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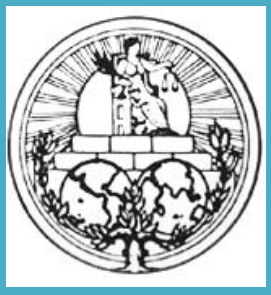
IN **T**HE **I**NTERNATIONAL **C**OURT **O**F **J**USTICE
LA **C**OUR **I**NTERNATIONALE **D**E **J**USTICE
PEACE **P**ALACE, **T**HE **H**AGUE
NETHERLANDS
2010 **T**HE **G**ENERAL **L**IST **N**O……..

THE **D**EMOCRACY **O**F **P**SHAD (**A**PPLICANT)
V.
THE **R**EPUBLIC **O**F **A**RGUNIA (**R**ESPONDENT)



ENTRE **L**A **D**EMOCRATIE **P**OPULAIRE **D**E **P**SHAD
(DEMANDERESSE)
V.
ET **R**EPUBLIQUE **D**E **A**RGUNIA
(DEFENDEUR)

The **C**ase **C**oncerning the **D**ifferences **B**etween **P**shad and **A**rgunia **R**egarding the **I**nterpretation of **E**astern **J**imm **E**conomic **P**artnership **A**greement

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MEMORIAL **F**OR **A**PPLICANT /**M**EMOIRE **D**E **L**A **D**EMANDERESSE

THIRD GNLU INTERNATIONAL MOOT COURT COMPETITION 2011

MEMORANDUM **O**N **B**EHALF **O**F **T**HE **A**PPLICANT

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ABBREVIATIONS

- ¶: Paragraph
- Art.: Article
- Doc.: Document
- DSU: Understanding on Rules and Procedures Governing the Settlement of Disputes
- E.C.: European Community
- ECHR: European Convention on Human Rights and Fundamental Freedoms.
- ECT: Energy Charter Treaty.
- edn: Edition
- EHRR: European Court of Human Rights.
- EJEPA: Eastern Jimm Economic Partnership Agreement.
- EO: Eye Out.
- FCN: Treaty of Friendship, Commerce & Navigation.
- G.A. Res.: General Assembly Resolutions
- G.A.O.R.: General Assembly Official Records
- GATT: General Agreement on Trade & Tariffs.
- I.C.J.: International Court of Justice
- I.L.C.: International Law Commission
- I.L.M.: International Legal Materials
- ICCPR: International Convention on Civil & Political rights.
- ICSID: International Centre for the Settlement of Investment Disputes.
- MFN: Most Favoured Nation, in the WTO, the principle of treating trading partners equally
- n.: Note
- NAFTA: North American Free Trade Agreement.
- No.: Number
- OUP: Oxford University Press.
- P.C.A.: Permanent Court of Arbitration
- P.C.I.J.: Publications of the Permanent Court of International Justice
- pg : Page
- pp.: Pages
- R.A.: The Republic of Argunia
- R.I.A.A.: Report of International Arbitral Awards
- Rep: Report.
- Sec: Section
- Supp.: Supplementary
- UDHR: Universal Declaration of Human Rights.
- UNTS: United Nations Treaty Series.
- VCLT: Vienna Convention on the Law of Treaties
- Vol.: Volume
- WTO: World Trade Organisation
- YBILC: Year book of International Law Commission.

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STATEMENT OF JURISDICTION

The Republic of Argunia and the People's Democracy of Pshad 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.

STATEMENT OF FACTS

Background of facts:

- The Republic of Argunia ('RA') is a developed country and has enjoyed the fruits of industrialization over the past century. The People's Democracy of Pshad ('Pshad') is a developing country on the Eastern Border of RA. Pshad's industries are highly developed in the area of spacecraft and aeronautics and it is the second largest producer of telecommunications and surveillance satellites in the world; but sectors like agriculture have suffered. (¶ 2)
- The Eastern Jimm Economic Partnership Agreement ('EJEPA') was signed between RA and Pshad to foster holistic development and peaceful relations which provided for trade and investment related provisions. The EJEPA aims to foster holistic development of its members, and provides for liberalized trade and investment protection between the partners. It also calls for the transfer of technology to developing country partners from industrialized country partners (¶ 11)
- Since Pshad is a developing country, it fulfills its State obligations by providing free health care and schooling, plus highly subsidized food. (¶ 2)
- The returned Pshadi emigrants face a high probability of mistreatment by the Pshadi border officials. But in the absence of any conclusive proof to this effect, the *high probability* of mistreatment cannot be established. (¶ 2)

EO's satellite that mitigated *soccer hooliganism* and its subsequent destruction by a 'space junk':

- Laudi is a border city in RA and is home to a soccer team. For the past decade *soccer hooligans* have destroyed stadium property, threatened players and altercated with the police officials in Laudi. The Jimm Regional Championship play-off game in 2004 witnessed the worst aftermath of *soccer hooliganism*. (¶¶ 3-4)
- Eye Out ('EO') is a private security firm, founded by Rita Sen, a Pshadi immigrant to Laudi in 2000. EO was incorporated under the laws of RA with Rita Sen holding 30% of the shares. Another 40% were owned by a pension fund in Pshad (whose managing director is Rita Sen's cousin) and the other shares are owned by various high- value individuals in the two countries. (¶ 5)

- EO received an exclusive contract from the city of Laudi to maintain the security of Laudi's sports stadium. In September 2008, EO launched a remote sensing satellite that raised concerns regarding the privacy of RA's citizens. The success of EO's satellite is evidenced from the newspaper reports to this effect. (¶¶ 6-7)
- In May 2009, the said satellite collided with a dislodged portion of another satellite. On the basis of the recovered pieces of EO's satellite, RA attributed the nationality of the 'space junk' to Pshad. (¶ 7)

RA's call for an 'indefinite moratorium' on space technology exports to Pshad and the subsequent counterclaim:

- The Laudi authorities took the matter to RA's Federal Parliament, which culminated in the Parliamentary Committee for Science and Technology, calling for an 'indefinite moratorium' on space technology exports to Pshad. (¶ 10)
- Pshad brought a claim based on RA's export prohibition on space technology, for violating of Article 15 of the EJEPA. (¶ 12)
- RA claims that the export prohibition is excused by the general exceptions of Article 30 of the EJEPA. Moreover, RA justifies the export prohibition is an actual and pre-emptive countermeasure to Pshad's alleged human rights violations against the returned Pshadi citizens. (¶ 13)
- RA also made a counterclaim based on the investment provisions contained in Chapter 7 of the EJEPA, demanding on behalf of Sen the value of the satellite and lost profits until a new satellite can be brought into operation. (¶ 14)
- Pshad rejected RA's counterclaim contending that the ICJ does not have the jurisdiction to hear the counterclaim. Moreover, even if the court finds jurisdiction, RA's counterclaims cannot be upheld under international law. (¶ 15)

Therefore, the present application.

ISSUES RAISED

1. THE 'INDEFINITE MORATORIUM' ON SPACE TECHNOLOGY EXPORTS TO PSHAD BY THE REPUBLIC OF ARGUNIA VIOLATES ART. 15:1 OF THE EASTERN JIMM ECONOMIC PARTERNERSHIP AGREEMENT
2. THE 'INDEFINITE MORATORIUM' IS NOT AUTHORISED UNDER THE 'ESSENTIAL SECURITY' CLAUSE OF THE EJEPA
   - 2.1. The Court has the jurisdiction to go into the merits of the invocation of the 'essential security' clause of the EJEPA
   - 2.2. Pshad cannot be held accountable for any cross- border or general human rights violations of its nationals; that could threaten RA's essential security
     - 2.2.1. The Pshadi border officials have not violated the human rights of the illegal Pshadi emigrants returning from RA
     - 2.2.2. RA cannot grant diplomatic protection to the Pshadi nationals
     - 2.2.3. The action of the Pshadi border officials is not a threat to RA's essential security
   - 2.3. RA's essential security is not affected by the outer space activities conducted by Pshad
     - 2.3.1. RA has failed to comply with the standard procedure of indentifying 'space debris' and has wrongly attributed its nationality to Pshad
     - 2.3.2. Pshad is not liable under the Outer Space Treaty or the Liability Convention
     - 2.3.3. Pshad has maintained a reasonable standard of care in conducting its space activities
3. RA's COUNTERMEASURE CANNOT BE UPHELD UNDER CUSTOMARY INTERNATIONAL LAW
   - 3.1. RA cannot injure the Pshadi economy by abusing its 'power to coerce'
   - 3.2. Absence of 'good faith' in enforcing the countermeasure
   - 3.3. Absence of a 'prior unlawful act' by Pshad
   - 3.4. RA's countermeasure is inconsistent with the 'doctrine of proportionality'
4. THE 'INDEFINITE MORATORIUM' ON SPACE AND TECHNOLOGY IS NOT JUSTIFIED UNDER THE GENERAL EXCEPTIONS OF ART. 30 OF EJEPA

SUMMARY OF ARGUMENTS

1. **THE 'INDEFINITE MORATORIUM' ON SPACE TECHNOLOGY EXPORTS TO PSHAD BY THE REPUBLIC OF ARGUNIA VIOLATES ART. 15:1 OF THE EASTERN JIMM ECONOMIC PARTERNERSHIP AGREEMENT**

   The 'indefinite moratorium' on the export of space technology by RA is a *prima facie* violation of Art. 15:1 of the EJEPA, which states that no 'prohibitions or restrictions' can be instituted against the exportation of goods. Since, the said action has been taken by RA's Parliamentary Committee; it falls within the ambit of a 'governmental measure' having a mandatory nature. Hence, the 'indefinite moratorium' violates Art. 15:1 of the EJEPA.

