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IN THE INTERNATIONAL COURT OF JUSTICE
LA COUR INTERNATIONALE DE JUSTICE
PEACE PALACE, THE HAGUE
NETHERLANDS

2011 GENERAL LIST NO. _____

THE PEOPLE'S DEMOCRACY OF PSHAD……..APPLICANT

V.

THE REPUBLIC OF ARGUNIA……..RESPONDENT

ENTRE
LA DÉMOCRTIE POPULAIRE DE PSHAD
PARTIE RÉQUERANTE
ET
LA RÉPUBLIQUE D'ARGUNIA
PARTIE REPONDANTE

The case concerning differences between the States arising out of the Eastern Jimm Economic Partnership Agreement

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MEMORIAL FOR THE APPLICANT/NOTE DE SERVICE PAR LA RÉQUERANTE

ON SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE JOINTLY NOTIFIED TO THE COURT ON THE 17TH JULY, 2010

3rd GNLU International Moot Court Competition, 2011

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LIST OF ABBREVIATIONS

¶/ ¶¶	Paragraph/Paragraphs
§	Section
Art./art.	Article
B.C. Int'l & Comp. L. Rev.	Boston College International and Commparative Law Review
B.Y.I.L.	British Yearbook of International Law
Doc.	Document
EJEPA	Eastern Jimm Economic Partnership Agreement
E.C.R.	European Court Reports
Fla. J. Int'l	Florida Journal of International Law
G.A. Res.	General Assembly Resolution
GATT	General Agreement on Trade and Tariffs
I.L.M.	International Legal Material
I.L.R.	International Law Reporter
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
MICH. J. Int'l L	Michigan Journal of international Law
N.Y.I.L.	Netherlands Yearbook of International Law
P.	Page
P.C.I.L.	Publications of the Permanent Court of International Justice
Rep.	Report
SC Res.	United Nations Security Council Resolution
TRIPS	Trade Related aspects of Intellectual Property Rights
U.N. GAOR	United Nations General Assembly Official Records
UN	United Nations
U.N.T.S.	United Nations Treaty Series
VCLT	Vienna Convention on Law of Treaties
Vol.	Volume

WTO	World Trade Organization
Yale J. Int'l L. J	Yale Journal of International Law

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3. *Greddo* v. *Ente Nazionale Risi* , [1973] ECR 865.
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7. Marrakesh Agreement Establishing the World Trade Organisation.
8. North American Free Trade Agreement, 1994.
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10. Stockholm Convention, 1960.
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STATEMENT OF JURISDICTION

The People's Democracy of Pshad and the Republic of Argunia have submitted this dispute to the International Court of Justice pursuant to a Special Agreement *(Compromis)*, dated July 17, 2010. This Court's jurisdiction is invoked under Art. 36 (1) read with Art. 40 (1) of the Statute of the International Court of Justice, 1950.

The Parties have agreed to act in accordance with the findings and conclusions of the Court.

STATEMENT OF FACTS

1. **Background of the Parties**

   The Republic of Argunia [hereinafter referred to as "Argunia"] is an industrialized country located on a peninsula, sharing its eastern border with the People's Democracy of Pshad [hereinafter referred to as "Pshad"], a rapidly industrializing country. Argunia has a diversified economy with a stable and moderate growth over the past fifty years, and has maintained its democratic values, albeit acrimoniously. Earlier it made excessive investment in the field of spacecraft and aeronautics and now it is one of the second-largest producer of technologies and surveillances satellites in the world. However, due to this, its population continues to be in two extremes with the top 5 percent enjoying and opulent lifestyle, while the others struggle to remain above poverty line. Yet Pshad has progressed over the years in its social policy and has turned out to be the most liberal, economically, rising from its feudal past.

2. **Emigration by Pshadi Residents**

   Due to such wealth discrimination, there exists a lot of social unrest, but certain incentives like free health care, and schooling, plus highly subsidized food, have prevented the realization of the threats. This unrest has, however, witnessed poverty-driven emigration by the public, especially to the Argunia. But, most of the illegal Pshadi immigrants receive hostile treatment in Argunia and are often exploited as a source of cheap labor. These immigrants receive unfavorable treatment in Pshad and are mostly mistreated by the border officials, as Pshad perceives emigration unfavourable.

3. **Disturbance in the Laudi**

   Laudi is one of the border cities of RA and is the home of its soccer team. For the past decade, certain groups have begun to create commotion and unrest in the soccer field. It includes destruction of stadium property, intimidation of opposing teams and is fans, etc. In 2004, a particularly violent riot broke down when the home team lost to the visiting team from Pshad, leading to a mass battle and consequent loss to property and injury to people, which included hooligans and peaceful individual belonging to both countries.

4. Establishment of Eye Out

Eye-Out [hereinafter referred to as "EO"], a Private security firm was founded by a Pshadi immigrant, Rita Sen, became popular in both public and private sectors, as the police force in Laudi is not sufficient in number due to lack of funds. In 2004, EO received an exclusive contract to maintain security in the Laudi Sports Stadium. Though, it was rumoured that it was the close friendship of Rita Sen with the mayor, which was the reason behind the award of the contract. In 2005, as a result of experiencing explosive growth, Rita Sen finally incorporated EO as a company, in which she held 30% of the shares, the other 40% held by a pension fund in Pshad [managed by her cousin], and the rest of the shares were held by high value individuals of both the countries.

5. EO's satellite

Subsequently, with the aim to improve its services, EO launched a satellite to maintain surveillance over the entire Argunia-Pshad border area. Revolving at a height of 1000 km above the earth, it accomplished the tracking of football "hooligans". However, concerns were raised over the existence of such a satellite, regarding the information collected by such satellite, like issues relating to the invasion of privacy rights and tracking of Pshadi emigrants. However, in May 2009, the satellite collided with a space junk. It was found to be a dislodged piece of a nonfunctioning satellite launched from Oxia and Pshad. The said space junk was found to be built and owned by Pshad, which was a part of its programme in 1990. The satellite of the EO, consequently, stopped functioning. Outraged by the loss incurred, Laudi Authorities, on being influenced by EO, took the matter to federal parliament. Wherein, the Parliamentary Committee for Science and Technology took prompt action and called for indefinite moratorium on space technology exports to Pshad.

6. EJEPA

Argunia and Pshad are parties to the Eastern Jimm Economic Partnership Agreement [hereinafter referred to as "the EJEPA"], which aims to cultivate holistic development and peaceful relations of its members. Likewise, it calls for transfer of technology to developing country partners from industrialized country partners. Its non-economic

provisions recognize the importance of sustainable political and social policies, requiring basic adherence to basic individual rights and rule of law. The EJEPA also allows for internal countermeasures in case of violation of the agreement. The Parties have also agreed under the EJEPA that in case of dispute it shall be submitted to the International Court of Justice [hereinafter referred to as "ICJ"]. Also, it has a specific provision in case of disputes pertaining to investment claims.

