

**PHILIP C. JESSUP INTERNATIONAL LAW  
MOOT COURT COMPETITION**

**2007 SHEARMAN & STERLING INTERNATIONAL ROUNDS**

**THE REPUBLIC OF ADARIA**

**v.**

**THE REPUBLIC OF BOBBIA, THE KINGDOM OF CAZALIA, THE COMMONWEALTH OF  
DINGOTH, THE STATE OF EPHRAIM, AND THE KINGDOM OF FINBAR**

**THE CASE CONCERNING THE ROTIAN UNION**

**BENCH MEMORANDUM**

**\*\*\*CONFIDENTIAL\*\*\***

**FOR JUDGES EYES ONLY**

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***VERSION SEVEN***

***9 March 2007 – Shearman & Sterling International Rounds***

**2007 Philip C. Jessup International Law Moot Court Competition**

**BENCH MEMORANDUM**

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## PART 1: GENERAL INFORMATION

### *I. Introduction*

The purpose of this bench memorandum is to provide judges in the Philip C. Jessup International Law Moot Court Competition with the basic factual and legal issues in the 2007 Jessup Problem (the "Compromis"). This Bench Memorandum should be read in conjunction with the Compromis and the Corrections and Clarifications to the Compromis. The Compromis is intended to present the competitors with a balanced problem, such that each side has strengths and weaknesses in its case. The Compromis contains a number of legal issues that are relevant to more than one claim for relief, and participants will often be required to argue in favor of a rule of law in support of one claim and distinguish the same rule with respect to another claim. Judges should note and question any internal inconsistencies that may arise in a competitor's or team's argument.

This memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Compromis. Judges should not be surprised when, in evaluating either a Memorial or an oral argument, they see arguments or authorities not discussed in this memorandum. This does not suggest that such arguments are not relevant or credible.

### *II. Synopsis of the Facts*

The year's Jessup Problem focuses on the increasing role of intergovernmental organizations (IGOs) like the European Union. IGOs are playing an increasing role in international political and economic affairs, and yet a traditional State-centered framework of international law relegates them to a subsidiary role. For example, only "States" are permitted to appear before the International Court of Justice in contentious cases, even though (as in this year's Problem) IGOs are frequently parties to multilateral international agreements. As a result, an IGO may have rights under a treaty but no recourse to the ICJ with respect to those rights, and States may have claims against an IGO but unable to bring that IGO directly before the ICJ.

The Problem arises out of Adaria's application to join the Rotian Union (RU). The RU is an intergovernmental association created by five Member States. The RU resembles in many fashions the European Union. The Respondents are the five RU Member States, represented through common counsel.<sup>1</sup> This is an important point: although the parties might, at various points in their argument, prefer to argue on behalf of or against the *Rotian Union itself*, the RU is not a State, and is therefore not a proper party before the ICJ. This issue is discussed in greater length below.

Founded in 1966, the RU originally harmonized Member State laws in many economic sectors, including agriculture, fisheries, transportation and mining. It also eliminated all tariffs and barriers to trade among the Member States, and created a common external tariff vis-à-vis non Member States. It has progressively expanded its range of activities, taking on a number of responsibilities traditionally regarded as the exclusive purview of "States." Key events in this respect include:

- 1997 – **The RU joins the World Trade Organization (WTO)**. Although the five Member States are also members of the WTO, the RU

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<sup>1</sup> Respondents stated in a declaration to the ICJ that the facts and law underlying their defenses and claims are identical, and therefore they will be represented by common counsel "in the name of the Rotian Union." Adaria accepted this declaration, but specified "such acceptance does not entail recognition of the Rotian Union as an international legal person or as a party to this litigation." *Compromis* at para. 38.

Commission represents their interests, and they defer to the RU in WTO matters.

- 1991 – **The Member States ratify the CARUT.** The Convention Amending the Rotian Union Treaty (CARUT) empowered the RU to "coordinate the non-trade relations between the Member States and others."
- 1991 – **Single currency (the "Roto").** The CARUT also created a new currency, the "Roto," which supplanted the five Member States' national currency.
- 1995 – **RU negotiates agreements with India and the U.S.** The RU negotiated agreements with the United States and India providing for mutual recognition of domestic civil money judgments. Similar agreements followed with dozens of other countries.
- 2004 – **RU negotiates for release of hostages.** The President of the RU Commission successfully negotiated for the release of 40 nationals of RU Member States held hostage by a paramilitary organization abroad.

Adaria (Applicant in this case) applied for RU membership on December 2, 1995. Adaria is a developing state with a small ethnic minority, the Sophians. The Sophians are an insular people living traditionally, rejecting many modern technologies, in the northwest portion of the country. In order to protect the Sophians and their traditional lifestyle in the face of globalization and technological advances, in 1975 the Adarian government enacted the Sophian Protection Acts (SPA). The SPA provided subsidies and benefits to the Sophians, including price discounts for power and water and direct support payments to small, privately-owned Sophian businesses.

#### *The Adarian Accession Agreement*

On October 1, 2001, the RU Commission and Adaria concluded the Adarian Accession Agreement (AAA), which set three conditions for Adaria's membership in the RU:

- (1) That Adaria reduce its debt owed to States other than Member States of the Rotian Union to an amount not to exceed ten percent (10%) of Adaria's GDP;
- (2) That Adaria privatize or dissolve the four State-owned enterprises (Adarenergy, Adarfleet, Adardrink, and Adarmoire); and
- (3) That Adaria eliminate all state support payments to small domestic businesses (as that term is defined in the RU Codex).

The Commission presented the AAA to the Council and Parliament for approval. During debate, the RU Parliament expressed concern about the welfare of the Sophian minority in Adaria. Parliament formally urged the Council to add to the AAA a requirement of social and economic protection for the Sophians. The Council apparently ignored this request, and unanimously ratified the AAA on December 20, 2001. For its part, Adaria ratified the AAA "as a treaty" on December 1, 2001.

Adaria's deadline for fulfillment of the three conditions was set at December 1, 2005.<sup>2</sup>

In order to meet these conditions, Adaria took several steps. In order to pay off its foreign debt, Adaria increased the *ad valorem* tax rate in every sector and borrowed 500 million Rotos

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<sup>2</sup> Paragraph 16 of the *Compromis* incorrectly lists the date as November 1, 2005. This was corrected in the official Corrections and Clarifications, at Correction #1.

(US\$100 million) from private Adarian banks. The Adarian Ministry of Commerce auctioned off four state-owned enterprises (Adarenergy, Adarfleet, Adardrink and Adarmoire). The government revoked those portions of the SPA which provided direct support payments to Sophian businesses. The newly-privatized power and water companies eliminated the price discounts given to Sophians. These latter actions resulted in hardship for the Sophians, as over 500 Sophian handicraft concerns ceased operations and many communities lost basic utilities.

On November 10, 2005, the President of the RU Commission notified the RU Council that RU auditors had determined that Adaria had satisfied the three conditions of the AAA, and urged the Council to admit Adaria to the RU. On November 24, 2005, the Council *rejected* Adaria's application. While the Council acknowledged that Adaria had, in fact, satisfied all the requirements of the AAA, it expressed concern about the effects that Adaria's actions had had on the Sophian minority.

Adaria's Prime Minister Mesmin replied on December 5, accusing the RU of breaching its obligations. He noted that Adaria had satisfied the three AAA obligations, and that the very effects that the RU complained about were *caused by* the AAA conditions.

### *The Rotian Union Legation*

On February 1, 2002, the RU established the "Permanent Legation of the Rotian Union to the Republic of Adaria" in the Adarian capital city of Ilsa. Mr. Uriah Heep was designated "Chief of Legation." The Adarian Prime Minister received Mr. Heep at an official dinner shortly after his appointment. The stated purpose of the Legation was to "facilitate the work of the RU Commission and its experts, and to aid in the diplomatic and economic aspects of Adarian integration into the RU." Among other things, the Legation housed the RU auditors who determined that Adaria had satisfied the three conditions of the AAA.

