including Claimant, were not excessive, especially in light of their purpose. As the LG&E Tribunal underlined, one should always pay due regard to “the context within which a measure was adopted and the host State’s purpose”.\textsuperscript{241} In that respect, a measure cannot be deemed expropriatory, if it is necessary to achieve an exigent regulatory purpose.\textsuperscript{242}

\textsuperscript{233} Reinisch Expropriation, p.284; Rusoro, ¶563.
\textsuperscript{234} GAMI, ¶114.
\textsuperscript{235} El Paso, ¶315; Metalpar, ¶161.
\textsuperscript{236} EO, preamble; Facts, ¶16.
\textsuperscript{237} EO, ¶1(a).
\textsuperscript{238} EO, ¶1(a).
\textsuperscript{239} EO, Preamble; Facts, ¶16.
\textsuperscript{240} PO2, ¶6.
\textsuperscript{241} LG&E, ¶194.
\textsuperscript{242} Henckels, pp.252,253.
117. In the present case, the balance must be struck between peace and stability on the one hand and property rights on the other. As aptly stated by Professor Newcombe, property primarily serves social functions and cannot “be used in a way that results in serious harms to public order”. This was precisely Oceania’s rationale. Respondent could simply not risk the promotion of an internationally deviant conduct on behalf of Euroasia. Thus, the effect of the EO on the listed persons and entities was deemed to be inferior to the preservation of the international legal equilibrium.

118. Be that as it may, State practice seems to effectively corroborate Respondent’s decisions. In cases of serious violations of international law, States did not stay inactive. Indicatively, it was Switzerland, the US and the Council of the Arab League that took measures against Libya in response to the violent repression of the civilian population. Correspondingly, in the recent case of Crimea, Russia was sanctioned by several States, due to its ostensibly unlawful military invasion in the Ukrainian territory.

119. The proportionality of the aim sought and the effect of the measures is further illustrated by the degree of the EO’s impression on Rocket Bombs. One should never disregard that Claimant maintains control and access to his investment, elements that did not signal the occurrence of expropriation for the tribunals in Cargill and Fireman’s Fund. In corroboration, the Saluka Tribunal did not consider that the Czech Republic’s forced administration in claimant’s investment qualified as expropriatory, when aiming at the protection of the banking system's stability. This cannot but effectively punctuate the need for a ‘fair balance’ to be achieved between the general welfare and the individual’s position. Indeed, Claimant’s shares did not reach the threshold of a total devaluation, while Rocket Bombs’ assets remain intact and Claimant has an overall use of its investment.

120. To conclude, even the duration of the measures at hand does not qualify as disproportionate to their aim. Arbitral jurisprudence appears to lead the way with the S.D. Myers Tribunal not considering the respondent’s eighteen-month governmental measure as overly
tampering with the investor’s property rights and the LG&E Tribunal determining that even a four-year measure cannot suffice as permanent. Hence, Respondent’s sanctions, being temporary measures that have lasted for only two and a half years, are proportionate to their purpose and not qualifying as expropriatory.

B. The EO fulfills Oceania’s obligations with respect to international peace and security

121. Remembering the findings of the LG&E Tribunal, a State is precluded from any responsibility and liability, when its actions fall within the scope of a Non-Precluded Measures (NPM) clause. Having that in mind, Respondent submits that, in any event, the Euroasia BIT itself grants a window of action to the Contracting Parties for the adoption of measures with regard to their international obligations, precluding the applicability of any substantive BIT obligations.

122. In contrast to other BITs that specifically characterize the measures as ‘necessary’, the lack of this characterization in the wording of the provision at hand further demonstrates that the Contracting Parties enjoy a notably wide margin of appreciation to the States. Consequently, the Contracting Parties’ discretionary power is by far not restricted.

123. More specifically, pursuant to the NPM clause of Art.10 Euroasia BIT, all measures enforced for the maintenance of international peace or security do not count as a violation of the BIT. The specified permissible objective embodied in the clause is what Professor Shaw has illustratively described as being “the heart of the system”, namely international peace or security.

