

TEAM CODE: 113R

**IN THE INTERNATIONAL COURT OF JUSTICE
LA COUR INTERNATIONALE DE JUSTICE
PEACE PALACE, THE HAGUE
NETHERLANDS
2010 THE GENERAL LIST NO.....**

**THE DEMOCRACY OF PSHAD (APPLICANT)
V.
THE REPUBLIC OF ARGUNIA (RESPONDENT)**



**ENTRE LA DEMOCRATIE POPULAIRE DE PSHAD
(DEMANDERESSE)
V.
ET REPUBLIQUE DE ARGUNIA
(DEFENDEUR)**

**The Case Concerning the Differences Between Pshad and Argunia Regarding
the Interpretation of Eastern Jimm Economic Partnership Agreement**

MEMORIAL FOR RESPONDENT /MEMOIRE DE LA DEFENDEUR

**THIRD GNLU INTERNATIONAL MOOT COURT COMPETITION
2011**

MEMORANDUM ON BEHALF OF THE RESPONDENT

TABLE OF CONTENTS

List of Abbreviations.....IV

Index of Authorities.....V

Statement of Jurisdiction.....XV

Statement of Facts.....XVI

Issues Raised.....XVIII

Summary of Arguments.....XIX

Arguments Advanced.....1

1. THE ACTION TAKEN BY THE REPUBLIC OF ARGUNIA DOES NOT VIOLATE
ART. 15:1 OF THE EASTERN JIMM ECONOMIC PARTERNERSHIP
AGREEMENT.....1

1.1. The action of the Parliamentary Committee for Science and Technology *calling* for
an ‘indefinite moratorium’ on space technology exports to Pshad, does not fall within
the ambit of Art. 15:1.....1

1.2. The ‘indefinite moratorium’ does not qualify as a ‘prohibition or restriction’ within
the meaning of Art.15:1.....2

2. THE ‘INDEFINITE MORATORIUM’ IS AUTHORISED UNDER THE ‘ESSENTIAL
SECURITY’ CLAUSE.....3

2.1. The ‘self-judging’ nature of the ‘essential security’ clause.....3

2.1.1. The ‘self-judging’ nature of the ‘essential security’ clause has transformed into
customary international law.....5

2.2. The invocation of the ‘essential security’ clause by RA is a valid countermeasure to
further its own as well as international peace and security7

2.2.1. Annulment of the border surveillance program to check *soccer hooliganism*...8

2.2.2. Human rights violations committed by Pshad against the illegal Pshadi
emigrants returning from RA to their home state.....10

3. THE ‘INDEFINITE MORATORIUM’ ON SPACE TECHNOLOGY IS JUSTIFIED
UNDER THE GENERAL EXCEPTIONS CONTAINED IN ART. 30 OF THE
EJEPA.....13

3.1. Export prohibition justified under ‘public morals’ and ‘human health’ exception....13

3.2. The *call* for the ‘indefinite moratorium’ on space and technology exports to Pshad is
justified under Art. 30(d).....14

3.3. The countermeasure is justified by the ‘doctrine of proportionality’.....17

Preliminaries.....	III
3.4. The <i>call</i> for the ‘indefinite moratorium’ on space technology exports to Pshad is not an ‘arbitrary or unjustified discrimination’ or a ‘disguised restriction on international trade’.....	18
4. THE COUNTERCLAIM BROUGHT BY RA IS VALID AND IS WITHIN THE JURISDICTION OF THE ICJ.....	19
4.1. Diplomatic protection can be granted to Eye Out.....	20
4.2. The jurisdiction of the ICSID could not have been invoked.....	21
4.3. The rule of the exhaustion of local remedies is not applicable.....	23
5. THE DAMAGE CLAIMED BY RA IS JUSTIFIED.....	24
Final Submission/Prayer.....	25

LIST OF 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.I.A.A.: Report of International Arbitral Awards
 - RA: The Republic of Argunia
 - 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.

Index of Authorities

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STATEMENT OF JURISDICTION

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

STATEMENT OF FACTS

Background:

- 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 also required adherence to basic individual rights and the rule of law. The EJEPA allowed for application of regime-internal countermeasures in response to any violation of any provision of the agreement. (¶ 11)

Illegal Emigration from Pshad to RA: (¶ 2)

- There exists a stark wealth differential division in Pshad. The top five percent of the Pshadi population leads a life of opulence while the remaining population is struggling to remain above the poverty line. This has led to social unrest and a prospective political agitation.
- For the past three years there has been an increase in poverty driven emigration of illegal Pshadi nationals, seeking a better standard of living in RA.
- The Pshadi Government looks down upon illegal emigration. Therefore, when the said illegal emigrants return to Pshad, they face a high probability of mistreatment by the Pshadi border officials.

EO's satellite mitigating the threat posed by *soccer hooliganism* and its subsequent destruction by a Pshadi '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, intimidated opposing team's fans, threatened players and wrangled 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 in 2005, 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 satellite with all the state of the art facilities, dramatically reducing the threat posed by *soccer hooliganism*. (¶¶ 6-7)
- In May 2009, the said satellite collided with a dislodged portion of a satellite owned by Pshad and was put out of function. Thereby, rendering the sensitive city of Laudi vulnerable to future attacks by the *soccer hooligans*. (¶ 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 allegedly violating of Art. 15 of the EJEPA. (¶ 12)
- RA claims that the export prohibition is excused by the general exceptions of Art. 30 of the EJEPA. In fact, the export prohibition is an actual and pre-emptive countermeasure to Pshad’s 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 alleging 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)

ISSUES RAISED

1. THE ACTION TAKEN BY THE REPUBLIC OF ARGUNIA DOES NOT VIOLATE ART. 15:1 OF THE EASTERN JIMM ECONOMIC PARTERNERSHIP AGREEMENT
 - 1.1. The action of the Parliamentary Committee for Science and Technology *calling* for an ‘indefinite moratorium’ on space technology exports to Pshad, does not fall within the ambit of Art. 15:1.
 - 1.2. The ‘indefinite moratorium’ does not qualify as a ‘prohibition or restriction’ within the meaning of Art. 15:1
2. THE ‘INDEFINITE MORATORIUM’ IS AUTHORISED UNDER THE ‘ESSENTIAL SECURITY’ CLAUSE
 - 2.1. The ‘self-judging’ nature of the ‘essential security’ clause
 - 2.2. The invocation of the ‘essential security’ clause by RA is a valid countermeasure to further its own as well as international, peace and security
3. THE ‘INDEFINITE MORATORIUM’ ON SPACE AND TECHNOLOGY IS JUSTIFIED UNDER THE GENERAL EXCEPTIONS CONTAINED IN ART. 30 OF THE EJEPA
 - 3.1. Export prohibition justified under ‘public morals’ and ‘human health’ exceptions.
 - 3.2. The *call* for the ‘indefinite moratorium’ on space and technology exports to Pshad is justified under Article 30(d)
 - 3.3. The countermeasure adopted by RA is justified by the ‘doctrine of proportionality’
 - 3.4. The *call* for the ‘indefinite moratorium’ on space technology exports to Pshad is not an ‘arbitrary or unjustified discrimination’ or a ‘disguised restriction on international trade’
4. THE COUNTERCLAIM BROUGHT BY RA IS VALID AND IS WITHIN THE JURISDICTION OF THE ICJ
 - 4.1. Diplomatic protection can be granted to Eye Out
 - 4.2. The jurisdiction of the ICSID could not have been invoked
 - 4.3. The rule of the exhaustion of local remedies is not applicable
5. THE DAMAGE CLAIMED BY RA IS JUSTIFIED

SUMMARY OF ARGUMENTS

1. THE ACTION TAKEN BY THE REPUBLIC OF ARGUNIA DOES NOT VIOLATE ART. 15:1 OF THE EASTERN JIMM ECONOMIC PARTNERSHIP AGREEMENT

RA's Parliamentary Committee for Science and Technology of had *called* for an 'indefinite moratorium' on space technology exports to Pshad. A mere *call* by a Parliamentary Committee does not amount to an 'other measure' under Art. 15 of the EJEPA, as it lacks a legal backing or an obligation as to its adherence. Moreover, the 'indefinite moratorium' only implies an 'indeterminate delay' and does not amount to a 'prohibition or restriction' under Art. 15:1 of the EJEPA. It is thereby concluded that Pshad's claim before the ICJ is premature.

2. THE 'INDEFINITE MORATORIUM' IS AUTHORISED UNDER THE 'ESSENTIAL SECURITY' CLAUSE

The EJEPA contains an 'essential security' clause. Owing to its 'self judging' nature, the said clause can be invoked to the subjective satisfaction of RA alone. Firstly, Pshad's 'space junk' collided with RA's satellite in the outer space and rendered it dysfunctional. Hence, the sensitive city of Laudi was yet again vulnerable to the threat posed by *soccer hooliganism*; thereby, injuring RA's 'own essential security interest'. Secondly, the mistreatment meted out to the returning Pshadi emigrants by the Pshadi border officials augmented the problem of illegal emigration in RA (that had far reaching social and economic consequences). The actions of the Pshadi border officials also negate the tenets of customary international law by rendering the said emigrants *de facto* stateless.

3. THE 'INDEFINITE MORATORIUM' ON SPACE TECHNOLOGY IS JUSTIFIED UNDER THE GENERAL EXCEPTIONS CONTAINED IN ART. 30 OF THE EJEPA

An evolutionary approach in interpreting Art. XX (a) of the GATT (since Art. XX of the GATT is *parie materia* to Art. 30 of the EJEPA), implies that it was designed to accommodate human rights, within the broad ambit of 'public morals'. Moreover, 'human health' under Art. XX (b) of the GATT also embraces fundamental human rights values. The countermeasure is also justified under Art. 30(d) for 'securing compliance' with the 'essential security' clause of the EJEPA. The said measure was designed to alleviate RA's 'own essential security' by receiving immediate compensation from Pshad and taking cognizance of

the *de facto* stateless Pshadi emigrants. No ‘reasonably available alternative remedy’ would have been as effective as the said countermeasure. Hence, the ‘indefinite moratorium’ is justified under the doctrines of ‘necessity’ and ‘proportionality’. The ‘countermeasure’ does not comprise an ‘arbitrary or unjustifiable discrimination’ or a ‘disguised restriction on international trade’ as it was taken after due consideration and deliberation.

