



**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 DÉMOCRATIE POPULAIRE DE PSHAD
PARTIE RÉQUERANTE
ET
LA RÉPUBLIQUE D'ARGUNIA
PARTIE RÉPONDANTE

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

**MEMORIAL FOR THE RESPONDENT/NOTE DE SERVICE PAR LA
RÉPONDANTE**

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

TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	iv
INDEX OF AUTHORITIES.....	v
I. CASES, ADVISORY OPINIONS AND ARBITRAL RULINGS.....	v
A. International Court Of Justice.....	v
B. Permanent Court Of International Justice	v
C. GATT/ WTO Appellate Body Reports.....	vi
D. GATT/ WTO Panel Body Reports	vi
E. Other International Judgements And Arbitral Awards.....	vi
II. TREATIES, CONVENTIONS, STATUTES AND DECLARATIONS	vii
III. THE INTERNATIONAL LAW COMMISSION (ILC).....	viii
IV. TREATISES, BOOKS & DIGESTS.....	viii
V. ARTICLES, JOURNALS AND YEARBOOKS	x
STATEMENT OF JURISDICTION.....	xii
STATEMENT OF FACTS	xiii
ISSUES RAISED.....	xvi
SUMMARY OF ARGUMENTS.....	xvii
ARGUMENTS ADVANCED	1
1. That export prohibition imposed on the People’s Democracy of Pshad by the Republic of Argunia is justified.	1
1.1. That the export prohibition imposed is valid under the Article 30 of the EJEP.	1
1.2. That the Argunia has the authority to impose a counter-measure.	6

MEMORIAL ON BEHALF OF THE RESPONDENT

1.3. That the export prohibition imposed is justified due to security reasons.	12
2. That the ICJ has jurisdiction to decide upon the counterclaim made by Republic of Argunia.	14
2.1. That approaching the Centre for Settlement of Investment Disputes [hereinafter referred to as the “Centre”] is not essential.	14
2.2. That the counterclaims are admissible under the jurisdiction of the ICJ.....	18
3. That Pshad is liable to compensate Republic of Argunia for the damage caused.	18
3.1. That the Republic of Argunia can approach the ICJ on behalf of the EO.....	18
3.2. That Pshad is liable for the destruction of EO’s Satellite.....	22
3.3. That Pshad is liable to pay for the loss caused due to the damage.....	23
FINAL SUBMISSION.....	xix

LIST OF ABBREVIATIONS

¶/¶¶:	Paragraph/Paragraphs
Doc.	Document
Fla. J. Int'l	Florida Journal of International Law
I.L.M.	International Legal Material
MICH. J. Int'l L	Michigan Journal of international Law
P.	Page
Rep.	Report
U.N.T.S.	United Nations Treaty Series
Art./art.	Article
B.Y.I.L.	British Yearbook of International Law
G.A. Res.	General Assembly Resolution
I.L.R.	International Law Reporter
NYIL	Netherlands yearbook of International Law
P.C.I.J.	Publications of the Permanent Court of International Justice
SC Res.	United Nations Security Council Resolution
U.N. GAOR	United Nations General Assembly Official Records
Vol.	Volume
Yale J. Int'l L. J	Yale Journal of International Law

INDEX OF AUTHORITIES

I. CASES, ADVISORY OPINIONS AND ARBITRAL RULINGS**A. International Court Of Justice**

1. *Admissions case*, [1948] I.C.J. Rep. 57.
2. *Aegean Sea continental shelf case (Greece v. Turkey)*, [1978] I.C.J. Rep. 23.
3. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment*, [1996] I.C.J. Rep. 595.
4. *Barcelona Traction, Light and Power Co. Case*, [1970] I.C.J. Rep. 32.
5. *Corfu Channel Case*, [1949] I.C.J. Rep. 214.
6. *East Timor (Portugal v. Australia)*, Judgment, [1995] I.C.J. Rep. 90.
7. *Interhandel (Preliminary Objections) case*, [1959] I.C.J. Rep. 27.
8. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, [1998] I.C.J. Rep. 275.
9. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, [1996] I.C.J. Rep. 226.
10. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, [1984] I.C.J. Rep. 440.
11. *Oil Platforms Case (Islamic Republic of Iran v. United States of America)*, [1996] I.C.J. Rep. 803.
12. *The UN Admissions Case (Competence of General Assembly)*, [1950] I.C.J. Rep. 8.
13. *United States Diplomatic and Consular Staff in Tehran case (United States of America v. Iran)*, [1980] I.C.J. Rep. 3.

B. Permanent Court Of International Justice

1. *Chorzow Factory Case*, 1928, P.C.I.J. (ser. A) No. 17 at 27.

2. *Mavrommatis Palestine Concessions (Jurisdiction)*, P.C.I.J. (Ser. A) No.2 at 12.
3. *Panevezys-Saldutiskis railways*, 1939 P.C.I.J. (ser. A/B) No. 76 at p.16.
4. *River Meuse Case (Netherlands v. Belgium)*, P.C.I.J. (ser. A/B) No. 76 at 28.
5. *The Lotus Case (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10 at 16.

C. GATT/ WTO Appellate Body Reports

1. Appellate Body Report, *Korea-Various Measures on Beef*, WT/DS161/AB/R.
2. Appellate Body Report, *United States-Gasoline*, WS/DS2/AB/R.
3. Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R.
4. *European Communities- Measures Affecting the Prohibition of Asbestos and Asbestos Products*, WT/DS135 (adopted in 2001).
5. *Korea – Measures Affecting imports of Fresh Chilled and Frozen Beef*, WT/DS161 and WT/DS169.
6. *Thailand – Restrictions on Import of and Internal Taxes on Cigarettes*, GATT B.S.I.D. DS10/R-37S/200 (November 7, 1990)
7. *United States: Import prohibition of certain Shrimp and Shrimp products*, WT/DS58/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I. 323.

D. GATT/ WTO Panel Body Reports

1. Panel Report, *United States- Gambling*, WT/DS285/R.

E. Other International Judgements And Arbitral Awards

1. *Capethorn Pigeon case* (1902), 9 RIAA 65.
2. *Parker Case*, (1926), 4 RIAA, 35, at 37.
3. *Reparation Commission v. U.S.* (1926), 2 RIAA, 779, at 787.
4. *Rhodope Forest claim* (1933), 3 RIAA, 1391, at 1426.

5. *Shufedt claim* (1930), 2 RIAA, 1079.
6. *Spanish Zone of Morocco* (1925), 2 RIAA, 617, at 658.

II. TREATIES, CONVENTIONS, STATUTES AND DECLARATIONS

1. Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1868 U.N.T.S. 201.
2. Convention on International Liability for Damage caused by Space Objects.
3. Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
4. European Free Trade Association, Stockholm Convention 1960.
5. General Agreement on Tariffs and Trade, Jan. 1, 1995, 1867 U.N.T.S. 187.
6. International Covenant on Civil and Political Rights, Dec. 16, 1946, G.A. Res. 2200(XXI).
7. Iraq-Kuwait, U.N. SC Resolution 670 (Sep. 25. 1990).
8. Manila Declaration on the Peaceful Settlement of International Disputes, GA Res. 37/10 (1982) 21 ILM 449.
9. Rules of the International Court of Justice (1978), adopted on 14 April 1978 and entered into force on 1 July 1978.
10. The Charter of the United Nations, 26 June 1945, Can. T.S. 1945 No 7.
11. The General Agreement on Trade in Services, Treaty of Rome 1957.
12. The International Convention on Elimination of All Forms of Racial Discrimination.
13. The Legal Text: The Results of the Uruguay Round of Multilateral Trade Negotiations 17(1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).
14. The Vienna Convention on Law of Treaties, 1969, 1155 U.N.T.S. 331.

15. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual – Use Goods and Technologies, 1996.
16. Trade Related Aspects of Intellectual Property Rights.
17. U.N. SC Res. 1203 (1998), Federal Republic of Yugoslavia.
18. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A(III)

III. THE INTERNATIONAL LAW COMMISSION (ILC)

1. 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).

IV. TREATISES, BOOKS & DIGESTS

1. A.R.BISWAS, INTERNATIONAL LAW, Kamal Law House, 1999.
2. ALINA KACZOROWSKA, TEXTBOOK ON PUBLIC INTERNATIONAL LAW, Old Bailey Press, 2002.
3. ANTONIO CASSESSE, INTERNATIONAL LAW IN A DIVIDED WORLD, Clarendon Press, 1986.
4. BERNARD M. HOEKMAN AND MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM, THE WTO AND BEYOND, 3rd ed., The Oxford University Press, 2009
5. D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW, 5th ed. (London: Sweet & Maxwell, 1998).
6. D.W. GREIG, INTERNATIONAL LAW, 2nd ed., London Bitterworths, 1976.
7. DAVID COTRIGHT AND GEORGE A. LOPEZ , ECONOMIC SANCTIONS: PANACEA OR PEACE BUILDING IN A POST-COLD WAR WORLD?, Westview Press, 1995.

8. EDWARDS AND FASTMAN, HUMAN SECURITY AND NON CITIZENS-LAW, POLICY AND INTERNATIONAL AFFAIRS, Cambridge University Press.
9. G.I. TUNKIN, THEORY OF INTERNATIONAL LAW.
10. GUCHTENEIRE, PECOUD AND CHOLEWINSKI, MIGRATION AND HUMAN RIGHTS- THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHTS, Cambridge University Press, 2009.
11. HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE, Martinus Nijhoff Publishers, 1987.
12. IAN BROWNLIE, BASIC DOCUMENTS IN INTERNATIONAL LAW, 4th ed., Oxford 1995.
13. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 2nd ed., Cambridge University Press, 2004.
14. MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW, 4th ed., Universal Law Publishing Co. Pvt. Ltd., 2001.
15. MAX SORENSON, MANUAL OF PUBLIC INTERNATIONAL LAW.
16. MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW, 4th ed., George Allen and Unwin.
17. RAJ BHALA INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, 3rd ed., LexisNexis.
18. RAY AUGUST, PUBLIC INTERNATIONAL LAW, Prentice Hall, 1995.
19. RICHARD SWIFT, INTERNATIONAL LAW- CURRENT AND CLASSIC, John Wiley and Sons Inc., 1969.
20. ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW, The University Press of Virginia.
21. JENNINGS AND WATTS, OPPENHEIM'S INTERNATIONAL LAW, 9th ed., Pearson Education Asia, Volume 1 Peace, Parts 2 to 4, (2003).