124. Furthermore, the drafting of the NPM reflects the Contracting Parties intention not to restrict the clause’s scope of application to international obligations deriving solely from the UN Charter or the decisions of the UNSC. Indicatively, the NPM clause of the Canada Model BIT explicitly refers to “obligations under the United Nations Charter”. Such provisions are generally viewed as reflecting the need for UN mandate for the applicability of the NPM under examination.

---

253 S.D. Myers, ¶283.
254 LG&E, ¶54,200.
255 LG&E, ¶261.
256 Burke-White/von Staden, p.386.
257 Canada Model BIT, Art.10(4(c)).
259 Shaw, p.6.
260 Canada Model BIT, Art.10(4(c)).
261 Burke-White/von Staden, p.335.
125. However, Art.10 Euroasia BIT does not contain a similar restriction; *au contraire*, the lack of copulative connection between ‘international peace’ and ‘security’ not only departs from the common language used by the UN, but it also broadens the scope of the Parties’ discretion by introducing the additional permissible objective of ‘security’. Evidently, thus, it encompasses unilateral actions pursued beyond the context of the UN.

126. Be that as it may, Respondent’s obligation to safeguard international peace or security derives from Art.41(1) ILC. Pursuant to the said provision, there exists a responsibility of States to co-operate, so as to end serious breaches of peremptory norms, while not obliged to acknowledge internationally unlawful acts. In that regard, Oceania, along with many other countries equally outraged by Euroasia’s actions, imposed sanctions in order to actively condemn the ‘wrongdoer’.

127. Considering that the UNSC’s frequent inability to reach a decision albeit the existence of an undisputed threat to international peace or security, as in the case at hand, it falls on the States to preserve the international system intact through the imposition of unilateral sanctions. An indicative example is the inaction of the UNSC in the case of Syria, where due to the vetoes of Russia and China, the UNSC abstained from taking any positive measures, despite the “bloody crackdown” on Syrian protesters. In this case, the US unilaterally imposed sanctions in an effort to restore the international legal order.

128. In the case at hand, Respondent was confronted with multiple and egregious violations of international peremptory norms, such as the unlawful use of force of March 1, 2014 and the interference with the territorial integrity of Eastasia, as well as the preposterous ‘official declaration’ of annexation of March 28, 2014. Obvious even to the *non-connaissieur*, these actions ostensibly threaten the international peace or the security of States, as well as the legal balance on the inter-State plane. In that regard, Respondent’s sanctions cannot but fall within the scope of application of Art.10 Euroasia BIT, exempting Oceania from any alleged unlawfulness under the BIT.

---

262 UN Charter, Preamble.
263 Titi, p.92.
264 Facts, ¶17.
265 PO3, ¶11.
266 Shaw, p.4.
267 PO2, ¶3.
268 Shaw, p.5.
269 Okhovat, p.18.
270 US EO Ukraine.
271 Facts, ¶14.
C. The EO is a countermeasure in response to Euroasia’s unlawful conduct

129. Respondent further submits that any possible wrongfulness of the EO is precluded, since it constitutes a legitimate exercise of Oceania’s right to recourse to countermeasures,\(^\text{272}\) pursuant to Art.22 ILC. The imposed sanctions intended to put pressure on Euroasia so as to compel it to cease its illegal conduct and comply with its international obligations.\(^\text{273}\) Indeed, Art.22 ILC, read in conjunction with Art.54 and 48(1) ILC, enables any third State to take measures in retaliation to any violation of *erga omnes* obligations,\(^\text{274}\) such as an unlawful use of force against the territorial integrity of another State.\(^\text{275}\)

130. As held in the *Air Services* case, countermeasures must satisfy the rule of proportionality, in the sense that we should not only look at the alleged damage of the investors, but also factor in “the importance of the questions of principle arising from the alleged breach”.\(^\text{276}\) This is precisely what happened in the present dispute. Always recognizing the discomfort that the EO may have caused to Claimant, the armed violation of international peace or security qualifies as a priority and had to be dealt with *via* a strict and pressure-generating economic regulation.