4. THE COUNTERCLAIM BROUGHT BY RA IS VALID AND IS WITHIN THE JURISDICTION OF THE ICJ

RA is justified in bringing a counterclaim since the ICJ has the jurisdiction to hear counterclaims. Firstly, the said counterclaim has a direct connection with the dispute that was initially presented to the ICJ. It flows directly from the principal claim and also serves as a defence for RA. Secondly, the EJEPA allows for the jurisdiction of the ICJ to resolve any investment dispute between Pshad and RA, who have consented to its jurisdiction. Thirdly, there is no express clause consenting to the jurisdiction of the ICSID. Moreover, in the absence of an investment in Pshad, the jurisdiction of the ICSID could not have been invoked. Hence, RA is completely justified in bringing EO’s claim to the ICJ.

5. THE DAMAGE SOUGHT BY RA IS JUSTIFIED

In the light of justice and equity, RA is justified in claiming the value of the satellite and the lost profits from Pshad; to restore the conditions that would have existed had the damage to its satellite not occurred. The counterclaim does not seek to punish Pshad, but to receive the value of the satellite and lost profits from Pshad; in order to address its essential security needs at the earliest.

ARGUMENTS ADVANCED

1. THE ACTION TAKEN BY THE REPUBLIC OF ARGUNIA DOES NOT VIOLATE ART. 15:1 OF THE EASTERN JIMM ECONOMIC PARTNERSHIP AGREEMENT

1.1. The action of the Parliamentary Committee for Science and Technology *calling* for an ‘indefinite moratorium’ on space technology exports to Pshad, does not fall within the ambit of Art. 15:1

It is humbly submitted that ‘Eye Out’ is a private security firm, incorporated under the laws of the Republic of Argunia (hereinafter ‘RA’).¹ EO received an exclusive contract from the city of Laudi, to suppress *soccer hooliganism*. To this effect it launched a satellite in September 2008. But in May, 2009 the said satellite collided with a dislodged portion of a Pshadi owned satellite and was henceforth, put out of function.² Laudi authorities took the matter to the Federal Parliament which culminated in the Parliamentary Committee for Science and Technology, *calling* for an indefinite moratorium on space technology exports to Pshad.³ When a parliament committee calls for a moratorium it is nothing but a recommendation to be followed by a legal measure by the concerned government, hence not legally binding. Therefore, it does not fall within the ambit of ‘other measure’ under Art. 15:1.⁴

The 1983 Panel Report on ‘*United States-Imports of Certain Automotive Spring Assemblies*’ explained the term ‘measure’ as a particular section from their domestic legislation.⁵ This signifies the requisition of a legislative backing to constitute a measure. Moreover, as held in *Japan-Trade in Semi-Conductors*,⁶ ‘not all non-mandatory requests could be regarded as measures within the meaning of Art. XI: 1 of the GATT’ [which is *pari materia*⁷ (i.e., in the same matter) to Art. 15:1 of the EJEPA]. In order to invoke Art. 15:1 of the EJEPA, the criteria of either an institution or maintenance of a ‘prohibition’ or ‘restriction’ has to be

¹See ¶ 5, Fact on Record.

²See ¶ 9, Fact on Record.

³See ¶ 10, Fact on Record.

⁴See, Annexure of fact of Record; Eastern Jimm Economic Partnership Agreement (hereinafter ‘EJEPA’).

⁵See, GATT Panel Report, *United States: Imports of Certain Automotive Spring Assemblies*, (1994) GATT BISD 30S/107, adopted 26 May 1983. ¶ 54-55.

⁶See, Panel report, *Japan: Trade in Semi-Conductors*, (1989) GATT BISD.35S/116, adopted 4 May 1988, ¶ 108.

⁷See, BA Garner, Black’s Law Dictionary (7th edn West Group St. Paul, Minn., 1999).

satisfied. But RA’s Parliamentary Committee has only ‘called’ for an indefinite moratorium; thereby, indicating that no such law to this effect has been passed. Therefore, the said action does not violate Art. 15:1.

According to the maxim *onus probandi actori incumbit* (considered a part of customary international law); the specific party (i.e. the claimant) carries the burden of proof⁸ to prove its case. Since, a mere assertion of claims does not amount to proof,⁹ therefore, Pshad bears the onus of framing a *prima facie* case to contest the violation of Art. 15:1.¹⁰

1.2. The ‘indefinite moratorium’ does not qualify as a ‘prohibition or restriction’ within the meaning of Art. 15

It is submitted that no moratorium has been instituted but, arguendo an indefinite moratorium by its nature is at best a temporary suspension. Therefore, an ‘indefinite moratorium’ does not qualify as a ‘prohibition’ or ‘restriction’. The term ‘indefinite’¹¹ refers to an action ‘having no clearly determined being or character, *i.e.* indeterminate, vague, or undefined’. ‘Moratorium’¹² is defined as ‘an authorized postponement usually a lengthy one’. Therefore, an ‘indefinite moratorium’ implies an indeterminate delay.

Furthermore, ‘prohibition’¹³ means ‘the action or an act of forbidding a thing by command or the legal ban on trade or importation of specified commodity’. ‘Restriction’¹⁴ is ‘a thing which restricts someone or something, a limitation on action’; and as per the interpretation of the international tribunals it amounts to imposing ‘absolute limitations’.¹⁵ Thus, in the instant case the export of space technology to Pshad has just been indeterminately or indefinitely delayed, but there is no legal ban, limitation or an imposition of a particular condition to be fulfilled on the exports. Therefore, it does not qualify as a ‘prohibition’ or ‘restriction’ and is not contrary to Art. 15:1.

⁸ See, Amersinghe, *Principles of Evidence in International Litigation* (Martinus Nijhoff, 2005) 156; Also see, *Case Concerning Elettronica sicula S.p.A (United States v. Italy)* [1989] ICJ Rep 62.

⁹ See, WTO, *India: Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products - Report of the Panel* (22 September 1999) WT/DS90/R, as upheld by the *Appellate Body Report* (23 August 1999) WT/DS90/AB/R; Also see, WTO, *Australia :Measures Affecting Importation of Salmon-Appellate Body report* (6 November 1998) WT/DS18/AB/R.

¹⁰ See, EJEPA (n 4)

¹¹ See, Shorter Oxford English Dictionary (5th edn OUP, Oxford 2003)1353.

¹² See, Black’s Law Dictionary (n 7) 1026.

¹³ See, Shorter Oxford English Dictionary (n 11) 2362.

¹⁴ Ibid 2554.

¹⁵ WTO, *Turkey: Restriction on Imports of Textile and Clothing Products-Report of the Appellate Body* (22 October 1999) WT/DS34/AB/R.

2. THE INDEFINITE MORATORIUM IS AUTHORISED UNDER THE ESSENTIAL SECURITY CLAUSE

2.1. The ‘self-judging’ nature of the ‘essential security’ clause

It is humbly submitted that the terminology of the ‘essential security’ clause of the EJEPA¹⁶ suggests that every country is the sole judge on questions relating to its own security.¹⁷ It is further submitted that the provision of ‘essential security’ under the EJEPA is *pari materia* to Art. XXI of the GATT. Moreover, Art. 31 of the VCLT¹⁸ states that treaty provisions should be understood in their ordinary meaning.

Since the ‘essential security’ clause refers to action which the contracting party considers necessary for the protection of its own essential security interests; therefore, the necessity of invoking such a provision is not left to objective but rather the subjective determination of the State in question.¹⁹ Similar provisions to the ‘essential security’ clause in the EJEPA may be found in the European Communities (EC) Treaty,²⁰ the North American Free Trade Agreement,²¹ the GATT,²² as well as in numerous bilateral treaties of Friendship, Commerce and Navigation (FCN treaties).²³ Various human rights treaties also contain provisions allowing States to restrict the exercise of some of the rights and freedoms provided for in those treaties, where it is necessary in the interests of national security.²⁴ Moreover, the OECD Codes²⁵ of Liberalisation of Capital Movements and of Current Invisibles Operations in Art. 3 contain similar provisions which allow each member government of the OECD to take measures which ‘it considers necessary’; thereby, implying that the said provision is explicitly ‘self-judging’.

¹⁶ See, *Essential security* EJEPA Ch.7, (n 4).

¹⁷ See, JH. Jackson, *World Trade and Law of GATT* (Bobbs-Merrill Company, 1969) 748.

¹⁸ See, Vienna Convention on the Law of Treaties (Adopted 22 May 1969, opened for signature 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331 (VCLT) art. 31.

¹⁹ See, Dapo Akande & S Williams, ‘International Adjudication on National Security Issues: What Role for the WTO?’ (2003) 43 Va. J. Int’l L. 365.

²⁰ See, EC Treaty (Treaty of Rome, as amended) O.J. (C 340) 3 (1997) art. 296.

²¹ See, North American Free Trade Agreement (opened for signature 17 December 1992, came into force 1 January 1994) (NAFTA) 32 I.L.M. 605. Art. 2102.

²² See, General Agreement on Tariffs and Trade 1947 (30 October 1947) 55 UNTS 194 (GATT) art. XXI.

²³ See, Treaty of Friendship, Commerce and Navigation (United States – Nicaragua) (21 January 1956) 367 UNTS 3 (FCN) art. XXI.

²⁴ See European Convention on Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS. 221 (ECHR) art. 6.

²⁵ See, OECD Codes of Liberalization of Movements and Current Visible Operation (2010), available at <<http://www.oecd.org/dataoecd/41/21/2030182.pdf>> accessed on 20 December 2010.