22. SUBHASH C. JAIN, NATIONALISATION OF PROPERTY, Deep and Deep Publications.
23. WILLIAM W. BISHOP, JR., INTERNATIONAL LAW- CASES AND MATERIALS, 2nd ed., Little Brown and Company (1962).

V. ARTICLES, JOURNALS AND YEARBOOKS

1. **Antonias Dimolista**, *Issues Concerning the Existence, Validity, and Effectiveness of the Arbitrationo Agreement*, pp. 21, 22, ICC Bulletin Vol. 7/No. 2, December 1996.
2. **Barry J. Hurewitz**, *Non proliferation and Free Access to Outer Space: The Dual Use Conflict between the Outer Space Treaty and Missile Technology Control*, p. 212, 9 High Tech. L.J. 211.
3. **Bruce W. Jentleson**, *Coercive Prevention - Normative, Political, and Policy Dilemmas*, in UNITED STATES INSTITUTE OF PEACE PEACEWORKS, p.20, (Issue 35).
4. **Facundo Perez-Aznar**, *Counter Measures in The WTO Dispute Settlement System, An analysis of their Characteristics and Procedure in the Light of General International Law*.
5. **Fitzmaurice**, *The Law and Procedure of the ICJ: Treaty Interpretation and certain other Treaty Points*, (1951) 28 B.Y.I.L.
6. **Gudrun Monika Zagell**, *WTO and Human Rights: Examining Linkages and Suggesting Convergence*, in IDLO VOICES OF DEVELOPMENT JURIST PAPER SERIES, p. 14, Vol. 2. No. 2. 2005.
7. **Hamburger AG and Dr.Benjamin Leisinger**, *Mediation – Arbitration clauses, The Importance of drafting*, (4A_18/2007), Journal BSCC news (online).
8. **Howard A Baker**, *Space Debris: Legal and Policy Implications*, 1 *Utrecht Studies in Air and Space Law*, Vol. 6, 1989.
9. **James P.Lamperitus**, *The Need for An Effective Regime For Damage Caused By Debris in Outer Space*, p. 8, 13 MICH. J. Int'l L (1992).

10. **Jianming Shen**, *National Sovereignty and Human Rights in a Positive Law Context*, 26 Brook. J. Int'l L. 417 (2000).
11. **Lorand Bartels**, *Article XX of GATT and The Problem of extraterritorial Jurisdiction: The Case of Trade Measures for The Protection of Human Rights*, JWT(2002), Vol. 36, No. 2.
12. **Meinhard Schoroder**, *Principle of Non-intervention*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. II, (Elsevier, 1999) p. 620. (R. Bernhardt ed.).
13. **Peter M. Wolrich**, *Multi-tiered Clauses: ICC Perspectives in Light of the new ICC ADR Rules*, p.10, presented at the International Bar Association, 2002, Durban, South Africa.
14. **R. C. R. Siekmann**, *Netherlands State practice for the parliamentary year 1982–1983*, NYIL, 1984, vol. 15.
15. **Roger Alford**, *GATT Article XX and Extraterritoriality*.
16. **Sarah H. Cleveland**, *Norm Internalization and U.S. Economic Sanctions*, 26 Yale J. Int'l L.J 51 (2001).
17. **Stephen J. Powell**, *Place of Human Rights Law in World Trade Organization Rules*, 16 Fla. J. Int'l 219 (2004).
18. **T. Modibo Ocran**, *The Doctrine of Humanitarian Intervention in light of Robust Peacekeeping*, 25 B.C. Int'l & Comp. L. Rev. 1. (2002).
19. **Tatjana Eres**, *The Limits of GATT Article XX: A Back Door for Human Rights*.
20. The Avalon Project at Yale Law School, *Nuremberg Trial Proceedings Volume 3*, available at <http://www.yale.edu/lawweb/avalon/imt/proc/12-04-45.htm>.
21. **Tractatenblad van het Koninkrijk der Nederlanden**, No. 140 (1975). H.-H. Lindemann, *The repercussions resulting from the violation of human rights in Surinam on the contractual relations between the Netherlands and Surinam*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, vol. 44 (1984).

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 moderate growth, and has maintained its democratic values, albeit acrimoniously. However, its historical lead in technology development and professional services has diminished over last fifteen years. It has only been for the last 20 years that Pshad has risen from its feudal past and evolved into one of the most progressive nations in terms of social policy. 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, as it is not yet fully competitive in agriculture and poor in natural resources.

2. Emigration By Pshadi Residents

Due to such inequalities in wealth, there exists a lot of social unrest in Pshad. This has led to large scale poverty driven emigration of the Pshadi citizens, especially to the Argunia. Most of the illegal Pshadi immigrants are often a source of cheap labor in Argunia. Though, these immigrants receive antagonistic treatment in their own country and are mostly mistreated by the border officials, in case they attempt to return.

3. Disturbance In The Soccer Field

Laudi is one of the border cities of Argunia and is a home to its soccer team. Though, 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 the fans, etc. In 2004, a particularly violent riot broke down leading to a mass battle and consequent loss to property and injury to people.

4. Establishment Of EO

As a consequence of incapacity of Laudi's Police to deal with the ruckus, Eye Out [hereinafter referred to as "EO"], a Private security firm founded in the year 2000 by a Pshadi immigrant, Rita Sen, became popular in both public and private sectors, as there were lack of funds for the Laudi's police forces. After the said riot in 2004, EO received an exclusive contract to maintain security in Laudi Sports Stadium, though there were rumours about the reason for the award of the said contract. As a result of its growth EO, Rita Sen incorporated EO as a company in 2005, under the laws of Argunia. In the said company, she held 30% of the shares, another 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 [Argunia and Pshad].

5. EO's Satellite

Subsequently, with the aim to improve its services, EO launched a satellite to maintain surveillance over the entire RA-Pshad border area. Revolving at 1000 km above the earth, it promised to revolutionize security measures and also accomplished the tracking of football "hooligans". However, concerns were raised regarding the information collected by the satellite, the invasion of privacy rights and tracking of Pshadi emigrants. In May 2009, the satellite collided with a space junk, which was a part of a satellite built and owned by Pshad in 1990. The damage was not merely to the hardware, but the satellite, consequently, stopped functioning. Outraged by the losses running into millions of dollars, Laudi Authorities took the matter to federal parliament. On reference, the Parliamentary Committee for Science and Technology took prompt action and called for an 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 "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 adherence to basic individual rights and rule of law. EJEPA also allows for regime-internal countermeasures in case of violations of the agreement.

7. The Compromis

Subsequently, Pshad has claimed violation of Article 15 of EJEPA, which forbids the parties from quantitative restrictions on each other, without exceptions. Argunia has claimed that their actions are excused under the general exception vide Article 30 of the same agreement. Alternatively, Argunia has claimed that the prohibition is an actual and pre-emptive countermeasure against Pshad's human rights violations against the returned Pshadi citizens. Argunia has made a counterclaim that Pshad must pay the value of the satellite and lost profits until a new satellite can be brought into operation. Pshad has rejected all the claims made by Argunia and has contended the Jurisdiction of the Court with respect to investment claims and that any which way it cannot be upheld under the international law.

ISSUES RAISED

1. That export prohibition imposed on the Pshad [Applicant] by Argunia [Respondent] is justified.
 - 1.1. That the export prohibition imposed is valid under the Article 30 of the EJEPA.
 - 1.1.1. That the export prohibition imposed is valid under the Article 30(a) of the EJEPA.
 - 1.1.2. That the export prohibition imposed is valid under the Article 30(b) of the EJEPA.
 - 1.2. Arguendo, that the Argunia has the authority to impose a counter-measure.
 - 1.3. That the export prohibition imposed is justified due to security reasons.
2. That the International Court of Justice has the jurisdiction to decide upon the counterclaim made by Argunia.
 - 2.1. That approaching the International Centre for Settlement of Investment Disputes is not essential.
 - 2.1.1. That the Intention of the Parties was not to make the dispute settlement provision compulsory.
 - 2.1.2. That the rules under the ICSID Convention have been not been violated.
 - 2.1.3. That the Dispute Resolution Mechanism is only advisory in Customary International Law.
 - 2.2. That the counterclaims are admissible under the jurisdiction of the ICJ.
3. That Pshad is liable to compensate Republic of Argunia for the damage caused.
 - 3.1. That the Republic of Argunia can approach the ICJ on behalf of the EO.
 - 3.2. That Pshad is liable for the destruction of EO's Satellite.
 - 3.3. That Pshad is liable to pay for the loss caused due to the damage.

SUMMARY OF ARGUMENTS

1. That export prohibition imposed on the People's Democracy of Pshad by the Republic of Argunia is justified.

The Republic of Argunia is justified in imposing restriction on the export of space technology to the Democracy of Pshad and such an action is not in violation of the Eastern Jimm Economic Partnership Agreement.

1.1. That the export prohibition imposed is valid under the Article 30 of the Eastern Jimm Economic Partnership Agreement.

The imposition of the trade prohibition on export of the space technology by The Republic of Argunia over The Democracy of Pshad is not in violation of the Eastern Jimm Economic Partnership Agreement, as the same is exempted under clauses (a) and (b) of Article 30 of the Agreement.