Once the RU Council denied RU membership to Adaria, the Adarian government moved swiftly against the RU. On December 16, 2005, Prime Minister Mesmin alleged that RU Legation staff members made illegal political contributions to parliamentary candidates during the 2003 and 2005 parliamentary elections. He explained that such contributions violated Section 17-1031 of the Adarian Criminal Code,<sup>3</sup> which prohibits political contributions by a "foreign business or corporate entity."

On December 16, Adarian Justice Ministry agents delivered a duly-issued subpoena to Heep at the RU Legation, directing him to deliver "any and all electronic or paper bank records concerning transactions within Adaria." Heep refused to comply, asserting that the RU Legation was inviolable under international diplomatic law. The agents took him into custody, and he was held for two days. Armed agents returned to the Legation the next day with a warrant to seize the bank records described in the subpoena. They seized four papers and diskettes containing bank records. The materials revealed that the RU staff in Ilsa had made contributions through intermediaries to political candidates who supported RU membership.

RU Commission President Kinga immediately demanded the release of Heep and the records. Prime Minister Mesmin replied, asserting that the seizure was legal and proper. He opined that the RU Legation (and Heep) was not entitled to diplomatic immunity because the RU was not a State.

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<sup>3</sup> Paragraph 30 of the *Compromis* incorrectly cites Section 17-1031 of the Adarian *Civil* Code. This was corrected in the official Corrections and Clarifications, at Correction #3.

### *Expropriation and the National Industry Act*

On December 19, 2005, the Adarian Parliament passed the "National Industry Act" (NIA). The NIA forbade the new owners of the formerly state-owned enterprises from repatriating any of the businesses' assets, directly or indirectly, to the RU Member States. Prime Minister Mesmin justified the NIA as "a protection against capital flight" and "a means of reducing the damage that was caused when we were denied membership in the RU."

One of the new owners was Bobboman, a Bobbian corporation that purchased Adarmoire. Bobboman's CEO, Mr. Brendan Noyala, denounced the NIA as "tantamount to an expropriation." Bobboman brought a lawsuit against the government in Adarian civil court, alleging that its property had been expropriated. The court rejected the lawsuit, concluding that since the company and its stock were still in existence, nothing had been taken from it. The Adarian Supreme Court upheld the ruling.

### The Rotian Union and States

THE ROTIAN UNION (RU) is a union of the five Respondent States, created by the Treaty of Rotian Union (TRU) in 1966. The principal organs of the RU are:

The RU Commission is a five-person body, headed by a President. The RU Commission negotiated the Adarian Accession Agreement and, upon Adaria's satisfaction of the three conditions, recommended that Adaria be admitted to the RU.

The RU Council is a body consisting of the Head of Government of each of the five Member States of the RU. It is responsible for the budget of the RU, as well as passing RU legislation in conjunction with the Parliament. The RU Council unanimously ratified the Adarian Accession Agreement. Later, acting unanimously, the RU Council denied Adaria membership to the RU.

The RU Parliament is a 100-member body responsible, in conjunction with the Council, for passing RU legislation. At the time it was considering the Adarian Accession Agreement, the Parliament urged the Council to add a requirement to the Agreement providing economic and social safeguards for the Sophian minority in Adaria. With respect to admissions of new States to the Rotian Union, however, the Parliament has only a right to be consulted by the Council.

The RU High Court consists of one judge from each of the Member States, and is empowered to interpret the Rotian Union Treaty and Union legislation. It plays no affirmative role in the events of this Problem.

ADARIA, Applicant in this case, is a developing State. Adaria applied, and was eventually rejected, for membership in the Rotian Union. Organs of the Adarian government that have a role in the events of the *Compromis* are:

The Ministry of Foreign Affairs negotiated the Adarian Accession Agreement with the Rotian Union.

The Ministry of Commerce was responsible for the privatization in 2002 of the four Adarian state-owned companies.

The Ministry of the Treasury borrowed 500 million Rotos (US\$100 million) from private Adarian banks to redeem bonds held by foreign creditors, thereby satisfying the first of the three conditions in the Adarian Accession Agreement.

The Ministry of Justice conducted an investigation into illegal interference by the RU Legation into Adarian domestic politics. On December 16, Justice agents served a subpoena on Uriah Heep at the RU Legation, directing him to deliver the Legation's bank records. When he refused to comply, they arrested him. The next day, Justice agents presented a duly-issued warrant to the Legation and seized paper and electronic bank records.

BOBBIA, a Respondent in this case, is one of the five Member States of the RU. Bobbia is the only RU Member States that shares a border with Adaria.

CAZALIA, a Respondent in this case, is one of the five Member States of the RU.

DINGOTH, a Respondent in this case, is one of the five Member States of the RU.

EPHRAIM, a Respondent in this case, is one of the five Member States of the RU.

FINBAR, a Respondent in this case, is one of the five Member States of the RU.

GERASIMOV is not a party to this case. Like Adaria, it applied for membership in the RU. It has yet to satisfy the conditions set forth in its accession agreement. Nothing else is said about Gerasimov in the Compromis.

#### People and Entities

The Sophians are an ethnic minority within Adaria. They are an insular people whose lifestyle is governed by a literal adherence to traditional religious texts. They are resistant to technological and social change and do not participate in Adaria's mainstream economy. Most Sophians are employed in making household crafts and village-level farming.

Ms. Lynne Kinga is the President of the RU Commission. In 2004, she successfully negotiated for the release of 40 nationals of RU Member States held hostage abroad by a paramilitary organization. In November 2005, she notified the RU Council that Adaria had met the three conditions of the AAA, and urged the Council to approve the admission of Adaria to the RU.

Mr. Augusto Mesmin is the Prime Minister of Adaria. His government negotiated and concluded the Adarian Accession Agreement with the RU Council in 2001. His government was also responsible for the Adarian austerity measures aimed at meeting the conditions of the AAA.

The RU Legation was created by the Adarian Accession Agreement. Based in Adaria's capital city, Ilsa, it is the official representative of the RU in Adaria. The Legation opened its doors on February 1, 2002, and was headed at all times by Mr. Uriah Heep.

Mr. Uriah Heep is a citizen of Lichtenstein, employed by the RU as Chief of Legation of the RU Legation to Adaria. He refused to comply with the subpoena by the Adarian Justice Ministry on December 16, 2005, and was detained for two days. He was later released, and died in April 2006 of unrelated acute kidney failure.

Adarmoire was the Adarian state-owned furniture enterprise. It was privatized by auction in September 2002, and purchased by Bobboman, Inc. After privatization, Adarmoire cancelled dozens of supply contracts with Sophian handicraft manufacturers.

Bobboman, Inc. is a privately-owned corporation based in Bobbia. Bobboman purchased Adarmoire at auction in September 2002. When Adaria enacted National Industry Act, forbidding the repatriation of the assets or proceeds of Adarmoire, Bobboman brought an unsuccessful suit in Adarian civil court, alleging expropriation.

Mr. Brendan Noyala is the chief executive officer of Bobboman, Inc., the company that purchased at auction the Adarian state-owned furniture concern, Adarmoire. He denounced the Adarian National Industry Act as "tantamount to an expropriation."

Adardrink, Adarfleet and Adarenergy were the Adarian state-owned water supply, transportation, and power companies, respectively. They were privatized in 2002 and purchased by privately-owned companies based in RU Member States. Upon privatization, they revoked the price discounts offered to Sophians under the Sophian Protection Acts, resulting in an increase in power and water prices and leaving many Sophian villages without basic utilities.

The RU auditors were RU employees based in the RU Legation in Ilsa. They were responsible for determining whether Adaria had successfully met the three conditions for admission to the RU. They completed their work on October 20, 2005, and notified the RU Commission President that Adaria had, in fact, satisfied all three conditions.

### Laws and Treaties

The Treaty Establishing the Rotian Union (TRU) is the agreement among the five Member States which created the Rotian Union. It entered into force in 1966, and was subsequently amended by the CARUT. The TRU enumerates the powers and principal organs of the RU.

The Convention Amending the Rotian Union Treaty (CARUT) was a 1991 amendment to the TRU. The CARUT expanded the non-trade powers of the RU and empowered the RU to replace the national currencies with the Roto.

The Adarian Accession Agreement (AAA) is the 2001 agreement between Adaria and the RU Council which set forth the terms for Adaria's admission to the RU. The AAA set three economic conditions for Adaria's admission, and set a deadline of December 1, 2005, for their satisfaction.