The ICJ interpreted the ‘it considers’ clause, when it examined the treaty language that allowed a national security exception to certain treaty obligations.²⁶ The ICJ in the *US-Nicaragua* case²⁷ acknowledged the difference between ‘necessary to protect its essential security interests’ and ‘it considers necessary’ clause. While the former is to be read objectively, the latter mandates a subjective reading; *i.e.* the country may take measures ‘it considers necessary’.²⁸

It is further submitted that such a subjective reading of Art. XXI of the GATT has been supported by various WTO members. The GATT Council discussions²⁹ and the 1949, *Czechoslovakia-USA* case³⁰ noted that ‘every country must be the judge in the last resort on questions relating to its ‘own security’. A similar principal was upheld in 1982, when Council discussions were held on trade restrictions applied for non-economic reasons by the EEC’s member states *i.e.* Canada and Australia against imports from Argentina.³¹ Moreover, on Portugal’s accession to the GATT, Ghana stated that the boycott of the Portuguese goods as potential danger is justified under the auspices of the ‘essential security’ clause.³²

The *United States - Trade Measures Affecting Nicaragua* in 1985 (U.S.-Nicaragua dispute)³³ dealt with the prohibition of U.S.A.’s trade with Nicaragua, citing Art. XXI of the GATT. The U.S. argued that Art. XXI left it to each contracting party to judge what actions it considered necessary for the protection of its essential security interests. In its view, a panel could neither address the validity, nor the motivation for the United States' invocation of Art. XXI.³⁴ The panel was later constituted on the condition that the US action under Art. XXI was outside the scope of review.³⁵ It is thus submitted that whenever the self-judging nature of Art. XXI was questioned, there was no strong opposition to that view by other GATT members.³⁶ A similar clause can also be found in the TRIPS Agreement. Negotiations of the Doha Round have also clarified that the use of the waiver requirement allows ‘[e]ach member has the right to

²⁶ See, WA. Cann Jr., ‘Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance between Sovereignty and Multilateralism’ (2001) 26 *Yale J. Int'l L.* 413 at 422.

²⁷ See, *Military and Paramilitary Activities case (Nicaragua v US)* [1986] I.C.J.Rep 14, 22 (June 27)

²⁸ *ibid.* at 116-17.

²⁹ See, Analytical Index:Guide to GATT Law and Practice (Vol 1 World Trade Organisation Geneva, 1995) at 600.

³⁰ *ibid* (citing GATT Doc. CP.3/33 (May 30,1949))

³¹ See, GATT: Analytical Index (n 29).

³² See, GATT: Analytical Index (n 29) (citing: GATT Doc. SR.19/12, at 196 (1961)).

³³ *ibid* at 601 (citing GATT Doc. L/6053 (1986) (unadopted report)).

³⁴ *ibid* at 603 (citing GATT Doc. C/M/191 (1986)).

³⁵ *Ibid.*

³⁶ See, Dapo (n 19).

determine what constitutes a national emergency or other circumstances of extreme urgency'.³⁷

In *Commission v Greece*,³⁸ it was held that the interpretation of the 'essential security' clause being a hard fact rather than perception³⁹ is subjective on account of different geo-political considerations of States. Each member state is better placed than the community institutions or the other member states, to mitigate the threat posed by a third state. Moreover, the issue of national security is subject to the appraisal of the authorities of the State concerned.⁴⁰ It is also submitted that the self-judging aspect of the 'essential security' clause is simply a reflection of a general principle of international law,⁴¹ and that the questions raised under the 'essential security' clause are 'political questions'⁴² incapable of being determined judicially.⁴³

Hence, it is contended that, if a test is introduced to determine the reasonableness or necessity of a measure under the 'essential security' clause, it would fail to respect the deliberate wording of that provision and the distinction made by the drafters with other provisions. If the drafters of the agreement wished to insert a qualification of measures, which the members "reasonably consider necessary," they would have done so.⁴⁴ It is also submitted that the 'essential security' clause in the EJEPA is even significantly broader than Art. XXI of the GATT, as the safeguards mentioned under Art. XXI (b) i-iii which require an objective reading are not present in the EJEPA. Therefore, it is wider in scope allowing the contracting parties more leverage to exercise their subjective opinion.

2.1.1. The Self-Judging nature of the Essential Security clause has transformed into Customary International Law

It is humbly submitted that the self-judging nature of the terminology used in the 'essential security' clause has transformed into customary international law.

³⁷See, Ministerial Conference, 'Declaration on the TRIPS Agreement and Public Health' (20 November 2001) WT/MIN(01)/DEC/2, ¶ 5(c).

³⁸ See, Case C-183/91 *Commission v Greece* [1996] ECR I-1513 ¶¶ 54-55.

³⁹ See, Peter Lindsay, 'The ambiguity of GATT article XXI: Subtle Success or Rampant' (1998) 52 Duke L.J. 1227.

⁴⁰ *Grady v United Kingdom* (App. No) (2000)29EHRR 493; *Ireland v United Kingdom* (App. No. 5310/71)(1980) 2 EHRR 25.

⁴¹ See generally, GATT: Analytical Index (n 29).

⁴² See, Dapo (n 19).

⁴³ See, C. Todd Piczak, 'The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, The National Security Exception to the GATT and The Political Question Doctrine' (1999) 61 U. Pitt. L. Rev. 287 at 319, 326.

⁴⁴ See, Dapo (n 19) at 393.

1) Evidence of State practices:

Many Multilateral and Bilateral treaties have been phrased in similar terms to the ‘essential security’ clause, like Art. XXI of the GATT (now the WTO) which was established in 1947 and now has 153 members; European Communities (EC) Treaty;⁴⁵ Art. 2102 of the North American Free Trade Agreement,⁴⁶ which was established in 1994 and has 3 members; numerous bilateral treaties of Friendship, Commerce and Navigation (FCN treaties);⁴⁷ Art. 3 of the OECD Codes⁴⁸ of Liberalisation of Capital Movements and of Current Invisibles Operations, which was established in 1961 and has 34 members;⁴⁹ the Energy Charter Treaty which entered into force on April 1998 and has 53 members;⁵⁰ Art. 2 of the Draft MAI which was established in 1995 and has 26 members;⁵¹ Art. XIVbis of the General Agreement on Trade in Services (GATS).⁵² Furthermore, BITs and investment chapters of other FTAs (Free Trade Area) in the new model BITs of Canada (2004), Germany (2005), India (2003) and the United States (2004) use the ‘it considers’ provision to protect their essential security, which indicate its self-judging nature. Thus, the inclusion of the ‘essential security’ clause in the aforementioned treaties along with its incorporation by various nations establishes that the ‘conduct of states in general... is consistent’⁵³ with the ‘essential security’ clause for it to acquire the status of a customary rule.

It is further presented that Ghana invoked Art. XXI in 1961 announcing its ban and stated the aforementioned point.⁵⁴ The *United States in United States - Trade Measures Affecting Nicaragua in 1985* (U.S.-Nicaragua dispute)⁵⁵ also excluded the jurisdiction of the panel in reference to decide the dispute on grounds of Art. XXI, and the panel did not consider the motivation, nor the validity of the United States invocation of Art. XXI(b)(iii).⁵⁶ Further these

⁴⁵ See, EC Treaty (n 20).

⁴⁶ See NAFTA (n 21).

⁴⁷ See FCN treaty (n 23).

⁴⁸ See OECD codes (n 25).

⁴⁹ See, K Yannaca, ‘Essential Security Interests under International Investment Law International Investment Perspectives’ (2007) available at <http://www.oecd.org/dataoecd/59/50/40243411.pdf>, accessed 25 September, 2010.

⁵⁰ See, Energy Charter Treaty(opened for signature December 1994, entry into force 16 April 1998) 34 ILM 360 (ECT).

⁵¹ The Multilateral Agreement on Investment- Draft Consolidated Text (22 April 1998) DAF/MAI(98)7/REVI, available at <http://www.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> accessed 19 December 2010.

⁵² *General Agreement on Tariffs and Trade*, [hereinafter GATT] 1 January 1995, 1867 U.N.T.S. 187 Annex 1B (GATS).

⁵³ See, *Nicaragua v United States*(The Merits) [1986] ICJ 14.

⁵⁴ See GATT: Analytical index (n 29) (citing GATT Doc. SR.19/12, at 196 (1961)).

⁵⁵ See United States – Nicaragua (n 33) (quoting GATT Doc. L/6053 (1986) (unadopted report)).

⁵⁶ *ibid.*

were state claims, and state claims may also be taken as evidence of state practices without considering whether such claims were consistently enforced as in the *Fisheries Jurisdiction* (Merits) case.⁵⁷

There is support for the non-justiciability for invoking Art. XXI in the negotiating history of the equivalent of Art. XXI in the Charter of ITO.⁵⁸ Such interpretation of the said clause has also been re-affirmed by the representatives of EEC⁵⁹, Canada⁶⁰, Britain⁶¹, Australia⁶² and the United States⁶³. Moreover, state practice is strengthened by the absence of any real opposition.⁶⁴

2) **Opinio Juris:**

The application of the ‘essential security’ clause falls within the purview of *opinio juris sive necessitates*.⁶⁵ The state practices, case laws and the statements of representatives indicate the psychological belief in the subjective reading of ‘essential security’ clause; reflected by its incorporation in numerous treaties with an intention to adhere to it (*pact sunt servanda*⁶⁶).

2.2. The invocation of the ‘essential security’ clause by RA is a valid countermeasure to further its own as well as international, peace and security

It is humbly submitted that under the tenets of law, the ‘essential security’ clause can be instituted via the subjective satisfaction of RA alone. Yet in the light of justice and equity, the rationale behind the aforementioned countermeasure, shall be explained in greater detail. Firstly, Pshad abandoned a dislodged portion of its satellite in the *res communis omnium*⁶⁷; that destroyed EO’s remote sensing satellite and consequently rendered the RA- Pshad border area vulnerable to the threat of soccer hooliganism. Secondly, human rights violations committed by Pshad augmented the social and economic impact of the illegal emigration borne by RA.