2. **THE 'INDEFINITE MORATORIUM' IS NOT AUTHORISED UNDER THE 'ESSENTIAL SECURITY' CLAUSE OF THE EJEPA**

   The 'essential security' clause does not have a 'self judging' nature and is subject to an objective interpretation. Thus, the court has the jurisdiction to go into the merits of its invocation.

   Moreover, Pshad's treatment of the returning Pshadi emigrants is not a threat to RA's essential security. Firstly, the allegations of a 'high probability' of mistreatment by Pshad are unfounded. Secondly, the Pshadi emigrants can't get RA's diplomatic protection under the 'nationality of claims' rule. Thirdly, there is no injury to RA's national interest which could amount to a threat to its essential security.

   RA's essential security is not affected by the outer space activities conducted by Pshad. RA has failed to comply with the standard procedure of indentifying 'space junk' and has wrongly attributed its nationality to Pshad. Pshad is also not liable under the Outer Space Treaty or the Liability Convention as a 'space junk' does not constitute a 'space object' or its 'component parts'. Furthermore, Pshad has abided by the expected duty of care in conducting its space activities as there exists no pre- existing legal duty to remove 'space debris'.

3. THE COUNTERMEASURE ADOPTED BY RA CANNOT BE UPHELD UNDER CUSTOMARY INTERNATIONAL LAW

RA has abused its power to coerce by injuring Pshad's spacecraft and aeronautics industry, which is the mainstay of its economy. Pshad is not liable for any prior unlawful act; thereby, invalidating the countermeasure. Moreover, RA's countermeasure is inconsistent with the 'doctrine of proportionality'.

4. THE COUNTERMEASURE ADOPTED BY RA IS NOT JUSTIFIED UNDER THE GENERAL EXCEPTIONS OF ART. 30 OF THE EJEPA

RA's countermeasure amounts to an 'arbitrary or unjustified discrimination' as well as a 'disguised restriction on international trade'. RA's countermeasure is not justified under Art. 30(a) or 30(b) of the EJEPA. A violation of human rights is not covered under 'public morals' or the protection of 'human, animal or plant life or health'. Furthermore, RA's countermeasure is not justified under Art. 30(d) of the EJEPA as there is no domestic 'law or regulation' in RA with which it purports 'to secure compliance'. Moreover, it is not 'necessary' under Art. 30(a), 30(b) or 30(d) of the EJEPA as there existed 'reasonably available' 'alternative measures', to address the situation.

5. RA's COUNTERCLAIM CANNOT BE ENTERTAINED IN THE ICJ

RA can't give diplomatic protection to Rita Sen (a Pshadi national) to raise a claim in the ICJ. The 'Consent of Each Party to Arbitration' clause of the EJEPA mandates that first the jurisdiction of the ICSID must be exhausted and only then can RA take the claim to the ICJ. Moreover, there has been no prior exhaustion of the local remedies or the third party procedure before granting diplomatic protection. The counterclaim also violates Art. 80 of the Rules of the ICJ, as there is no connection between an initial countermeasure that invokes Art. 30 of the EJEPA on account of human rights violations and a counterclaim that seeks compensation for the destruction of EO's satellite.

6. THE COMPENATION SOUGHT BY RA IS UNJUSTIFIED

RA cannot demand the entire value of the destroyed satellite and lost profits from Pshad alone, when even Oxia is a 'launching state' and equally liable for the 'space debris'. Moreover, RA cannot demand the 'loss of profits' under the 'new business rule'.

ARGUMENTS ADVANCED

1. THE 'INDEFINITE MORATORIUM' ON SPACE TECHNOLOGY EXPORTS TO PSHAD BY THE REPUBLIC OF ARGUNIA VIOLATES ART. 15:1 OF THE EASTERN JIMM ECONOMIC PARTERNERSHIP AGREEMENT

It is humbly submitted that RA had imposed an 'indefinite moratorium' on space technology exports to Pshad after the collision of EO's satellite with a 'space junk'.[1] The said action would not only impair the 'volume of trade' but also 'affect the investment plans' between the two nations.[2] Thus, the 'indefinite moratorium' violates Art. 15:1 of the EJEPA, which states that no restriction or prohibition can be instituted against the exportation of goods.

In order to prove the violation of Art. 15:1 of the EJEPA, it is imperative to prove that the 'indefinite moratorium' constitutes an 'other measure' under the Art. 15:1.

It is humbly submitted that the Panel in the *Argentina-Hides and Leather* [3]case held that 'only governmental measures fall within the ambit of Art. XI:1' of the GATT; with an express exclusion of 'duties, taxes or other charges'.[4] Facts on record indicate that the 'indefinite moratorium' was imposed by the Parliamentary Committee for Science and Technology. Hence, it constitutes a 'governmental measure' that falls within the ambit of an 'other measure' which violates Art. 15:1 of the EJEPA [Art. 15:1 of the EJEPA is *pari materia*[5] (*i.e.* on the same subject) to Art. XI: 1 of the GATT]. [6]

The 'indefinite moratorium' was imposed by the Parliamentary Committee on Science and Technology. Therefore, its implementation is both mandatory and obligatory. This is sufficient to constitute an 'other measure' that violates Art. 15:1 of the EJEPA.[7] In fact, all restrictions of a *de facto* nature[8] fall within the broad residual category of 'other measures'.[9]

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[1]See ¶ 10, Fact on Record.
[2]See GATT Panel Report, *Panel on Japanese Measures on Imports of Leather* (15 May 1984) GATT BISD 31S/94 (adopted 15 May 1984) ¶ 47.
[3]See, WTO, *Argentina-Measures Affecting the Export of Bovine Hides and the Import of Finished Leather-Report of the Panel*(16 February 2001) WT/DS/55/R and Corr. 1.
[4]See, GATT Panel Report, *Japan: Trade in Semi-conductors*, (1989) GATT BISD 35S/116 (adopted 4 May 1988) ¶ 104.
[5]See, BA Garner, Black's Law Dictionary (7th edn West Group St. Paul, Minn., 1999).
[6]See, General Agreement on Tariffs and Trade 1947 (30 October 1947) 55 UNTS 194 (GATT).
[7]See, WTO, *India-Measures Affecting the Automotive Sector.-Appellate Body Report* (5 April 2002) WT/DS146/AB/R.
[8] See *Japan – Trade in Semi-Conductors* (n 4) ¶ 105.
[9] See *Argentina -Hides and Leather* (n 3) ¶ 11.17.

It is further submitted that the legal status of the 'indefinite moratorium' is not a *sine qua non* for constituting an 'other measure' under Art. 15:1 of the EJEPA. This was held in *Japan-Trade in Semiconductors;* which stated that 'Art. XI:1, unlike other provisions of the Agreement, did not refer to laws or regulations but broadly to measures'. Therefore, any measure instituted or maintained by a contracting party which restricted the exportation or sale for exports of products was covered by this provision, irrespective of the legal status of the measure.[10]

Arguendo, that the measure by the Parliamentary Committee on Science and Technology was 'non-mandatory', it would still violate Art. 15:1 of the EJEPA. This was acknowledged in *Japan-Trade in Semiconductors*[11] where the panel held that 'even a non-mandatory measure may constitute a restriction when there were incentives or disincentives for it to take effect and when it operated in a way essentially dependant on Government action or intervention'. The difference between a mandatory and a non- mandatory measure was one of form rather than substance;[12] thereby, violating Art. 15:1 of the EJEPA.

It is humbly asserted that even the export licence practices that delayed the issue of non-automatic licences upto three months, were considered to violate of Art. XI of the GATT on account of being discretionary. Discretionary systems by their very nature operate as limitation on action since imports may not be permitted.[13] Owing to the 'indefinite' nature of the moratorium, RA has a sweeping discretion to exercise its will; thereby, violating Art. 15:1 of the EJEPA.

2. THE 'INDEFINITE MORATORIUM' IS NOT AUTHORISED UNDER THE 'ESSENTIAL SECURITY' CLAUSE OF THE EJEPA

It is humbly submitted that the countermeasure adopted by Pshad cannot be justified under the 'essential security' clause of the EJEPA. The *prima facie* justification of RA for enforcing the countermeasure is the alleged human rights violations by the Pshadi border officials. In the absence of any conclusive proof to this effect, no responsibility can be affixed on Pshad.

[10] See, Analytical Index: Guide to GATT Law and Practices (Vol 1 World Trade Organization, Geneva 1995)315.
[11] *Japan – Trade in Semi-Conductors* (n 4).
[12] ibid.
[13] See, Panel Report, *EEC-Quantitative Restrictions Against Imports of Certain Products from Hong Kong* GATT BISD. 30S/129 (adopted 12 July 1983) ¶ 31.

Moreover, RA cannot cite the destruction of EO's satellite as a justification for enforcing the countermeasure since Pshad cannot be held accountable for negligence in conducting its space activities. Hence, no purported Pshadi action threatens RA's essential security.

2.1. The Court has the jurisdiction to go into the merits of the invocation of the 'essential security' clause of the EJEPA

It is humbly submitted that the 'essential security' clause is subject to an objective and not a subjective interpretation. There is no state practice or agreement among parties[14] which could justify the subjective interpretation of the 'essential security' clause under Art. 31(3) (b) of the VCLT.[15] Hence, RA has not acted in good faith[16] and abused its rights (*abus de droit*) [17] by arbitrarily being a 'sole judge' in applying the said clause; without proving how any Pshadi action is detrimental to its national security.