7. The Compromis

Pshad has approached the Hon'ble Court due to the arising of a dispute. Pshad has claimed violation of Art. 15 of EJEPA, which forbids the parties from quantitative restrictions on each other, without exceptions. Argunia has claim general exception vide Art. 30 of the same agreement. Alternatively, it has claimed the countermeasure against Pshad's human rights violations against returned Pshadi citizens. It has also counterclaimed vide investment provisions in the EJEPA, and demands Pshad to compensate Sen for the satellite and the lost profits until a new satellite can be brought into operation. In turn Pshad has rejected all of Argunia's claims and contends that the Court does not have the requisite jurisdiction to decide investment claims.

ISSUES RAISED

1. That the imposition of the indefinite moratorium on space technology exports by Republic of Argunia is unjustifiable.

1.1. That the export prohibition imposed by Argunia is violated under Art. 15 of the EJEPA.

1.2. That the export prohibition imposed by Argunia is not exempted under the General Exception Clause provided in Art. 30 of the EJEPA.

1.2.1. That the export prohibition imposed by Argunia is not exempted under "the General Exception" Clause provided in Art. 30 of the EJEPA.

1.2.2. That the export prohibition imposed by Argunia is arbitrary and unjustifiable.

1.3. That the moratorium is not justifiable on the grounds of human rights.

2. That the counter-claim cannot be heard.

2.1. That ICJ does not have the Jurisdiction to hear the counter-claim of the said nature.

2.1.1. That Rita Sen has not exhausted her local remedies before approaching the ICJ.

2.1.2. That the appropriate forum to decide the counter-claim of the said nature is ICSID.

2.2. Arguendo, that Argunia's counter-claim cannot be upheld under International law.

2.2.1. That the Democracy of Pshad has not ratified any of the relevant conventions.

2.2.2. Arguendo, that Democracy of Pshad is not liable, as launching state is responsible.

SUMMARY OF ARGUMENTS

1. THAT THE IMPOSITION OF THE INDEFINITE MORATORIUM ON SPACE TECHNOLOGY EXPORTS BY REPUBLIC OF ARGUNIA IS UNJUSTIFIABLE.

The Republic of Argunia [hereinafter referred to as "Argunia"] has taken a step which is unacceptable under international law, as it has imposed a moratorium on the exports that are made of space technology from the Republic of Argunia to the People's Democracy of Pshad [hereinafter referred to as "Pshad"]. The same is unjustifiable and hence, should be removed.

1.1. That the export prohibition imposed by Argunia is violative of Art. 15 of the EJEPA.

The export prohibition imposed by Argunia is in violation of Art. 15 of the EJEPA which does not allow such restrictions and promotes free trade between the states. The EJEPA calls for transfer of technology to developing country partners from industrialized country partners, and thus the export prohibition is not in accordance with the Art. 15 of the EJEPA.

1.2. That the export prohibition imposed by Argunia is not exempted under "the General Exception" Clause provided in Art. 30 of the EJEPA.

The Art. 30 of the EJEPA is labeled as "the General Exception" clause and provides for an exhaustive list under which an action between the parties can be ensued as an exception. But, the act of Argunia of imposing a moratorium cannot be justified under any of the grounds and hence, is arbitrary and unjustifiable.

1.2.1. That the export prohibition imposed by Argunia is not exempted under the General Exception Clause provided in Art. 30 of the EJEPA.

The export prohibition imposed by Argunia is not exempted under the General Exception clause provided in Art. 30 of The Agreement, the imposition of export prohibition does not fall under the purview of Art. 30 and hence is unjustifiable.

1.2.2. That the export prohibition imposed by Argunia is arbitrary and unjustifiable.

The export prohibition imposed by The Republic of Argunia does not fulfill the requirements laid down in the introductory clause of Art. 30 of the EJEPA, i.e. the export prohibition is arbitrary and unjustifiable and hence cannot be exempted under Art. 30.

1.3. That the moratorium is not justifiable on the grounds of human rights.

The Republic of Argunia has claimed that the export prohibition is an actual and pre-emptive measure to the human rights violations committed by Pshad against its own citizens. In fact, there is no human rights violations that are being committed by Pshad and moreover, emigration is a matter of the domestic policy of a State. Further, is Republic of Argunia that has failed in complying with its international obligations with respect to the Pshadi immigrants in Argunia. Furthermore, no ground has been established by Argunia with respect to the fact that there exists any ground for any pre-emptive action.

2. THAT THE COUNTER-CLAIM CANNOT BE HEARD.

The counter-claim made by the Argunia is not only ill-founded and baseless. But, the forum chosen by it is also not appropriate and hence, the International Court of Justice [hereinafter referred to as "ICJ"] cannot decide on the said counter-claim. Moreover, in substance as well the counter-claim cannot be upheld.

2.1. That ICJ does not have the Jurisdiction to decide the counter-claim of the said nature.

In International law, States are prohibited from encroaching upon the internal affairs of other States. According to Article 22 of Part I of the International Law Commission Draft , a state is responsible for injury to foreign nationals only (i.e. foreign nationals) when they have exhausted the effective local remedies available to them. In fact, Rita Sen, on whose behalf Argunia has brought forth the claim for compensation, has not exhausted the local remedies available to her in the national courts of Pshad (when she being a Pshadi citizen had the option of doing so). Thus the counter-claim made by Argunia cannot be decided under the present dispute. Further, the nature of the claim made is that of an investment and hence, it is the Centre for Settlement of International Disputes [hereinafter referred to as "the Centre"] which is the appropriate authority. Hence, the ICJ does not have the jurisdiction to hear to decide the present counter-claim.

2.2. Arguendo, that Argunia's counter-claim cannot be upheld under International law.

Assuming, but not submitting that ICJ has the authority to decide on the subject matter of the counter-claim, the counter-claim itself cannot be upheld under international law. This is as Pshad has not ratified any of the relevant conventions, which may identify the liability on Pshad, if there is any. In the alternative, Pshad is not liable, as under the relevant treaties or conventions, it is the launching state that is responsible.

ARGUMENTS ADVANCED

1. That the imposition of the indefinite moratorium on space technology exports by republic of argunia is unjustifiable.

1.1. That the export prohibition imposed by Argunia is violated under Article 15 of the EJEPA.

The Eastern Jimm Economic Partnership Agreement [hereinafter referred to as "EJEPA"] was entered into by the Republic of Argunia and People's Democracy of Pshad aiming to foster 'holistic development' and peaceful relations of its members, provides for liberalized trade and investment protection between the partners. It further also provides for trade relations that may be shared between the two nations. It emphasizes on transfer of technology to developing country partners from industrialized country partners.