⁵⁷ See, *Fisheries Jurisdiction case* (Merits) [1974] ICJ Rep 3.

⁵⁸ ‘The Verbatim Report of the 33rd meeting of the Commission A of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Environment’ (24 July 1947) UN Doc E/PC/T/A/PV/33, 26-27.

⁵⁹ See, GATT: Analytical Index (n 29) .

⁶⁰ See, *ibid* 600 (citing C/M/157, pg. 10).

⁶¹ See *ibid* (citing GATT Doc. CP.3/SR.22, Corr. 1 (1949)).

⁶² See *ibid* (citing C/M/157, p.11).

⁶³ See *ibid* 601 (citing C/M/157, p.19).

⁶⁴ See, Dapo (n 19) .

⁶⁵ See, Brownlie, *The Rule of Law in International Affairs: International Law at the fiftieth anniversary of the United Nations*, (Martinus Nijhoff Publishers, 1998) 21.

⁶⁶ See, VCLT (n 18) Art. 26.

⁶⁷ See, WC Jenks, ‘International Law and Activities in Space’ (1956) 15 INT’L & COMP. L. Q. at 99.

2.2.1. Annulment of the border surveillance program to check *soccer hooliganism*

2.2.1.1. RA's OWN ESSENTIAL SECURITY

The state of the art remote sensing satellite launched by EO in September 2008, revolutionized the tracking down of football ‘hooligans’;⁶⁸ evidenced by the prompt prosecution of 350 unruly fans and the media reports appreciating the ‘dramatic reductions’ in football violence. But the negligent abandonment of space debris by Pshad, rendered the said satellite dysfunctional. Hence, the city of Laudi was yet again susceptible to the threat posed by rowdy soccer fans; reminiscent of the 2004 riots when public property was damaged and fans sustained injuries.

It is thereby submitted that *prima facie* responsibility can be affixed on Pshad under the general principles of international law⁶⁹ by virtue of being a joint⁷⁰ launching state,⁷¹ having procured⁷² a launch from Oxia. Pshad breached its legal obligation⁷³ of timely mitigating space debris in the outer space,⁷⁴ which happens to be a *global commons*.⁷⁵ Pshad’s negligent desertion of its space object (which encompasses all space refuse)⁷⁶ negates the Roman maxim *sic utere tuo ut alienum non laedas* and Principle 21 of the Stockholm Declaration on Human Environment⁷⁷ (accepted as a rule of customary international law)⁷⁸ which mandate State ‘responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment... beyond the limits of national jurisdiction’.⁷⁹ Moreover, being a

⁶⁸ See ¶ 7, Fact on Record.

⁶⁹ See, K. Wiewiorwsa, ‘Some Problems of State Responsibility in Outer Space Law’ (1979- 80) 7 J Space L 3 at 30.

⁷⁰ See, Convention on International Liability for Damage Caused by Space Object (opened for signature 29 March 1972, entered into force on 1 September 1972) 961 UNTS 187 (Outer Space Liability Convention) art V.

⁷¹ See, *ibid* art. 1 (c.) (i).

⁷² Prof. Dr. KH Bockstiegel, ‘The terms “Appropriate State” and “Launching State” in Space Treaties – Indicators for State Responsibility and Liability for State and Private Activities’ ,(1991) 34 IISL Proc 13.

⁷³ See, Brownlie, *Principles of Public International Law* (3rd edn Oxford Clarendon Press, 1979) at 434.

⁷⁴ See, ‘Space Debris Mitigation Guidelines of the Scientific and technical Sub- Committee on the Peaceful Uses of Outer Space’ (2007) U.N .Doc. No .A/AC. 105/890, Annex.IV available at <<http://www.reachingcriticalwill.org/legal/paros/DebrisMitigationGuidelines.pdf>> accessed 16 December 2010.

⁷⁵ See, SJ Buck, *The Global Commons: An Introduction* (Earthspan, London 1998).

⁷⁶ See, H De Saussure, ‘The Impact of Manned Space Station on the Law of Outer Space’ (1984) 1 San Diego LR 985 at 995.

⁷⁷ C Q Christol, *The Modern International Law of Outer Space* (Pergamon Press, New York 1982) 130.

⁷⁸ A Kiss, “*The International Protection of the Environment*” in Mac Donald, RStJ and DM Johnson (eds) *The Structure and Process of International Law* (Martinus Nijhoff Netherland, 1986) 1069.

⁷⁹ *The Corfu Channel Case (United Kingdom v Albania)* [1949] ICJ Rep 4(9 April 1949); Also see , Draft Articles on State Responsibility, 1996 YBILC II(2). art 19.2 available at <

signatory to the Liability Convention and the Outer Space, Pshad is bound by Art. 18 of the VCLT.

It is further contended that fault liability⁸⁰ under Article III of the Liability Convention⁸¹ can be subjectively affixed on Pshad, under the law of negligence⁸² for abandoning its space debris to become a *res nullius* in spite of owning the said satellite and exercising control and jurisdiction⁸³ over it. The space debris subsequently collided with EO's satellite, which was the sole solution for RA's internal security threats. It is submitted that no other company which submitted its tender for the RA- Pshad border control services owned satellites with intricate features like detecting license plate numbers of cars. This was peculiar only to EO's satellite which was put out of function on account of Pshad's negligence. Thus, yet again the sensitive city of Laudi would be subjected to social unrest caused by the soccer hooligans.

2.2.1.2. INTERNATIONAL PEACE AND SECURITY

It is humbly submitted that Pshad is responsible for the 'harmful contamination'⁸⁴ of the Lower Earth Orbit, which accommodates various research, military and commercial telecommunication satellites. It also serves as a storage orbit for space objects prior to their transfer to higher orbits.⁸⁵ Therefore, the presence of space debris injures the 'benefit and interests'⁸⁶ of other space faring nations and runs contrary to the 'Charter of the UN...(for maintaining) international peace and security'.⁸⁷

An ill conceived abandonment of space debris, as in the instant case, would result in a cascade effect⁸⁸and create a vicious cycle of unending space collisions⁸⁹. It is worth

http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> accessed 10 December 2010.

⁸⁰ See, Outer Space Liability Convention (n 70) art. III.

⁸¹ Ibid.

⁸² FK Schewetje, 'Managing Outer Space Traffic in the Future' (LLM thesis, McGill University Montreal 1985) 251 (citing J Pfeifer 'International Liability for Damage Caused by Space Objects' (1981), 30 ZL Weltramrecht 215).

⁸³ See, Outer Space Liability Convention (n 70) art. VIII; F von der Dunk 'The Illogical Link- Launching, Liability and Leasing' American Institute of Aeronautics and Astronautics Inc.

⁸⁴ See Outer space Liability Convention (n 70) art. IX.

⁸⁵ See, HA Baker, *Space Debris: Legal and Policy Implications* (Cmarkimis Nijhoff Publishers, 1989) 13.

⁸⁶ See, Outer Space Liability Convention (n 70) art I.

⁸⁷ See, Outer space Liability Convention (n 70) Art. III .

⁸⁸ See, MG Wolfe and LP Temple III, 'Department of Defense Policy and the Development of a Global Policy for the control of Space Debris', *30 Colloquium on Law of Outer Space*, Brighton 1987 at 3.

⁸⁹ See, LP Temple III , 'The Impact of Space Debris on Manned Space Operations', (June 1986) (Paper prepared for presentation at the AIAA Space Systems Technology Conference, San Diego, CA), at 6.

considering that even a 0.5mm chip of paint can potentially kill an astronaut⁹⁰ and destroy a satellite⁹¹ (since the collision would eject from the satellite a mass of 115 times the mass of the impacting debris).⁹² Thus, the prospective impact of Pshad's space refuse on any other space faring nation is *res ipsa loquitur*. Moreover, the possibility of more space debris left unaccounted for, in the outer space by Pshad, may pose a threat to the comity of nations undertaking space activities.

2.2.2. Human rights violations committed by Pshad against the illegal Pshadi emigrants returning from RA to their home state

It is well established under the tenets of international law that unilateral human rights sanctions may be employed by countries for the protection of their own security interest and may also take the form of restriction of trade practices.⁹³ For example, the United States invoked the protection under Art. XXI of the GATT to defend the Helms-Burton secondary boycott against Cuba and the Massachusetts selective purchasing law against Burma, for serving its security interests as they responded directly to human rights violations committed by the respective regimes.⁹⁴ Secondly, the US also banned trade activities with Uganda citing human rights violation.⁹⁵ Thirdly, President Reagan imposed IEEPA⁹⁶ trade sanctions on South Africa. The United States also imposed trade and other sanctions on Iraq, motivated in part by Iraqi human rights violations.⁹⁷ IEEPA has also been used similarly on countries such as Haiti, Burma, Sudan, Serbia and Montenegro, and the Federal Republic of Yugoslavia. Export restrictions were imposed on Iran during the Iranian hostage crisis; on agricultural exports to the Soviet Union following the invasion of Afghanistan; and on Poland after the government's declaration of martial law.⁹⁸

⁹⁰ Mr. SN Menon, *State Responsibility and Need of International Legal Consequences for Debris- Free Environment*, 50th Colloquium on Law of Outer Space, Hyderabad 2007 at 273.

⁹¹ HA Baker (n 85).

⁹² S. Wiesser, 'Access to a *Res Publica Internationalis*: The Case of the Geostationary' (1986), 29 *Colloquium on Law of Outer Space* at 147.

⁹³ See, SH. Cleveland, 'Human Rights Sanctions and International Trade: A Theory of Compatibility' (2002) 5 J. Int'l Econ. L. 133. at 135.

⁹⁴ See, R Goodman, 'International Human Rights Law In Practice Norms and National Security: The WTO as a Catalyst for Inquiry' (2001) 2 Chi. J. Int'l L. 101.