The discretionary provisions contained in Art. 22 of the Dispute Settlement Understanding (applicable in the WTO arbitration)[18] allows for a suspension of concessions when the 'party considers that it is not practicable'. This is analogous to the 'it considers' clause contained in Art. XXI of the GATT (which is *pari materia* to the 'essential security' clause of the EJEPA). In the WTO arbitration between Ecuador and the European Communities,[19] the latter had violated certain provisions of the GATT.[20] It was held that Ecuador could not discretionally suspend the concessions to the EC under Art. 22(c), because the said provision is subject to a substantive review by the arbitrators. [21] The arbitrators had a 'margin of review, (*i.e.*) the authority to broadly judge' Ecuador's objective determination to suspend concessions under

[14] See, RE Browne, 'Revisiting "National Security" in an Interdependent World: The GATT Article XXI Defence After Helms-Burton'(1997) 86 Geo. L.J. 405at pg. 422-23.
[15] See, HL. Schloemann & S Ohlhoff, '"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence' (1999) 93 Am. J. Int'l L. 424 at pg. 437.
[16] See, WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products-Appellate Body Report*, (12 October 1998) WT/DS58/AB/R ¶ 158.
[17] See generally B Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953) 125.
[18] See, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 112,(1994) art. 22.1.
[19] See, *European Communities--Regime for the Importation, Sale and Distribution of Bananas--Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*: Decision by the Arbitrators, (24 March 2000) WT/DS27/ARB/ECU.
[20] See, WTO, *European Communities--Regime for the Importation, Sale and Distribution of Bananas – Appellate Body Report* (Sept. 9, 1997) WT/DS27/AB/R.
[21] See, *European Communities Under Article 22.6 of the DSU* (n 19) at pg 27.

the agreement.[22] This indicates that RA is not a 'sole judge' in applying the 'it considers' provision of the 'essential security' clause, which is subject to an objective interpretation.

Apart from the fact that there is a right to establishment of a panel in GATT, it is no longer possible to exclude the consideration of the national security question from the terms of reference of the panel-as was done in the U.S. - Nicaragua[23] dispute. Therefore per Art. 7 of the DSU; the said panel is empowered to examine any 'national security' exception contained in the various agreements cited by the parties. Hence, once a panel is established, it has the jurisdiction to consider all the legal issues relating to the invocation of Art. XXI of the GATT.

A similar position was upheld when the EC imposed sanctions on Yugoslavia.[24] The panel that was established to consider Yugoslavia's complaint against the EC was later dissolved on account of Yugoslavia's disintegration.[25] Therefore, the panel did not have the opportunity to consider the matter. The relevance of this case lies in the fact that the jurisdiction of the panel (when it existed) extended to the issue of national security. This indicates that the said provision in not self-judging.

In the *Oil Platforms* case, the United States had initially argued in its written pleadings that the 'national security' exception (contained in Art. XX (1) (d) of the Treaty of Amity), deprived the court of its jurisdiction to consider the case brought by Iran.[26] However, during the oral pleadings of the jurisdictional phase, the United States dropped this argument and accepted that a proper interpretation of Art. XX of the Treaty of Amity was a matter for the merits phase.[27] Admittedly, the treaty provisions at issue in the ICJ cases do not contain the words 'any action which [the party] considers necessary' (as Art. XXI of the GATT does) but simply provide for measures 'necessary' to protect the security interests.[28] However, this does

[22] ibid.
[23] See GATT Panel Report , *United States: Trade Measures Affecting Nicaragua-Report of the Panel (*13 October 1986) L/603 (unadopted Report).
[24]See, GATT, Analytical Index (n 10) 604.
[25] ibid.
[26] See *Oil Platforms* case *(Islamic Republic of Iran v The United States of America)*[1996] ICJ Rep 803 ¶ 21.
[27] ibid. at pg 811; CR96/13, 33, 55 (Sept. 17, 1996).
[28] See Treaty of Friendship, Commerce and Navigation(United States – Nicargua) (21 January1956) 367 UNTS 3 (FCN) art.XXI.

not affect the jurisdiction of the interpreting tribunal, as a proper interpretation of the 'national security' clause is a matter to be determined on the merits of the case.[29]

Similarly, in the cases involving the *Friendship Commerce and Navigation Treaties*, the ICJ has held that the invocation of the 'national security' clause [30] does not deprive the court of its jurisdiction. This is a matter for examination at the merits phase of the case.[31]

It is further submitted that according to Judge Lauterpacht in the *Norwegian Loans* case [32] the acceptance of the ICJ's compulsory jurisdiction cannot be subject to a condition within the sole decision of the State.[33] Thus, RA cannot 'unilaterally determine'[34] the application of the 'essential security' clause. The 'binding effect' RA's 'self-judging' application of the said clause would vitiate the legal effect of the EJEPA. [35]

It is humbly submitted that the 'contracting parties taking measures under Article XXI of the GATT must notify other contracting parties'.[36] In this regard the representatives of Argentina have stated that 'a contracting party invoking Art. XXI [37] would be required to state reasons of national security...as no trade restrictions could be applied without being notified, discussed and justified.'[38] Moreover, Paragraph 7(iii) of the Ministerial Declaration at the thirty-eighth Session of the Contracting Parties provides that 'the contracting parties... (shall) abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement.'[39] Hence, it is an accepted norm[40] that every contracting party should be cautious not to take any step which might have the effect of undermining the Agreement.[41]

[29] See Dapo, Akande & S Williams, 'International Adjudication on National Security Issues: What Role for the WTO?' (2003) 43 Va. J. Int'l L. 365.
[30] See, *Oil Platforms* case *(Iran v United States)* (n 26) at 803, 811; *Military and Paramilitary Activities* case *(Nicaragua v US)* [1986] I.C.J.Rep14.
[31] See Dapo Akande & S Williams (n 29) pg 380.
[32] See, *Norwegian Loans* case *(France v Norway)*[1957] ICJ Rep 9.
[33] ibid at 48.
[34] ibid at 50.
[35] ibid.
[36] See, *Decision Concerning Article XXI of the General Agreement*, Nov. 30, 1982, GATT B.I.S.D. 29S/ 23 (1983).
[37] See, GATT (n 6) art XXI.
[38] See, GATT, Analytical index (n 10) (citing C/M/157, p.12; C/M/159 pg.14).
[39] See, GATT Analytical index (n 10) (citing L/5424, adopted on 29 November 1982, 29S/9, 11).
[40] See, GATT: Analytical index (n 10) (citing The discussion of the complaint of Czechoslovakia at the Third Session in 1949, GATT/CP.3/SR.22, Corr. 1.).
[41] See, GATT: Analytical Index (n 10)(citing GATT/CP.3/SR.22, Corr. 1.).

Moreover in interpreting Art. 30 of EC treaty[42] the ECJ considered whether the concept of public security includes both internal and external security,[43] and whether the protection of petroleum supplies is an objective covered by the public security clause.[44] Similarly, ECHR went into the merits and held that imposing a ban on homosexuals in armed forces is not necessary for the protection of national security.[45]

2.2. Pshad cannot be held accountable for any cross-border or general human rights violations of its nationals; that could threaten RA's essential security

2.2.1. The Pshadi border officials have not violated the human rights of the illegal Pshadi emigrants returning from RA

It is humbly submitted that the problem of illegal emigration is looked upon unfavourably by the Pshadi Government. To address this issue, the Pshadi border officials are under a sovereign duty to inspect the passports[46] and allied documents of the illegal Pshadi emigrants returning from RA.

It is further submitted that the Pshadi action is validated by the 'doctrine of proportionality',[47] which is 'a key tool of modern administrative law to ensure the purposive rationality of public action'.[48] Pshad can exercise a 'margin of appreciation'[49] in constraining certain rights of the undocumented migrants since they had illegally migrated to RA. Hence, an inspection protocol is necessary for the maintenance of 'public order'[50] in Pshad.

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[42] See, EC Treaty(Treaty of Rome, as amended) O.J. (C 340) 3 (1997) art 296.

[43] See, Case C-367/89, *Criminal Proceedings against Aime Richardt and Les Accesoires Scientifiques SNC*[1991] E.C.R. I-4621 ; Case C-70/94, *Fritz Werner Industrie- Ausrustungen GmbH v. Germany* [1995] E.C.R. I-3189; Case C-83/94, *Criminal Proceedings against Peter Leifer, et al* [1995] E.C.R. I-3231.

[44] See, Case 72/83, *Campus Oil, Ltd. v Minister for Industry and Energy* [1984] E.C.R. 2727; Case C-398/98, *Commission v Greece* [2001] 3 C.M.L.R. 62.

[45] See *Smith & Grady V United Kingdom*,(2000) 29 EHRR. 493 ; *Lustig-Prean & Beckett v United Kingdom*(2000) 29 EHRR 548.

[46] See, L Oppenheim, *International Law* (8th edn London, 1955).

[47] See, J McBride, 'Proportionality and the European Convention on Human Rights', in *The Principle of Proportionality in the Laws of Europe* 3, 3 (Evelyn Ellis ed., 1999).

[48] See, R Thomas, *Legitimate Expectations and Proportionality in Administrative Law* 77(Hart Publishing , 2000).