131. Furthermore, the fact that countermeasures have an inter-State effect cannot give rise to claims by investors. Indeed, an individual investor may only invoke the rights that have been accorded to its parent-State, and not enjoy a broader protection. This is what the *ADM* Tribunal accepted, when stating that an investor is not conferred individual or independent substantial rights.\(^\text{277}\) In fact, the investors enjoy only derivative protection by the IIAs, namely the procedural capability to invoke a substantial right, the bearer of which is the State itself. In essence, if the state enjoying the IIA rights has no valid legal claim, the investors that merely “*step in its shoes*”\(^\text{278}\) can only initiate proceedings for an *ab initio* lost cause.

132. In conclusion, Claimant is not only erringly claiming that Respondent’s actions expropriated his investment, but he also audaciously chooses to disregard the existence of an international community and the States’ responsibility to safeguard international peace or security. For all the aforementioned reasons, Respondent invites the Tribunal to dismiss Claimant’s unsubstantiated expropriation claim.

\(^\text{272}\) Response, p.16.
\(^\text{273}\) Response, p.16; EO, Preamble.
\(^\text{274}\) ILC Com. Responsibility, Part II, ¶8.
\(^\text{275}\) Alland, p.1238.
\(^\text{276}\) *Air Services Agreement*, ¶83.
\(^\text{277}\) *ADM*, ¶180.
\(^\text{278}\) Douglas, p.11.
PART THREE: REMEDIES

VI. CLAIMANT CONTRIBUTED TO THE DAMAGE SUFFERED

133. In the remote event that this Tribunal finds that compensation is due, Respondent still submits that Claimant brought upon itself the damage he suffered. The contributory fault, as enshrined in Art.39 ILC, constitutes a general principle of international law, applied and recognized by various legal systems. Pursuant to Art.39 any compensation due is to be reduced when the aggrieved party’s conduct is negligent and causally linked to its injury.

134. Having in mind these considerations, Claimant can by no means be fully compensated and enjoy the fruits of his own wrongdoing, since his conduct was both negligent (A) and led directly to his alleged damage (B).

A. Claimant acted in a negligent way

135. Pursuant to the commentary of Art.39 ILC, negligence consists of actions that demonstrate “a lack of due care” on behalf of the injured party, depending on the special circumstances of each case. In this regard, the special attributes of each sector ought to be taken into account, when considering the due care that an investor shows in its business. In the same wavelength, the Genin Tribunal concluded that the claimants acted “unprofessionally” and “carelessly”, not having taken the necessary precautions required in the banking practice.

136. For this reason, Claimant’s negligence can only be examined with reference to the idiosyncrasy of the arms sector, which constitutes a “uniquely structured market”. Its intense interaction with politics and governments requires increased attention regarding political changes and upturns. Simultaneously, the “close relations” between the contractors and the high degree of lobbying cannot but be taken into account, regarding Claimant’s degree of knowledge of the imminent invasion.

137. The factual premises of the case reaffirm this position. Claimant not only shared a longtime friendship with the Euroasian Minister of Defence, but they had also founded their co-operation in a relation of confidentiality. Indeed, John Defencel had provided Claimant with classified information of the Ministry regarding the expiration of the contract with

279 Shaw, p.98.
282 Genin, ¶345.
283 Gansler, p.9.
284 Anderton Defence, p.525.
286 Facts, ¶8.
Euroasia’s previous arms supplier. This conduct is actually in line with the practice of the arms sector, where the governments create a “revolving door” with their arms suppliers, permitting the exchange of information.