⁹⁵ See, Bretton Woods Amendment Act (1978) Pub. L. 95-435, 92 Stat. 1051.

⁹⁶ See, The international Emergency Economic Power Act, Pub L 95-223, 91 Stat 1626.

⁹⁷ See, Iran Sanctions Act, (1990) Pub L 101-513, 104 Stat. 2047.

⁹⁸ See, H. Moyer and L Mabry, 'Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases' (1983) 15 Law & Pol. Int'l Bus 1.

2.2.2.1. OWN ESSENTIAL SECURITY

It is humbly submitted that the failure of the Pshadi Government to achieve inclusive growth has led to a stark wealth differential division. Thus, the majority Pshadi population is struggling to remain above the poverty line. The consequent social unrest has paved the way for a mass influx of illegal Pshadi emigrants into RA.

Firstly, the Pshadi Government has failed to alleviate the inflow of undocumented migrant workers from their State into RA. Secondly, when the Pshadi border officials violate the human rights of the returning Pshadi emigrants, it instills fear in the migrant workers stationed in RA, and deters them from returning to Pshad. This leads to a situation where there is a heavy influx of illegal emigrants into RA but a miniscule outflow of the said emigrants back to Pshad. Consequently, the illegal emigrant population in RA has far reaching social and economic implications; thereby, hampering the Argunian ‘essential security’.

The illegal migrant workers offer themselves as cheap labour. A natural consequence of this (as experienced in the United States of America),⁹⁹ is that the Argunian citizens either lose their jobs to Pshadi migrants or are forced to work at much lower wages. Moreover, they burden the Argunian ex- chequer, which bears their medical, public education, welfare, criminal justice and incarceration costs.¹⁰⁰ Finally, the financial burden of maintaining these illegal emigrants trickles down to the Argunian tax-payers¹⁰¹, who are also affected by increased crime rates and drug problems.¹⁰²

2.2.2.2. INTERNATIONAL PEACE AND SECURITY

It is humbly pleaded that the Pshadi government has failed to provide its citizens an adequate standard of living,¹⁰³ health conditions,¹⁰⁴ education and training,¹⁰⁵ work opportunities,¹⁰⁶

⁹⁹See, H Rupp, ‘Illegal Aliens Working Legally: How Will This Affect Illegal Aliens, U.S. Citizens, and Their Respective Families?’ (2004) 6 J.L. & FAM. STUD. 409, 415.

¹⁰⁰ See, RS Ryan, ‘Proposition 187: California's Stance Against Illegal Immigration’(1996) 25. CAP. U. L. REV. 613.

¹⁰¹See, A Schloenhardt, ‘Immigration and Refugee Law in the Asia Pacific Region’(2002) Vol 32 Hong Kong Law Journal 519.

¹⁰² See, B Edmonston & R Lee (eds.), *Local and Fiscal Effects of Illegal Immigration: Report of a Workshop*(National Academy Press- Washington DC, 1996).

¹⁰³See, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) UDHR art 25(1) UDHR; The International Centre for Settlement of Investment Disputes (Opened for signature 18 March 1965, entry into force 14 October 1966) 575 UNTS 159. art.11(1) ;UNGA Res. 3348(1974) GAOR 29th Session Supp 31, 75; Brownlie, *The Human Right to Food* (Human Rights Occasional Paper, Commonwealth Secretariat London, 1987).

social security assistance¹⁰⁷ and development;¹⁰⁸ thereby forfeiting their ‘third generation rights’.¹⁰⁹ On account of agrarian incompetence, the majority Pshadi population is striving hard to survive above the poverty line. The mounting social unrest is indicative of a prospective political agitation. Pshad’s inability to fulfill its State obligations¹¹⁰ is illustrated by the large number of undocumented Pshadi citizens who emigrate to RA, seeking a better standard of living.

Therefore, it is humbly submitted that the returning Pshadi emigrants are subjected to ‘degrading treatment’¹¹¹ by the Pshadi border officials, who arouse ‘feelings of fear, anguish and inferiority capable of humiliating and debasing (the returned Pshadi emigrants) and possibly breaking their physical and moral resistance.’¹¹² Pshad bears an international responsibility¹¹³ for the disproportionate restriction of civil rights¹¹⁴ by its border officials, under the garb of maintaining public order. In fact, under the tenets of customary international law every Pshadi citizen has a right to ‘enter his own country’.¹¹⁵

Hence, it is reasonable to conclude that the undocumented Pshadi emigrants residing in RA are *de facto* stateless as after ‘having left the country of which they were nationals, (they) no longer enjoy the protection and assistance of their national authorities... because these authorities refuse to grant them assistance and protection’.¹¹⁶ Neither do they have an ‘effective nationality’¹¹⁷ of Pshad nor are they protected under the ‘operation of its law’.¹¹⁸ In

¹⁰⁴ *ibid* UDHR.

¹⁰⁵ *ibid* art. 26.

¹⁰⁶ *ibid* art 23.

¹⁰⁷ *ibid* art 22.

¹⁰⁸ O Schachter, ‘The Evolving International Law of development’ (1976) 15 Columbia Journal of Transnational Law 1,6.

¹⁰⁹ Brownlie (n 103) 567.

¹¹⁰ Charter of United Nations (24 October 1945) 1 UNTS XVI (UN charter) art. 55 & 56.

¹¹¹ UDHR (n 103) art 5; Also see, International Convention on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7 &10(1).

¹¹² *Ireland case* (n 40).

¹¹³ *USA (L.F. Neer) v United Mexican States* , (1926), RIAA iv. 60 at 61-2.

¹¹⁴ See *e.g.* in German Law, JellinekFleiner, *Droit administratif allemand* (Trad. Eisenmann, 1933), 246; Krauss, *Der Grundsatz der Verhältnismässigkeit* (Hannburg, 1955) 5-6.

¹¹⁵ ICCPR (n 111) art 12(4); UDHR (n 103) art. 13(2).

¹¹⁶ See, UN Secretary General, ‘A Study of Statelessness’ (New York, August 1949) E/1112/Add.1 at 9 available at <<http://www.unhcr.org/3ae68c2d0.pdf>> accessed on 11 November 2010.

¹¹⁷ Carol Batchelor, ‘Statelessness and the Problem of Resolving Nationality Status’(1998) 10 INT’L J. REFUGEE L. 156, 172.

¹¹⁸ See, Convention Relating to the Status of Stateless Persons of 1954 (adopted on 24 September 1954, entry into force 6 June 1960) 360 UNTS 117.

spite of having a ‘legal claim to the benefits of (Pshadi) nationality, (they) are not... able to enjoy these benefits’¹¹⁹ on account of ‘state repression (and)... discrimination’.¹²⁰

It is humbly asserted that this contravention of human rights is a threat to international peace and security and violates Art. 15 (2) (d) of the EJEPA. In fact, even the Security Council under Chapter VII of the UN Charter recognizes the human rights atrocities involving cross-border harms as a threat to international peace and security.¹²¹ Thus, RA is obligated by Art. 8(1) of ILC’s 2006 Draft Articles: to ‘exercise diplomatic protection in respect of a stateless person’.¹²² It is worth mentioning that Article 8 is concerned only with the diplomatic protection of stateless persons... and not with the conferment of nationality upon such persons.¹²³

3. THE ‘INDEFINITE MORATORIUM’ ON SPACE AND TECHNOLOGY IS JUSTIFIED UNDER THE GENERAL EXCEPTIONS CONTAINED IN ARTICLE 30 OF THE EJEPA

It is humbly pleaded that Article 30 of the EJEPA is *pari materia* to Art. XX of the GATT. It is further submitted that RA shall justify the export moratorium under Art. 30 without *ipso facto* conceding to a violation of the EJEPA.¹²⁴

3.1. Export prohibition justified under ‘public morals’¹²⁵ and ‘human health’¹²⁶ exceptions.

The exception of public morals contained in Art. XX (a) of the GATT suggests that it originally was conceived to accommodate some limited human rights concerns.¹²⁷ An evolutionary approach would thereby embrace both *jus cogens* norms and human rights

¹¹⁹See, D Weissbrodt, C Collins, ‘The Human Rights of Stateless Persons’(2006) HRQ 28 at 251 - 252.

¹²⁰See, H Massey, ‘UNHCR and *de facto* Statelessness’ (2010) LPPR/2010/01 available at <<http://www.unhcr.org/4bc2ddeb9.html> > accessed on 18 November 2010.

¹²¹ See, R Goodman, ‘International Human Rights Law in Practice Norms and National Security: The WTO as a Catalyst for Inquiry’ (2001) 2 Chi. J. Int’l L 110.

¹²² See, Draft Articles on Diplomatic Protection (2006) art 8(1) available at < http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf > accessed on 19 November 2010 .

¹²³ See, Amerasinghe (n 8) 119.

¹²⁴ See, GATT, *United States : Restrictions on Imports of Tuna –Report of the Panel* ,(3 September 1991) DS21/R (unadopted) ¶¶ 5.22.

¹²⁵ See, EJEPA (n 4) art 30(a).

¹²⁶ See, EJEPA (n 4) art 30(b).

¹²⁷ See, WTO, *United States- Importation of Certain Shrimp and Shrimp Products-Appellate Body Report* (22 October 2001) WT/DS58/AB/RW.

norms that are mutually binding on states by treaty.¹²⁸ The *erga omnes* status of human rights norms establishes that all states have an interest in compelling compliance with human rights by other states, regardless of whether the violating state's conduct directly impacts other states' interests in the traditional sense.¹²⁹ This is in consonance with the aforementioned protection of Pshadi emigrants' human rights by RA.