The Sophian Protection Acts (SPA) were a package of Adarian laws enacted in 1975 intended to allow the minority Sophians to maintain their traditional way of life. The SPA provided for government subsidies and benefits including direct support payments to small businesses and discounts for electricity and water provided by the state-owned public utilities. Adaria dismantled most of the SPA in efforts to meet the accession requirements of the AAA.

The "massive public works program" was an initiative of the Adarian government, aimed at providing jobs and income for Sophians harmed by revocation of the Sophian Protection Acts. The program was announced in July 2003, launched in April 2004, and cancelled in June 2004 due to lack of interest by Sophians.

RU Resolution No. 05/376 ("Further Measures Regarding Adaria") was a resolution enacted by the RU Council on November 24, 2005. The resolution acknowledged that Adaria had satisfied the three conditions of the AAA, but nonetheless denied Adaria's application for membership in the RU. The Resolution noted that the Council was "deeply concerned" over the living conditions of the Sophian minority in Adaria, a matter that was not discussed in the AAA.

National Industry Act (NIA) was an Adarian law passed on December 19, 2005. It forbade the exportation of the proceeds of the sale of goods or services produced by the privatized, formerly-state owned Adarian entities.

Section 17-1031 of the Adarian Criminal Code<sup>4</sup> is a domestic Adarian law which prohibits foreign businesses or corporate entities from contributing to any Adarian political candidate. The Adarian Justice Ministry investigated the RU Legation for apparent violations of this law.

#### Timeline

<u>Date</u>	<u>Description</u>
1950s	Each of the future RU Member States becomes a Contracting Party to the General Agreement on Tariffs & Trade (GATT)
1964	Rotian Union (RU) created by five Member States.
3 June 1964	Chairman of the TRU negotiating session delivers a speech, calling the RU a "new legal order."
1 January 1966	Treaty Establishing the Rotian Union (TRU) enters into force in the five Member States.
1971	RU creates a common external tariff on all goods entering the customs territories of the RU Member States.
1975	Adarian Parliament enacts the Sophian Protection Acts (SPA), aimed at allowing the Sophians to maintain their traditional lifestyle.
January 1988	<i>Time</i> magazine names the Rotian Union its "Man of the Year," calling it "the stealth superpower."
1991	RU Member States begin negotiating the Convention Amending the Rotian Union Treaty (CARUT).
1 January 1993	CARUT enters into force.
1995	RU negotiates agreements with the United States and India regarding mutual recognition of domestic civil money judgments.
2 December 1995	Adaria applies to the RU Commission for admission to the RU.
1997	RU joins the World Trade Organization (WTO).
16 December 1999	RU Commission submits to the RU Council its recommendation concerning Adarian membership in the RU, enumerating three conditions for Adarian admission.
1 February 2000	RU Council ratifies the RU Commission's recommendation and authorizes the Commission to enter into negotiations with Adaria.
1 October 2001	RU and Adarian delegations conclude the Adarian Accession Agreement (AAA), setting out the terms for Adaria's admission to the RU.
<i>Sometime in October or November 2001</i>	RU Parliament urges the Council to include a requirement of social and economic protection for Sophians in the AAA. No such requirement is included in the final ratified version.
1 December 2001	Adaria duly ratifies the AAA as a treaty.
20 December 2001	RU Council unanimously ratifies the AAA without amendment.
15 January 2002	Adarian Prime Minister Mesmin presents the AAA to the Adarian public in his annual address
1 February 2002	RU Legation opens in Ilsa, the capital city of Adaria. Uriah Heep is Chief of Legation.
5 February 2002	Uriah Heep presents his credentials to Prime Minister Mesmin at an official dinner.
1 September 2002	Adarian Ministry of Commerce holds a public auction to privatize

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<sup>4</sup> Note that paragraph 30 of the *Compromis* incorrectly references this as "Section 17-1031 of the Adarian Civil Code." The Corrections and Clarifications, at Correction #3, corrects this error.

	Adarmoire, the national furniture company. Bobboman, Inc., purchases Adarmoire.
<i>Sometime in late 2002</i>	Bobboman, Inc., closes four Adarmoire factories and lays off 20,000 laborers, citing "efficiencies of scale."
2003	Prime Minister Mesmin's party maintains a majority in the Adarian parliament after regular elections.
1 January 2003	Adarian government completes its elimination of all subsidies to businesses engaged in traditional artisan activities.
<i>Early 2003</i>	Within months of the elimination of subsidies, 500 Sophian handicraft collectives cease operations.
July 2003	Adarian government announces plans to fund a massive public works project aimed at providing jobs to out-of-work Sophians.
15 August 2003	Facing criticism of the public works project, Prime Minister Mesmin defends the project.
2004	RU Commission President Kinga successfully negotiates for the release of 40 nationals of RU Member States held hostage by paramilitary organization abroad.
1 April 2004	Adaria launches a massive public works campaign, aimed at providing jobs and income for Sophians.
June 2004	Adaria cancels the massive public works campaign, owing to lack of interest on the part of Sophians.
2005	Prime Minister Mesmin's party maintains a majority in the Adarian parliament after regular elections.
June – July 2005	Adarian Ministry of Treasury borrows 500 million Rotos (US\$100 million) from private Adarian banks to redeem bonds held by foreign creditors and satisfy the requirements of the AAA.
September – October 2005	RU auditors work to assess Adaria's satisfaction of the AAA accession conditions.
20 October 2005	RU auditors report to the President of the RU Commission that Adaria has satisfied the three accession conditions enumerated in the AAA.
10 November 2005	RU Commission President Kinga informs the RU Council that Adaria has satisfied the three accession conditions and urges the Council to approve Adaria's admission to the RU.
20-24 November 2005	RU Council meets to deliberate on the Adaria's membership in the RU.
24 November 2005	RU Council adopts Resolution No. 05/376, denying Adaria membership in the RU.
1 December 2005	Deadline under the AAA for Adarian compliance with the conditions for admission to the RU.
6 December 2005	Adarian Prime Minister Mesmin addresses the nation, denouncing the RU's denial of membership.
15 December 2005	Prime Minister Mesmin announces that the Ministry of Justice is investigating interference by the RU legation into the domestic politics of Adaria.
16 December 2005	Adarian Justice Ministry agents serve a subpoena on the RU Legation. Uriah Heep refuses to comply, and is arrested.
17 December 2005	Adarian magistrate issues a warrant to seize the records of the RU Legation. Justice Ministry officials duly seize boxes and diskettes containing bank records of the legation.
18 December 2005	Uriah Heep is released from custody.
18 December 2005	RU Commission President Kinga sends a diplomatic note to Prime

	Minister Mesmin, protesting the arrest of Uriah Heep and seizure of the records.
19 December 2005	Prime Minister Mesmin replies to the diplomatic note, denying that the RU Legation has diplomatic immunity.
19 December 2005	Adarian Parliament passes the National Industry Act (NIA), forbidding expatriation of the assets of the recently-privatized Adarian companies.
2006	Bobboman, Inc., brings a suit in Adarian civil court, alleging that the NIA effectively expropriated its property in forbidding the repatriation of Adarmoire assets and proceeds. The court rejects the suit, and the Adarian Supreme Court upholds the rejection.
April 2006	Uriah Heep dies of acute kidney failure, unrelated to his arrest or detention.
20 April 2006	Adaria files an application with the Registrar of the ICJ, complaining about the denial of membership in the RU.
May 2006	Members of Adarian Parliament urge the re-introduction of the Sophian Protection Acts. Prime Minister Mesmin requests that any consideration of the SPA be deferred until after the present ICJ case is resolved.
August 2006	An Adaria National University report indicates that the revocation of the Sophian Protection Acts has had a "significant effect" on Sophian farming.
1 September 2006	RU and the Member States deliver a joint declaration to the ICJ, announcing their intention to utilize common council, as that the facts and law underlying their claims and defenses are identical.
1 September 2006	<i>Compromis</i> is concluded by the six States party to this case.
25 October 2006	Adarian Taxation Ministry formally notifies the RU Commission that the RU owes 30 million Rotos (US\$6 million) in back taxes on the property occupied by the RU Legation.