[49] See, TJ Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT'L L.REV. 465, 487 (2005).

[50] See, International Convention on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171 (ICCPR) art 12(3) and 12(4) of the ICCPR; *X v Austria* (1747/ 62) CD 13, 42; *X v United Kingdom* (6084/ 73) DR 3, 62; *Lohiya v State of Bihar* [1966] 1 SCR 605; *Madhu Limaye v Sub-Divisional Magistrate, Monghyr* [1971] 2 SCR 711.

The said action is not 'contrary to a customary norm of international law so as to infringe a *jus cogens*'.[51]Moreover, to qualify as a violation of human rights the action must be 'serious and on such a scale that it can be regarded as an attack on the international legal order';[52] which is inapplicable in the case of the Pshadi action. Furthermore, according the report of the International Law Commission to the General Assembly in 1979, merely alleging 'a high probability of mistreatment' by the Pshadi border officials is not sufficient. [53] A conclusive proof to this effect is necessary to prove a breach of a legal obligation by Pshad.

2.2.2. RA cannot grant diplomatic protection to the Pshadi nationals

It is humbly submitted that RA cannot grant diplomatic protection to the Pshadi nationals. 'A state's right to exercise diplomatic protection is based on the link of nationality between the injured individual and the acting state. Thus, the general rule is that a State may not extend its protection to or espouse claims of non- nationals'.[54]

As held in the *Nottebohm* case (Second Phase), 'nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments together with the existence of reciprocal rights and duties'. Factors like 'habitual residence,[55] centre of interest, family ties, participation in public life etc',[56] indicate that the Pshadi nationals have a 'genuine and effective link'[57] with Pshad and not with RA. Hence, in the absence of a 'continuous nationality' [58]from the 'date of injury to the presentation of the claim',[59] RA is disabled from granting diplomatic protection to the Pshadi nationals.

It is further submitted that RA has no *locus standi* to secure the interests of the Pshadi emigrants after having exploited them as cheap labour. RA has negated the clean hands

[51] See, *Pinochet* case *Lord Millet dissenting* [1999] 2 WLR. 825 at 911-12; ILR 119, 135 at 229-30.
[52] See, ibid.
[53]*See, Report of the Commission to the General Assembly on the Work of its 31st session* (Yearbook, 1979) A/CN.4/SER.A/1979/Add.l (Part 2).
[54] See, Van Panhuys, *The Role of Nationality in International Law: An Outline* (A. W. Sijthoff, Leyden 1959) 59-73;; P Jessup, *A Modern law of Nations* (Macmillan co., 1968 Reprint) 99; C Ohly, 'A Functional Analysis of Claimant Eligibility', *International law of State Responsibility for Injuries to Aliens* (University Press of Virginia, 1983) ; Christopher Ohly, 'A Functional Analysis of Claimant Eligibility', *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia, 1983) ; Amerasinghe, *State Responsibility for Injuries to Aliens* (1967) 61 ff; Amerasinghe, *Local Remedies in International Law* (2nd edn, 2004) 43ff.
[55] See, G Amador, 'International Responsibility: Third Report' (1958) 2 YBILC 66, UN doc. A/ CN.4/Ser. A/1958/Add. 1.
[56] See, Brownlie, *Principles of Public International Law* (3rd edn Oxford Claredon Press, 1979) at 413.
[57] See, *Nottebohm* case*(Liechtenstein v Guatemala)*[1955] ICJ Rep 24.
[58] See, *Loewn Group Inc v USA* ICSID Reports (2005) 485; see also *Eschauzier Claim 1931, GB v Mexico* 5 UNRIAA 207.
[59] See, Warbrick, 'Protection of Nationals Abroad: Current Legal Problems' 37 ICLQ (1988) 1006.

doctrine which states that 'a state which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of the corresponding illegalities on the part of other states'. [60] A similar principle was upheld in the *Construction of a wall* case[61], the *Oil Platform* case,[62] the *La Grand* case[63], the *Nicaragua* case[64] and the *Mavrommatis Palestine* case[65]. Thus, RA's espousal of the Pshadi emigrants' claim is against the maxims '*ex dolo malo non oritur actio'* and '*ex injuria non oritur jus', i.e.* he who comes to equity for relief must come with clean hands.

2.2.3. The action of the Pshadi border officials is not a threat to RA's essential security

The border officials were merely taking cognizance of the Pshadi migrant's failure to comply with the emigration protocol. Hence, their action is in no way detrimental RA's essential security.

According to the *Mavrommatis Palestine Concessions* case, [66] since, the illegal emigrants do not have the nationality of RA, there has been no 'injury to (RA's) national interest'. Hence, per the *Interhandel* case[67] RA cannot adopt the cause of Pshad's nationals and grant them diplomatic protection. 'The nation is injured through an injury to its national and it alone may demand reparation as no other nation is injured'.[68] Thus, in the absence of an injury to RA's national interest,[69] even its essential security is not at risk.

It is further submitted that the use of the word 'essential' signifies the intent of the drafters of the Agreement to implicate a higher standard of security to justify the clause. Had the drafters intended otherwise they would have simply used the word 'security'. Therefore, classification

[60] See, Fitzmaurice, 'The General Principles of the International Law Considered from the Standpoint of the Rule of Law', 92 Hague *Recueil* (1957) 119.
[61] See,*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory , order of 19th December 2003*, ICJ Reports 2003 at pg 428 ¶¶ 27- 30.
[62] See, *Oil Platforms* case (n 26).
[63] See, *LaGrand* case *(Germany v United States)* ICJ, 27 June 2001, available at: <http://www.unhcr.org/refworld/docid/3f2927934.html [accessed 3 December 2011] >¶ ¶ 61- 63.
[64] See, *Military activities Act* (n 30).
[65] See also Dugard, 'Sixth Report on Diplomatic Protection' (2005), UN Doc A//CN 4/546,5.
[66] See, *Administrative Decision No. V* (1924) PCIJ Series A, No. 2, 12; see also *Panevezys- Saldutikis Railway case*, (1939) PCIJ Series A/B Bo. 76 16, 17; The *Nottebohm* case [1955] ICJ Rep 24.
[67] See, *Interhandel* case *(Switzerland v United States)* [1959] ICJ Rep 37.
[68] See, UNGA 'First Report on Diplomatic Protection', UN GAOR 52nd session, UN Doc. A/CN.4/506/Add.1 at pg 3(citing Umpire Parker in *Administrative Decision V,* 1925 AJIL at 613- 14) ;See also the *Panavezys-Saldutikis Railway* case (n 66).
[69] See, G Amador, 'State Responsibility. Some New Problems' 94 Hague *Recueil* (1958) 437- 9, 472; G Amador, 'Second Report to the ILC' 2 YBILC (1957) 112- 16; Bennoufna, 'Preliminary Report on Diplomatic Protection', UN Doc. A/CN.4/484 ¶ 34.

in part as 'essential' must meet some higher standard in relation to other, 'normal' security interests.[70] To affect the essential security interest of a State there must be a 'grave and imminent' peril which threatened that interest;[71] which is not present in the instant case.

2.3. RA's essential security is not affected by the outer space activities conducted by Pshad

2.3.1. RA has failed to comply with the standard procedure of indentifying 'space debris' and has wrongly attributed its nationality to Pshad

Facts on record indicate that RA had identified the 'space junk' and affixed its nationality on Pshad, by the 'recovered pieces of their own satellite'.[72] It is humbly submitted that RA's process of identifying the space debris is both flawed and defective. RA cannot reasonably ascertain that the space debris belonged to a Pshadi satellite, merely by the 'recovered pieces of their own satellite'.

A well designed system of registration under space law provides for the accurate identification of space debris[73] and the subsequent attribution of nationality. It is humbly submitted that the correct and accepted method of identifying a piece of space debris is through a 'marking'[74] borne by it (*i.e.* a 'designator or registration number or both').[75] Without examining any 'marking' on the space debris, RA cannot affix its nationality on Pshad; simply by the 'recovered pieces of their own satellite'.

It is humbly submitted that the importance of a 'precise physical identification' of space debris has been recognized since the earliest days of space age.[76] Under the tenets of space law a correct 'identification of space debris'[77] is the first step in 'identifying the state responsible for the refuse'.[78] There can be no 'valid attribution of nationality'[79] to space debris, until it has been correctly identified. In the instant case, RA had failed in the first step

[70] See, HL Schloemann & S Ohlhoff, '"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence' 93 Am. J. Int'l L. 424 (1999) at pg. 443
[71] See, *Gabcíkovo-Nagymaros Project* case *(Hungary v Slovakia)*[1997] ICJ Rep at 40 ¶ 52-58.
[72] See, ¶ 9 of Fact of Record.
[73]See, PG Dembling and SS Kalsi, 'Pollution of Man's Last Frontier: Adequacy of Present Space Environmental Law in Preserving the Resources of Outer space' (1973) 20 Netherlands Int'l LJ 15 at 142.
[74] See, UNGA,'Report of the Scientific and Technical Sub Committee' UN GAOR 7thsession A/AC 105/82 (1 may 1970) ¶ 39- 43.
[75] See, Convention on Registration of Objects Launched into Outer Space (adopted 12 November 1974, entry into force 15 September 1976) 1023 UNTS 15. art V .
[76] See, M McDougal, HD Laswell and IA VLASIC, *Law and Public Order in Outer Space* (New Haven Yale University Press, 1963) 569.
[77] See, M McDougal, HD Laswell and IA VLASIC (n 76) 569.
[78] See, I.A.Shearer, *Starke's International Law* (OUP, oxford 2007).
[79] See The Registration Convention (n 75) Preamble ¶ 2-4.

to correctly identify the space debris; hence, the next step of affixing its nationality on Pshad is naturally invalid as well.