1.2. Arguendo, that the Republic of Argunia has the authority to impose a counter-measure.

Assuming, without submitting the imposition of the indefinite moratorium on export of space technology on the Democracy of Pshad is actually a pre emptive countermeasure to the human rights violations that the Democracy of Pshad commits against it's returned Pshadi citizens.

1.3. That the export prohibition imposed is justified due to security reasons.

Further, the imposition of the indefinite trade prohibition of the nature of a moratorium by the Republic of Argunia, on the export technology to the Democracy of Pshad is justified as it is called for safeguarding of national security and fulfilling its state responsibility to its natural and legal persons.

2. That the ICJ has jurisdiction to decide upon the counterclaim made by Republic of Argunia.

The EJEPA Agreement entered into by Argunia and Pshad, mentions the consent of the parties to submit any dispute that might arise, under the International Court of Justice. Clause 2 of the Chapter 7 of the EJEPA the same mentions that the only requirement would be that

the submission of a claim would have to satisfy the requirements of Chapter II of the ICSID Convention. In the present case, the requirements under the ICSID Convention have thus, been fulfilled. As a company is a legal person, a claim on its behalf can be brought forth by the country of its nationality and Eye Out is a company registered in Argunia. Further, the Dispute Resolution Mechanism is only advisory under customary International Law.

3. That Pshad is liable to compensate Republic of Argunia for the damage caused.

The Republic of Argunia is entitled to be compensated for the loss that has been caused by People's Democracy of Pshad due to the non-performance or breach of the international obligation imposed on it.

3.1. That the Republic of Argunia can approach the ICJ on behalf of the Eye Out.

The satellite was launched as an act of the Eye Out to improve the services they provide. EO is registered under the law of the Republic of Argunia and is a legal person, and it is Eye Out which has suffered the damage. Hence, as the EO is a national of Republic of Argunia, Republic Argunia can approach the ICJ.

3.2. That Pshad is liable for the destruction of EO's Satellite.

The space junk which damaged the satellite was a dislodged portion of a satellite that has been taken out of a space programme and was left to orbit. The piece that damaged EO's satellite had been determined to be a piece of a Pshadi-built and owned satellite from 1990. Under the Liability Convention, it is clearly stipulated that the said action is a breach of international obligation. It is the said breach which has damaged EO's satellite and caused loss to it. Hence, Pshad is liable for the destruction of EO's satellite.

3.3. That Pshad is liable to pay for the loss caused due to the damage.

It is a principle under international law that if there has been a breach of an international obligation, then the party causing the breach is liable to pay for the loss that it has caused to injured party. In light of the said principle, the respondent has sought that Pshad pays for value of the satellite damaged and the lost profits, until a new satellite is made.

ARGUMENTS ADVANCED

1. That export prohibition imposed on the People’s Democracy of Pshad by the Republic of Argunia is justified.

It is submitted that the indefinite moratorium on space technology exports to the Democracy of Pshad imposed by the Republic of Argunia,¹ is justified under Article 30 of the EJEPA and hence, is valid.

1.1. That the export prohibition imposed is valid under the Article 30 of the EJEPA.

Article 30 of the EJEPA justifies measures that can be imposed by a member State, subject to the requirement that such measures are not in such manner that would constitute a means of arbitrary or unjustifiable discrimination between countries, especially where same conditions prevail or a disguised restriction on international trade.²

It is interesting to note that Article XX of the General Agreement of Tariffs and Trade [hereinafter referred to as “GATT”],³ has the same provision as has been stipulated under Article 30 of the EJEPA. Hence, it is submitted that Article XX of the GATT has been relied upon for the interpretation of Article 30 of the EJEPA.

Interestingly, Article 12 of the Stockholm Convention states:⁴

“Provided that such measures are not used as a means of arbitrary or unjustifiable discrimination between Member States, nothing in Article 10 and 11 shall prevent the adoption or enforcement by any Member State...”

Various other international instruments have similar provisions regarding general exceptions to imposition of export restrictions.⁵ The “General Exceptions” provisions under the GATT and the General Agreement on Trade and Services [hereinafter referred to as “GATS”] allow

¹ Compromis ¶ 10.

² Compromis, Annexure, Article 30.

³ World Trade Organisation/General Agreement of Tariffs and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1868 U.N.T.S. 201; The Legal Text: The Results of the Uruguay Round of Multilateral Trade Negotiations 17(1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), Article XX of GATT reads as “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement.

⁴ European Free Trade Association, art. 12, Stockholm Convention 1960.

⁵ The General Agreement on Trade in Services, art. XVI, Treaty of Rome 1957 [hereinafter referred to as “The Rome Treaty”].

members to take measures that violate a rule or discipline, if necessary to achieve non-economic objectives.⁶ The Chapeau to Article XX of the GATT states that a measure which falls under any of the exceptions provided for in Article XX must not constitute “*a means of arbitrary or unjustifiable discrimination*” or “*a disguised restriction on international trade.*”⁷ The Appellate Body in the US Shrimp/Turtle case observed:⁸

“*The chapeau states that a measure which falls under any of the enumerated exceptions must meet the requirements of the first paragraph of the Article in order for that measure to be exonerated.*”

It has been established, that the chapeau is (a) a balancing act principle to mediate between the right of a member to invoke a derogation of Article XX and its obligation to respect the rights of other members, (b) a qualification making the Article XX exemptions limited and conditional, (c) an expression of the principle of good faith in international law, and (d) a safeguard against the doctrine of *abus de droit*.⁹

Hence, the construct of Article XX of GATT [and Article 30 of the EJEPA] requires that if any measure of such kind has been imposed, the same has to qualify and be permitted under the chapeau. Thus, the moratorium imposed on the export prohibition by Argunia is justified, as it qualifies under the chapeau of Article 30 of the EJEPA and the sub points (a) and (b).

1.1.1. That the export prohibition imposed is valid under the Article 30(a) of the EJEPA.

Article 30 stipulates that subject to the requirement that restrictive measures are not applied in an arbitrary or unjustifiable discriminatory manner and if it does not amount to a disguised restriction on international trade, the Member States are exempted from taking such

⁶ BERNARD M. HOEKMAN and MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM, THE WTO AND BEYOND*, 3rd ed. at 465 [hereinafter referred to as “THE POLITICAL ECONOMY OF THE WORLD”].

⁷ PATRICK F.J. MACRORY, ARTHUR EDMOND APPLETON and MICHAEL J. PLUMMER, *THE WORLD TRADE ORGANISATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS*, Volume I, p. 1393, New York, 2005 (Springer).

⁸ *United States: Import prohibition of certain Shrimp and Shrimp products*, WT/DS58/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I. 323 [hereinafter referred to as “*the US Shrimp/Turtle case*”].

⁹ *US Shrimp/Turtle case*.

measures, which are not in accordance with the Agreement, if the same is necessary to protect public morals.¹⁰

In the US Gambling case, “*public morals*” was defined as,¹¹ “*Public morals is a standard of right and wrong conduct maintained by or on behalf of a community or nation.*” This autonomous definition of the treaty term “*public morals*” acknowledges that the material content of public morals, is the content of the standards of conduct, and hence, it is contingent on the values sustained by a certain community.¹²

Hence, if seen against the background of the overall purpose of Article XX of the GATT to protect Members’ ‘sovereignty’,¹³ it is to allow the protection of important internal interests and the implementation of national policy decisions.¹⁴ It is for this reason that the public morals exception empowers Members to invoke their national standards of right and wrong conduct to deviate from GATT prescriptions, under certain narrowly defined circumstances.¹⁵ Under this interpretation of Article XX (a), a Member State can justify its rights to ensue trade actions, in response to the grave human right violations being done by the other Member State.¹⁶

Interestingly, the infringement of the right to emigrate can also be considered as a gross human rights violation.¹⁷ The Universal Declaration of Human Rights [hereinafter referred to as “UDHR”]¹⁸ proclaims, “*Everyone has the right to leave any country, including his own, and to return to his country.*” This right was reconfirmed by the subsequent adoption of the International Covenant on Civil and Political Rights [hereinafter referred to as “ICCPR”],¹⁹ which states that “*No one shall be arbitrarily deprived of the right to enter his country.*” The International Convention on Elimination of All Forms of Racial Discrimination also declares

¹⁰ Compromis, Annexure, art. 30.

¹¹ Panel Report, United States- Gambling, WT/DS285/R, ¶ 6.465.

¹² RUDIGER WOLFRUM, PETER-TOBAIS STOLL AND ANJA SEIBERT- FOHR, WTO: TECHNICAL BARRIERS AND SPS AGREEMENT, p. 83 [hereinafter WTO: TECHNICAL BARRIERS AND SPS AGREEMENT].

¹³ STOLL and SCHORKOPF, MAX PLANEK CWTI, Volume I, ¶ 170.

¹⁴ Appellate Body Report, United States- Gasoline, WS/DS2/AB/R.

¹⁵ WTO: TECHNICAL BARRIERS AND SPS AGREEMENT, p. 83.

¹⁶ Stephen J. Powell, *Place of Human Rights Law in World Trade Organization Rules*, p. 223, 16 Fla. J. Int’l 219 (2004) [hereinafter referred to as “Stephen J. Powell”].

¹⁷ Stephen J. Powell, p. 223.

¹⁸ Universal Declaration of Human Rights, art. 13(2), Dec. 10, 1948, G.A. Res. 217 A (III), UN Doc. A/810 (1948) at 71.