#### Other International Treaty and Organization Status

All six States party to this case are parties (and have been at all relevant times) to the following organizations and instruments:

1. United Nations. *Note: None of the States are, or have been at any relevant time, members of the U.N. Security Council.*
2. World Trade Organization. *Note: The Rotian Union is also a member of the WTO in its own right.*
3. Vienna Convention on the Law of Treaties (1969).
4. Vienna Convention on Diplomatic Relations (1961).
5. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986). *Note: This Convention has not yet entered into force. According to its terms, 35 States must ratify the Convention in order for it to enter into force. As of 1 November 2006, 28 States had ratified the Convention. Even adding to that number the six fictional States in this Compromis, the total number of parties is still only 34.*
6. International Covenant on Civil and Political Rights (1966).
7. International Covenant on Economic, Social and Cultural Rights (1966).

### Prayers for Relief of Each Party

There are four issues before the Court:

- (1) Whether the RU Member States violated international legal obligations by denying Adaria membership in the RU.
- (2) Whether the RU Member States have standing to make any claim concerning Adaria's actions vis-à-vis the RU Legation.
- (3) Whether Adaria violated international law by seizing the premises, property or personnel of the RU Legation.
- (4) Whether Adaria's National Industry Act (NIA) constitutes an illegal expropriation of the five privatized companies.

#### **Adaria (Applicant) requests that the ICJ adjudge and declare:**

- (a) Respondents have violated international legal obligations owed to Adaria by denying Adaria membership in the Rotian Union;
- (b) Respondents do not have standing to make any claim concerning Applicant's actions with respect to the Rotian Union representative office, its property, or its personnel;
- (c) Applicant did not violate international law concerning the immunity of diplomatic missions by seizing the premises, property, or personnel of the Rotian Union representative office; and
- (d) The National Industry Act does not constitute an illegal expropriation of Adarmoire and the other privatized concerns under international law.

#### **The five Member States (Respondents) request that the ICJ adjudge and declare:**

- (a) The denial of Adaria's application to join the Rotian Union did not breach any international legal obligations owed by Respondents to Adaria;
- (b) Respondents may properly bring a claim for the Applicant's actions with respect to the Rotian Union Legation, its property, and Ambassador Heep;
- (c) Applicant violated international law concerning the immunity of diplomatic missions by seizing the premises, property and personnel of the Rotian Union Legation; and
- (d) The Adarian National Industry Act constitutes an illegal expropriation of Adarmoire and the other privatized concerns under international law.

### ***III. Sources of International Law***

This section is an introduction to public international law for judges who might not have professional experience or training in the field. There are important distinctions between international law and most domestic legal systems. The most significant for the moot judge is the rigid definition of what sources of law are acceptable before the Court.

In particular, judges (and competitors) should bear in mind throughout the Competition the difference between *States* and *intergovernmental organizations*. Although there are many aspects of the Rotian Union that seem "State-like," international law places great emphasis upon the difference between States and non-States.

#### A. General

The conduct and rules of the International Court of Justice (the "ICJ") are governed by the Statute of the International Court of Justice (the "ICJ Statute"). Under Article 38(1) of its Statute, the

International Court of Justice may consider the following sources of international law in order to decide disputes before it:

- (a) treaties or conventions to which the contesting States are parties;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) general principles of law recognized by civilized nations;
- (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Commentators disagree as to whether these sources are listed in order of importance.

Judges from common-law systems should note the status of precedent. Article 59 of the ICJ Statute states that decisions of the Court are binding *only on the parties to the case*, and are without formal effect as precedent. In practice, the ICJ often cites its prior decisions, and those of its predecessor, the Permanent Court of International Justice, as persuasive authority, pursuant to Article 38(1)(d). Additionally, the Court frequently evaluates rules of customary international law in its opinions and subsequently relies upon those evaluations in later decisions.

Resolutions of the United Nations General Assembly are not, of themselves, binding upon the Court. Although Resolutions may be evidence of customary international law, the General Assembly is not analogous to a domestic legislature.

### B. Treaties

Treaties are agreements between and among States, by which parties obligate themselves to act, or refrain from acting, according to the terms of the treaty. Rules regarding treaty procedure and interpretation are defined in the 1959 Vienna Convention on the Law of Treaties<sup>5</sup> (the “VCLT”).

Article 26 of the VCLT sets out the fundamental principle relating to treaties, *pacta sunt servanda*, which provides, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Once a State becomes a party to a treaty, it is bound by that treaty.

Article 34 of the VCLT adds that a treaty does not create rights or obligations for State that are not parties to the treaty. However, even if a State is not party to a treaty, the treaty may serve as evidence of customary international law. Article 38 of the VCLT recognizes this “back-door” means by which a treaty may become binding on non-parties.<sup>6</sup> Judges should be aware, however, that situations arise where some provisions of a treaty – for example, many provisions of the International Covenant on Civil and Political Rights -- may reflect or codify customary international law, while other parts do not.

### C. Customary International Law

The second source of international law is customary international law. A rule of customary international law is one that, whether or not it has been codified in a treaty, has binding force of

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<sup>5</sup> 1155 U.N.T.S. 331 (1969), available at <http://fletcher.tufts.edu/multi/texts/BH538.txt>. (hereinafter, the “VCLT”).

<sup>6</sup> The ICJ has also recognized this possibility in the *North Sea Continental Shelf Cases (F.R.G. v. Den.)*, 1969 I.C.J. 1 (1969).

law because the community of States treats it and views it as a rule of law. In contrast to treaty law, a rule of customary international law is binding upon a State whether or not it has affirmatively assented to that rule.

In order to prove that a given rule has become a rule of customary international law, one must prove two elements: widespread state practice and *opinio juris* – the mutual conviction that the recurrence (of state practice) is the result of a compulsory rule.

“State practice” is the objective element, and simply means that a sufficient number of states behave in a regular and repeated manner consistent with the customary norm. Evidence of State practice may include a codificatory treaty, if a sufficient number of States sign, ratify, and accede to a convention. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create “regional customary international law” or whether the practice of particularly affected states, *e.g.* in the area of space law, can create custom that binds other states, although the ICJ has acknowledged the possibility.<sup>7</sup>

*Opinio juris* is the psychological or subjective element of customary international law. It requires that the State action in question be taken out of a sense of legal obligation, as opposed to mere expediency. Put another way, *opinio juris*, is the “conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it.”<sup>8</sup>

Customary international law is shown by reference to treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and the practice of international organizations. Each of these items might be employed as evidence of State practice, *opinio juris*, or both.

In *The North Sea Continental Shelf Cases*, the ICJ stated that the party asserting a rule of customary international law bears the burden of proving it meets each of the two requirements.

#### D. General Principles of Law

The third source of international law consists of “general principles of law.” Such principles are gap-filler provisions: on occasion, the ICJ must have recourse to rules typically found in domestic courts and domestic legal systems in order to address procedural and other issues.

The bulk of recognized general principles are procedural in nature, for example, the laws regarding burden of proof and admissibility of circumstantial evidence. Many others, for example estoppel, waiver, unclean hands, necessity, and *force majeure*, may sound to a common-law practitioner as equitable doctrines. The principle of general equity in the interpretation of legal documents and relationships is one of the most widely cited general principles of international law.

Important for this year's Jessup Problem, general principles may also include commercial principles that are common to many of the major domestic legal systems.<sup>9</sup> At least one commentator has observed that the Iran-U.S. Claims Tribunal has used “general principles” to find general principles of commercial and contract law, including doctrines concerning contract

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<sup>7</sup> *Ibid.*

<sup>8</sup> MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

<sup>9</sup> Restatement (Third) of Foreign Relations Law of the United States (1987), section 102, cmt. 1.

formation, unjust enrichment, and conflicts of laws.<sup>10</sup> Either party to this case might argue that a similar commonality of rules exists with respect to the treatment of corporate entities across many major legal systems.

It is important to note, however, that “equity” in this sense is a source of international law, brought before the court under Article 38(1)(c) of the Statute of the ICJ. It is an *inter legem* (within the case) application of equitable principles, and not a power of the Court to decide the merits of the case *ex aequo et bono* (that is, to simply decide the case based upon a balancing of the equities), a separate matter treated under Article 38(2) of the Statute.