138. Accordingly, the fact that Euroasia invited Claimant to negotiations for the conclusion of a new contract amidst a raging political debate for the intervention after Fairyland's invitation, on 23 January 2014, speaks for itself. One can only conclude that Claimant was not blissfully unaware of the imminent invasion during the negotiations of February 2014, and the subsequent conclusion of the contract, on the eve of the invasion, February 28, 2014.

139. Furthermore, Claimant should have been aware of Oceania's domestic legislation and its effect on his business. In fact, any investor must know the laws of its host-State; given the increased state intervention in the arms sector, this need becomes imperative for an arms producer. Hence, Claimant must have known about the IEEPA, which was profoundly relative to his business. The latter set forth the content and imposition mechanisms of sanctions in response to crucial situations, such as the one that was ante portas in Fairyland.

140. In light of the above, Claimant’s negligence cannot be disputed. Claimant did not demonstrate any concern for his business, as he willfully engaged in a situation, which would apparently lead his business directly into the scope of the upcoming measures. This conduct manifests negligence and constitutes a textbook example of contributory fault, falling under the scope of Art.39 ILC.

B. Claimant’s actions led to his damage

141. Respondent further submits that the causal link required by arbitral jurisprudence for the establishment of a contributory fault could not be more present. In particular, the negligent conduct of the aggrieved party needs it to have “materially and significantly” contributed to its injury.
142. In the same vein, it becomes evident that Claimant contributed to his damage both materially and significantly. Claimant’s conduct was the only cause of its damage, since absent the contract with Euroasia, he would not have been affected by the EO. In contradistinction to Occidental II, where the claimant’s conduct was a piece of a complex causal nexus,298 in the case at hand it is solely Claimant’s act that put his company under the scope of the EO.299

143. Thus, any compensation due to Claimant cannot but be respectively reduced. According to the Anatolie Stati Tribunal, the decisive criterion to determine the investor’s contribution is its role in the crucial events.300 On the same wavelength, MTD underlined that when the claimants fail to safeguard their own interests, they share an equal burden to that of the State.301 This is precisely the reason why it awarded a compensation reduced by 50%.302

144. The same goes for the case at hand; Claimant bears an equal part of responsibility to Respondent. Claimant has manifestly fallen short of his duty to make prudent decisions for his business. In essence, he chose to gamble, putting his investment at stake, by engaging in a situation that would soon erupt, always considering BIT protection as a safety net. However, quoting Maffezini, “Bilateral Investment Treaties are not insurance policies against bad business judgments”.303

145. Hence, Claimant is now confronted with a negative cash-out due to his own irresponsible venture. As a result, Respondent invites the Tribunal to see the facts for what they are, delimit the requested compensation by 50% and abstain from overly burdening a State because of an investor’s greed.

---

298 Occidental II, ¶685.
299 EO, ¶1; Facts, ¶16.
300 Anatolie Stati, ¶1331.
301 MTD Annulment, ¶101.
302 MTD, ¶¶245,246.
303 Maffezini, ¶64.
PRAYER FOR RELIEF

146. Respondent respectfully requests this Tribunal to find that it lacks jurisdiction, since:
(1) Claimant is not a Euroasian national;
(2) Claimant blatantly disregarded the pre-arbitral steps set forth in Art.9 of the Eastasia BIT;
(3) Claimant may not invoke Art.8 of the Eastasia BIT by virtue of the MFN clause of the Euroasia BIT;
(4) Claimant’s requests are inadmissible due to his ‘unclean hands’;
147. Should the Tribunal find that it has and should exercise jurisdiction, Respondent urges it to recognize that:
(5) Respondent has not violated Art. 4 of the Euroasia BIT;
148. Even if the Tribunal finds that compensation is due, Respondent calls the Tribunal to conclude that:
(6) Claimant substantially contributed to its losses and as a consequence any compensation due should be reduced by 50% of the total amount.

Respectfully Submitted on September 26, 2016

By

Team Ruda

On Behalf of Respondent

The Republic of Oceania