Art. XI of the General Agreement on Tariffs and Trade [hereinafter referred to as "GATT"], is actually same as the Art. 15 of the EJEPA. It imposes a restriction on the imposition of quantitative restrictions. Hence, Art. XI of GATT has been relied upon here for the interpretation of Art. 15 of the GATT. The introductory clause of Art. 15 prohibits any State from imposing quantitative restrictions in general.[1]

Interestingly, Art. 15 of the EJEPA states that no States party to it, shall impose any prohibitions or restrictions other than duties, taxes or charges, whether made effective through quotas, import or export licenses or other measures.[2] Hence Art. 15 provides that there should be general exemption of quantitative restrictions. Quantitative restrictions in itself devolve out of the economic or specifically the trade relations that the States may share with each other. In the case of *Greddo* v. *Ente Nazionale Risi*, quantitative restrictions was defined to mean measures which amount to a total or partial restraint of, imports, exports or goods in transit, depending on the circumstances.[3]

The Introductory Clause of Art. 15 of the EJEPA states that no prohibition or restrictions other than duties, taxes or other charges, in any manner, shall be instituted or maintained by any contracting party on the imposition of any product of the territory of any other

[1] Compromis, Annexure, art. 15.
[2] Compromis, Annexure, art. 15.
[3] *Greddo* v. *Ente Nazionale Risi* , [1973] ECR 865.

contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.[4]

It is interesting to note that the Art. 10 of the Stockholm Convention, 1960 states:

"*Member states shall not introduce or intensify quantitative restrictions on imports of goods from the territory of the other Member states.*"[5]

Art. 11 of the Stockholm Convention states:[6]

"*Member states shall not introduce or intensify prohibitions on restriction on exports to other Member states, whether made effective through quotas or export licensor or other measures equivalent measures effect, and shall eliminate any such prohibitions or restrictions….*"

Various other International Trade Organizations and Agreements have similar provisions.[7] Actually Art. XI (1): General Elimination of Trade Restrictions, of the GATT permits the application of export duties, taxes and other charges, but prohibits institution or maintenance which shall be made effective through quotas, import or export licenses or other measures, on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.[8]

In the present case, the imposition of the export prohibition is a measure that comes under Art. 15 of the Treaty through which a claim has been brought.[9] The first exception under Art. 15 of the EJEPA deals with export prohibitions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party,[10] which is not relevant to the present case. Further, the second exception under Art. 15 of the EJEPA deals with import and export prohibitions or restrictions necessary to the application

[4] Compromise, Annexure, art. 15.
[5] Stockholm Convention, 1960, art. 10.
[6] Stockholm Convention, 1960, art. 11(1).
[7] World trade Organisation Uruguay Rounds of Ministerial Trade Negotiations 17 [1999], 1867 U.N.T.S 187, 33 I.L.M. 1153 (1994), Article XI [hereinafter referred to as "GATT"], Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A., Stockholm Convention, 1960, Article VII [hereinafter referred to as "Stockholm Convention"]., Treaty of Rome, 1957, Article XXIX [hereinafter referred to as "Rome Treaty"]., North American Free Trade Agreement, 1994, Article 101 [hereinafter referred to as "NAFTA"], Canada – US Free Trade Agreement, I.B.L.J; 1989, pgs. 1022-1034, Central Asia Regional Economic Co-operation, European Free Trade Association.
[8] GATT, art. XI (1).
[9] Compromis ¶ 12.
[10] Compromis, Annexure, art. 15, ¶ 2(a).

of standards or regulations for the classification, grading or marketing of commodities in international trade,[11] which is also submitted to be irrelevant in the present case. Moreover, the third exception under Art. 15 of the EJEPA deals with import restrictions on any agricultural or fisheries product, imported in any form,[12] which is also submitted to be not relevant to the present matter at hand.

It is also important to note that Art. 15 of the EJEPA states that a member state can impose import or export restrictions necessary to ensure the protection or promotion of international law accepted by the international community, including the aims set forth in the United Nations Charter.[13] As a matter of fact, the United Nations Organization through international economic and social cooperation, aims to promote high standards of living, full employment and conditions of economic and social progress and development.[14]

It is interesting to note that the Art. XXXVII of the GATT states that the developed contracting parties shall have special regard to the trade interest of less developed contracting parties when considering the application of other measures permitted under the GATT to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interest of those contracting parties.[15]

In the present matter at hand, Pshad's population is increasingly struggling to remain above the poverty line.[16] The very high incomes from the telecommunications and surveillance satellites branch ensure that only the top 5 percent of the Pshadi enjoy a life of opulence.[17] The EJEPA aims to foster holistic development inter alia.[18] Therefore the imposition of the trade restriction is a complete violation of the EJEPA and is imposed not taking into account the aims of the United Nations Charter [hereinafter referred to as "UN Charter"] and the obligations that are set on Argunia as a developed nation. It is a global scenario in which a State attempts to sustain in and in such scenario international cooperation is of essential importance. It is further submitted that the said act of Argunia amounts to violation of the

[11] Compromis, Annexure, art.15, ¶ 2(b).
[12] Compromis, Annexure, art.15, ¶ 2(c).
[13] Compromis, Annexure, art.15, ¶ 2(d).
[14] UN Charter, Chapter IX.
[15] GATT, art. XXXVII, Commitments.
[16] Compromis, ¶ 1.
[17] Compromis, ¶ 1.
[18] Compromis, ¶ 11.

principles recognized and accepted not merely by Pshad, but by the international community also.

Therefore, the indefinite moratorium imposed by the Parliamentary Committee for Science and Technology, Republic of Argunia,[19] on the space technology exported to Pshad is not in accordance with the introductory clause of Art. 15.

1.2.<u>That the export prohibition imposed by Argunia is not exempted under the General Exception Clause provided in Article 30 of the EJEPA.</u>

1.2.1. That the export prohibition imposed by Argunia is not exempted under the General Exception Clause provided in Article 30 of the EJEPA.

The construct of Art. 30 of the EJEPA is constructed in a unique manner. The purpose of Art. 30 is to ensure that the member states can deviate from the provisions of the EJEPA in certain cases enumerated under the abovementioned provision. As mentioned in the foregoing paragraphs, the Art. 30 of EJEPA is the same as Art. XX of the GATT and due to various transactions internationally, a trend has been set with respect to the use of Art. XX of the GATT. To invoke an exception under Art. XX: General Exceptions under the GATT, the onus of proof lies on the member state invoking the exception.[20]

The Appellate Body has observed in the Wool Shirts and Blouses case that:[21]

"*Various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that a party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof.*"

The Appellate Body in the Hormones case noted:[22]

"*The general rule in a dispute settlement proceeding requiring a complaining party to establish a prima facie case of inconsistency with a provision…before the burden of showing consistency with that provision is taken on by the defending party, is not avoided by simply describing that same provision as an exception.*"

[19] Compromis, ¶ 10.
[20] HANS VAN HOUTTE, LAW OF INTERNATIONAL TRADE, p. 103, 2nd ed., Sweet and Maxwell, London.
[21] Appellate Body Reports, *US – Wool Shirts and Blouses*, § IV.
[22] Appellate Body Reports, *WTO – United States and Canada v. European Communities* [hereinafter Hormones case].

In the above case the panel had adopted an interpretation of the Sanitary and Phytosanitary Agreement [hereinafter referred to as "the SPS Agreement"] which suggested that the parties complained against, generally bore the burden of proof that its measures complied with the Agreement, unless they were based on international standards.[23]

There is a substantial body of jurisprudence supporting the principle that in the case of GATT exceptions the burden of proof lies on the respondent.[24] In the present case the Respondent has invoked Art. 30 of the EJEPA to justify the imposition of the indefinite moratorium on the transfer of space technology.[25] As per international law the onus of proof for justifying the measure lies on the respondent, viz. Argunia.