2.3.2. Pshad is not liable under the Outer Space Treaty or the Liability Convention

Arguendo that the 'space junk' belonged to a Pshadi satellite; even then, no responsibility can be affixed on Pshad under the Liability Convention or the Outer Space Treaty. It is humbly submitted that RA is only a signatory of the above-mentioned instruments, but has not ratified them. Hence, under Art. 18 of the VCLT, Pshad 'does not have to abstain from all acts which will be prohibited after their entry into force'.[80] Moreover, no Pshadi space activity 'defeat(s) the purpose'[81] of either the Liability Convention or the Outer Space Treaty. It is humbly submitted that Pshad is not liable under Art. VII of the Outer Space Treaty. The said article affixes liability on any 'launching state'[82] for damage done to another State, by its 'space object'. In order violate Art. VII 'the dislodged portion of the satellite' should fall within the definition of a 'space object'. But 'space debris' does not constitute a 'space object'[83] for the following reasons:

Firstly, under Art. 1(d) of the Liability Convention a 'space object' includes 'component parts of a space object as well as its launch vehicle and parts thereof'; with an express exclusion of 'space debris'.[84] It avoids any reference to objects detached, launched or thrown, whether intentionally or unintentionally.[85]

Secondly, 'fragmentation debris' is beyond the definitional scope of a 'space object', which only includes 'operational debris'.[86] The instant case deals with a dislodged portion of a satellite, which constitutes 'fragmentation debris'. Hence, it is not a 'space object'.

Thirdly, the drafters of the Liability Convention by their definition regarded only 'component parts' and not all 'parts' of a space object as being subject to the constraints of the

[80] See, A. Aust, *Modern Treaty Law and Practice*, (Cambridge: Cambridge University Press, 2000) at 94.
[81] See, Vienna Convention on the Law of Treaties (adopted 22 May 1969,opened for signature May 23 1969, entry into force 27 January 1980)1155 UNTS 331 (VCLT) art 18.
[82] See, Convention on International Liability for Damage caused by Space Object(opened for signature March 29 1972, entry into force on 1 September 1972) 961 UNTS 187(Outer Space Liability Convention) art I (c).
[83] See, HE Qizhi, *Review of Definitial Issues in Space Law in the Light of Development of Space Activities*, Montreal IISL Colloqium in 1991 at 35; WB Wirin, *Space Debris and Space Objects*, Montreal IISL Colloqium in 1991 at 55.
[84] See, HA Baker, *Space Debris: Legal and Policy Implications* (Cmarkimis Nijhoff Publishers, 1989).
[85] ibid.
[86] See, HA Baker (n 84).

Convention.[87] It is humbly submitted that a 'component part' is 'any object without which the spacecraft would be regarded as incomplete'.[88] A 'component part' excludes any object which does not 'facilitate the objectives of the launch' or would not be 'conducive to the successful operation of the space object'.[89] Hence, 'fragmentation debris' does not constitute a 'component part'[90] to be regarded as a space object.

No 'fault liability' can be affixed on Pshad under Art. III of the Liability Convention. It is humbly submitted that Article III 'appears to be primarily concerned with a possible collision between (active) space objects'.[91] In addition there is no indication of what duty of care is required to give rise to fault[92] or what standard of care is necessary for establishing reasonableness.[93]Hence, in the absence of foreseeability of damage,[94] no 'fault liability' can be affixed on Pshad.

2.3.3. Pshad has maintained a reasonable standard of care in conducting its space activities

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It humbly submitted that Pshad has taken due precautions to mitigate orbital debris like timely de-orbiting its active satellite, preventing an intentional break- up in outer space etc.[95] Therefore, Pshad has performed its duty of care to minimize mission related debris.

[87] See, S Gorove, 'Towards a Clarification of the Term "Space Object" –An International Legal and Policy Imperative?' (1993) 21 J. Space L. 11.

[88] See, D Verschoor, 'Legal aspects of Environmental Protection in Outer Space Regarding Debris' (1987) *30 Colloqium L Outer Space* 131 pg 3-4.; IH Ph D Verschoor, 'Harm Producing Events Caused by Fragments of Space Objects (Debris)' (1982), *5 Colloqium L Outer Space* at 2 pg 3-4.

[89] See, C Q Christol, *The Modern International Law of Outer Space* (NY: Pergamon Press, 1982) 130; CQ Christol 'International Liability for Damage Caused by Space Objects' (1980) 74, AmJ Int'l 346 at 357.

[90] See, LP Wilkins, 'Substantive Bases for Recovery Injuries Sustained by Private Individuals as a Result of Fallen Space Objects' (1978) 6 J Space L 161 at 162; Flinch, *Summary of Discussion* (1982) *5 Colloqium L Outer Space* 67 at 67.

[91] See, US Senate Report on Liability Convention- RH Campbell in Staff of Senate Comm on Aeronautical Space Services, 92nd Cong, 2nd Session, Report on the Contravention on International Liability for Damage Caused by Space Object [:] Analysis and Backgroound data (Comn Print 1972) 27.

[92] See, Firestone, 'Problems in the Resolution of Disputes Concerning Damage' (1985) *17 Colloquium L Outer Space* 159

[93] See, N Jasentuliyana and RSK Lee (eds) *Manual on Space law* (Vol I Dobby Ferry : Oceana Publication, New York 1979) 83 at 395.

[94] See, Cheng, Matte, Christol, MS Firestone 'Problems in Resolution of Dispute Concerning Damages Caused in Outer Space' (1985) 59 Tulane LR 747; KD Heard, 'Space Debris and Liability: An Overview' (1986) 17 Cumberland LR 167;

[95] See, IAA Position Paper on Orbital debris, Acta Astronautica. Vol. 31, October 1993. P. 169. Appeared also in the UN documents A/AC.105?570, A/AC.105/593, p.22- 43.

It is further submitted that Pshad has no pre- existing legal duty to remove any unintentional space debris from outer space. At present there are no 'detailed standards of conduct' or a 'specific regulatory regime'[96] (either under Art. VI of the Outer Space Treaty or Principle 21 of the Stockholm Declaration) to this effect. Hence, the removal of unintentional space debris from the 'outer space environment' is 'not within the scope of the Convention'.[97]

In the absence of rules or regulations (obligating States to remove any unintentional space debris), there can be no attribution of international responsibility. In addition any regulatory regime establishing legal obligations (to remove space debris) must be as specific as possible, since legal issues in international law rely heavily on the individuality of the case.[98]

It is further pleaded that a large amount of space debris is caused by most space faring nations. It is worth mentioning that out of the tracked 7000 space objects, the total space debris population in the Lower Earth Orbit has been calculated to be around eight to eleven times that amount; [99] comprising inactive satellites, burned out rocket stages, fragments and active satellites.[100] Hence, an additional obligation should not be placed on Pshad alone (to remove the 'space junk' that unintentionally dislodged from its satellite); while no such responsibility is affixed on other States.

3. RA's COUNTERMEASURE CANNOT BE UPHELD UNDER CUSTOMARY INTERNATIONAL LAW

3.1. RA cannot injure the Pshadi economy by abusing its 'power to coerce'

Facts on record indicate that due to a scarcity of natural resources, the Pshadi economy is rather incompetent in the agricultural sector. The only mainstay of its economy is the spacecraft and aeronautics industry. Hence, an 'indefinite moratorium' on space technology

[96]See, PM Sterns and LI Tennen, 'Principles of Environmental Protection in the Corpus Juris Specialis', (1987) *30 Colloquium L Outer Space* 112.

[97] See, IH Ph D Verschoor, 'The Legal Aspects of Space Activities with Potentially Harmful Effects on the Earth and Space Environments' (1972) *15 Colloquium L Outer Space* 268 at 273; Jasentuliyana and RSK Lee (eds) *Manual on Space law* (Vol I Dobbs Ferry,Oceana Publications, New York 1979) 83 at 179- 98; A McCloud, 'Space Pollution' *30 Colloquium L Outer Space* 228 Brighton 1987.

[98] See, Brownlie(n 56) 434.

[99] See, F. Kenneth Schwetje, 'Current U.S. Initiatives to Control Space Debris' *30th Colloquium on the Law of Outer Space* 163, 167 (1987); Also see, U.S. Congress, Office of Technology Assessment, *Orbiting Debris: A Space Environmental Problem-Background Paper, OTA-BP-ISC-72* (Washington, DC: U.S. Government Printing Office, September 1990) at pg 36.

[100] See, V Kopal, 'The Need for International Law Protection of Outer Space Environment Against Pollution of Any Kind, Particularly Against Space Debris' *32nd Colloquium on the Law of Outer Space* 107, 110 (1989).

exports will not just injure Pshad's space industry, but will also be detrimental to its economy.