#### E. Decisions and Publicists

The final source of international law is judicial decisions and teachings of scholars. This category is described as “a subsidiary means of finding the law.” Judicial decisions and scholarly writings are, in essence, research aids for the Court, used for example to support or refute the existence of a customary norm, to clarify the bounds of a general principle or customary rule, or to demonstrate state practice under a treaty.

Judicial decisions, whether from international tribunals or from domestic courts, are useful to the extent they address international law directly or demonstrate a general principle.

“Teachings” refers simply to the writings of learned scholars. Many student competitors make the mistake of believing that every single published article constitutes an Article 38(1)(d) “teaching.” However, the provision is expressly limited to teachings of “the most highly qualified publicists.” For international law generally, this is a very short list, and includes names like Grotius, Lauterpacht, and Brownlie. Within the context of a specific field – for example, environmental law – there are additional scholars who would be regarded as “highly qualified publicists.”

#### ***IV. Burdens of Proof***

In the *Corfu Channel Case*,<sup>11</sup> the ICJ set out the burdens of proof applicable to cases before it. The Applicant normally carries the burden of proof with respect to factual allegations contained in its claim, by a preponderance of the evidence. The burden falls on the Respondent with respect to factual allegations contained in a cross-claim.

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<sup>10</sup> John R. Crook, “Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience,” 83 Am.J. Int’l L. 278, 292-297.

<sup>11</sup> *Corfu Channel Case (Merits) (U.K. v. Alb.)*, 1949 I.C.J. Rep. 4.

## PART 2: LEGAL ANALYSIS

This legal analysis is divided into four sections, based upon the four issues before the Court. The first section deals with the rejection of Adaria's bid to join the Rotian Union. The second and third sections concern Adaria's seizure of the RU Legation: firstly, whether the RU Member States have standing to make a claim with respect to the RU Legation; and secondly, whether Adaria in fact violated international law by entering the Legation, seizing the records, and arresting Mr. Heep. The final section concerns whether Adaria's enactment of the National Industry Act is an illegal expropriation.

Competitors should be extremely careful about their choice of terminology. In particular, Adaria will not wish to refer to Uriah Heep as "Ambassador Heep," as this would seem to concede his status as a diplomat; likewise, all competitors will likely draw a fine distinction between references to "the Rotian Union" and the five Respondents in this case.

### ***I. Did the denial of Adaria's RU membership bid violate international law?***

The first issue is very difficult for Applicant. In the first instance, Applicant might argue that the Member States breached the Adarian Accession Agreement (AAA)<sup>12</sup> by denying Adaria membership in the Rotian Union. Alternatively, Applicant may argue that the Member States, by their statements and representations, are estopped from denying Adaria membership once it has relied upon those statements. Both of these arguments are problematic, both on the law and on the facts.

Counsel will rely heavily upon the experience of the European Union. This is no surprise, since the Rotian Union is modeled in part upon the EU. However, to the extent that competitors rely *exclusively* upon decisions of the European Court of Justice, note that these decisions, interpreting EU law and the organic documents of the EEC/EC/EU, may easily be limited to the EU context. Such decisions, coupled with the practice of outside bodies and third States, may be instructive to the Court as to how such organizations and third States deal with intergovernmental organizations.

### **A. A Preliminary Matter: The Independent Legal Personality of the Rotian Union**

The first two issues place both parties on the horns of a dilemma. Applicant claims that the Respondent Member States are somehow liable for the denial of Adaria's RU membership bid. Respondents counterclaim that the Member States have standing to claim for Adaria's violation of the Rotian Union's legation in Adaria. Each of these claims might be defeated by a successful defense that it is the *Rotian Union*, not the Member States, that is the proper party (claimant or defendant) in interest. Unfortunately, a party's successful defense on one issue might significantly undermine its claim on the other.

The concept of "international legal personality" entails the capacity of an organization to possess international rights and duties – that is, to sue and be sued. In the *Reparations Advisory Opinion*,<sup>13</sup> the ICJ held that an international organization (in that case, the United Nations itself) can possess international legal personality.<sup>14</sup> The ICJ surmised that such status results either from an explicit statement in the organization's organic document or from the functions and powers

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<sup>12</sup> Adarian Accession Agreement to the Rotian Union Treaty of October 1, 2001, *Compromis, Annex II* (hereinafter "AAA").

<sup>13</sup> *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Adv. Op., Apr. 11).

<sup>14</sup> *Id.* at 179.

granted to the organization.<sup>15</sup> Commentators<sup>16</sup> and the ICJ itself<sup>17</sup> have since developed indicia for international legal personality, including most notably the existence of independent decision-making and ministerial organs, financial independence, and the capacity to enter into international agreements.

In this case, there is a strong argument for the independent legal personality of the Rotian Union. The Treaty Establishing the Rotian Union<sup>18</sup> vests the Rotian Union with the capacity to conclude treaties with third States.<sup>19</sup> The TRU has, in fact, exercised this capacity, joining the World Trade Organization in 1997<sup>20</sup> and concluding treaties with several States regarding mutual recognition of civil judgments.<sup>21</sup> Furthermore, the TRU vests the Rotian Union with an income stream independent of the Member States<sup>22</sup> and with the authority to determine its own budget.<sup>23</sup> Finally, the TRU establishes four Union organs, and members of its principle administrative organ, the Commission, must conduct itself "completely independently of national or other influence in the performance of their duties."<sup>24</sup>

Proving that the RU has independent legal personality does not wholly solve either issue. Counsel for Applicant may argue (as discussed below) that the Member States are derivatively liable for the obligations of the RU or, in the alternative, that they have individually breached some obligation by their negative votes in the Council. Likewise, Respondent may (for example) argue that, independently of the harm done to the RU, Adaria has somehow caused direct harm to the Member States in violating the RU Legation.

If pressed on the asymmetry of its standing and liability claims, Applicant may rely on the different nature of the relevant RU bodies. With respect to Adaria's claim, the RU Council is the body that allegedly breached a duty. By contrast, with respect to the Member States' claim, the affected body was the RU Commission.<sup>25</sup> The Council is a representative body of the Member States, with each Member State represented by its Head of Government and receiving one vote.<sup>26</sup> The Commission is "completely independent[]" of the Member States.<sup>27</sup> Therefore, Applicant will argue, it is appropriate to hold the Member States liable for actions of the representative Council, while denying them standing for harm to the independent Commission.

#### B. Whether the RU is bound by the AAA to admit Adaria

Adaria's Prime Minister argues that the Rotian Union is bound by the terms of the AAA to admit Adaria to the Rotian Union once Adaria has satisfied the three conditions contained in the Agreement. Adaria will argue that by denying Adaria membership, the Member States have

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<sup>15</sup> *Id.* at 182.

<sup>16</sup> *See, e.g.*, C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* 83 (2005); Jan Klabbers, *Introduction to International Institutional Law* 45 (2002).

<sup>17</sup> *Western Sahara*, 1975 I.C.J. 12 (Adv. Op., Oct. 16).

<sup>18</sup> Treaty Establishing the Rotian Union as amended by the Convention Amending the Rotian Union Treaty, *Compromis, Annex I* (hereinafter "TRU").

<sup>19</sup> TRU, art. 5(1)(e).

<sup>20</sup> *Compromis*, para. 9.

<sup>21</sup> *Compromis*, para. 12.

<sup>22</sup> Namely, the proceeds of the Union's common external tariff. TRU, art. 9.

<sup>23</sup> The RU Commission proposes and the RU Council adopts the RU's budget. TRU, arts. 4(1)(b) & 5(1)(b).

<sup>24</sup> TRU, art. 4(4).

<sup>25</sup> AAA, art. 3. ("In order to facilitate the work of the *RU Commission* and its experts . . . the RU shall establish an official delegation. . . ")

<sup>26</sup> TRU, art. 5(2).