¹⁹ International Covenant on Civil and Political Rights, art 12(4), Dec. 16, 1946, G.A. Res. 2200(XXI).

the ‘*right to return to one’s country*’.²⁰ In the resolution 1199 (1998), the Security Council, reaffirmed the rights of refugees to return.²¹ Also, the right of ‘*safe and free*’ return has been emphatically repeated in later resolutions, such as resolution 1239 and 1244 (1999), and in those adopted in respect of east Timor. The right of non-citizens can also be protected through application of international refugee law and the law relating to stateless persons.²² Both UDHR and ICCPR have been widely ratified and are legally binding on States’ parties and form an essential part of customary international law in context to human rights. Further, as Pshad is a party to ICCPR,²³ it is legally bound to provide its citizens the right to return.

Therefore mistreatment by border officials to returned Pshadi citizens,²⁴ and the stand taken by the Pshadi Government, perceiving emigration to be unfavourable,²⁵ is a clear violation of abovementioned human right. Hence, the indefinite moratorium on export of space technology to Pshad by Argunia is justified under Art. 30 (a) of the EJEPA.

1.1.2. That the export prohibition imposed is valid under the Art. 30 (b) of the EJEPA.

Art. 30 (b) of the EJEPA says that imposition of trade restrictions are permitted as long as the measure employed satisfies the requirements of the first paragraph of the said Article and such a measure is necessary to protect human, animal or plant life or health.²⁶ On the issue of extraterritorial jurisdiction reach of measure enforcing human rights, Lorand Bartels opines that:²⁷

“Article XX is to be read consistently with the rules governing a WTO Member’s right to exercise legislative jurisdiction over activities and the things located outside of its territory, the provision should apply to save various trade measures designed to promote and protect human rights outside of the territory of the regulating member.”

²⁰ The International Convention on Elimination of All Forms of Racial Discrimination, art. 5(d) (ii).

²¹ In U.N. SC res. 1203 (1998), the Security Council also underlined the responsibility of the Federal republic of Yugoslavia for creating the conditions which allow refugees to return.

²² ALICE EDWARD & CARLA FERSTMAN, HUMAN SECURITY and NON-CITIZENS, LAW, POLICY & INTERNATIONAL AFFAIRS, p. 262, Cambridge University Press.

²³ Compromis, Clarification I.

²⁴ Compromis ¶ 2.

²⁵ Compromis ¶ 2.

²⁶ Compromis, Annexure, art. 30.

²⁷ Lorand Bartels, Article XX of GATT and *The Problem of extraterritorial Jurisdiction: The Case of Trade Measures for The Protection of Human Rights*, JWT(2002), Vol. 36, No. 2, p. 353.

Also the Art. 31 (3) of the Vienna Convention on Law of Treaties [hereinafter referred to as “VCLT”] requires the treaty provisions to be interpreted in light of subsequent agreements between the parties and relevant rules of international law applicable between parties,²⁸ and since, treaties or international law principles of prescriptive jurisdiction allow Member States to regulate extraterritorial harms, then this should inform the interpretation of the Article XX exceptions.²⁹ Hence, Members should be able to take measures under Article XX (a) and (b) to promote human rights arising in other countries even if those harms are not manifest in their own country.³⁰

Article XX (b) contains a necessity test that trade measure must pass a weighing and balancing test to evaluate whether the measure is necessary to achieve the intended goal.³¹ In order to demonstrate a nexus between the measure and the specific Article XX exception, there are two requirements for justifying the imposition of a trade restrictive measure under Article XX (b).³² First, a member must prove that the measure falls under the general policy of objective specified in the exception and second the measure must be necessary.³³ ‘Necessary’ is not limited to which is indispensable or absolute necessary or inevitable to secure compliance but other measures too may fall within the ambit of the exception.³⁴ The term ‘necessary’ has been interpreted to be the least GATT inconsistent measure.³⁵ A Contracting Party is also required to show that the measure in question falls within a range of policies designed to protect human life.³⁶

There is undisputed human rights violation on the returned Pshadi citizens by the border officials.³⁷ The unfavorable stand of the Pshadi government on emigration³⁸ is also a clear

²⁸ Vienna Convention Laws on Treaties 1969, art. 31(3), 1155 U.N.T.S. 331.

²⁹ Roger Alford, *GATT Article XX and Extraterritoriality*. [hereinafter referred to as “GATT ARTICLE XX AND EXTRA TERRITORIALITY”].

³⁰ GATT ARTICLE XX AND EXTRATERRITORIALITY.

³¹ Gudrun Monika Zagell, *WTO and Human Rights: Examining Linkages and Suggesting Convergence*, in IDLO VOICES OF DEVELOPMENT JURIST PAPER SERIES, p. 14, Vol. 2. No. 2.2005; *Korea – Measures Affecting imports of Fresh Chilled and Frozen Beef*, WT/DS161 and WT/DS169; *European Communities-Measures Affecting the Prohibition of Asbestos and Asbestos Products*, WT/DS135 (adopted in 2001) [hereinafter the EC Asbestos case].

³² Tatjana Eres, *The Limits of GATT Article XX: A Back Door for Human Rights*, p. 15,35 [hereinafter referred to as “Tatjana Eres”].

³³ Tatjana Eres.

³⁴ Appellate Body Report, *Korea-Various Measures on Beef*, WT/DS161/AB/R.

³⁵ *Thailand – Restrictions on Import of and Internal Taxes on Cigarettes*, GATT B.S.I.D. DS10/R-37S/200 (November 7, 1990) [hereinafter the Thailand Cigarettes case].

³⁶ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R.

³⁷ Compromis ¶ 11.

violation of the right to return to one's own country bestowed upon recognized under the UDHR.³⁹ Hence, the infringement of the right to emigrate can also be considered to be a gross human right violation.⁴⁰

Hence the measure falls within a range of policies designed to protect human life and also no other measure less inconsistent with the provisions of the EJEPA were available and so the export prohibition is justifiable under Article 30 (b) of the EJEPA.

1.2. That the Argunia has the authority to impose a counter-measure.

1.2.1. That Argunia has the right to intervene.

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations.⁴¹ Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such.⁴²

In the statement by International Court of Justice [hereinafter referred to as "ICJ"] in the Barcelona Traction case,⁴³ the Court drew "*an essential distinction*" between obligations owed to particular States and those owed "*towards the international community as a whole.*" With regard to the latter, the Court went on to state that "*in view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.*" The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to "*the outlawing of acts of aggression, and of genocide*" and to "*the principles and rules concerning the basic rights of the human person, including*

³⁸ Compromis ¶ 11.

³⁹ The Universal Declaration on Human Rights, art. 13(2).

⁴⁰ Stephen J. Powell.

⁴¹ 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), art. 1, ¶ 4.

⁴² 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), art. 48, ¶ 10.

⁴³ *Barcelona Traction, Light and Power Co. Case*, [1970] I.C.J. Rep. 32, ¶ 33 [hereinafter referred to as "*Barcelona Traction*"].

protection from slavery and racial discrimination”.⁴⁴ In its judgment in the East Timor case, the Court added the right of self-determination of peoples to this list.⁴⁵

In the light of the rule laid down by the ICJ in the above cases, it can be concluded that human rights obligations are obligations *erga omnes*. Therefore, Pshad owes a duty to the whole international community to adhere the human rights of its citizens.

Further, the ICJ has recognized the principle of non-intervention.⁴⁶ Numerous General Assembly Resolutions have repeatedly emphasized the importance of the principle of state sovereignty and non-intervention. Nowadays, this principle tends to be extended to other means of intervention, namely economic and cultural.⁴⁷ Concerning “*economic interference*,” the principle of non-intervention reflects the nature of international law in general.⁴⁸ Oppenheim defines intervention as, “*forcible or dictatorial interference by a state in the affairs of another state, calculated to impose certain conduct or consequence on that other state.*”⁴⁹

Interestingly, it has been stated that the protection and promotion of human rights should be achieved through international law which includes the principle of state sovereignty.⁵⁰ States should be viewed not as bodies denying human rights; rather should be perceived as protectors and promoters of the human rights of their nationals. Respect for state sovereignty can be realized by protecting the fundamental rights of a state’s nationals through the national law. It is also essential to note that the International Commission on Intervention proclaims that, sovereignty does not include any claim of the unlimited power of a state to do what it wants to its own people. It is acknowledged that sovereignty implies a dual responsibility: externally—to respect the sovereignty of other states, and internally, to respect the dignity

⁴⁴ *Barcelona Traction case*, p. 32, ¶ 34.

⁴⁵ *East Timor (Portugal v. Australia)*, Judgment, [1995] I.C.J. Rep. 90, p. 102, ¶ 29; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, [1996] I.C.J. Rep. 226, p. 258, ¶ 83; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, Judgment, [1996] I.C.J. Rep. 595, pp. 615–616, ¶¶ 31–32.

⁴⁶ *Case of Certain Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits*. [1984] I.C.J. Rep. 440, pp.106-109, ¶¶ 202-207.

⁴⁷ Meinhard Schoroder, *Principle of Non-intervention*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. II*, (Elsevier, 1999) p.620. (R. Bernhardt ed).

⁴⁸ Meinhard Schoroder, *Principle of Non-intervention*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. II*, (Elsevier, 1999) p.621.

⁴⁹ D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW*, p.890, 5th ed. (London: Sweet & Maxwell, 1998).

⁵⁰ Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 *Brook. J. Int'l L.* 417 (2000) pp.434.

and basic rights of all the people within the state. In international human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as a responsibility has become the minimum content of good international citizenship.⁵¹

The implication of this perspective is that state authorities are responsible for the functions of protecting the safety and lives of citizens, as well as the promotion of their welfare; that national authorities are responsible to both the national citizenry and international community through the UN; and that the agents of states are responsible for their actions and accountable for acts of commission and omission. In sum, they are accountable where hitherto they benefited from purported impunity.⁵² Failure to accept these responsibilities is the foundation for a '*just cause*' for intervention.⁵³

In the present case, Pshad has been committing human rights violations against returned Pshadi citizens.⁵⁴ The above mentioned human rights violations by Pshad provide sufficient ground to RA for intervention in order to prevent such violations.