It is humbly submitted that RA has a responsibility to transfer space technology to developing countries like Pshad under Article I of the Outer Space Treaty[101] as well as the objectives of the EJEPA. By enforcing the said countermeasure, RA has abused its 'power to coerce' and infringed the 'principle of equal sovereignty' (*par in parem non habet imperium, non habet juridictionem*).[102]

3.2. Absence of 'good faith' in enforcing the countermeasure

Facts on record indicate that RA's hegemony in the high- technology sector has lessened over the last fifteen years. Therefore, Pshad's booming space industry poses a threat to RA's economic interests. Hence, under the false pretext of securing the interests of the returned Pshadi emigrants (for which no legal responsibility can be affixed on Pshad); RA is actually impeding the growth of Pshad's high technology industry. RA's illicit motive behind enforcing the said countermeasure is to injure Pshad's spacecraft and aeronautics industry.

RA's countermeasure is analogous to the U.S. policy of not permitting the People's Republic of China to provide launch services for western satellites. The reason apparently stated by the U.S. for the said measure was the massacre at the Tiananmen Square. But in reality the U.S. wanted to restrict the satellite launch services provided by China at much lower costs.[103]

It is humbly pleaded that 'good- faith is the foundation of all laws and conventions'.[104] 'The reasonable and bona- fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another state, whether these interests be secured by a treaty or by general international law.'[105]

[101] See also UNGA Res. 51/ 122 adopted without vote on 13 December 1996 as the 'Declaration on International Co-operation in the Exploration and Use of Outer Space for the Benefit and in the Interests of all States Taking into Particular Account the Needs of Developing Countries; N. Jasentuliyana, 'Article I of the Outer Space Treaty' (1989) 17 *J. Sp. L.* 130; M Benko and K- U. Schrogl, 'History and Impact of the 1996 UN Declaration on "Space Benefits" (1997) 13 *Space Policy* 139- 43.

[102] See, Elizabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Transnational Publishers Inc. Dobbs Ferry, New York 1984).

[103] See, S Gorove(n 87).

[104] See, *The Megalidis Case (A.A. Megalidis v Turkey)* 4 Ann. Dig. 395 (Turkish-Greek Mixed Arb. Trib. 1928) at pg.35.

[105] See, Cheng (n 17) pg. 131.

3.3. Absence of a 'prior unlawful act' by Pshad

Countermeasures can be enforced only as a consequence of a prior and continuing unlawful act.[106] As held in the *Naulilaa Incident* 'the *sine qua non* of the right to make reprisals is a motive furnished by an earlier act contrary to the laws of nations'.[107] The Special Rapporteur, Mr. Quentin Baxter has stated that there was no possibility to resort to countermeasures and *a fortiori* to sanctions against a lawful conduct.[108] In the instant case Pshad cannot be held responsible for any 'prior unlawful act'.

Moreover, RA had suspended the operation of trade obligation under the EJEPA, even though there was no material breach of the treaty by Pshad. Hence, by virtue of Article 65 of the VCLT, RA was required to notify Pshad about its claim, which it failed to do.[109] Therefore, the RA's claim cannot be sustained owing to a procedural flaw

3.4. RA's countermeasure is inconsistent with the 'doctrine of proportionality'

The principle of proportionality means that the burdens imposed on the persons concerned must not exceed the steps required in order to meet the public interest involved. If therefore, a measure imposes on certain categories of persons a burden which is in excess of what is necessary- which must be appraised in the light of the actual economic and social conditions and having regard to the means available- it violates the principle of proportionality.[110]

It is humbly submitted that there is no proximate nexus between an 'indefinite moratorium' on space technology export and the purported mistreatment of the Pshadi emigrants. It has been noticed that 'trade restrictive measures enforced to protect human rights are grossly futile',[111] and sometimes 'aggravate the suffering of the general population'.[112] Hence, an 'indefinite moratorium' on space technology export would be ineffective in controlling the alleged mistreatment of the Pshadi emigrants.

[106] See Tammes, Means of Redress in the General International Law of Peace, *Essays on the Development of International Legal Order-in Memory of H.F. van Panhuys* (Kluwer Academic Publishers, 1980) pg 11.
[107] See, *Naulilaa Incident* (1928) 2 R.I.A.A. 1027 (Translation by the Secretariat of the I.L.C.).
[108] See, (Yearbook,1979) (n 49) p. 79, 27.
[109] VCLT (n 81) art 65.
[110] See, Case C- 114/76, *Bela- Muhle Josef Bergmann KG v Grows- Farm GmbH*, 1977 ECR 1211, 1232 (opinion of Advocate –General Capotorri).
[111] See, Human Rights Watch World Report 2000: Children's Rights, available at< http://www.hrw.org/ wr2k/Crd.htm#TopOfPage>See J Bhagwati, Trade Linkage and Human Rights, *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel 243*-44 (J Bhagwati & M Hirch eds., 1998).
[112] See, ND Kristof, 'Let Them Sweat' N.Y. TIMES, June 25, 2002, at A25.

It is further submitted that a 'high probability' of mistreatment by the Pshadi border officials is not *proportional* to the grave injury caused to the Pshadi economy on account of RA's countermeasure.

The aforementioned reasoning is substantiated by the *Air Services* Award[113] where the Tribunal observed that the economic losses suffered by France as a result of the US countermeasure (which called for a suspension of all of Air France's flights between Los Angeles and Paris) were far graver and disproportionate to the economic losses suffered by the US carrier Pan Am (after the suspension of the projected services by France). Analogously, the economic injury to Pshad is more detrimental than the alleged injury to the returning Pshadi emigrants.

Moreover, it was held in the *Oil Platforms* case,[114] that the test of proportionality could not be met solely by demonstrating that the actions were taken in response to an aggressive act, but also required evidence that these 'actions were necessary and proportional'. The said requirement is 'strict and objective, leaving no room for any measure of discretion'. Hence, RA cannot discretionally enforce the countermeasure, without justifying its proportionality and necessity. A similar position was upheld in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory opinion) case.[115]

It is further submitted that in the *Nicaragua* case, [116] the American military action inside Nicaragua was considered graver and disproportionate to Nicaragua's aid to the Salvadorian insurgents. A similar verdict was declared in the *Armed Activities on the Territory of the Congo* case,[117] where the court did not support the Ugandan claim to have been attacked or threatened on such a scale to give right to resort to military force in self-defence on the territory of the Congo. Hence, RA's 'indefinite moratorium' on space technology export is not 'commensurate with the injury suffered'[118] by the Pshadi emigrants.

[113] See, *Air Services Award (France v United States)* 18 R.I.A.A.416.
[114] See, *Oil Platforms (Iran v US)* 2003 ICJ Rep. 161 (Nov 6).
[115] See, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 ICJ Rep 136 (July 9).
[116] See, *Military Activities* case (n 30).
[117] See, *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v Uganda)* [2005] ICJ Rep. 168.
[118] See, *Gabcikovo- Nagymaros Project (Hung v Slovk.)*1997 ICJ REP. 7 (Sept. 25).

4. THE 'INDEFINITE MORATORIUM' ON SPACE AND TECHNOLOGY IS NOT JUSTIFIED UNDER THE GENERAL EXCEPTIONS OF ARTICLE 30 OF EJEPA

4.1. The 'indefinite moratorium' on space technology exports to Pshad is an 'arbitrary or unjustified discrimination' or a 'disguised restriction on international trade'

It is humbly submitted that the ultimate availability of the general exceptions under Art. 30 is subject to the fulfilment of its introductory paragraph (which corresponds to the 'chapeau' of Art. XX of the GATT).[119] The introductory paragraph of Art. 30 checks the specific contents of the questioned measure, but more importantly the manner in which the measure is applied.[120]Hence, its main purpose is to prevent the abuse of the exceptions in Article 30 that would result in defeating the objectives of the EJEPA.[121]

The burden of proof that the measure taken in its entirety satisfies these conditions lies with the invoking member (i.e. RA);[122] who must ensure that it is applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.[123]

In the instant case RA has acted contrary to the doctrine of abuse of rights (*abus de droit*)[124] by not applying the countermeasure in good faith. [125] The aforementioned issue has clearly established how the said countermeasure is contrary to the general principles of international law and amounts to a 'disguised restriction on international trade' as well as an 'arbitrary or unjustified discrimination'. Moreover, for a trade measure to be justified under the introductory paragraph of Art. 30, it needs to be transparent, having a predictable procedure, a least restrictive alternative and must be safeguarded against over inclusive application.[126] Furthermore, it should be targeted more carefully at achieving the policy goal directly, (as

[119] See *Appellate Body Report on US — Shrimp* (n 16) ¶ 157.
[120] See, WTO, *United States — Standards for Reformulated and Conventional Gasoline-Appellate Body Report* (29 April 1996) WT/DS2/AB/R at pg 20-22.
[121] ibid.
[122] ibid 22.
[123] See *Appellate Body Report on US — Shrimp* (n 16) ¶ 156.
[124] See, B Cheng (n 17) 125.
[125] See, *Appellate Body Report on US — Shrimp* (n 16) ¶ 158–159
[126] See,*United States-Import Prohibition of Certain Shrimp and Shrimp Products by the United States* (n 16).

opposed to indirectly aiming to harm an unrelated trade of the target State).[127] It is humbly submitted that RA's 'indefinite moratorium' on space exports fails to target the alleged mistreatment of the Pshadi nationals directly; as trade measures intended to enforce human rights have been noted to be unsuccessful.[128] Moreover failure to explore adequate means, in particular, cooperation and negotiation, has been recognised as 'unjustifiable discrimination' and a 'disguised restriction on international trade'.[129] Thus, the said measure by RA qualifies as an 'arbitrary or unjustified discrimination' and a 'disguised restriction on international trade'.