It has been held that there must be a provisional justification by reason of characterization of the measure to come under the exception.[26] It has been suggested that the connection or relationship between the measure under appraisal and the state interest should inform the interpretation of Art. XX.[27] Argunia has neither proved the applicability of Art. 30, viz. General Exceptions nor has established a relationship or connection between the measure and the interest of the state to come under the purview of Art. 30 of the EJEPA.

A contracting party cannot justify a measure inconsistent with other GATT provisions as necessary if an alternative measure which it could reasonably be expected to employ which is not inconsistent with other GATT provisions available to it.[28] Neither any need for consultations nor any efforts to explore others measures in accordance with the EJEPA had been explored by Argunia prior to the imposition of the indefinite moratorium. Moreover, Argunia has not fulfilled its international obligation of notifying Pshad of the indefinite export moratorium.[29]

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[23] M.J. TREBILCOCK, ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE, p. 129, 3rd ed.
[24] Panel Reports, *Canada – FIRA*, ¶ 5.20; *Japan – Agricultural Products I*, ¶ 5.1.3.7; *Canada – Ice Cream and Yoghurt*, ¶ 59; *EEC – Dessert Apples*, ¶ 12.3; *EEC – Apples (US)*, ¶ 5.3; *Norway Trondheim Toll Ring*, ¶ 4.5; *EEC – Bananas II*, ¶ 350.
[25] Compromis, ¶ 10.
[26] *United States: Import prohibition of certain Shrimp and Shrimp products*, WT/DS58/AB/R [hereinafter the US Shrimp/Turtle case].
[27] *United States - Standards for Reformulated and Conventional Gasoline*, p. 21-24, WT/DS2/AB/R. [hereinafter Reformulation case].
[28] Patrick F.J. Macorory, Arthur Edmond Appleton, *The World Trade Organization: Legal Economic and Political Analysis*, Vol. B, p. 155.
[29] *Unites States: prohibition of Tuna case*.

Hence, the prohibition imposed on the export of space technology to Pshad, by Argunia does not satisfy essentials of Art. 30 of the EJEPA and hence, does not fall under its exception.

1.2.2. That the export prohibition imposed by Argunia is arbitrary and unjustifiable.

The construct of the EJEPA is unique, though similar to the GATT. Art. 15 in itself also provides for the exception, but it is Art. 30 that provides for General Exceptions to the agreement in general. Art. 30 of the EJEPA states that, amongst others, no import or export restrictions shall be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[30] For proper interpretation of Art. 30, a mention and Treaty interpretation of the Art. XX of GATT is required. A two tier is used to determine whether a measure is qualified for Art. XX i.e. it should not be arbitrary, discriminatory and unjustifiable, it should be in conformity with the chapeau to Art. XX,[31] and as held in *Venezuela, Brazil* v. *US Gasoline*, the policy underlying the trade measure should fall within the purview of the range of policies.[32]

It is submitted that beyond the agreement reached between the two parties of the EJEPA, in case any State wants to impose an export prohibition, of the nature imposed by the Republic of Argunia, it must also be justifiable and should not be arbitrary. For, this reason, a reference to the GATT is made. For a measure to come under exceptions under Art. XX of GATT it must pass the test set forth in the chapeau to the Art. XX.[33] Firstly the contracting party claiming exemption must show that its measure is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where same conditions prevail. Secondly any such measure must not amount to a disguised restriction on trade.[34] Moreover, Article 36 of the Rome Statute also states that a measure shall not constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States.[35] Interestingly, the term 'arbitrary' is defined as based on a whim and is generally used to refer a decision based on a preference alone, or without a stated reason.[36]

[30] Compromis, Annexure, art. 30.
[31] *Reformulated Gasoline case*.
[32] *Reformulated Gasoline case*.
[33] RAJ BHALA INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, 3rd ed., LexisNexis.
[34] GATT, Chapeau to art. XX; Patrick F.J. Macorory, Arthur Edmond Appleton, *The World Trade Organization: Legal Economic and Political Analysis*, Vol. B, p. 155.
[35] Rome Statute, art. XXXVI.
[36] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, p. 32, Vol. 1, (1966) [hereinafter WEBSTER'S DICTIONARY].

Furthermore, 'unjustifiable' means the performance of a balancing test between the benefit sought and the burden incurred.[37]

It is hence, submitted that the act of the Republic of Argunia by imposing a moratorium on the export of space technology to People's Democracy of Pshad is arbitrary and unjustifiable.

Along with the satisfaction of the two tired test a Member state must also satisfy the 'necessity test' on invocation of Art. XX.[38] The 'necessity test' has been recognized by the Appellate Body of GATT.[39] Art. of XX(b) authorizes measures 'necessary to protect human, animal or plant life or health', however a contracting party cannot justify a measure inconsistent with other GATT provisions as necessary if an alternative measure which it could reasonably be expected to employ which is not inconsistent with other GATT provisions available to it.[40] Discrimination is said to be evident when similar actions are not take against all other related parties.[41] If same or similar actions are taken against all the related Member States then the actions against them 'might not necessarily be arbitrary and unjustifiable'.[42]

In the present case an export moratorium on Space Technology has been imposed by the Government of Argunia on Pshad.[43] The discrimination is undeniable and the imposition has been imposed in an arbitrary manner and is not justifiable. The bias exists and is apparent as the benefit for Pshad is less than the burden incurred.

Hence, the action of imposing a moratorium on exports of space technology from Argunia solely to Pshad is clear discrimination. This is as the imposition of a unilateral restriction on Pshad is not treated on equal terms with other states sharing trade relations with the Argunia. Further, respondent has also failed to establish a causal relation between the damage and the measure taken.

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[37] WEBSTER'S DICTIONARY.
[38] BEMARD M. HOEKMAN & MICHEL M, KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM, THE WTO & BEYOND, p. 446, 3rd ed., [hereinafter THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM].
[39] THE POLITICAL ECONOMY OF THE WORLD.
[40] PATRICK F.J. MACORORY, ARTHUR EDMOND APPLETON, THE WORLD TRADE ORGANISATION: LEGAL ECONOMIC AND POLITICAL ANALYSIS, volume B, *US - Section 377*, p. 158.
[41] GATT Panel Report, 1982, *United States- Prohibition of Imports of Tuna and Tuna Products from Canada*, BSID, 29th Supp, 91. [hereinafter referred to as "US Prohibition of Tuna case"].
[42] *US Prohibition of Tuna case*.
[43] Compromis ¶10.

A recurring issue under Art. XX (b) has been one of transparency i.e. lack of adequate publication, notification and consultations concerning measures taken under the Article.[44] A Member State must submit to expeditious consultations with the principally concerned contracting party as soon as trade damaging act has occurred with a view to reaching a mutually satisfactory resolution of the dispute.[45] It has been held that before a unilateral trade restriction can be imposed, negotiations with the exporting nation must be done.[46] The according to the procedure for settlement of disputes established, the Member States must initially attempt to solve their disputes through bilateral consultations.[47] Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultations regarding such representations as may be made by another contracting party with respect to any matter affecting the operation of the GATT (WTO, 1999).[48] It is thus established that contracting parties to the GATT are under an obligation to engage in consultations in the first instance to resolve possible trade conflict.[49] Art. XXIII states that a contracting party, with a view to reach a satisfactory adjustment of the matter, is under an obligation to make written representation or proposals.[50] If a member decides to pursue a dispute it must submit the case to the WTO adjudication bodies.[51] It may not go ahead and retaliate.[52] Only if a member does not comply with the outcome of the process, and the Dispute Settlement Body authorizes retaliation, only in such a case can a member retaliate.[53]

Hence, the Republic of Argunia did not attempt any diplomatic measures to solve the dispute between it and Pshad and took the extreme step of imposing a moratorium, without entering into any diplomatic dialogue with People's Democracy of Pshad. Hence, such an action is contrary to international law.