Humanitarian intervention is based upon the doctrine that there are limits to the freedoms that states have in dealing with their own nationals.⁵⁵ When this doctrine was defined by Dutch international scholar Hugo Grotius and other 17th century legal scholars, it allowed one or more states to use force to prevent another state from mistreating its own nationals in circumstances so brutal and widespread that they shocked the conscience of the international community.⁵⁶

Sir Hartley Shawcross confidently declared at the Nuremberg Trials that:

⁵¹ Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, p.8.

⁵² Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, p.13-14.

⁵³ Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, p.32-34.

⁵⁴ *Compromis* ¶ 12.

⁵⁵ RAY AUGUST, *PUBLIC INTERNATIONAL LAW*, (Prentice Hall, 1995), pp.251-252.

⁵⁶ RAY AUGUST, *PUBLIC INTERNATIONAL LAW*, (Prentice Hall, 1995), pp.251-252.

*“the right of humanitarian intervention on behalf of the rights of man, trampled upon by a state in a manner shocking the sense of mankind, has long been considered to form part of the recognized law of nations.”*⁵⁷

As mentioned earlier, in the present case emigration is looked upon unfavourably by the Pshadi government and Pshad mistreats its own nationals when they are trying to return to their country.⁵⁸ This is a clear violation of their basic human right to return to one’s own country.⁵⁹ Therefore it can be concluded that Argunia can use force to prevent such human rights violations.

The interpretation of UN Articles can be collectively threaded to justify preventive intervention. These include Articles 2(7) on sovereign rights; Article 3 on rights regarding life, liberty and personal security; Article 55 on human rights as a fundamental and universal freedom; and Article 56 that pledges membership action towards promoting these goals. Further, according to Annan, *“even national sovereignty can be set aside if it stands in the way of the Security Council’s overriding duty to preserve international peace and security.”*⁶⁰ Moreover, respect for human rights is one of the main goals of the UN Charter,⁶¹ and the member states have a duty to take actions to promote the goals of the Charter.

In the present case, mentioning it repeatedly and emphatically, the Pshad’s human rights violations against returned Pshadi citizens will serve as a deterrent for them to return back to their country.⁶² Moreover, the conditions of social unrest are also prevailing in Pshad.⁶³ All these factors will eventually increase the flow of illegal migrants in Argunia, which would trickle this increased flow will be a burden on the economy of Argunia and a threat to their national security. It is to prevent such circumstances that a preventive intervention was called for. Hence, the Republic of Argunia had taken such a step and was justified in doing the same.

1.2.2. That the countermeasure imposed is valid.

⁵⁷ The Avalon Project at Yale Law School, *Nuremberg Trial Proceedings Volume 3*, available at <http://www.yale.edu/lawweb/avalon/imt/proc/12-04-45.htm>.

⁵⁸ Compromis ¶ 2.

⁵⁹ The Universal Declaration of Human Rights, art. 13(2).

⁶⁰ Bruce W. Jentleson, *Coercive Prevention - Normative, Political, and Policy Dilemmas*, in UNITED STATES INSTITUTE OF PEACE PEACEWORKS, p.20, (Issue 35).

⁶¹ The Charter of the United Nations, art. 55, 26 June 1945, Can. T.S. 1945 No 7.

⁶² Compromis ¶ 2.

⁶³ Compromis ¶ 2.

Article 48 of the ILC draft,⁶⁴ read with Article 54 provides that a state has a right to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

In principle, human rights law applies to all human beings at all times. Human rights instruments exist that guarantee basic rights to all human beings. All migrants are human beings who possess fundamental and inalienable human rights and freedoms that are universally acknowledged in international instruments such as the UDHR, ICCPR, etc. adopted by the United Nations General Assembly. As mentioned earlier the human rights obligations are *erga omnes* in nature, and therefore are owed to the international community as a whole. Hence, Argunia has the right to take counter measures to ensure the cessations of human rights violation in Pshad.

Further, in the case of Netherlands-Suriname (1982),⁶⁵ in 1980 a military Government seized control over the State of Suriname. In response to a crackdown by the new Government on opposition movements in December 1982, the Dutch Government suspended a bilateral treaty on development assistance under which Suriname was entitled to financial subsidies.⁶⁶ While the treaty itself did not contain any suspension or termination clauses, the Dutch Government stated that the human rights violations in Suriname constituted a fundamental change of circumstances which gave rise to a right of suspension.⁶⁷

Hence, drawing an analogy here, the human rights violations committed by Pshad against returned Pshadi citizens,⁶⁸ have amounted to a fundamental change of circumstances, which

⁶⁴ “Article 48. Invocation of responsibility by a State other than an injured State:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) the obligation breached is owed to the international community as a whole.”

⁶⁵ 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), art. 54, ¶ 4.

⁶⁶ Tractatenblad van het Koninkrijk der Nederlanden, No. 140 (1975). See H.-H. Lindemann, *The repercussions resulting from the violation of human rights in Surinam on the contractual relations between the Netherlands and Surinam*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 44 (1984), p. 64, at pp. 68–69.

⁶⁷ R. C. R. Siekmann, *Netherlands State practice for the parliamentary year 1982–1983*, *NYIL*, 1984, vol. 15, p. 321.

⁶⁸ Compromis ¶ 2.

gave rise to a right to Argunia to take appropriate action in the interest of the international community.

Further, economic sanctions can be defined as,⁶⁹ *“Coercive foreign policy actions.....that intentionally suspend customary economic relations such as trade and/or financial exchanges in order to prompt the targeted state to change its policy or behavior.”* In 1986 in the case of Nicaragua v. the United States case heard by the ICJ is important in terms of the principle of non-intervention.⁷⁰ The Court first defined the principle of non-intervention as follows:

*“205... the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State...”*⁷¹

Applying the principle of non-intervention to the facts of the case, the court concluded that:⁷²

“the U.S. support for..... the military and paramilitary activities of the contras in Nicaragua by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention.”

However, when reviewing the U.S. economic coercion toward Nicaragua on the issue of the accordence of economic coercion with international law, the ICJ concluded that it was *“unable to regard such action on the economic plane as is here complained of as a breach of*

⁶⁹ DAVID COTRIGHT AND GEORGE A. LOPEZ, ECONOMIC SANCTIONS: PANACEA OR PEACE BUILDING IN A POST-COLD WAR WORLD?, Westview Press, 1995.

⁷⁰ T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in light of Robust Peacekeeping*, 25 B.C. Int'l & Comp. L. Rev. 1. (2002), p.15.

⁷¹ *Case of Certain Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* [1984] I.C.J. Rep. 392, June 27, 1986.

⁷² *Case of Certain Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ¶ 245, [1984] I.C.J. Rep. 392, June 27, 1986.

*the customary law principle of non-intervention.*⁷³ Therefore, it can be concluded that nothing forbids the use of economic sanctions in customary international law.

Further, while Article 2(4) of the U.N. Charter prohibits unilateral measures involving the use of force the Charter does not expressly prohibit unilateral non-military actions such as economic sanctions by U.N. members.⁷⁴ Furthermore, condemning the gross human rights violation by Iraq, “*the treatment by Iraqi forces of Kuwait nationals, including measures to force them to leave their own country and mistreatment of persons and property.....and its holding of third-state nationals against their will,*” Security Council Resolution 670,⁷⁵ tightened the binding economic sanctions imposed on Iraq.

In the present case, the economic sanction has been imposed by RA in the form of an indefinite moratorium on space technology.⁷⁶ From the above mentioned principles, it can be established that the export prohibition is justifiable as a countermeasure to Pshad’s human right violations.

1.3. That the export prohibition imposed is justified due to security reasons.

The EJEPA provides for an Essential Security clause which states that:⁷⁷

“*Nothing in this Treaty shall be construed to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligation with respect to the maintenance or restoration or international peace or security, or the protection of its own essential security interests.*”

Article XXI of the GATT allows measures to be imposed whenever a government considers it “*necessary for the protection of its essential security interests.*”⁷⁸ Export control can be

⁷³ *Case of Certain Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ¶ 245, [1984] I.C.J. Rep. 392, June 27, 1986.

⁷⁴ Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 Yale J. Int'l L.J 51 (2001).

⁷⁵ *Iraq-Kuwait*, U.N. SC Resolution 670 (Sep. 25. 1990).

⁷⁶ *Compromis* ¶ 10.

⁷⁷ *Compromis*, Annexure, Chapter 7.

⁷⁸ The General Agreement on Tariffs and Trade [hereinafter referred to as “GATT”], art. XX.

used for limiting the military capability of another country.⁷⁹ The Wassenaar Arrangement provides for control of exports for dual use products.⁸⁰

In the present case, space surveillance and space technology can be termed as dual use products as they can be used for both peaceful and military purpose.⁸¹ There is a threat that space surveillance data can be used by the Pshadi Government to track down emigrants and their families.⁸² This in turn can also have an impact on the national security of Argunia. The security threat is a legitimate cause for concern. Traditionally, in international relations, national security takes precedence over the benefits of trade.⁸³ States may wish to use trade sanctions as an instrument of foreign policy against other states who, either violate international law or pursue policies considered to be unacceptable or undesirable.⁸⁴ States may also want to prohibit the export of arms or other products of military use to other countries with which they do not share friendly relations.⁸⁵

Art. 73 of the Trade Related Aspects of Intellectual Property Rights [hereinafter referred to as “TRIPS”] states that Member States can take three kinds of measures contrary to their normal obligation under TRIPS i.e. it permits states to take “*any action*” they “*consider necessary for the protection of their essential security interest...*”⁸⁶

Pshad’s actions are in clear violation of the non-economic objectives of the EJEPA which requires adherence to basic individual rights and rule of law.⁸⁷ The VCLT regulates in Art. 60 the suspension or termination of treaties in relation with a material breach as in this case.⁸⁸ Hence the friendly relations amongst the two States cease to exist and the indefinite

⁷⁹ MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM, PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANISATION: LAW, PRACTISE AND POLICY*, p. 591, 2nd ed., The Oxford University Press, USA (Oct 2006).