4.2. The 'indefinite moratorium' on space technology exports to Pshad is not justified under Art 30(a) or 30(b) of the EJEPA

It is humbly submitted that Art. 30(a) deals with 'public morals' which do not entail 'human rights'. Firstly, the connotation of the term 'public morals' contained in Art. 30(a) of the EJEPA, is different from that contained in the various human rights treaties.[130] Secondly, a significant number of trade treaties that have been negotiated prior to the EJEPA, have specifically recognised an exception covering 'moral or humanitarian grounds.'[131] But Art. 30(a) only refers to 'public morals' and not 'humanitarian grounds' or 'human rights'; thereby, signifying the intent of the drafters to exclude such an exception. Hence, RA cannot validly claim an exception under Art. 30(a) on account of a violation of human rights.

Moreover, even other treaties (such as the GATT), which have exceptions coined in similar terms, have never interpreted them to include human rights. 'Public morals' may be related to matters like pornography, gambling, human trafficking etc, but human rights do not fall within its definitional ambit. *Arguendo,* even the human rights violations which RA claims are not recognised as *jus cogens* or *erga omnes*, hence cannot be a valid exception.

It is further submitted that Art. 30(b) sets a two-tier test to determine whether a measure is justified under it. Firstly, the policy in respect of the measure for which the provision was invoked, should fall within the range of policies designed to protect human, animal or plant life or health. Secondly, the inconsistent measures for which the exception is being invoked

[127] ibid.
[128] See, *LaGrand* (n 63) ;See J Bhagwati, Trade Linkage and Human Rights, *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel* (J Bhagwati & M Hirch eds., 1998).
[129] See, *Appellate Body Report on US - Gasoline* (n 120) pg. 26.
[130] See, AE Cassimatis, *Human Rights Related Measures under International Law* (Martinus Nijhoff Publication, Boston 2007) 355.
[131] See, S Charnovitz, 'The Moral Exception in Trade Policy'(1998) 38 Va. J.Int'l L. 689 at 709.

should be necessary to fulfil the policy objective.[132] In the *Tuna-Dolphin* case,[133] an interpretation of Art. XX (b) of the GATT reflected that no contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights.

As explained in the aforementioned issues, neither is Pshad accountable for any human rights violations of the Pshadi emigrants; nor is a breach of human rights covered under Art. 30(b) of the EJEPA. Moreover, Art. 30(b) does not have an extraterritorial application *i.e.* it only covers individuals within the jurisdiction of the invoking country. [134] Hence, RA is not only disabled from granting diplomatic protection to the Pshadi emigrants under the 'nationality of claims' rule but also under Art. 30(b) of the EJEPA.

It is further submitted that Art. 30(b) covers the protection of health from smoking,[135] asbestos[136] etc., but does not specifically include human rights.

4.3. The 'indefinite moratorium' on space technology exports to Pshad is not justified under Art. 30(d) of the EJEPA

It is humbly submitted that for a measure to be provisionally justified under paragraph (d) of Article 30, two elements must be present. Firstly, the measure must be one designed to 'secure compliance' with the 'laws or regulations' that are not in themselves inconsistent with some provision of the GATT. Secondly, the measure must be 'necessary' to secure such compliance.

The 'laws or regulations' under the said article, imply rules that form part of the domestic legal order.[137] They include the domestic legislative acts intended to implement the international obligations of the invoking member and do not cover the obligations of another

[132] See Panel Report, *US – Standards for Reformulated and Conventional –Report of the Panel* (29 January,1996) WT/DS2/R at ¶ 6.20.
[133] See, Panel Report, *United States: Restrictions on Imports of Tuna-Report of the Panel* (1993) GATT BISD 39S/155, 199 (1993) adopted 16 August 1991.
[134] ibid.
[135] See, Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes-Report of the Panel, 7 (November 1990) DS10/R - 37S/200.
[136]See, WTO, *EC-Measures Containing Asbestos and Asbestos Containing Products-Report of the Panel*(18 September 2000) WT/DS135/R.
[137] See, Panel Report, *United States: Imports of Certain Automotive Spring Assemblies*(1983) GATT BISD 30S/107 at 124 (adopted 26 May 1983).

member.[138] Therefore, RA cannot legitimately 'seek compliance', as there is no domestic legislation in RA[139], which is inconsistent with EJEPA.

Moreover, Art. 30(d) only covers measures designed to prevent actions that would be illegal under the 'laws or regulations'.[140] In the instant case, there is no prior or continuing unlawful act by Pshad, which RA's countermeasure seeks to address. Furthermore, the scope of Art. 30(d) is only limited to securing compliance with the laws or regulations and not with their objectives.

4.4. The 'indefinite moratorium' on space technology exports to Pshad is not 'necessary' within the meaning of Art. 30(a), 30(b) or 30(d)

'Necessity' implies that the measure taken was the only way, and it does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the International community as a whole'.[141] Moreover, the specific means employed to deal with the crisis must not be excessive. It is the responsibility of the derogating state to demonstrate 'why such a measure is necessary and would be legitimate in the circumstances'.[142]

It is humbly submitted that a measure is 'necessary' only when there are no alternative measures consistent with the Agreement, or less inconsistent with it, which the defending member could reasonably be expected to employ to achieve its objective.[143] RA could have reasonably resorted to cooperative measures which would not have had any impact on trade.[144] And as a result the measure cannot be taken as necessary as it fails the least-inconsistent test.[145]Hence, the invoking member has not exhausted all other reasonably available, less-inconsistent measures to achieve its objective.[146]

[138] See,WTO, Mexico-Tax Measures on Soft Drinks and other Beverages-Report of the Panel(7 October 2005) WT/DS308/R.
[139] See, GATT: Analytical Index (n 10).
[140] See, GATT, *EEC: Regulation on Imports of Parts and Components-Report of the Panel*(May 16, 1990) 30 I.L.M. 1075, 1113.
[141] See, Draft Articles on State Responsibility, 1996 YBILC II(2) art 25.
[142] See UN Doc. CCPR/C/SR. 1902 ¶ 12 (29 March 2001) (comments of Sir N Rodley (UK), Member of the Human Rights Committee) ¶ 18 (Statement by Chair, PN Bhagwati).
[143] See, GATT Panel Report, *United States: Section 337 of the Tariff Act of 1930-The Panel Report*, (16 January 1989) L/6439 ¶ 5.26.
[144] See, WTO Panel Report, *Canada: Measures Relating to the Export of Wheat and Treatment of Imported Grain- Report of the Panel* (6 April 2004) WT/ DS276/R ¶ 6.226.
[145] ibid ¶ 5.29.
[146] See, WTO, *United States-Restrictions on Imports of Tuna-Report of the Panel*, DS21/R (Sept. 3, 1991) ¶ 5.28 (circulated, not adopted).

5. NO COUNTERCLAIM CAN BE RAISED BEFORE THE ICJ

5.1. RA cannot grant diplomatic protection to Rita Sen

Facts on record indicate that RA has sought compensation from Pshad on behalf of Rita Sen. It is humbly submitted that Rita Sen is a Pshadi national; therefore, RA is disabled from granting any form of diplomatic protection to her. Diplomatic protection by its very definition 'consists of the invocation by a state through diplomatic action or other means of peaceful settlement of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a natural or legal person that is a national of the former state with a view to the implementation of such responsibility'.[147] Hence, RA cannot espouse the claim of Rita Sen.

It is further submitted that by granting of diplomatic protection to Rita Sen, RA is also acting contrary to the 'nationality of claims' rule. According to the said rule 'a state's right to exercise diplomatic protection is based on the link of nationality between the injured individual and the acting state. Thus, the general rule is that a State may not extend its protection to or espouse claims of non- nationals'.[148] Moreover, the right to grant diplomatic protection to Rita Sen, belongs to Pshad and not RA. According to the *Administrative Decision No. V* case, [149] 'it is a general principle of nations not to espouse a private claim against another nation unless in point of origin it possesses the nationality of the claimant nation. The nation is injured through injury to its national and it alone may demand reparation as no other nation is injured'.

It is further submitted that under Art. VII (a) of the Liability Convention, the 'nationals of the launching state cannot seek compensation, whether they are on Earth or in space. They do have recourse under national law'.[150] Hence, Rita Sen cannot seek compensation from Pshad.

[147] See, Dugard, 'First Report on Diplomatic Protection' (2000), UN Doc. A/CN.4/506, 11; See also Joseph, *Nationality and Diplomatic Protection- The Commonwealth of Nations (1969) 1;* Leigh, 'Nationality and Diplomatic Protection', 20 ICLQ (1971) 453.

[148] See, Van Panhuys, *The Role of Nationality in International Law: An Outline* [Leyden: A. W. Sijthoff, 1959]59-73; G Amador, "Third Report to the ILC"; 2 YBILC (1950) 66.

[149] See The *Panavezys- Saldutikis Railway* case (n 149).

[150] See, JA Bose 'Practical Analysis of International 3rd Party Liability for Outer Space Activities- a US Perspective' (1985) 29 Trial lawyer Guide 298 ' a; See also JA Bose 'Liability of the US Government for Outer Space Activities which Result in Damages, Injuries or Death' (1986) 51 J Air L and Com 809.