Furthermore, Art. 49 of the International Law Commission Draft Articles [hereinafter referred to as "ILC Draft Articles"] states the objects and limits of countermeasures. It states

[44] Patrick F.J. Macorory, Arthur Edmond Appleton, *The World Trade Organization: Legal Economic and Political Analysis*, Vol. B, p. 155.
[45] C/M/ 236, BISD, 36th Supp. 67; *Guide to GATT Law and Practise*, p. 571-572.
[46] *US Shrimp case*.
[47] THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM, p. 89.
[48] GATT, art. XXII, Consultations, ¶ 1.
[49] Robert Read, *Trade Dispute Settlement Mechanisms: The WTO Dispute Settlement Understanding in the Wake of GATT*.
[50] GATT, art. XXIII, Nullification and Impariment.
[51] Uruguay Round Dispute Settlement Understanding, art. 23.2 [hereinafter referred to as "DSU"].
[52] THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM, p. 88.
[53] THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM, p. 88.

that, firstly "*An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two*." Secondly, "*Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State*," and lastly "*Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.*"

Art. 49 describes the permissible object of countermeasures taken by an injured State against the responsible State and places certain limits on their scope. Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two, namely, to cease the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured State. Countermeasures are not intended as a form of punishment for wrongful conduct but as an instrument for achieving compliance with the obligations of the responsible State under Part Two. The limited object and exceptional nature of countermeasures are indicated by the use of the word 'only' in paragraph 1 of Art. 49.[54]

A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure. This point was clearly made by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case, in the following passage:

"*In order to be justifiable, a countermeasure must meet certain conditions. In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State*."

Paragraph 1 of Art. 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts

[54] Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 81, U.N. Doc. A/56/10 (2001).

to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment. In this respect there is no difference between countermeasures and other circumstances precluding wrongfulness.

In the present case, the countermeasure that has been resorted to by Argunia, is, it claims, due to the human rights violations that have been committed by Pshad on returned Pshadi citizens. Thus the ingredients for imposing a countermeasure have not been fulfilled in the first place because Argunia is not the '*injured State*' in the present case. That besides, for placing a preemptive countermeasure, there should be reasonable cause for concern, which is absent in the present case as Pshad has never posed any threat to Argunia.

Aware of the risks behind recognizing that third States had the right to resort to countermeasures in response to a breach that did not directly affect them, it was expressed that the task of determining the existence of a breach of an obligation of fundamental significance for the international community as a whole, and of deciding the measures that should be taken in response, should be vested not to individual States but to international organizations such as the United Nations [hereinafter referred to as "UN"].[55]

In the present case, Argunia placed the export prohibition on Pshad supposedly as a preemptive countermeasure to human rights violations without bringing the issue before the international community at large to decide what measures should be taken and whether there is a valid cause for countermeasures in the first place.

1.3.<u>That the moratorium is not justifiable on the grounds of human rights.</u>

Moratorium, as has been imposed by Argunia is by the mode of an actual and pre-emptive measure to the human rights violations by Pshad against its own citizens. Whereas, actually there are no human rights violations being committed by Pshad and as a matter of fact emigration is actually a concern domestic policy of a State. Rather, it is Argunia who has failed to perform its obligation, set on it internationally.

Human Rights practices within a State are no longer a matter solely of its own internal affairs if the circumstances, by their gravity or otherwise, are such as to make them of legitimate

[55] Mr. Roberto Ago, 8th Report on State Responsibility, Yearbook of the ILC (1979), vol. II, Part 1, p. 43-44, ¶¶ 91-92.

concern to other States.[56] However for a non injured State to intervene there has to be a violation of human rights, which is an *erga omnes* obligation, on part of the responsible state.[57]

In the present case, there is a probability of mistreatment of the returned Pshadi emigrants by the border officials of Pshad.[58] This is only a probability and there is no direct and cogent evidence for such mistreatment by the border officials on the returned emigrants. Thus RA cannot claim that there are human rights violations against the returned Pshadi citizens on the basis of probability.

Further, it is essential to note that Article 2 (7) of the UN Charter[59] prohibits the United Nations from intervening in matters essentially within the domestic jurisdiction of any state. It states that:

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter".

This is a customary interpretation which allows no third parties to interfere in issues which are for the State itself to decide.[60] Emigration in principle is considered as a matter of internal legislation of the different states.[61] Every state can fix for itself the conditions under which emigrants may leave, and under which they lose or retain their nationality.[62] A state can also prohibit emigration altogether, or can at any moment, request those who have emigrated to return, provided the emigrants have retained their former nationality.[63]

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[56] MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, p.157, Oxford University Press, 1989.
[57] ILC Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res 56/83 (2001), art. 48 (1) (b) [hereinafter referred to as "ASR"].
[58] Compromis ¶ 2.
[59] UN Charter, 26 June 1945, Can. T.S. 1945 No 7.
[60] J.S. Watson, *Auto interpretation, Competence, and the Continuing Validity of Article 2 (7) of the UN Charter*, 71 Am. J. Int'l L. 60 1977.
[61] RICHARD PLENDER, INTERNATIONAL MIGRATION LAW, p. 234, 2nd ed.., Martinus Nijhoff Publishers (1988).
[62] SIR ROBERT JENNINGS AND SIR ARTHUR WATTS (EDS.), OPPENHEIM'S INTERNATIONAL LAW, p.423, 9th ed., Pearson Education Asia, Volume 1 Peace, Introduction and Part I, 2003 [hereinafter OPPENHEIM].
[63] OPPENHEIM, p. 423.

In the present matter, Pshad has looked upon the illegal emigration to Argunia unfavourably.[64] Pshad is justified in keeping such an opinion as all emigration matters are subject to its domestic jurisdiction. However, this opinion of Pshad is not valid proof for Argunia to claim that there are human rights violations by Pshad on the returned Pshadi emigrants. Thus, RA cannot bring a claim of human rights violations by Pshad by virtue of its unfavourable attitude towards emigration.

Moreover, it is the national security is what is of prime importance to any State. International migration has moved to the top of the international security agenda, due in part to concerns that migration flows provide conduits for the spread of international terrorism.[65] Illegal migration is generally perceived as the most dangerous part of migratory flows due to its uncontrolled character.[66] Establishing and maintaining adequate border controls is imperative to stop illegal activity and control terrorist activities.[67]

In the present case, the Pshad government has shown an unfavourable attitude to the act of illegal emigration.[68] Pshad's opinion is not unreasonable since it is used as a security measure which is of paramount consideration for any government.[69] In order to control illegal emigration and terrorist activities in the present day, Pshad's border officials are authorized to keep a check on the returned Pshadi citizens. RA has misconstrued this act of the border officials as mistreatment and violation of the basic individual rights of these citizens.