⁸⁰ The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual – Use Goods and Technologies, 1996.

⁸¹ Barry J. Hurewitz, *Non proliferation and Free Access to Outer Space: The Dual Use Conflict between the Outer Space Treaty and Missile Technology Control*, p. 212, 9 High Tech. L.J. 211.

⁸² Compromis ¶ 8.

⁸³ PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS*, p. 629, Cambridge University Press, [hereinafter referred to as “Peter van den Bossche”].

⁸⁴ Peter van den Bossche.

⁸⁵ Peter van den Bossche.

⁸⁶ The Trade Related Aspects of Intellectual Property Rights [hereinafter referred to as “TRIPS”], art. 73.

⁸⁷ Compromis ¶ 11.

⁸⁸ Facundo Perez-Aznar, *Counter Measures in The WTO Dispute Settlement System, An analysis of their Characteristics and Procedure in the Light of General International Law*, p. 14.

moratorium imposed on the export of military is justifiable. Such a measure is necessary to fulfill obligations with respect to protection of security interests.

2. That the ICJ has jurisdiction to decide upon the counterclaim made by Republic of Argunia.

The ICJ has the jurisdiction to decide the counter-claim that has been brought forth by Argunia. The counter-claim is pertaining to the investment provisions that have been provided for in the EJEPA,⁸⁹ as extreme loss to such covered investment has been caused.

2.1. That approaching the Centre for Settlement of Investment Disputes [hereinafter referred to as the "Centre"] is not essential.

The counter-claim, even though is of investment nature, it is not essential to take the same before the Centre first and it can be made before the ICJ as well, as the same has been agreed by the Parties.

2.1.1. That the Intention of the Parties was not to make the dispute settlement provision compulsory.

The International Law Commission⁹⁰ and the jurisprudence of the ICJ have taken the view that when the intention of the parties can be unambiguously interpreted, then there is no need to resort to the rules of interpretation but the direct interpretation of the text of the Treaty is sufficient.⁹¹ To facilitate this, the textual or ordinary meaning school of interpretation can be applied.⁹² The prime object of this school is to establish the meaning of the text according to the ordinary or apparent signification of its terms; the approach is therefore through the study and analysis of the text.⁹³ The use of the words such as "*the party may...*" make it clear that a

⁸⁹ Compromis, Annexure, Chapter 7.

⁹⁰ Year Book of the International Law Commission, 1966, II, p. 220 [hereinafter referred to as "YBILC"]; *Admissions case*, ICJ rep. 1948, p. 57; *Competence case*, [1950] I.C.J. Rep.. 4; *Aegean sea continental shelf case (Greece v. Turkey)*, [1978] I.C.J. Rep. 23.

⁹¹ The Vienna Convention on Law of Treaties, 1969, 1155 U.N.T.S. 331, Article 30 (1) (hereinafter VCLT); SIR ROBERT JENNINGS AND SIR ARTHUR WATTS (EDS.), OPPENHEIM'S INTERNATIONAL LAW, p.1267, 9th ed., Pearson Education Asia, Volume 1 Peace, Parts 2 to 4, (2003) [hereinafter OPPENHEIM]; *the UN Admissions Case (Competence of General Assembly)*, 1950] I.C.J. Rep. 8; *the Lotus Case (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10 at 16; *Italy v. Federal Republic of Germany (1959)*, ILR, 29, pp. 442, 449.

⁹² Fitzmaurice, *The Law and Procedure of the ICJ: Treaty Interpretation and certain other Treaty Points*, (1951) 28 B.Y.I.L. [hereinafter referred to as "Fitzmaurice"]; DJ HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW, p. 832, 6th ed., Sweet and Maxwell, London, 2004 [hereinafter referred to as "DJ HARRIS"].

⁹³ Fitzmaurice, *Ibid.*; DJ HARRIS, *Ibid*, p. 833.

dispute resolution mechanism in a provision is merely of an advisory procedure.⁹⁴ And as such, their uses do not make a section expressly obligatory.⁹⁵

The present Treaty uses words such as “*seek...*”, “*if the parties consider...*”, and “*the parties may...*”⁹⁶ These words as per ordinary and apparent verbatim and signification show that the dispute settlement mechanism was meant to be only an optional advisory multi-tiered mechanism for the settlement of investment disputes and not one to which the parties intended to follow.

2.1.2. That the rules under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [hereinafter referred to as “ICSID”] have been not been violated.

Article 25(1) of the ICSID talks about Jurisdiction of the Centre and states that:

“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.”

The EJEPA entered into by Argunia and Pshad, explicitly mentions the consent of the parties to submit any dispute that might arise, to arbitration, under the ICJ. Clause 2 of the 7th sub-point in the Chapter VII of the EJEPA,⁹⁷ mentions that the only requirement would be that the submission of a claim would have to satisfy the requirements of Chapter II of the ICSID.

The ingredients of Chapter II of the ICSID are clearly fulfilled because in the present case there has arisen an investment dispute concerning the damaged satellite in space belonging to the national of one concerning State,⁹⁸ the national being Eye Out and the contracting States being Argunia and Pshad. Hence, Pshad is responsible, for the damage thus caused.

⁹⁴Hamburger AG and Dr.Benjamin Leisinger, *Mediation – Arbitration clauses, The Importance of drafting*, p. 4, (4A_18/2007), Journal BSCC news (online) [hereinafter referred to as “Hamburger”].

⁹⁵ Peter M. Wolrich, *Multi-tiered Clauses: ICC Perspectives in Light of the new ICC ADR Rules*, p.10, presented at the International Bar Association, 2002, Durban, South Africa [hereinafter Peter M. Wolrich].

⁹⁶ Compromis, Annexure, Chapter 7, “Dispute Settlement”.

⁹⁷ Compromis, Annexure, Chapter 7, “Consent of Each Party to Arbitration”.

⁹⁸ Compromis ¶ 9.

A company is a legal person and so is entitled to diplomatic protection. When as is the usual case, the company itself is injured, then the prima facie rule is that the state of nationality of the company alone is entitled to determine which is the state of nationality of the company. This is usually the State in which the company is incorporated.⁹⁹ As is in the present case, it is a matter of fact that EO has been incorporated under the laws of Argunia.¹⁰⁰ Hence, EO is of the nationality of Argunia and Argunia can extend its diplomatic protection to EO.

Further, under the EJEPA the parties had also agreed to submit any dispute arising under it, to the ICJ for a peaceful resolution of their differences.¹⁰¹ The current dispute regarding the destruction of space satellite is one that has arisen under the EJEPA itself and hence can be submitted to the ICJ for redressal. The jurisdiction of the ICJ under the Treaty depends upon it satisfying the ICSID jurisdictional requirements.¹⁰² Part two of Article 26 of the ICSID mentions the intent of the parties, i.e., if the parties do not intend to make the exhaustion of local remedies obligatory, then the consent is the consent in exclusion of the local remedies.¹⁰³ Hence, even if EO and/or RA had local remedies and they did not exhaust the same, does not affect the present dispute that has been submitted before the Hon'ble Court.¹⁰⁴

Moreover, as has been proven above, the intention of the parties was not to make the dispute resolution mechanism obligatory but merely optional. Thus, Argunia was not under an obligation to satisfy the local remedies. Hence, it is submitted that its' consent to the ICJ can be treated as one in exclusion of the exhaustion of local remedies, thereby satisfying Article 26 of the ICSID and conferring jurisdiction to the ICJ.

It is also interesting to note that the inclusion of negotiation-arbitration by parties in their agreements for dispute settlements creates additional problems, uncertainties and also causes much delay.¹⁰⁵ The delay would not be caused however, if proper rules to govern the dispute settlement processes are provided as has been by the World Trade Organisation [hereinafter

⁹⁹ MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW, p. 247, 4th ed., Universal Law Publishing Co. Pvt. Ltd., 2001.

¹⁰⁰ Clarification III, ¶ 2.

¹⁰¹ Compromis ¶ 11.

¹⁰² Compromis, Annexure, Chapter 7, "consent to arbitration".

¹⁰³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art 26, part 1.

¹⁰⁴ Compromis ¶ 14.

¹⁰⁵ Hamburger, p.4.

referred to as “WTO”].¹⁰⁶ The damage suffered by the satellite of EO,¹⁰⁷ has caused great loss,¹⁰⁸ and damage to the enterprise. The Treaty is silent on the rules governing negotiation and consultation.¹⁰⁹ EO is in an emergent situation and needs timely redressal. Approaching negotiation and consultation would not guarantee a quick or timely solution as the EJEPA has no rules governing such a mechanism of dispute resolution. Thus, negotiation-arbitration would only have prolonged the matter and delayed the proceedings as there is no definite time-period or rule provided in the EJEPA and would not have properly addressed the claim.

2.1.3. That the Dispute Resolution Mechanism is only advisory in Customary International Law.

It has been accepted by the United Nations Organisation [hereinafter referred to as “UN”],¹¹⁰ and is also recognised as general international law,¹¹¹ that there is no obligation to exhaust negotiation, consultation, or mediation before the dispute is taken to the next level. It has also been found by the International Chamber of Commerce that non-compliance with pre-conditions in a multi – tiered clause does not prevent a party from approaching the next level¹¹² and hence, failure by one party to comply with the first tier does not invalidate the scope, extent and existence of the second tier.¹¹³

In the instant case, neither EO nor Argunia resorted to the dispute settlement-tier provided in Chapter 7 of the Treaty but directly submitted their claim as a counterclaim in the last-tier, i.e., the ICJ.¹¹⁴ Thus, non-compliance does not question the jurisdiction of Argunia’s counterclaim under the ICJ as there is no specific, compulsory rule that denies it the right to proceed

¹⁰⁶ The WTO offers a comprehensive time-table and time limit within which the dispute must be redressed. If consultations fail to settle the dispute within 60 days, the dispute goes to the panel: Dispute settlement body art. 4.7 and 4.8, 6.1 and 8.3. The whole process by the panel must be completed within six months: DSU art. 11, art. 12.8.