It is further submitted that the human life exception entailed in Art. XX (b) of the GATT embraces fundamental human rights values.¹³⁰ It is contended that the violation of fundamental human rights norms is an illegal act justifying quantitative restrictions. These obligations, as the International Court of Justice has explained, constitute 'obligations of a State toward the international community as a whole' and include the 'basic rights of the human person'.¹³¹ Nothing in the GATT text purports to override these international law jurisdictional principles. The WTO appears to be moving in a direction that would interpret the GATT's unwritten jurisdictional requirements, to be consistent with customary international law.¹³²

Finally, it is pertinent to differentiate the position of the EJEPA with respect to the WTO. The EJEPA is a bilateral treaty which accords equal considerations to both economic as well as non economic factors, whereas the WTO considers and furthers trade measures giving minimal considerations to human rights. Both the countries are not members of the WTO, and are governed by the EJEPA. Thus, giving due consideration to the principles of customary international law and the provisions of the EJEPA, a logical inference upholding the significance of the 'indefinite moratorium' in lieu of human rights atrocities is rationally acknowledged.

3.2. The call for the 'indefinite moratorium' on space technology exports to Pshad is justified under Art. 30(d)

In order to invoke the provision of Art. 30(d), the measure must be one designed to secure compliance with laws or regulations that are not themselves inconsistent with some provision

¹²⁸ ¶ 9 Fact on Record.

¹²⁹ See, L Oppenheim, *International Law*, (8th edn London, 1955) 137-39.

¹³⁰ See, OY. Elagab, *The Legality of Non-forcible Counter-Measures in International Law* (OUP New York, Oxford 1988).

¹³¹ See, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, 51-54, ¶¶ 107-116.

¹³² See, SH. Cleveland, 'Human Rights Sanction and International Trade : A theory of Compatibility'(2002) 5 J. Int'l Econ. L. 133.

of the Agreement.¹³³ It is humbly submitted that the customary international ‘laws and regulations’¹³⁴ under which the countermeasure has been enforced, are justified under the ‘essential security’ clause of the EJEPA. Hence, they are consistent with the Agreement. Moreover, the drafters of Art. XX (d) of the GATT did not intend to limit such ‘laws and regulations’ to domestic legislations¹³⁵ only. Hence, they shall be interpreted to include customary international law as well (along with domestic legislations), by giving it an ordinary meaning under Art. 31(1) of the VCLT.¹³⁶

Secondly, the measure must be ‘necessary’ to secure compliance.¹³⁷ As held in the *United States-Section 337 of the Tariff Act of 1930*, a measure is considered necessary if it does not have at its disposal a reasonably available alternative measure consistent with the Agreement, and if not, it shall adopt the least inconsistent measures.¹³⁸

In order to justify the ‘necessity’ clause the rationale behind the countermeasure shall henceforth be explained. It is humbly submitted that the countermeasure shall exert economic and political pressure on Pshad to compensate RA for the value of the destroyed satellite. Facts on record indicate that the destroyed satellite on account of its sophisticated features was the only solution to RA’s essential security crises. But after its destruction, RA could not find a substitute to this satellite (as none of the satellites in the current tender for the border surveillance program offer such advanced features). The only solution before RA is to demand immediate compensation from Pshad to orbit another satellite, having all the state of the art facilities as the destroyed satellite. This is the best way out to address the urgent and grave essential security crises in Laudi. Hence, the objective of the said countermeasure is a speedy recovery of the destroyed satellite’s value; furthering the cause of protecting RA ‘own essential security interest’.

It is further pleaded that since space technology is an important aspect of the Pshadi economy, an indefinite moratorium on the transfer of space technology exports will exert reasonable

¹³³ See WTO, *Korea : Measures Affecting Imports of Fresh, Chilled and Frozen Beef- Appellate Body Report* (11 December 2000) WT/DS169/AB/R ¶ 157.

¹³⁴ See, GATT, *EEC: Regulation on Imports of Parts and Components- Dispute Panel Report* (May 16, 1990) 30 I.L.M. 1075, at 1113.

¹³⁵ See, Salman Bal, ‘International Free Trade Agreements and Human rights: Reinterpreting Article XX of the GATT’ (2001) 10 Minn. J. Global Trade 62 at 88.

¹³⁶ See, VCLT (n 18) art 31(1).

¹³⁷ See, Appellate Body Report (n 133).

¹³⁸ See, GATT, *United States -Section 337 of the Tariff Act of 1930-The Panel Report*, (16 January 1989) L/6439 - 36S/34 ¶ 5.26.

pressure on Pshad. Hence, RA would stand a chance to immediately recover the value of the destroyed satellite; thereby, catering to its essential security needs at the earliest.

Moreover, the said countermeasure will also hurt Pshad’s reputation in the international plane for committing a host of human rights violations. Consequently, not only will the countermeasure secure the rights of the *de facto* stateless Pshadi emigrants, but would also curb the flow of illegal emigrants into RA. Hence, the countermeasure is permitted under the ‘exigencies of the situation’.¹³⁹

3.2.1. The countermeasure is the ‘least inconsistent’ measure

It is humbly submitted that the term ‘indefinite moratorium’ only implies an indeterminate delay and not a ‘restriction’ or ‘prohibition’. Hence, there has been no contravention of Art. 15 *per se*. Moreover, the countermeasure only effectuates a ‘non- performance’¹⁴⁰ of the treaty obligation to transfer space technology,¹⁴¹ but it does not amount to ‘a suspension, termination, withdrawal or abrogation’¹⁴² of the EJEPA. Hence, it does not violate Art. 42 (2) of the VCLT.

3.2.2. No alternative measure is reasonably available

It is humbly submitted that no alternative remedy would ‘achieve the level of compliance sought’¹⁴³ by RA. Even the third party procedure mentioned under the ‘dispute settlement’ clause of the EJEPA,¹⁴⁴ is not a ‘reasonably available remedy’ due to its non-binding nature. Moreover, the ‘duty to negotiate may turn out to be an odious trap’¹⁴⁵ for RA, as Pshad may take ‘advantage of this duty to let the dispute drag on’.¹⁴⁶ This will be detrimental to RA’s essential security interests, as it would unnecessarily prolong the launch of another remote sensing satellite and expose the city Laudi to the menace of *soccer terrorism*. Hence, any

¹³⁹ See, ICCPR (n 110) Art. 4(1); Adam Mizok, *The Legality of the Fifty- two Year State Emergency in Israel*, (2001) 7 U.C. DAVIS J. INT’L L. & POL’Y 3, ¶ 4.

¹⁴⁰ See, Elizabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, (Transnational Publishers Inc. Dobbs Ferry New York, 1984).

¹⁴¹ EJEPA (n 4) art 15.

¹⁴² See, TM. Frank , ‘On Proportionality of Countermeasures in International Law’(October 2008)102 AM. J. INT’L L. 715.

¹⁴³ See, WTO, *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

¹⁴⁴ See, *Dispute Settlement* :EJEPA (n 16)

¹⁴⁵ *United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* [1980] ICJ Rep 3

¹⁴⁶ See, Edward Dumbauld, *Interim Measures of Protection in International Controversies* (M. Nijhoff Hague, 1932) 20.

form of consultation or negotiation with Pshad would not ‘contribute to the realization of the end pursued’.¹⁴⁷

It is further pleaded that being a ‘co- requisite... (and not) ‘a pre- requisite to countermeasures’,¹⁴⁸ RA can ‘reject the obligation to resort to dispute settlement measures’¹⁴⁹ under Art. 48 of the 1996 Draft Articles.¹⁵⁰ This is in line with the decision of the Appellate Body in EC-Asbestos case which held that ‘the more vital or important the common interests or values’ pursued by a government, the more deference a government deserves.¹⁵¹ Even the Appellate Body in the Korea-Beef case upheld the "common interests or values that the law or regulation to be enforced is intended to protect".¹⁵²

3.3. The countermeasure adopted by RA is justified by the ‘doctrine of proportionality’

It is humbly submitted that the right to survival¹⁵³ contained in the doctrine of proportionality was introduced in international law by the *Naulilaa Incident*¹⁵⁴ and was re-affirmed by International Law Commission in its commentary on Art. 30 of its Draft on State Responsibility.¹⁵⁵ Moreover, even the 2001 commentary by the International Law Commission (ILC) on its Draft Articles on Responsibility of States for Internationally Wrongful Acts reiterates with approval the ICJ’s view, expressed in the *Nuclear Weapons* advisory opinion, that ‘necessity and proportionality’ are always ‘considerations’ in assessing the legality of a resort to any kind of coercion.¹⁵⁶

The adverse effect of the said countermeasure on the Pshadi economy is *proportional* the effect of Pshad’s ‘prior unlawful acts’¹⁵⁷ on RA. (*i.e.* the threat to RA’s essential security and

¹⁴⁷ See, *Canada: Wheat Exports* (n 143)

¹⁴⁸ See, J Crawford, ‘Countermeasures as Interim Measures’ (1994)5 EJIL 65.

¹⁴⁹ See, C Tomuschat, ‘Are Countermeasures Subject to Prior Dispute Settlement Procedures?’ (1994) 5 EJIL 77, 78.

¹⁵⁰ See, Draft Article on State Responsibility (n 78); See also ILC, *Report of the Fifty second Session* (2000), A/55/10 52, 55- 57.

¹⁵¹ See, WTO, *European Communities : Measures Affecting Asbestos and Asbestos Containing Products- Appellate Body Report*, (12 March 2001)WT/DS135/AB/R, ¶ 172.

¹⁵² See, *Korea-Beef* (n 133) ¶ 162.

¹⁵³ See, Bourquin, ‘Crimes et delits contre la surete des Etats strangers’ (1927) 16 Hague *Recueil* 121- 246; Falk, ‘The Iran Hostage Crisis: Easy Answers and Hard Questions’(1980) 74 *A.J.I.L.* 411- 417.

¹⁵⁴ See, *Naulilaa Incident Arbitration, Portugal v Germany* (1928) 2 R.I.A.A. 1012.

¹⁵⁵ *Yrbk I.L.C.* (1979) ii (2), p. 118 9No. 595).

¹⁵⁶ See, Draft Articles on state Responsibility (n 79) Commentary to Art. 21, ¶ 4 (citing Advisory Opinion *,Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ REP. 226, ¶ 30).