Thus, Argunia's claim that there have been human rights violations against the returned Pshadi emigrants by Pshad has no basic premise and is hence unjustified. Hence, the moratorium imposed by Argunia on the exports of space technology to Pshad has no basis of any actual human rights violation. Further, there has nothing been mentioned to the effect that there is any act that are expecting, in pursuance of which this is a pre-emptive action. Hence, the space technology prohibition is not justifiable.

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[64] Compromis ¶ 2.
[65] Fiona Adamson, *Crossing Borders: International Migration and National Security*, Journal Article, International Security, vol. 31, issue 1, pp.165-199, *Summer 2006.*
[66] Anna Kicinger, *International migration as a non-traditional security threat and the EU responses to this phenomenon*, Central European Forum for Migration Research, Warsaw, October 2004.
[67] International Migration, Human Rights and Development in Latin America and the Caribbean, Summary and Conclusions, 33rd Session of ECLAC, Uruguay, 2006.
[68] Compromis ¶ 2.
[69] Elizebeth M. Bruch, *Open or Closed: Balancing Border Policy with Human Rights*, 96 Ky. L.J. 197 2007-2008.

Furthermore, the UN has established seven human rights instruments[70] that are defined by the Office of the UN High Commissioner for Human Rights [hereinafter referred to as "OHCHR"] as '*core human rights treaties*' and The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 [hereinafter referred to as "ICRMW"] is one of them.[71] While the ICRMW aims specifically at the protection of migrants workers, the other six apply to migrants as well.[72] Migrant worker as defined in ICRMW "*a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national*."[73] Therefore, the ICRMW protects all migrant workers and members of their families, irrespective of their legal status, regular or illegal.

Interestingly, as per the International Labour Organisation [hereinafter referred to as "ILO"], "*People who enter or work in countries without legal authorisation have been labelled illegal, clandestine, undocumented or irregular. "Illegal migrants" has a normative connotation and conveys the idea of criminality.*"[74] Irregular migrants are most in need of international protection as their lack of legal status or recognition makes them particularly susceptible to abuse, exploitation, and denial of their most basic human rights.[75] They constitute a reserve of very flexible and cheap labour, and their status makes it difficult for them to have minimum work standards respected.[76] The ICRMW acknowledges that migrants, even if temporary, are a permanent feature of societies that calls for specific

[70] The International Convention on Elimination of All forms of Racial Discrimination, 1965 [hereinafter referred to as "ICERD"], The International Covenant on Civil and Political Rights, 1966 [hereinafter referred to as "ICCPR"], The International Covenant on Economic, Social and Cultural Rights, 1966 [hereinafter referred to as "ICESCR"], The Committee on the Elimination of Discrimination against Women, 1979 [hereinafter referred to as "CEDAW"], The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 [hereinafter referred to as "CAT"], The Convention on the Rights of the Child, 1989 [hereinafter referred to as "CRC"] and The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 [hereinafter referred to as "ICRMW"].

[71] Global Commission on International Migration Report 2005, p. 54 [hereinafter referred to as the "GCIM Report"].

[72] MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHT, p. 124, Cambridge University Press.

[73] The ICRMW, art. 2 (1).

[74] International Labour Conference, 92nd Session, 2004, Report VI, *Towards a Fair Deal for Migrant Workers in the Global Economy*.

[75] Website of International Organization for migrations (IOM), http://www.iom.ch/jahia/Jahia/about-migration/migration-management-foundations/rights-obligations-migrants/international-law-migrant-rights-obligations/cache/offonce/lang/en.

[76] MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHT, p. 4, Cambridge University Press.

policies.[77] The ICRMW further establishes that migrant workers are more than labourers or economic entities; they have social entities with families, and accordingly have rights. It reinforces the principles in ILO conventions on equality of treatment with nationals of states of employment in a number of legal, political, economic, social and cultural areas.

Further, Art. 25 of ICRMW is particularly meaningful as it guarantees, under the principles of equality of treatment, that some rights (right to receive remuneration, conditions of work and terms of employment, etc.) cannot be refused by employer by reason of irregularity in the stay or employment of the migrants.[78] Also, International Convention on Elimination of All forms of Racial Discrimination [hereinafter referred to as "CERD"] proclaims that state should ensure that foreign workers enjoy the same labour protection as national workers especially as regards minimum protection against poor working conditions and low wages and proper representation of ethnic minority groups in the labour market.[79] The International Covenant on Economic, Social and Cultural Rights [hereinafter referred to as "ICESCR"] also enumerates the right to work and enjoyment of just and favourable conditions of work.[80]

In the present case, the Republic of Argunia is an industrialized country whereas the People's Democracy of Pshad is a developing nation suffering from various socio-economic problems.[81] The increasing poverty rate among Pshadi citizens has compelled them to migrate to Argunia, despite the fact that the government of Pshad has taken measures to curb the flow of migrants like providing free health care, school and highly subsidized food.[82] Hence, it is correct to say that the Pshadi migrants have the right of equal remuneration with various other human and labour rights irrespective of their migrant status.

Moreover, Art. 12 of the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), also urges States to "guarantee equality of treatment, with regard to working conditions, for all migrant workers who perform the same activity whatever might be the particular conditions of their employment". ILO Convention No. 143 [Convention concerning

[77] MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHT, p. 27, Cambridge University Press.
[78] MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHT, p. 147, Cambridge University Press.
[79] MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHT, p. 129, Cambridge University Press.
[80] The ICESCR, art. 6 and 7.
[81] Compromis ¶ 1.
[82] Compromis ¶ 2.

Migrant Workers (Supplementary Provisions)] and the ICRMW include provisions intending to prevent and eliminate exploitation of migrants, thus reinforcing the 'decent work' agenda defined by International Labour Standards, nearly all of which apply explicitly or implicitly to all migrant workers. Migrant workers' issues should be seen in the context of the ILO's decent work framework because conditions of work determine the quality of employment. Decent jobs should mean fair and acceptable conditions of work. The Director-General's report to the International Labour Conference in 2001[83] identified decent work deficits for workers in four categories: employment, rights at work, social protection, and social dialogue.

Further, in the advisory opinion that the Inter-American Court of Human Rights issued at the request of Mexico on the legal status and rights of undocumented migrants,[84] the Court states that the fundamental principle of equality and non-discrimination is of a peremptory nature and binds all States regardless of any circumstance or consideration such as the migratory status of a person. The Court concludes that the State thus has the obligation to respect and guarantee the labour human rights of all workers, including those of undocumented migrant workers. The Court clarifies that "*the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labour-related nature*……*States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these may be, including those of a migratory character*"

Therefore, according to existing treaty and customary law, states have a minimum obligation to uphold the fundamental rights of all human beings, including the right to life and equality before the law, as well as protection against human rights violations, and cruel, inhuman or degrading treatment as well. As a general rule, the provisions apply equally to citizens and non-nationals and to regular and other migrants, and therefore form an important component of the normative framework.[85]

[83] ILO: *Reducing the decent work deficit – A global challenge*, Report of the Director-General, Part I(A), International Labour Conference, 89th Session, Geneva, 2001.
[84] Inter-American Court of Human Rights, *Advisory Opinion OC-18/03 on the juridical condition and rights of undocumented migrants*, 17 September 2003. ¶ 106.
[85] The GCIM Report of 2005, p. 55.