¹⁰⁷ Compromis ¶ 9.

¹⁰⁸ Compromis ¶ 10.

¹⁰⁹ Compromis, Annexure, Chapter 7, “Dispute Settlement”.

¹¹⁰ The Charter of the United Nations, 26 June 1945, Can. T.S. 1945 No 7 [hereinafter “The Charter”], art. 33; JOHN COLLIER AND VAUGHEN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW*, 1st ed., Oxford University Press, p.7; IAN BROWNLIE, “BASIC DOCUMENTS IN INTERNATIONAL LAW”, 4th ed., Oxford 1995, p.36; Manila Declaration on the Peaceful Settlement of International Disputes, GA Res. 37/10 (1982) 21 ILM 449.

¹¹¹ *Aegean Sea case (Greece v. Turkey)*, [1978] I.C.J. Rep. 3; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, [1984] I.C.J. Rep. 440; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, [1998] I.C.J. Rep. 275, ¶ 56.

¹¹² Antonias Dimolista, *Issues Concerning the Existence, Validity, and Effectiveness of the Arbitration Agreement*, pp. 21, 22, ICC Bulletin Vol. 7/No. 2, December 1996.

¹¹³ Peter M. Wolrich, p. 10.

¹¹⁴ Compromis, ¶ 14.

to the next level without proceeding first with the lower tier under customary international law.

2.2. That the counterclaims are admissible under the jurisdiction of the ICJ.

Article 80 of the Rules of the ICJ, 1978 requires that counter-claims must be sufficiently connected to the claim of the Applicant.¹¹⁵ This has been interpreted by the Court to mean for it to directly arise out of the principle claim.¹¹⁶ They are not to be regarded as something else but something more than a defense.¹¹⁷ More importantly, it is not necessary for it to arise from the same set of facts but must contain the same legal aim.¹¹⁸

In the present set of facts, the claim of Pshad is on the breach of Article 15 of the EJEPA.¹¹⁹ The counter-claim is raised on the breach of investment provisions under the same EJEPA.¹²⁰ It can be ascertained from the above that the legal aim of both the claims is the breach of the Treaty and the interpretation of the same. Thus, the counterclaim is directly related to and sufficiently connected with the principle claim in so far as it requires a different interpretation of the Treaty thus defending the principle claim.

3. That Pshad is liable to compensate Republic of Argunia for the damage caused.

The satellite that was launched by EO has been caused excessive damage,¹²¹ due to the space junk that was left to orbit by Pshad.¹²² This amounts to a breach of obligation by Argunia and hence, it is liable to pay for the damages sought in the counter-claim.

3.1. That the Republic of Argunia can approach the ICJ on behalf of the EO.

In the Parker case,¹²³ it was held that if a state is exercising its own rights, it is entitled, but not obliged, under international law to present a claim and once it is presented, “*The control of the Government, which has espoused and is asserting the claim... is complete.*” Hence, though there is no obligation in the present case, the decision is of the Argunia whether it

¹¹⁵ Adopted on 14 April 1978 and entered into force on 1 July 1978.

¹¹⁶ *River Meuse Case (Netherlands v. Belgium)*, P.C.I.J. (ser. A/B) No. 76 at p. 28.

¹¹⁷ *United States Diplomatic and Consular Staff in Tehran case (United States of America v. Iran)*, [1980] I.C.J. Rep. 3.

¹¹⁸ *Oil Platforms Case (Islamic Republic of Iran v. United States of America)*, [1996] I.C.J. Rep. 803.

¹¹⁹ Compromis, ¶ 12.

¹²⁰ Compromis, ¶ 14.

¹²¹ Compromis, ¶ 10.

¹²² Clarification II.

¹²³ *Parker case* (1926), 4 RIAA, 35, at 37.

chooses to espouse the said counter-claim. In the present case, Argunia has chosen in the affirmative.

One of the difficulties encountered for the presentation of claims is the lack of *ius standi* of private persons before international bodies, under general international law. Yet, it is an established principle in international law that the State is as a principle free to determine, by its own constitution and domestic legislation, that who is entitled to its nationality. This controversy hence, evolved into a question requiring settling of position as there was extreme confusion.

Though, there exists another interesting aspect to the said counterclaim. Corporations and other legal persons do not possess nationality in the sense in which the term is used of natural persons, because the concept of allegiance and certain privileges attaching to natural persons, involved for instance in expatriation or naturalisation, are inapplicable to legal persons. In fact, the state treats corporation and other legal persons as nationals in the exercise of jurisdiction and for purposes of diplomatic protection. Of the different factors in the link between corporations or legal persons and the State, that most often relied on is the place of incorporation or registration.¹²⁴ Other factors also include the place of administration and management.¹²⁵ Hence, it is the obligation on the Argunia to come to the aid of it's company and the consequent shareholders, to make the State responsible that has caused loss to it's nationals.

Such a difficulty has been solved by what has been described as 'an ingenious juridical construction' Judge Badawi's dissenting opinion, Corfu Channel case,¹²⁶ developed principally by the PCIJ on the basis of a long trend of arbitral awards. There are three elements, intimately concerned one with the other, in this construction. The first is the requirement of espousal of private claims by a state; the second is the principle which demands that this state must be the state of nationality of the alien. The third element, after identifying the state with its national, makes the damage sustained by it the measure of the reparation due. According this theory, the state does not act merely as the legal representative of the individual, but asserts its own rights; therefore the reparation which it claims has the same international character as any other reparation due from one state to another.

¹²⁴ MAX SORENSON, MANUAL ON PUBLIC INTERNATIONAL LAW, p. 480.

¹²⁵ MAX SORENSON, MANUAL ON PUBLIC INTERNATIONAL LAW, p. 480.

¹²⁶ *Corfu Channel case*, [1949] I.C.J. Rep. 214.

The Respondent is claiming on behalf of EO, which is a company incorporated in the respondent State, under the laws of Argunia.¹²⁷ The satellite was launched by Eye-Out in September, 2008.¹²⁸ It was a part of their programme to improve their efficiency. The same was put at standstill due to the breach of the international obligation by Pshad.¹²⁹

The first principle as mentioned above was explained by the PCIJ as below:¹³⁰

“It is an elementary principle of international law that a State entitled to protect its subjects, when injured by acts contrary international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.a State is in reality asserting its own rights, its right to ensure, in the person of its subject, respect for the rules of the international law.....Once, a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.”

Hence, in the present case it is the interest of Argunia that has been sought for redressal, as the claim or the so-called private interest has been espoused by Argunia. The second principle was laid down by the PCIJ as:

“This right is necessarily limited to intervention on behalf of its own nationals, because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rule of international must be envisaged.”¹³¹

Hence, in the present case it is the rights or interest of EO that has been sought redressal of and EO as proved above is a national of Argunia. Hence, the second principle also has been met with.

As the claim espoused by a state has its origin in the loss or damage caused to the individual or company, the modalities and extent of the reparation due to the claimant state must be

¹²⁷ Compromis, ¶ 5.

¹²⁸ Compromis, ¶ 7.

¹²⁹ Clarification II.

¹³⁰ *Mavrommatis Palestine Concessions (Jurisdiction)* 1924 P.C.I.J. (ser. A) No. 2 at p. 12.

¹³¹ *Panevezys-Saldutiskis Railways* 1939 P.C.I.J. (ser. A/B) No. 76 at p. 16.

closely related to that loss or damage.¹³² This principle has been enunciated by the PCIJ in the Chorzow Factory case as follows:¹³³

“The rules of law governing the reparation are the rules of international law in force between the two States concerned and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage..... The damage suffered by an individual is never therefore identical with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State.”

Hence, in the present case, the fact that for quantification of the damages a measure of loss caused to EO has been used, does not affect the claim at all.¹³⁴ The other arm of the principle that needs to be satisfied is that the party on behalf of which the State claims, must be its national. Hence, in the present case it is the nationality of EO that has to be judged.

Nationality of a corporation is usually attributed to the State under the laws of which it has been incorporated and to which consequently it owes its legal existence.¹³⁵ *“In our view international law takes cognizance of the distinct legal personality of corporations. To discard this principle as a ‘technical legal proposition of private municipal law’,..... ‘most doctrine and nearly all jurisprudence in all countries accord to the legal entity known as company, a personality and patrimony entirely distinct from those of its shareholders.’”*¹³⁶

Hence, as discussed before and above, EO is a national of Argunia and due to its distinct personality it can be represented by Argunia.

At this juncture, it is also essential to highlight that as Argunia comes to the aid of EO, it is actually assisting the shareholders of such company. This is the doctrine of corporate veil. According to this doctrine that if need be, we must lift the corporate veil and this would make us realise that each company, though is a legal person, is consists of its shareholders only. Hence, as the situation calls for in the present case, the veil must be lifted. Hence, the counter-claim that has been made can be perceived to be on behalf of the EO and its shareholders [which includes Rita Sen].

¹³² MAX SORENSON, MANUAL ON PUBLIC INTERNATIONAL LAW, p. 574.

¹³³ *Chorzow factory case*, 1928 P.C.I.J. (ser. A) No. 17 at pp. 27-28.

¹³⁴ *Compromis*, ¶ 10 and 14.

¹³⁵ JENNINGS AND WATT, OPPENHEIM'S INTERNATIONAL LAW, 9th ed., Pearson Education, 2003, p. 859.