<sup>27</sup> TRU, art. 4(4).

violated the terms of the AAA *and* Article 11 of the Treaty Establishing the Rotian Union (TRU).<sup>28</sup>

The European Court of Justice has regularly held that international law – especially customary international law regarding the interpretation and effect of treaties – is binding upon the European Union and its organs. In *Racke*,<sup>29</sup> the European Commission questioned whether international law regarding interpretation of treaties – in this case, the doctrine of "fundamental change of circumstances" – had become part of the European legal order. The ECJ emphatically stated, "[T]he European Community must respect international law in the exercise of its powers"<sup>30</sup> and "[T]he rules of customary international law concerning the termination and suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order."<sup>31</sup>

### 1. The RU's obligations under the AAA and the TRU

Adaria's first hurdle is that, on their face, the TRU and the AAA do not explicitly *oblige* the RU to admit Adaria to the Union. Article 11 of the TRU sets out the procedures for admission of new States to the RU. Article 11(6) states, "When the Commission has determined, in its sole discretion, that the applicant State has timely satisfied all conditions for accession described in the Accession Agreement, the Council *shall consider* the application, which it *may approve* by unanimous vote. . . "<sup>32</sup> (emphasis added) Verbs such as "consider" and "may approve" seem to leave the decision in the sole discretion of the RU Council.

The plain language of the AAA adds nothing to the RU's obligations. Article 1 of the AAA states simply that, upon its satisfaction of the three economic conditions, "Adaria *shall be eligible* for admission to the Rotian Union, pursuant to Article 11, Section 6 [of the TRU]. . . "<sup>33</sup>

Adaria will argue that, while the RU Council has discretion to admit or deny membership to a State, the enumeration of three economic conditions in the AAA *limited* that discretion.

In its Advisory Opinion in *Conditions of Admission of a State to Membership in the United Nations (the First Admissions Case)*,<sup>34</sup> the ICJ considered upon what grounds a Member State could vote against admission of a State to the United Nations. Specifically, the ICJ was asked whether a Member State could, consistent with Article 4 of the United Nations Charter, make its vote to admit one State conditional upon the admission of other States.

Article 4(1) of the Charter states, "Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."<sup>35</sup> The ICJ interpreted this as creating five conditions for membership, and noted at the outset that a given applicant's satisfaction of these conditions was "subject to the judgment of the Organization."<sup>36</sup>

<sup>28</sup> TRU, *supra* note 18, art. 11.

<sup>29</sup> *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, Case 162/96 [1998] E.C.R. I-3655.

<sup>30</sup> *Racke*, para. 45.

<sup>31</sup> *Racke*, para. 46.

<sup>32</sup> TRU, art. 11(6).

<sup>33</sup> AAA, art. 1.

<sup>34</sup> *Conditions of Admission of a State to Membership in the United Nations*, Advisory Opinion, I.C.J. Reports 1947-1948, p. 58 (1948) (hereinafter "*First Admissions Case*")

<sup>35</sup> U.N. Charter, art. 4.

<sup>36</sup> *First Admissions Case*, p.62.

However, the ICJ reasoned that the text of Article 4(1), "by the enumeration which it contains and the choice of its terms, clearly demonstrates the intention of its authors to establish a legal rule which, while it fixes the conditions of admission, determines also the reasons for which admission may be refused."<sup>37</sup> Specifically, the ICJ dismissed the argument that the Member States possessed a general power of discretion in determining whether a State that otherwise met the criteria could nonetheless be denied admission. The ICJ reasoned:

Such a power would be inconsistent with the very character of paragraph 1 of Article 4 which, by reason of the close connexion which it establishes between membership and the observance of the principles and obligations of the Charter, clearly constitutes a legal regulation of the question of the admission of new States. To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required which has not been established.<sup>38</sup>

Adaria will argue that while Article 11 of the TRU places no limitations upon the Council's discretion to deny admission to the RU, the enumeration of criteria in the AAA, much like the enumeration of criteria in Article 4(1) of the U.N. Charter, limits the Council's discretion. Namely, the Council may only consider those facts which are reasonably connected to the enumerated conditions in the AAA.

Respondents will argue that the United Nations is an "open" organization, while the RU is a "closed" organization. Article 4(1) begins "Membership in the United Nations is open to all other peaceloving States. . ."<sup>39</sup> By contrast, the TRU contains no such language, and is in fact an exclusive organization, membership in which is subject to a lengthy process of review and approval by multiple RU organs.<sup>40</sup>

## 2. The RU's obligations under equitable doctrines

Adaria may also argue that the RU is bound to admit it by notions of equity. In its simplest form, Adaria's argument is that the RU promised that if Adaria met certain conditions, it would be admitted to the RU. In reasonable reliance upon that promise, Adaria took a number of actions which resulted in considerable detriment. In such case, the RU should be prohibited from revoking its promise.

Adaria may also argue that the RU is bound to admit it by notions of equity. In its simplest form, Adaria's argument is that the RU promised that if Adaria met certain conditions, it would be admitted to the RU. In reasonable reliance upon that promise, Adaria took a number of actions which resulted in considerable detriment. In such case, the RU should be prohibited from revoking its promise.

Applicant may argue that the Respondents are estopped from imposing an additional condition for admission to the RU. The ICJ has repeatedly recognized the equitable doctrine of estoppel,<sup>41</sup> which states that a party which makes representations upon which another party might reasonably

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<sup>37</sup> *Ibid.*

<sup>38</sup> *First Admissions Case*, p.63.

<sup>39</sup> U.N. Charter, art. 4(1).

<sup>40</sup> TRU, art. 11.

<sup>41</sup> See, e.g., *Temple of Preah Vihear (Cambodia v. Thailand)*, I.C.J. Reports 1962, p.6; *Arbitral Award by the King of Spain, (Honduras v. Nicaragua)*, I.C.J. Reports 1960, p. 192 at 213; *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, I.C.J. Rep. 1984, p. 392 at 411-13.

rely is prohibited by the court from later acting inconsistent with those representations. Adaria will point to the very clear and costly steps it took to meet the AAA requirements as the basis of this estoppel argument.

Finally, Adaria may raise the inequity of permitting the RU to deny admission to Adaria on the basis of a condition which the RU itself created. Prime Minister Mesmin alluded to this argument in his December 6, 2005, address: "[N]ow the Council has rejected our application based upon circumstances which its own Agreement has caused."<sup>42</sup> However, Respondents will reply that, although the AAA does not include explicit protections for the Sophians, it does not prescribe the means by which Adaria will meet the economic conditions. As the RU Parliament feared, Adaria chose to meet the conditions "by pauperizing an already vulnerable minority population."<sup>43</sup>

Several Applicants have analyzed this case under the ICJ's doctrine of "unilateral statements" enunciated in the *Nuclear Tests Case*.<sup>44</sup> In that case, the ICJ considered whether unilateral statements by France indicating that it would cease atmospheric nuclear tests would, absent any other agreement, create an actionable legal obligation in to cease such tests. The Court stated, "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations."<sup>45</sup> However, Respondents will distinguish *Nuclear Tests*. First, in that case, there was no other means by which France could bind itself to stop nuclear tests; here it would have been a simple matter for the RU Member States to include clear language in the AAA.

Adaria may also emphasize that the RU, in full awareness of the condition of the Sophians, chose not to protect the Sophians in the text of the AAA. Indeed, the RU Parliament urged the inclusion of a requirement of social and economic protection for the Sophians in the AAA, but the Council did not include any such provision.<sup>46</sup>

The touchstone, however, is the intention of the State making the statement. "Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound."<sup>47</sup> In this case, Adaria bears the difficult burden of proving, in light of the language of discretion in the AAA and the TRU, that the RU in fact intended to be bound.

### C. The AAA's status as treaty: Whether the Member States are bound by the AAA

Whatever Adaria's arguments on the merits, Respondents will reply that the individual Member States are not liable for any breach of international law committed by the Rotian Union. The AAA was an agreement between Adaria and "the Council of the Rotian Union." It was negotiated by the RU Commission, whose members "must conduct themselves completely independently of national or other influence in the performance of their duties."<sup>48</sup> It was ratified by the RU Council, the principal legislative organ of an intergovernmental organization which enjoys independent legal personality. The Member States took no action on the AAA apart from voting in Council to approve it and voting to deny membership to Adaria, pursuant to its terms.

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<sup>42</sup> *Compromis*, para. 29.

<sup>43</sup> *Compromis*, para. 16.