In the present case, the migrants from the People's Democratic of Pshad are being exploited as cheap unskilled labour in the Republic of Argunia,[86] which is as established above in violation of rights of migrant workers. Hence, it can be concluded that the Republic of Argunia is under an international obligation to ensure the protection of the rights of these migrants and to make policies or develop some mechanism through its legislature, for the same, which the Republic of Argunia has clearly failed to do so.

Hence, their export prohibition impose on Pshad with respect to space technology is arbitrary and unjustifiable.

2. That the counter-claim cannot be heard.

2.1.<u>That ICJ does not have the Jurisdiction to hear the counter-claim of the said nature.</u>

2.1.1. That Rita Sen has not exhausted her local remedies before approaching the ICJ.

In asserting that the principle of effective nationality is a general principle of International law, and as such is a limitation upon the discretion of States, the International Court of Justice [hereinafter referred to as "ICJ"] has declared that,

"*A State cannot claim that the rules it has…..laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.*"[87]

The UN Charter declares that the UN as an Organization is based upon the principle of the '*sovereign equality*' of all its Members,[88] and that nothing in the UN Charter shall authorize the Organization to intervene in matters essentially within the domestic jurisdiction of any State or shall require Members to submit such matters to settlement under the UN Charter.[89]

[86] Compromis, ¶ 2.
[87] *Nottebohm Case*, [1955] I.C.J. Rep. 4 at p. 23.
[88] UN Charter, art. 2 (1).
[89] UN Charter, art. 2(7), G.A. Resolution 1815 (XVII), 18 December. 1962, G.A. Res. 2131 (XX), 21 Dec. 1965, adopting a Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.

In the debate around the constitutional competence of the organs of the UN, Lauterpacht concluded that matters essentially within the domestic jurisdiction of a State do not comprise matters which have become a subject of international obligations or which have become matters of '*international concern*' by virtue of constituting an actual or potential threat to international peace and security.[90] Lauterpacht further affirmed that, in regard to the determination of matters of domestic jurisdiction, the power of interpretation belongs to the organ concerned, that is, to the General Assembly or the Economic and Social Council.

In Waldock's view, the essential effect of Art. 2(7) is twofold, "first to preclude any intervention by the UN in a State's affairs except with reference to the State's international obligations either under the Charter or otherwise; and secondly even where international obligations of the State are involved, to preclude the UN from penetrating, without the State's consent, behind its authority, over its own territory, nationals, ships, and aircraft, and except in cases of enforcement action for the maintenance or restoration of peace.

The principle of non-intervention has acquired the fundamental value of a solid and indispensable '*bridge*' between the traditional, sovereignty-oriented structure of the international community, and the '*new*' attitude of States based on coexistence geared to more intense social intercourse and closer cooperation. The principle ensures that intense international relations of States do not affect their vital and delicate domestic interests.

The major customary rule referred to above are the rule prohibiting States from encroaching upon the internal affairs of another State.[91] In the Nottebohm Case,[92] it is made clear that before a State can make a claim to International law, there must be a 'genuine-link' between the State and the individual/national who has been injured. In this very case Liechtenstein was not permitted to bring a claim in respect of alleged injury suffered by Nottebohm at the hands of Guatemala even though Nottebohm had been granted naturalization and nationality by Liechtenstein. The court did not dispute Nottebohm's nationality, but declined to allow it to have an effect in International law because there was no real connection between the individual and claimant state.

[90] BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, LAUTERPACHT, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, p. 288.
[91] ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD.
[92] *Nottebohm case*, [1955] I.C.J. Rep. 4.

In the present case, the Republic of Argunia has brought forth a claim for compensation on behalf of Rita Sen.[93] Rita Sen however, is a Pshadi citizen[94] and is merely an immigrant in the Republic of Argunia. Thus according to the principle set forth in the Nottebohm Case, the Republic of Argunia has no cause to bring forth a claim on behalf of Rita Sen against the country of her nationality.

According to Art. 22 of Part I of the ILC Draft, a State is responsible for injury to foreign nationals only (i.e. Foreign nationals) when they have exhausted the effective local remedies available to them. This means that foreign nationals must utilize such measures as are available in the local law to achieve a satisfactory vindication of their rights before their state of nationality can successfully maintain a claim in international law. The purpose of the rule is essentially practical in that it ensures that international tribunals are not engulfed by inter-state claims that could have been more easily and profitably dealt with at the local level.

In the Ambatielos Arbitration,[95] Greece brought a claim on behalf of one of its nationals allegedly by acts of the United Kingdom. Ambatielos had made limited use of the UK national legal system, but had not conducted his original hearing with due diligence and had failed to pursue an appeal to the House of Lords. In upholding the UK's objections on the ground of non-exhaustion of local remedies the Court noted that:

"*the State against which an international action is brought for injuries suffered by private individuals has the right to resist such action if the persons alleged to have been injured have not first exhausted all the local remedies available to them under the municipal law of that state.*"

Similarly the ICJ dismissed the claims in the Interhandel case,[96] and the Panevezys Railways Case.[97] Thus, claim brought forth by the Republic of Argunia on behalf of Rita Sen, not be considered on the grounds that she should have first exhausted local remedies available to her within Pshadi laws, before approaching the Republic of Argunia and in turn, the Hon'ble International Court of Justice.

[93] Compromis, ¶ 14.
[94] Compromis, ¶ 5.
[95] *Ambatielos Arbitration Greece* v. *UK*, (1956), 12, RIAA, 83.
[96] *Interhandel case*, [1959] I.C.J. Rep. 6.
[97] *Estonia* v. *Lithuania*, (1939) P.C.I.J. (ser. A/B) No. 76.

It is also clear that Art. 22 of the ILC Draft supposes that the international responsibility of a state does not actually arise until the foreign national has exhausted local remedies. In the Ambatielos Arbitration, the Arbitration Commission seemed to suggest that failure to exhaust local remedies was a procedural bar preventing the state of nationality form pursuing an otherwise existing claim of responsibility. Hence, the claim for compensation brought forth by the Republic of Argunia on behalf of Rita Sen, should thus not be considered on the above mentioned bases.

2.1.2. That the appropriate forum to decide the counter-claim of the said nature is ICSID.

In the present case, both Pshad and Argunia are signatories to the ICSID and have further agreed that submission of a claim relating to any dispute that might arise under the EJEPA would have to satisfy the requirements of Chapter II of the ICSID which deals with Jurisdiction. The provisions of the ICSID facilitate settlement of investment disputes by conciliation and arbitration methods, arising between contracting States, and nationals of other contracting States.

Thus, the appropriate forum for discussing investment claims between one contracting State, namely the Republic of Argunia, and the national of another contracting State, namely Rita Sen, who is a Pshadi citizen, is the ICSID and not the ICJ.