¹³⁶ *Reparation Commission v. U.S. (Tankers of D.A.P.G.) case* (1926), 2 RIAA, 779, at 787.

3.2. *That Pshad is liable for the destruction of EO's Satellite.*

In May 2009, EO's satellite collided with an object in space and was put out of function.¹³⁷ On investigation, it was concluded that the object in question was a dislodged portion of a satellite manufactured and owned by Pshad from 1990 and the satellite had been taken out of the space program twenty years ago but left to orbit.¹³⁸ Hence it can be concluded that Pshad was involved in the launching of the satellite [a dislodged portion of which was responsible for the damage caused to the satellite of EO], however the extent of the involvement in launching of the satellite is not conclusive.

Article XII of the Convention on International Liability for Damage caused by Space Objects [hereinafter referred to as "the Liability Convention"], provides for the payment of compensation in accordance with international law and the principles of justice and equity for the damage caused by space object.¹³⁹ Article III of the Liability Convention states that:

*"In the event of damage being caused else where than on the surface of the earth to a space object of one launching state or to persons or property on board such a space object by a space object of another launching state, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible."*¹⁴⁰

A launching state would be negligent if the party abandoned an active satellite.¹⁴¹ It has also been suggested that leaving any space object or space debris in orbit is negligence per se.¹⁴² Further, Article IV (i) of the Liability Convention states that:¹⁴³

"In the event of damage being caused elsewhere than on the surface of the Earth to a space object of one launching state or to persons or property on board such a space object by a space object of another launching state, and of damage thereby caused to a third state or its natural or judicial persons, the first two states shall be jointly and severally liable to the third state..."

¹³⁷ Compromis ¶ 9.

¹³⁸ Compromis ¶ 9 and Clarification II.

¹³⁹ The Convention on International Liability for Damage caused by Space Objects, art. XII.

¹⁴⁰ The Convention on International Liability for Damage caused by Space Objects, art. III.

¹⁴¹ Howard A Baker, *Space Debris: Legal and Policy Implications*, 1 *Utrecht Studies in Air and Space Law*, Vol. 6, 1989.

¹⁴² James P.Lamperitus, *The Need for An Effective Regime For Damage Caused By Debris in Outer Space*, p. 8, 13 MICH. J. Int'l L (1992).

¹⁴³ The Convention on International Liability for Damage caused by Space Objects, art. IV (i).

In all cases of joint and several liability referred to in Article IV (i) of the Liability Convention, the burden of compensation for the damage caused shall be apportioned between the launching states liable in accordance with the extent to which they were at fault and in case the extent of the fault cannot be determined then the burden of compensation shall be apportioned equally between them.¹⁴⁴ Such apportionment shall be without prejudice to the right of the third state to seek the entire compensation due under the Liability Convention from any or all of the liable launching states which are jointly and severally liable.¹⁴⁵

Therefore, in the matter at hand even if the extent of Pshad's fault or negligence cannot be determined as per the Liability Convention, Pshad is liable to bare the burden of compensation for the damage caused to the satellite of Argunia by the dislodged portion of Pshadi owned and manufactured satellite,¹⁴⁶ regardless of it being launched from Oxia.¹⁴⁷

3.3. That Pshad is liable to pay for the loss caused due to the damage.

A State discharges the responsibility incumbent upon it for breach of an international obligation by making good, that is to say, by giving reparation for the injury caused.¹⁴⁸ The word 'reparation' is the generic term which describes the various methods available to a State for discharging or realising itself from such responsibility, as it is also used in the Art. 36 (2) of the Statute of ICJ. In the case of Chorzow Factory, the PCIJ held that:¹⁴⁹

".... is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability would have existed if that act had not been committed."

Hence, the nature of reparation may consist, therefore, in restitution, indemnity or satisfaction.¹⁵⁰ In the present case, Pshad has actually as established¹⁵¹ caused loss by having damaged to the satellite launched by EO. This loss is of a nature that the satellite has been

¹⁴⁴ The Convention on International Liability for Damage caused by Space Objects, art. IV (ii).

¹⁴⁵ The Convention on International Liability for Damage caused by Space Objects, art. IV (ii).

¹⁴⁶ Compromis. Clarification II.

¹⁴⁷ Compromis ¶ 9.

¹⁴⁸ MAX SORENSON, MANUAL ON PUBLIC INTERNATIONAL LAW, p. 564.

¹⁴⁹ *Chorzow Factory case*, 1928 P.C.I.J. (ser. A) No. 17 at p. 47.

¹⁵⁰ It was held in the Chorzow Factory case that:

"Restitution in kind, or, if that is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it- such are principles which should serve to determine the amount of compensation due for an act contrary to international law."

¹⁵¹ Refer Statement of Arguments, Issue 3.2.

rendered most difficult to operate. Further, there have been consequential losses and loss of profits which have caused to both EO and Republic of Argunia.¹⁵² Hence, due to material difficulties and related impossibilities with respect to restitution of the satellite in kind, Argunia has limited its claim to indemnification.

It is interesting to note that while deciding the monetary compensation, in situations where restitution in kind is not possible, all economic factors are considered. They are considered to the effect that the party which has suffered the damage is brought to a position closest to when it had not suffered any loss. Hence, the value of the compensation is decided as per the value at the day of payment of indemnification.¹⁵³ Conclusively, PCIJ has referred to reparation as a design to wipe out ‘all the consequences’ of the unlawful act. Corollary, it is not indirect damages that can be sought for. Rather, there has to be close connection between the damage caused and the main event.

Hence, in the present matter, it is due to the space junk which was left in orbit irresponsibly by Pshad that damaged the satellite.¹⁵⁴ This is of pertinence as it is this satellite that was going to not only bring fiscal benefits (due to improved services) to the EO. But, this satellite was also in a position to ensure security in the city of Laudi. In fact it was seen as a direct consequence of the launch of satellite that by April, 2009 the newspapers had reported ‘dramatic reductions’ in football violence.¹⁵⁵ But, all this was brought to a standstill due to the collision and there has been a direct loss amounting to not merely the cost of the satellite [costing millions of dollars in hardware], but also it was put out of function.¹⁵⁶ Hence, the defendants seek for a counterclaim amounting to the value of the satellite.

Under the law of indemnification, there have been various situations where State have sought for the profits that were lost due to the breach of an international principle by another State. In earlier jurisprudence, claims for lost profits were treated as claims for indirect damages and therefore, not allowed. But, contemporary awards admit such losses on the basis that just compensation implies a complete jurisdiction of the *status quo ante*.¹⁵⁷ The PCIJ confirmed this arbitral jurisprudence referring in the Charzow Factory case to: “*losses sustained which*

¹⁵² Compromis ¶ 10.

¹⁵³ MAX SORENSON, MANUAL ON PUBLIC INTERNATIONAL LAW, p. 567.

¹⁵⁴ Compromis ¶ 9 and Clarification II.

¹⁵⁵ Compromis ¶ 7.

¹⁵⁶ Compromis ¶ 9 and 10.

¹⁵⁷ *Capetown Pigeon case* (1902), 9 RIAA 65; *The Kate* (1921), 6 RIAA, 76 at 81, 85; *Thomas E. Bayard case* (1925), 6 RIAA, 154; *Norwegian Shipowners' claim* (1922), 1 RIAA, 309 at 338.

would not be covered by restitution in kind or payment in place of it” and in assessing the basis for compensation took into account loss of profits to be anticipated in the normal development of the undertaking. The principle is actually limited to the principle of casualty. The *lucrum cessans* allowed as damages must be attributable in the normal course to the wrongful act, ‘a profit which would have been possible in the ordinary course of events’.¹⁵⁸

Hence, it is also the claim of the defendants that compensation must also include the lost profits, until a new satellite is brought into function.¹⁵⁹ It is essential that the same must be paid for, as EO was planning to bid for a government contract and the same has definitely reduced its efficiency, as the launch of the said satellite was the only advantage that EO had over its competitors.¹⁶⁰

Claims on behalf of nationals may be properly brought only when a legal right of a national is has been directly infringed by the act of a state in breach of international law. In order that the claim may be admissible, it is not sufficient that the interests of the alien, unprotected by law, are adversely affected or that economic or other damage is sustained by him. The protected person must himself be the bearer of a right to lodge a claim for damages. Furthermore, the ICJ described in the case of *Interhandel*,¹⁶¹ diplomatic protection as the situation “*in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another state in violation of international law.*” In general, the crucial question is to determine whether the act complained of represents or not a step directly aimed at the rights of the persons whose case is taken up by the State.¹⁶²

In the present case a direct loss has been caused to EO,¹⁶³ which is a national of Argunia,¹⁶⁴ and the loss has been caused directly by Pshad.¹⁶⁵ Hence, it is liable to compensate EO by paying the value of the satellite and the profits lost.

¹⁵⁸ *Capetown Pigeon case* (1902), 9 RIAA 65; *Spanish Zone of Morocco* (1925), 2 RIAA, 617, at 658; *Shufeldt claim* (1930), 2 RIAA, 1079.

¹⁵⁹ *Compromis* ¶ 14.

¹⁶⁰ *Compromis* ¶ 10.

¹⁶¹ *Interhandel (Preliminary Objections) case*, [1959] I.C.J. Rep. 27.

¹⁶² *Rhodope Forest claim* (1933), 3 RIAA, 1391, at 1426.

¹⁶³ *Compromis* ¶ 9.

¹⁶⁴ *Compromis* ¶ 5 and Clarification III.

¹⁶⁵ *Compromis* ¶ 9 and Clarification II.

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 on exports of Space Technology by the Republic of Argunia is justified;
- (b) Declare that that this Hon'ble Court has the jurisdiction to hear investment claims;

And hence, hold People's Democracy of Pshad liable to pay for the value of the satellite and the profits lost.

All of which is respectfully affirmed and submitted,

Agents for the Respondent,

Republic of Argunia