<sup>44</sup> *Nuclear Tests* (Austr. v. France), 1974 I.C.J. 253 (Dec. 20).

<sup>45</sup> *Nuclear Tests*, at para. 43.

<sup>46</sup> *Compromis*, para. 16.

<sup>47</sup> *Nuclear Tests*, at para. 44.

<sup>48</sup> TRU, art. 4(4).

At the outset, both Applicant and Respondents must be careful in making any argument based upon the independent legal personality of the RU. If Applicant overstates its position that the Member States bear direct responsibility for denying Adaria membership, it may undermine its position (in Claim #2) that the Member States do not have standing to make a claim regarding the RU Legation.

The closest extant analogue to the Rotian Union is the European Union. The parties might therefore rely upon the experience of European Court of Justice in addressing similar disputes arising under the Treaty of Rome, which established the European Economic Community, and subsequent treaties. The ECJ has regularly held that EC/EU regulations, directives and agreements are directly, fully, and immediately binding upon EU Member States. In *Costa v. ENEL*,<sup>49</sup> the ECJ stated:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having . . . powers stemming from a limitation of sovereignty, or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.<sup>50</sup>

The elements of the EU/EC that the ECJ felt were most salient – unlimited duration,<sup>51</sup> a limitation of sovereign rights,<sup>52</sup> and (separately) treaty language that directly binds the Member States<sup>53</sup> to follow European law are also present in the Rotian Union treaty. This is not surprising, since the TRU was modeled upon the European Union legal system.

#### D. Protection of Minority Rights: A Permitted "Implicit Condition?"

In the alternative, Respondents may concede that the RU Council unilaterally imposed a new condition for admission, namely, protection of the Sophian minority. Respondent will recall dicta of the ICJ in the *First Admissions Case* described above. After holding that the exhaustive list of membership conditions in Article 4(1) of the Charter precluded Member States from imposing certain conditions for U.N. membership, the Court noted,

"Article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article. The taking into account of such factors is implied in the very wide and very elastic nature of the prescribed conditions; no

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<sup>49</sup> *Costa v. ENEL*, Case 6/64 [1964] E.C.R. 585.

<sup>50</sup> *Costa* at 593.

<sup>51</sup> See TRU, art. 12 ("This Treaty is concluded for unlimited duration.")

<sup>52</sup> See TRU, art. 8(4) ("[T]he judicial and executive branches of each Member State shall give such [RU] legislation full force and effect, irrespective of any conflicting provision of domestic law.")

<sup>53</sup> See TRU, art. 8(3) ("[E]ach Member State shall take all such measures in accordance with the time limits set out in the [RU] legislation.") & art. 10(1) ("Member States shall take all appropriate measures . . . to ensure fulfillment of the obligations arising out of this Treaty or resulting from legislation or decisions enacted by the institutions of the Union.")

relevant political factor – that is to say, none connected with the conditions of admission – is excluded.”<sup>54</sup>

In short, Member States *may* impose additional conditions, if and only if they are "reasonably and in good faith" connected to the enumerated membership conditions. The present case is distinguishable, in that the condition (rights of the Sophians) is wholly *unconnected* to the three economic conditions enumerated in the AAA. However, Respondents will attempt to extend this reasoning, arguing that the additional condition is reasonably connected to a fundamental purpose of the *Rotian Union itself*. The Preamble to the TRU states that the purposes of the RU include "in particular respect for human rights and the rights of women and minorities."<sup>55</sup> While Adaria may have met the specific conditions set out in the TRU, it has done so at the expense of one of the fundamental aims of the Union. As such, it is reasonable for the Council to deny membership to Adaria.

## ***II. Do the Member States have standing to make a claim regarding the RU Legation?***

The Respondents' first counterclaim is that Adaria violated international law by seizing the bank records of the RU Legation and by arresting Uriah Heep, the Chief of Legation. However, before the merits of this claim can be addressed, the ICJ must first establish that the Respondents, mere Member States of the RU, have standing to make a claim arising out of an alleged violation of the rights of the RU. That is to say, the Respondents must have a legal right or interest in the subject matter of the claim asserted.

### **A. The Most Common Arguments: Direct and Derivative Interests**

International legal personality is also an issue with respect to this second issue. Respondents who previously argued that the Member States are protected from responsibility by the independent legal personality of the Rotian Union must now argue that the Member States have standing on the second issue *notwithstanding* the international legal personality of the Rotian Union. Likewise, counsel for Adaria who relies upon the independent legal personality of the RU to deny standing to the Member States on the second issue must do so without prejudicing their claim against the Member States on the first issue. For a full discussion of international legal personality, see *supra* Section I.A.

Respondents might first argue that they have a direct claim arising from the violation of the premises, property or personnel of the RU Legation. Unfortunately, the factual basis for this claim is quite weak. The RU Legation was established by the Rotian Union, not by the Member States, and its chief of legation, Uriah Heep, is "the official representative of the RU in Adaria."<sup>56</sup> Furthermore, Mr. Heep is a citizen of Lichtenstein, so no Respondent can claim diplomatic protection based upon his nationality.<sup>57</sup>

In the alternative, Respondents might concede that the Rotian Union is the real party in interest, but argue that the Member States have some derivative or residual interest in the premises, property or personnel of the RU Legation. They may also claim that the violation of the RU Legation causes "moral injury" to the RU and to its Member States. To bolster these claims, Respondents might argue that the Statute of the ICJ precludes the RU from appearing in its own

<sup>54</sup> *First Admissions Case*, at p.63.

<sup>55</sup> TRU, Preamble, para. 4.

<sup>56</sup> AAA, art. 3.

<sup>57</sup> Corrections & Clarifications to the *Compromis*, Clarification #3.

right,<sup>58</sup> and denying the Member States standing would leave the RU without redress for an international wrong.

The ICJ addressed these arguments in the *South West Africa Cases*.<sup>59</sup> In *South West Africa*, Ethiopia and Liberia (Applicants) alleged that South Africa had violated the terms of the League of Nations Mandate for South West Africa. Applicants based their standing upon their status as former members of the League of Nations. The ICJ determined that the Applicants had not established any legal right or interest in the Mandate and dismissed their claims.<sup>60</sup> The ICJ focused especially on Article 2 of the Covenant of the League, which provided that the "action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council with a permanent Secretariat." The ICJ reasoned, "If the action of the League as a whole was thus governed, it followed naturally that the individual member States could not themselves act differently relative to League matters. . . ." <sup>61</sup> Likewise, the TRU and the AAA confer exclusive powers to act on behalf of the RU in membership matters to the organs of the RU, leaving no role for the Member States.

Applicants in *South West Africa* objected that, since the League of Nations was now defunct, "in so far as the Court's view leads to the conclusion that there is now no entity entitled to claim the due performance of the mandate, it must be unacceptable."<sup>62</sup> This is analogous to Respondent's argument that, since the RU cannot appear before the ICJ, the Member States must be empowered to appear on its behalf. The ICJ rejected this argument, refusing to "engage in an essentially legislative task, in the service of political ends the promotion of which, however desirable in itself, lies outside the function of a court-of-law."<sup>63</sup>

Of further relevance to the case at hand, the ICJ disregarded arguments concerning the independent legal personality (or lack thereof) of the League of Nations, stating,

"The foregoing conclusions hold good whether the League is regarded as having possessed the kind of corporate juridical personality that the Court [previously] found the United Nations to be invested with, or whether the League is regarded as a collectivity of States functioning on an institutional basis, whose collective rights in respect of League matters were . . . exercisable only through the appropriate League organs, and not independently of these."<sup>64</sup>

Applicant may also argue that the TRU itself prohibits the Respondents from bringing these claims. Article 4(1)(g) of the TRU states, "The [RU] Commission is exclusively responsible for . . . conducting the economic, trade, and diplomatic relations of the Union with non-Member States and international organizations."<sup>65</sup> As Member States of the Rotian Union, Respondents are bound by the TRU.

Respondents may reply that the RU Commission has implicitly authorized the Member States to bring this action, in that the Rotian Union joined the Member States in delivering the Respondents' first communication with the ICJ concerning this dispute in a joint declaration

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<sup>58</sup> "Only states may be parties in cases before the Court." ICJ Statute, art. 34(1).