¹⁵⁷ 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) at 11.

a derogation of the universal human rights enshrined under customary international law). The proportionality between the essential security threat to RA and the economic injury to Pshad is based on ‘approximation and reflective equality’.¹⁵⁸ The countermeasure does ‘not seek to punish’ Pshad but immediately recover the value of the destroyed satellite; and thereby, restore the *status quo ante*.¹⁵⁹

Arguendo, the repercussions of RA’s countermeasure on the Pshadi economy may come across as harsher than the impact of Pshad’s actions on RA’s essential security. But the ratio of the *Air Services Agreement*¹⁶⁰ defends RA’s countermeasure by permitting ‘states to apply countermeasures that would be disproportionate in an economic sense in order to enforce a principle’.¹⁶¹ Drawing an analogy with the instant case, the measures taken by RA ‘do not appear to be clearly disproportionate’¹⁶² when compared to the ‘prior unlawful acts’ of Pshad.

It is humbly pleaded that the countermeasure is also in consonance with the ratio of the *Hostages* case due to RA’s ‘honest judgment on the basis of the conditions prevailing at the time’.¹⁶³ RA’s stance is further strengthened by the *Galic* case (2003) where the Tribunal placed itself ‘neither in the position of the actual perpetrator at the moment of choosing between available options, (*i.e.* RA) nor in that of a person with perfect hindsight, but, rather in that of an international version of the common law’s reasonable man, who has carefully considered all the evidence available at the critical time and shaped a rational choice between available means.’¹⁶⁴

3.4. The call for the ‘indefinite moratorium’ on space technology exports to Pshad is not an ‘arbitrary or unjustified discrimination’ or a ‘disguised restriction on international trade’

It is humbly submitted that based on the doctrine of ‘necessity’ and ‘proportionality’, the said countermeasure cannot be condemned as ‘arbitrary or unjustified discrimination’ or a ‘disguised restriction on international trade’. As in the instant case, even the Tuna I Panel noted that a ‘publicly announced trade measure’ could not be considered

¹⁵⁸ See, Thomas Frank (n 142) .

¹⁵⁹ See, Elizabeth Zoller (n 140) .

¹⁶⁰ *ibid* ¶ 83.

¹⁶¹ Lori Damrosch, *Retaliation or Arbitration- or Both? The 1978 United States- France Aviation Dispute*(1980) 74 AJIL 792.

¹⁶² *ibid* 443- 44.

¹⁶³ *In re List* (Hostages Trial, 1948), 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 69 (1949).

¹⁶⁴ Y Aksar, *Implementing International Humanitarian Law: From the ad hoc Tribunals to a Permanent International Criminal Court* (Routledge Publications, 2004) at 170 .

disguised.¹⁶⁵ Moreover, the ‘manner in which the measure is applied’¹⁶⁶ by RA takes due cognizance of its ‘legal duties in claiming the exception’.¹⁶⁷ The countermeasure has been ‘applied reasonably’¹⁶⁸ without ‘abusing the exceptions of Art. 30’.¹⁶⁹

4. THE COUNTER-CLAIM BROUGHT BY ARGUNIA IS VALID AND IS WITHIN THE JURISDICTION OF THE ICJ

It is humbly submitted that under Art. 80:1 of the Rules of the ICJ, allow counterclaims to be presented to the ICJ. Hence, RA is justified to bring a counterclaim as the rules of the court allow it. Art. 80 of the court permits counterclaims with the condition that the counterclaim should be directly connected with the claim.¹⁷⁰ The ICJ has in earlier instances also allowed counterclaims to be brought to the court and has heard claims brought by various defendant states.¹⁷¹

Judge Anzloti pointed out the practical advantage of admitting the submission of counterclaims in pending proceedings¹⁷², in that ‘it enabled the respondent to demand, in the course of the same proceedings, what was due to him from the applicant *for a reason already pending*’, and observed that ‘it was in fact possible that a counter-claim would be so *closely bound up with the defence* that, if the respondent were bound to submit a special application, there would be a danger of placing the latter in a difficult position’.¹⁷³ A suggested definition was ‘a claim directly dependent on the facts of the main action’.¹⁷⁴

¹⁶⁵ See, GATT, *United States: Prohibition of Imports of Tuna and Tuna Products from Canada-Report of the Panel* (22 February 1982) L/5198 at 108.

¹⁶⁶ See, GATT, *United States: Imports of Certain Automotive Spring Assemblies-Report of the Panel* (26 May 1983) L/5333 at 125.

¹⁶⁷ See, WTO, *United States : Standard for Reformulated and Conventional Gasoline -Appellate Body Report*(29 April 1996) WT/DS2/AB/R at 22.

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.*

¹⁷⁰ See, Rules of Court (adopted 14 April 1978, entry into force 1 July 1978) art. 80 available at < <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>> accessed 16 November 2010.

¹⁷¹ See, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Preliminary Objections)[1996] ICJ Rep 595; Also see, *Oil Platforms Case (Islamic Republic of Iran v The United States of America)*(Preliminary Objections) [1996] ICJ Rep 803.

¹⁷² See, OL Pegna, ‘Counterclaims and Obligation *Erga Omnes* against the International Court of Justice’ (1998). 9 EJIL 724.

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

In the *Asylum* case, the ICJ entertained the counterclaim based on facts and stated that if connection was ascertained it would have led to the rejection of the principal claim.¹⁷⁵ The said principle was reaffirmed in the *Morocco* case.¹⁷⁶ In the case concerning *United States Diplomatic and Consular Staff in Teheran* (Provisional Measures),¹⁷⁷ the court stated that it is open to the government under the Court's Statute and Rules, to present its own argument to the Court regarding those activities either by way of defence in a Counter-Memorial or by way of a counter-claim filed under Art. 80 of the Rules of the Court. Clearly defining the stand in the *Oil Platforms* case the Court stated that 'USA could bring a counterclaim against Iran, for Iran had breached the treaty in question' and that this formed a part of USA's defence.¹⁷⁸

Similarly, RA was justified in bringing a counterclaim to the ICJ as Pshad violated the human rights obligation under the object and purposes of the EJEPA.¹⁷⁹ The counterclaim is intrinsically connected with the Pshad's claim as the action taken by RA comes within the four-fold of Chapter 7 of EJEPA¹⁸⁰ as it has serious repercussions on the 'essential security' of RA, and therefore, it forms a part of a valid defence against the claim put forth by Pshad. The main action in the instant case can be construed as the collision of the EO's satellite with the 'space junk' that was determined to be the dislodged portion of Pshad's satellite. Thus, RA has espoused the claim of EO which is its national and is represented by Rita Sen.

4.1. Diplomatic Protection Can Be Granted To Eye Out

It humbly submitted that according to the *Barcelona Traction Co.* case, a corporation will 'ordinarily have the nationality of the state in which it is incorporated and has its seat of management'.¹⁸¹ In the instant case, Eye Out was registered under the laws of RA; hence, EO is a juridical national of RA. Consequently, the destruction of EO's satellite amounted to an

¹⁷⁵ See, *Columbia v Peru* (Merits)[1950] ICJ Rep 280.

¹⁷⁶ See, *French Republic v United states of America*(Merits)[1952] ICJ Rep 178.

¹⁷⁷See, *United States Diplomatic and Consular Staff in Teheran* (*United States of America v Iran*)[1980] ICJ Rep 3.

¹⁷⁸ See, *Oil Platforms* case (*Islamic Republic of Iran v United States of America*)(Counter-claim)[1998] ICJ Rep 190.

¹⁷⁹ See ¶ 11 Fact on Record.

¹⁸⁰ See, EJEPA (n 16) .

¹⁸¹See, *Barcelona Traction Co.* case (*Belgium v Spain*) (Merits)[1970] ICJ Rep 42; see also *Diallo* case (*Republic of Guinea v Democratic Republic of the Congo*(preliminary objections)[2007] ICJ Rep ¶ 61 ; See Also, Dugard, 'Fourth Report to the Diplomatic Protection to the ILC', UN Doc A/CN.4/ 530 12ff.

injury of RA’s ‘national interest’.¹⁸² Therefore, RA alone can grant ‘diplomatic protection’¹⁸³ to EO (which is represented by Rita Sen).

In the instant case, Pshad cannot grant diplomatic protection to the Pshadi shareholders of EO, *i.e.* Rita Sen and the members of the Pshadi pension fund since ‘a corporation does not necessarily have the nationality of the majority of its shareholders’¹⁸⁴ and lifting of corporate veil to grant diplomatic protection to shareholders is a *lex specialis*.¹⁸⁵ Hence, it is imperative for RA to safeguard the shareholder’s interests by granting diplomatic protection to EO. The said action falls under Art. 2 (c) of the ‘dispute settlement’ clause of Chapter 7 of the EJEPA and furthered by the ‘minimum standard of treatment’ and Art. 2 of the ‘non- discrimination’ clause of the EJEPA.

It is humbly submitted that RA has granted diplomatic protection to Eye Out and not Rita Sen (who acts as a representative of EO). Sen is a Pshadi national and therefore ineligible to receive RA’s diplomatic protection due to the ‘nationality of claims rule.’¹⁸⁶ Moreover, as held in the *Barcelona Traction* case, ‘whenever a shareholder’s interests were harmed by an injury to the company, it was the company that the shareholders must look to take action, for two separate entities may have suffered from the same wrong it was only the company whose rights had been infringed.’¹⁸⁷ Hence, Rita Sen’s interests will be protected by virtue of granting diplomatic protection to EO.