Article 25(1) of the ICSID Convention States, 'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

Article 26 of the ICSID Convention states, 'Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy….'. The Republic of Argunia and Pshad have clearly consented to resort to arbitration under this convention in case of dispute, according to the provisions of the EJEPA. The Republic of Argunia and Pshad clearly satisfy the jurisdictional

requirements of the ICSID and hence the ICSID has jurisdiction to hear investment claims, if there be any, and not the ICJ.

Further, a counterclaim must be based on the subject-matter of the principle claim and it must be claimed by the respondent.[98] It is required to be sufficiently and directly dependent and connected to the main claim of the Applicant[99] as it contends the existence of their claim.[100] In the present set of facts provided, the Applicant, i.e., Pshad put forth a claim on export prohibition and that it is invalid as it is a breach of the Treaty.[101] However, the counterclaim submitted by RA is on the basis of the investment provision provided in Chapter 7 of the Treaty.[102]

Thus, on the basis of these facts it can be unconditionally gathered that the counterclaims were not based on the claims of Pshad. That is to say, the counterclaim on the basis of the breach of an alleged investment provision in the Treaty is not remotely connected with the claim of Pshad, which is the export prohibition for which the Respondent invoked article 30 and a countermeasure of human rights violations.[103] Thus, the two being completely separate claims, the counter-claim cannot be said to be based on the subject matter of the claim and breaches Article 80 of the Rules of the ICJ.

2.2. Arguendo, that Argunia's counter-claim cannot be upheld under International law.

In May 2009, EO's satellite collided with an object in space and was put out of function and the object in question i.e. the piece that damaged EO's satellite has been determined to be a piece of a Pshadi built and owned satellite from 1990.[104] The only countries to have satellites that long ago were, Pshad and Oxia. In 1990 Pshad did not have a launching facility and all Pshadi produced and registered satellites were launched from Oxia.[105]

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[98] Statute of the International Court of Justice, Oct. 24, 1945, 832 U.S.T.S. 993, art. 30 (art. 80 of the Rules of the ICJ Statute, 1978) [hereinafter referred to as "the ICJ Statute"].
[99] *Case concerning Factory at Chorzow* (*Germany* v. *Poland*), P.C.I.J. (ser. A) No.9 at p. 31 [hereinafter referred to as "Chorzow case"]; *Asylum case* (*Columbia* v. *Peru*) [1950] I.C.J. Rep. 226 [hereinafter referred to as "Asylum Case"]; *Case Concerning the Application of the Convention on the Prevention and Punishments of the Crime of Genocide*, [1997] I.C.J. Rep. 243.
[100] *Asylum case*.
[101] Compromis, ¶ 12.
[102] Compromis, ¶ 14.
[103] Compromis, ¶ 13.
[104] Compromis, Clarification II.
[105] Compromis ¶ 9.

2.2.1. That Pshad has not ratified any of the relevant conventions.

The People's Democracy of Pshad is a signatory to the Treaty on Principles Governing the Act of States in the Exploration and Use of Outer Space including Moon and other Celestial Bodies [hereinafter referred to as the Outer Space Treaty] and the Convention on International Liability for Damage caused by Space Objects [hereinafter referred to as the Liability Convention] but has not ratified either of them.[106] Art. XIV of the Outer Space Treaty states that the treaty shall be subject to ratification by signatory states.[107] Similarly Article XXIV of the Liability convention states that the treaty shall be subject to ratification by signatory states.[108] The International Law Commission observes that:

"*It is established that the treaty itself is subject to subsequent ratification by the state before it becomes binding….to be the opinion that the general rule is that ratification is necessary to render a treaty binding.*"[109]

McNair and the Harvard Research observed that ratification is required when the treaty or the attendant's circumstances do not indicate an intention to dispense with ratification.[110] Fitzmaurice has opined that:

"*The necessity for ratification is not inherent and depends in the last resort, it depends on the intention of the parties; and that where no intention to ratify is apparent it may be assumed that none exists*."[111]

Hence in order for a treaty or convention to be binding on a state, the state must have ratified the said treaty or convention. In the present case Republic of Pshad is a signatory to the Outer Space Treaty and the Liability Convention.[112] Hence the Republic of Pshad cannot be held liable to any extent under any of the above mentioned treaty or convention.

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[106] Compromis, Clarification I, ¶ 8 .
[107] Treaty on Principles Governing the Act of States in the Exploration and Use of Outer Space including Moon and other Celestial Bodies, art. XIV, [hereinafter referred to as "The Outer Space Treaty"].
[108] Convention on International Liability for Damage caused by Space Objects, art. XXIV [hereinafter referred to as "The Liability Convention"].
[109] Draft Articles on the Law of Treaties with the Commentaries, adopted by the International Law Commission, eighteenth session, 1966.
[110] SIR IAN MCTAGGART SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES, p. 39.
[111] SIR IAN MCTAGGART SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES, p. 40.
[112] Compromis ¶ , Clarification I, ¶ 8.

2.2.2. Arguendo, that Democracy of Pshad is not liable, as launching state is responsible.

In arguendo, The Liability Convention, Art. I has defined the term "*launching state*" to include a state which launches or procures the launching of an object and a state from whose territory the object is launched. The definition of the concept of launching state, which mirrors the standards of Art. VII of the Outer Space Treaty and the definition contained in the Convention on Registration of Launched Objects into Outer Space [hereinafter referred to as the Registration Convention] provides sufficient basis for the determination of the state which bears international liability.[113]

Bockstieger suggests that:

"*there should be a substantial threshold test and therefore the provision of small minor components to the payload or the launching of another state, and even the sale of a satellite to another state would not qualify as procurement*."[114]

The space debris originated from a Pshadi build and owned satellite.[115] However the involvement of Pshad in launching that satellite is unclear. No concrete conclusion can be arrived at saying Pshad was involved in the launching of that satellite and also the extent of involvement, if any, is unclear. Pshad is neither the launching state nor has it procured the launching of the satellite and nor had the satellite been launched from the territory of Pshad, since in 1990 Pshad had no launching facility of its own.[116] Hence, Pshad cannot be held liable to any extent for the damage caused to EO's satellite to any extent whatsoever.

[113] JULIAN HERMINDA, INTERNATIONAL SPACE LAW (excerpts from Legal Basis for a National Space Legislation, the Hague, London and Boston: Kunwar Academic Publishers, 2004) [hereinafter JULIAN HERMINDA, INTERNATIONAL SPACE LAW].
[114] JULIAN HERMINDA, INTERNATIONAL SPACE LAW.
[115] Compromis ¶ 9.
[116] Compromis ¶ 9.

FINAL SUBMISSION

Wherefore in the light of the Issues raised, Argument advanced, Reasons given and Authorities cited, the Republic of Argunia requests this Hon'ble Court to:

(a) Declare that the moratorium imposed by Republic of Argunia on the exports of Space Technology to the People's Democracy of Pshad is not justified;

(b) Declare that that this Hon'ble Court does not have the jurisdiction to hear investment claims;

And hence, hold that the People's Democracy of Pshad is not liable to pay for the value of the satellite, the profits lost or any other kind of loss whatsoever.

All of which is respectfully affirmed and submitted,

Agents for the Respondent,

People's Democracy of Pshad