5.2. The ICJ does not have the jurisdiction to hear the investment claim

It is humbly submitted that the counterclaim presented by RA in the ICJ, violates the 'Consent of Each Party to Arbitration' clause contained in Chapter 7 the EJEPA. While the ICSID Convention and trade agreements form the basis of ICSID's jurisdictions, they must be interpreted in the light of International Law, namely VCLT.[151] According to Art.31 (1) of VCLT a treaty is to be interpreted in its ordinary meaning and in the light of its object and purpose. Para. 2 of the 'Consent of Each Party to Arbitration' clause states that the jurisdiction of the ICJ is subject to the satisfaction of Chapter II of the ICSID Convention. According to the abovementioned arbitration clause, first the jurisdiction of the ICSID must be exhausted and only then can RA take the claim to the ICJ. This can be clearly elucidated by analyzing Chapter II of the ICSID Convention.

Art. 25 of the ICSID Convention,[152] allows for jurisdiction to the centre for a dispute arising between a natural or juridical entity against a state. Art. 27 (1) of ICSID expressly bars any diplomatic protection,[153] when the consent to arbitrate in the ICSID has been provided under the EJEPA. In the instant case, RA did not give EO the opportunity to accept the 'standing offer'[154] to arbitrate under the ICSID, and unilaterally granted it diplomatic protection. Moreover, RA by espousing the claim of EO has violated the provisions and, the aims and object of the agreement. RA has violated the rule *pacta sunt servanda*[155] ; the rule requires that RA interpret the text of the agreement in good faith.

Also in the MHS Case[156] the term investment in the UK-Malaysian BIT was coined similarly to EJEPA *i.e*. 'Investment means every kind of asset...' due to this construction the tribunal interpreted the term broadly and granted jurisdiction to the dispute.

[151] See, JM Boddicker, 'Whose Dictionary Controls?: Recent Challenges to the Term "Investment" in ICSID Arbitration', (2010) 25 Am. U. Int'L. Rev. 1031.
[152] See, International Centre for settlement of Investment Disputes (opened for signature 18 March 1965, entry into force 14 October 1966) 575 UNTS 159 (ICSID) art 25 (1) .
[153] See, J Kokott, Interim Report on "The Role of Diplomatic Protection in the Field of Protection of Foreign Investement"' in *Report of the Seventieth ILA Conference* (ILA London, 2002) 265; see also J Dugard, *Fourth Report on Diplomatic Protection*, A/CN.4/530/Add.I, ¶. 108.
[154] See, SA Alexandrov , *The Compulsory Jurisdiction of the International Court of Justice. How Compulsory is it?* (OUP, Oxford 2006).
[155] See, Black's Law Dictionary (9th ed. 2009).
[156] See, *Malaysian Historical Salvors SDN BHD v Malaysia*, ICSID Case No.ARB/03/11.

5.3. No prior exhaustion of local remedies or the third party procedure

It is humbly submitted that no diplomatic protection can be granted to Rita Sen, before exhausting the local remedies available to her. The rule of exhaustion of local remedies is a part of customary international law; hence, it should not be derogated.[157] The genesis of an international claim arises on the condition of the prior necessity for the individual to apply to all the remedies under internal law.[158] This has been clarified in the *Barcelona Traction Light and Power Company Limited* case[159] in the course of Judge Tanaka's separate opinion.[160] In the opinion of Judge Morelli 'if an organ of the State which is under the obligation performs an act contrary to the desired result, the existence of an internationally unlawful act and of the international responsibility of the State cannot be asserted so long as the foreign national has a possibility of securing, through the means provided by the municipal legal system, the result required by the international rule'.[161] Moreover, as held in the *Interhandel* case,[162] 'before resorting to an international court, it has been considered necessary that the state where the violation has occurred should have an opportunity to resort it by its own means'.[163] Moreover, the *ELSI* case[164] upheld that 'the waiver of the requirement to exhaust local remedies should be express'[165], which is not so in the instant case.

It is further submitted that according to the 'Dispute Settlement' clause of the EJEPA, the disputes should initially be resolved through the third party procedures[166] like consultation and negotiation. However, no such initiative was taken and claims are directly being floored to the ICJ.

[157] See, *Interhandel* case *(Switz. v US*)(Preliminary Objections)[1959] ICJ Rep 6, 27 .
[158] See, SD' Ascoli, KM Scherr, 'The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights' Protection' (2007) EUI Working Paper Law 2007/02.
[159] See, *Barcelona Traction Co.* case*(Belgium v Spain)*[1970] ICJ Rep 42.
[160] See, ibid, Dissenting opinion [1970] ICJ Rep. 143.
[161] See, ibid, Dissenting opinion by Judge Morelli.
[162] See, *Interhandel* case (n 157).
[163] See, ibid.
[164] See, *Elettronica Sicula S.p.A. (ELSI)(United States of America v Italy*)[1989] ICJ Rep 15.
[165] *See* Amerasinghe, *Local remedies in International Law* (2nd edn, Cambridge University Press, Cambridge, 2004) 385- 421.
[166] See, O Schachter, 'Dispute Settlement and Countermeasures in the International Law Commission' (1994) 88 *American Journal of International Law* 471.

5.4. The counter claim violates the rules of the ICJ

Even if ICJ finds jurisdiction to allow to the counterclaim submitted by RA, the counter-claims so presented by RA shall be violative of the rules of the court. Art. 80 of the Rules of Court clearly state that counterclaims can only be presented to the ICJ if they are connected with the subject matter of the other party.[167] The claim of Pshad relates to the export prohibition imposed by RA which is in violation Art. 15 of the EJEPA and RA's claim is that the prohibition is excused by the general exceptions covered under Art. 30 of the EJEPA. The counterclaim raised by RA is on behalf of Rita Sen and claims for value of the satellite and lost profits. The original claim put forth by Pshad is in relation to the unjustified quantitative restriction which relates to the violation of the express treaty agreement and counter claim where RA espouses the claim of Rita Sen has no connection whatsoever as there is no treaty provision which provides for the same. Hence, ICSID is the proper forum to address claims of Rita Sen and not ICJ.

6. THE COMPENATION SOUGHT BY RA IS UNJUSTIFIED

Arguendo that the 'space junk' belongs to a Pshadi owned satellite; it is imperative to consider the following argument. Facts on record indicate that the satellite was jointly launched with Oxia, which provided the launch service facilities. Hence, Oxia qualifies as a 'launching state'[168] as well. Therefore, in the light of 'justice and equity', Pshad alone is not bound to pay the entire value of the satellite and the lost profits to RA; when Oxia is equally liable for the 'space junk'.

It is humbly submitted that Pshad has no guarantee of receiving an indemnification from Oxia. It cannot be presumed that Pshad and Oxia have concluded a prior agreement apportioning their liability under Art. V (2) of the Liability Convention. Firstly, Pshad has only signed but not ratified the Liability Convention and not is bound to negotiate a prior agreement to this effect. Secondly, the said satellite was launched twenty years ago, when

[167] See, Rules of Court (adopted 14 April 1978, entry into force 1 July1978) art 80 available at < http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0> accessed 16 November 2010.
[168] See, Liability Convention (n 82) Art 1(c) (ii).

Pshad's space industry was in its infancy. Therefore, the Pshadi national laws[169] at that time were inept to accurately apportion the liability with Oxia.

It is thus pleaded that Pshad cannot risk to pay the entire value of the destroyed satellite and lost profits to RA, when there exists no *prima facie* guarantee of its indemnification from Oxia. Moreover, RA is 'forum shopping'[170] when demanding the full compensation from Pshad alone, as it wants to hurt the Pshadi space industry.

6.1. RA cannot demand the 'loss of profits'

It is humbly submitted that EO's satellite was launched in September, 2008 and destroyed in May, 2009; i.e., it was in operation for less than one year. According to the 'new business rule'[171] of accounting, the lost profits in cases of an unestablished business are excluded from the damages sought by a Party, as they cannot be determined with 'reasonable certainty'.[172] The prospective profits of EO's satellite are too 'speculative, uncertain and contingent'[173] to be included in the damages sought by RA.

[169] *See Conference Room Paper A/AC.105/C.2/2001/CRP.10;* See also Dr. M Williams, 'Perceptions on the Definition of a "Launching State" and Space Debris Risks' *45th Colloquium on the Law of Outer Space*, Houston, United States, 2002, published by the American Institute of Aeronautics and Astronautics, 2004. . ISBN: 1-56347-625-8.

[170] See,V Kayser, *Launching Space Objects, Issues of Liability and Future Prospects* (Kluwer Academic Publishers,2001).

[171] See, *Fera v Village Plaza, Inc* 345 S.W. 2d 577 (Tex. Civ. App. 1961).

[172] See, *Story Parchment Co. v Paterson Parchment Paper Co.,* 282 US 555 (1931); *Mid-America Tablewares, Inc. v Mogi Trading Co.,* 100 F.3d 1353 (7th Cir. 1996).

[173] See, *Standard Machines Co. v Duncan Shaw Co.,* 208 F. 2d 61 (First Cir. 1953), at 64.

PRAYER

Wherefore in light of the facts of the case, arguments advanced and authorities cited, this Court may be pleased to adjudge and declare that-

I. The action taken by RA violates Art. 15:1 of the EJEPA and that the said moratorium be withdrawn.

II. The countermeasure adopted by RA is not justified under customary international law or by invoking the 'essential security' clause, or the general exceptions under Art 30 of the EJEPA.

III. The counterclaims raised by RA are not justified & ought not to be heard by the ICJ as per the provisions of the EJEPA. In case of the court's kind disposal, the Applicant abnegates the same, and solemnly pray the court to declare that the compensation sought by RA is unjustified.

All of which is respectfully submitted

Agents for the Applicants

The People's Democracy of Pshad