4.2. The Jurisdiction of the ICSID could not have been invoked

Arguendo, the claim for value of satellite and loss of profits should have been taken to the ICSID. The treaty requires that the requirements of chapter II of the ICSID convention should be satisfied. The requirements state that the International Centre for Settlement of Investment

¹⁸² See, *Mavrommatis Palestine Concessions* case (*Greece v UK*) (Merits) (1924) PCIJ Series A, No. 2, 12; see also *Panevezys- Saldutikis Railway* case (*Estonia v Lithuania*) (1939) PCIJ Series A/B Bo. 76 16, 17; The *Nottebohm* case (*Liechtenstiene v Guatemala*) [1955] ICJ Rep 24; Also see, Garcia Amador, ‘State Responsibility. Some New Problems’ (1958) 94 Hague *Recueil* 437; UNGA ‘Preliminary Report on Diplomatic Protection’, UN GAOR 52nd Session UN Doc. A/CN.4/484(2000) ¶ 34-7.

¹⁸³ See, Report on Diplomatic protection *ibid*; see also Joseph, *Nationality and Diplomatic Protection- the Commonwealth of Nations* (A. W. Sijthoff, Leyden 1969); Leigh, ‘Nationality and Diplomatic Protection’, (1971) 20 ICLQ 453.

¹⁸⁴ See, *Barcelona Traction* (n 181).

¹⁸⁵ See, Amerasinghe (n 8).

¹⁸⁶ Van Panhuys, *The Role of Nationality in International Law: An outline* (A. W. Sijthoff, Leyden 1959) 59-73; G Amador, ‘International Responsibility :Third Report’(1958) 2 YBILC 66, UN doc. A/CN. 4/Ser. A/1958/Add. 1 (1958); 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) 284.

¹⁸⁷ See *Barcelona Traction Co.* case (n 181).

Disputes shall have jurisdiction to hear disputes arising out of an investment and should be between a contracting state and national of another contracting state. Consent is a prerequisite for arbitration in ICSID. The EJEPA has a clause which consents to the jurisdiction of the ICJ¹⁸⁸. However, there is no binding consent which binds the parties to the jurisdiction of the ICSID.

Moreover investment is a prerequisite to the jurisdiction of ICSID¹⁸⁹. Clearly there is no scenario of an investment in the instant case as EO is a national of RA. Unless an asset or economic activity constitutes an investment under article 25 of the ICSID convention, it is not subject to ICSID jurisdiction.¹⁹⁰ RA has espoused the claim of EO (represented by Sen), because EO has not made an investment in Pshad. The essential element that needs to be fulfilled i.e. of an investment by a national of one state in another contracting state is not met with in the instant case. To substantiate we may look at ICSID jurisprudence over what constitutes to be an investment: (a) the dispute should arise out of an investment that the ICSID convention protects- i.e. one covered by Art. 25 of the ICSID convention; (b) the dispute should involve an investment as defined by the treaty¹⁹¹. Considering EO no investment has been made in Pshad in accordance with the definition of the treaty and considering Rita Sen; she is incapable of invoking the jurisdiction of ICSID as a national cannot proceed against one's own state in ICSID. Also in other cases investment¹⁹² was held to have these certain elements; a) a contribution in money or other assets;¹⁹³ b) a certain duration; c)an element of risk; d)an operation made in order to develop an economic activity in host state; e)assets invested in accordance with the laws of the host state and f) assets invested bonafide.¹⁹⁴ Hence, it is clear that ICSID had no jurisdiction over such a matter and hence the matter was only to stand in the ICJ by way of diplomatic protection.

¹⁸⁸ *ibid* .

¹⁸⁹ See, ICSID (n 103) art 25.

¹⁹⁰ See, J D Mortenson, 'The Meaning of "investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51 Harv. Int'l L.J.257 at 259.

¹⁹¹ See, *Ceskoslovenska Obchodni Banka, A.S. v. Slovakia, Decision on Jurisdiction*, ICSID Case No. ARB/05/22, 24 May 1999.

¹⁹² See, J M Boddicker, 'Whose Dictionary Controls?: Recent Challenges To The Term Investment in ICSID Arbitration' (2010) 25 Am. U. Int'l L. Rev. 1031.

¹⁹³ See, *Salini Construttori S.p.A v. Morocco, Award on Jurisdiction*, ICSID case no. ARN/00/04. 23 July 2001.

¹⁹⁴ See, *Phoenix Action Ltd. v. Czech Republic, Award on Jurisdiction*, ICSID Case No. ARB/06/05, 20 April 2009.

4.3. The rule of the exhaustion of local remedies is not applicable

Arguendo that the claim should have been first brought to the courts of Pshad. It is true that exhaustion of local remedies is a rule under customary international law, but it is for the defendant (Pshad in the case of counterclaim) state to show that a remedy existed and is exercisable in the courts of that country.¹⁹⁵ It is humbly pleaded that ‘it makes less sense to maintain the emphasis on ‘domestic’ rather than ‘remedies’ when each investment protection treaty is ‘marking another step in their [investors] transition from objects to subjects of international law’’.¹⁹⁶ Moreover, Facewett rightly observed that ‘[w]here the act complained of is a breach of an international agreement or of customary international law, but not of the local law, the rule of the exhaustion of local remedies is not applicable and cannot support a preliminary object or defence to a claim.’¹⁹⁷

This position has been clarified by the ICJ in the *Case Concerning Elettronica Sicula S.p.A.* In the case Italy had claimed that the claim was inadmissible due to the alleged failure of the two US Corporations to exhaust local remedies available to them in Italy. In the final judgement ICJ had ruled that ‘it was for Italy to show, as a matter of fact, the existence of a remedy which was open to the United States stockholders and which they failed to apply’.¹⁹⁸ In sum, one could conclude, in this particular case that ICJ laid down the obligation on the party which raised the contention.¹⁹⁹

It is further submitted that the same rule was applied in the case of *Norwegian Loans* case by the ICJ. Pshad had never communicated to EO or Sen (representative of EO) that there existed a remedy in Pshad and that they could recover the value for their satellite and loss of profits directly from Pshad. Hence, a claim that EO should have moved to the courts in Pshad does not stand, as the burden of proof is on Pshad to establish that a local remedy existed.

¹⁹⁵ See Lauterpacht, Sep op, *Norwegian Loans case (France v Norway)*[1957] ICJ Rep 9at 39; Tanaka, sep. op., *Barcelona traction* (n 181), 144-5; Gros, sep. op. *Barcelona traction case* (n 181).

¹⁹⁶ See, *Plasma Consortium Limited v Republic of Bulgaria* ICSID Case No. ARB/03/24, Decision on jurisdiction, February 8, 2005, 20 ICSID Review- *Foreign Investment Law Journal* 262, 304 (para 141); R Higgins, ‘Conceptual Thinking about the Individual in International Law’ (1978) NYLSLR 24 at 11.

¹⁹⁷ See, JES Fawcett, ‘The Exhaustion of Local Remedies: Substance or Procedure?’ (1954) 31 BR. Y. INT’L L. 452.

¹⁹⁸ See, *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)*[1989] ICJ Rep 15 ¶ 49.

¹⁹⁹ See, S D Ascoli & K M 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 Papers 2007/02 .

5. THE DAMAGE CLAIMED BY RA IS JUSTIFIED

It is humbly submitted that under Art. V (1) of the Liability Convention, both Pshad and Oxia are ‘jointly and severally’ liable for the damage caused to RA. Hence, under Art. V (2) of the Liability Convention, RA can claim the ‘entire compensation’ from Pshad.

As held in the *Charzow Factory (Indemnity)* case²⁰⁰ and the *Spanish Zone Morocco Claims* case²⁰¹ Pshad has a ‘duty to make reparation’. The damage sought in the instant case is based on the ‘principle of equivalence’ and Pshad is ‘under an obligation to give satisfaction’,²⁰² as the compensation demanded by RA ‘is not out of proportion to the injury and does not seek to humiliate’²⁰³ Pshad.

Under Art. XXII of the Liability Convention, the damage sought is based on the principle of *restitutio in integrum*, i.e., the amount which will restore the injured “to the condition which should have existed if the damage had not occurred.”²⁰⁴ Therefore, the compensation for the value of the destroyed satellite and the loss of profits is ‘commensurate with the injury suffered’²⁰⁵ as mandated by Art. 51 of the ILC’s Draft Articles on State Responsibility.²⁰⁶

It is further pleaded that there is a proximate causation between the destruction of EO’s satellite by the Pshadi space debris and the demand for the value of the destroyed satellite (i.e. direct damage) and the loss of profits (i.e. indirect damage). In the light of ‘justice and equity’ the loss of profits must also be included,²⁰⁷ as the injury to EO’s financial position caused by the destruction of the satellite is a direct result of Pshad’s negligence in conducting its outer space activities.

²⁰⁰ See, *Chorzow Factory* case (*Germany v Poland*) (Decision on jurisdiction), [1928] PCIJ Rep Ser. A No. 9 at 21.

²⁰¹ See, *Coenca Bros. v Germany* [1927-28] Ann.Digest 570 (no. 389).

²⁰² See, Draft Articles on State Responsibility (n 79) art. 37(1).

²⁰³ See, *Rainbow Warrior (New Zealand v France)* (1990) 20 R.I.A.A. 217 ¶ 122.

²⁰⁴ See, *HA Baker* (n 85).

²⁰⁵ See, WTO, *United States: Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan-Appellate Body Report* (8 October 2001) WT/DS 192/ AB/R ¶ 120.

²⁰⁶ See, Draft on State Responsibility (n 79) art 51.

²⁰⁷ See, Foster, ‘The Convention on International Liability for Damage Caused by Space Objects’(1972) 10 Canadian YB Int’l L.137 at 155.

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 does not violate Art. 15:1 of the EJEPA. In case of the court’s kind disposal, the Respondents abnegate the same, and solemnly pray the court to declare that the ‘indefinite moratorium’ on space and technology is authorised under the General Exceptions contained in Art. 30 of the EJEPA.
- II. The indefinite moratorium on space and technology is authorised under the essential security clause and therefore the countermeasure is valid under essential security clause.
- III. The counterclaim brought by RA is valid and within the jurisdiction of the ICJ.
- IV. The damages claimed by RA is justified and therefore, Pshad, is liable to pay for the value of the satellite and lost profits.

All of which is respectfully submitted

Agents for the Respondents

The Republic of Argunia