<sup>59</sup> *South West Africa (Eth. v. S. Africa; Liberia v. S. Africa) (Second Phase)*, 1966 I.C.J. 6 (Jul. 18).

<sup>60</sup> *South West Africa*, at para. 99.

<sup>61</sup> *South West Africa*, at para. 18.

<sup>62</sup> *South West Africa*, at para. 57.

<sup>63</sup> *South West Africa*, at para. 57.

<sup>64</sup> *South West Africa*, at para. 30.

<sup>65</sup> TRU, art. 4, para. 1.

authorizing common counsel.<sup>66</sup> Respondents will further reply by referring to the context and structure of the TRU: Article 4 merely sets out the powers of the Commission vis-à-vis the RU organs and the Member States; it is not intended to create rights in non-party States.

Applicant may counter that by specifically referencing diplomatic relations in third States, Article 4(1)(g) creates apparent exclusive authority in the Commission to conduct the external diplomatic affairs of the Union.

### B. The Member States' Rights Under the AAA

Respondents who conceded (or were forced to concede) that the Member States are, in fact, parties to the AAA in the first issue have an additional avenue available to them on the standing issue, relying on the ICJ's predecessor's reasoning in *The S.S. "Wimbledon"*.<sup>67</sup> In *Wimbledon*, the Permanent Court of International Justice (PCIJ), allowed Poland to intervene, despite the fact that Poland did not claim any damages or harm to a legal interest arising from the events. Poland's sole interest in the case was as a party to the Treaty of Versailles, a multilateral treaty whose provisions would necessarily be interpreted by the Court in its judgment. The PCIJ reasoned that it was "unnecessary for the Court to consider and satisfy itself whether Poland's intervention . . . is justified by an interest in a legal nature," since Poland had standing as a party to the multilateral treaty and, therefore, a legal interest in its interpretation.<sup>68</sup>

### ***III. Did Adaria violate international law in "seizing" the Legation?***

Respondents claim that Adaria has violated international law by seizing the records of the RU Legation and by arresting Uriah Heep, the Chief of Legation. Since these activities were conducted consistent with Adarian internal law,<sup>69</sup> Respondents' claim must be based upon some international legal notion that the RU Legation is immune from such processes. Indeed, when the Justice Ministry officials delivered the subpoena, Mr. Heep replied, "International law recognizes the inviolability of the Rotian Union Legation and its archives, as well as my person."<sup>70</sup> The question, therefore, is whether international law does, in fact, grant the RU Legation such immunity.

### A. The Privileges and Immunities of Diplomatic Missions Generally

Recognizing that ambassadors and other diplomatic agents are vital to international trade and diplomacy, States have long sought to protect their diplomats and embassies abroad. This protection was originally based upon principles of comity and reciprocity: States did not violate each others' embassies and diplomatic pouches, and did not subject each others' diplomats to judicial process, to ensure that their diplomats and diplomatic premises would be likewise protected abroad. This protection is referred to as diplomatic privileges and immunities. Although nearly every State has long recognized diplomatic privileges and immunities, the exact limit of these rights was historically the subject of confusion.

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<sup>66</sup> *Compromis*, at para. 38.

<sup>67</sup> *The S.S. "Wimbledon"* (U.K., Fr., Italy, Japan v. Ger.), 1923 P.C.I.J. (ser. A) No. 1.

<sup>68</sup> *Id.* at p.13.

<sup>69</sup> *Compromis*, at paras 31-32. (a "*duly-issued* subpoena," "the arrest and detention were carried out *in a manner consistent with Adarian law*")

<sup>70</sup> *Compromis*, at para. 31.

In 1961, over 30 states negotiated the Vienna Convention on Diplomatic Relations.<sup>71</sup> This Convention was the first attempt to codify the content of diplomatic privileges and immunities. After setting out the procedures for establishing diplomatic missions, the Convention sets out the following rights of the “sending State,” its diplomats, and its diplomatic mission:

- (1) The premises of the mission are inviolable. That is, agents of the host State may not enter them without the consent of the head of mission,<sup>72</sup> and they are immune from search, requisition, and attachment.<sup>73</sup>
- (2) The host State must take all appropriate steps to protect the premises of the mission against damage and disturbance by third parties.<sup>74</sup>
- (3) The archives and documents of the mission are inviolable, wherever they may be.<sup>75</sup>
- (4) The mission and the head of mission are, with certain exceptions, exempt from local taxation.<sup>76</sup>
- (5) Diplomatic agents have immunity from criminal and, in most cases, civil jurisdiction of the host State.<sup>77</sup> In particular, diplomatic agents may not be arrested or otherwise detained by the host State.<sup>78</sup>

In addition to other rights not strictly relevant to this *Compromis*, these provisions are intended to ensure that the mission and its staff have full freedom to carry out their diplomatic purposes.

The Diplomatic Relations Convention has received almost universal approval. As of April 2006, 184 nations have become parties to the Convention. The privileges and immunities have been upheld by countless national and international tribunals, and it is well-established that breach of the Convention by one party is not grounds for violation by the offended State.

Adaria will properly observe, however, that the VCDR applies only to the missions of States, and that the Rotian Union is not a State.

#### B. The Preliminary Work of the International Law Commission

The missions of international organizations are outside of the Diplomatic Relations Convention, for a number of reasons.

The impetus for diplomatic privileges and immunities was reciprocity: States wanted their diplomats protected abroad, so they were willing to assure protection to other States’ diplomats within their territory. The motivating factor of reciprocity does not exist with respect to international organizations: they never serve as “hosts” in the conventional sense; they only “send” diplomats and missions abroad.<sup>79</sup>

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<sup>71</sup> Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95 (1961) (hereinafter “Diplomatic Relations Convention”)

<sup>72</sup> Diplomatic Relations Convention, art. 22, para. 1.

<sup>73</sup> *Id.* at art. 22, para. 3.

<sup>74</sup> *Id.* at art. 22, para. 2.

<sup>75</sup> *Id.* at art. 24.

<sup>76</sup> *Id.* at art. 23 and, with respect to fees charged by the mission, art. 28.

<sup>77</sup> *Id.* at art. 31.

<sup>78</sup> *Id.* at art. 29.

<sup>79</sup> C.F. Amerasinghe, PRINCIPLES OF INTERNATIONAL LAW OF INTERNATIONAL ORGANIZATIONS 317 (2<sup>nd</sup> ed. 2005).

In most cases, the privileges and immunities of international organization legations are handled in agreements between the organization and the host State. For example, the United Nations Headquarters in New York City is governed by the United Nations Headquarters Agreement, an agreement between the U.N. and the United States.<sup>80</sup> Likewise, the privileges and immunities of peacekeeping missions of the United Nations and NATO are governed by “status of forces agreements” between the organization and the receiving State. It is highly unusual that the RU would establish a mission in Adaria without such a host agreement.

The U.N. International Law Commission has attempted to assemble the core principles related to the privileges and immunities of international organizations, with an eye to drafting a multilateral convention akin to the Diplomatic Relations Convention. The ILC began its work in 1976, and considered the question for almost two decades. In 1992, the ILC abandoned the topic, given the lack of interest of States in the issue.<sup>81</sup>

Over the course of its sixteen years, the ILC considered Draft Articles on the subject of privileges and immunities of international organizations. Article 7 of the Draft Articles read as follows:

“International organizations, their property, funds and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution or coercion.”<sup>82</sup>

The proposed Draft Articles also included similar “absolute immunity” for the premises<sup>83</sup> of international organizations.

This proposed “absolute immunity” was much broader than the limited immunity given to States in the Diplomatic Relations Convention and in then-current practice. When presented with this draft by the Reporter, the members of the ILC could not agree upon whether absolute immunity was appropriate for international organizations, and several members considered that the issue should continue to be dealt with on a case-by-case, bilateral, host-and-organization basis.<sup>84</sup>

The ILC draft articles are not a formal source of international law. In order for Respondent to invoke the draft articles, it will have to show that the articles constitute customary international law, based on state practice and *opinion juris*. Given the treatment of the Draft Articles by the ILC members, that is a challenging proposition.

### C. Current State Practice and the View of Scholars

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<sup>80</sup> Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, Signed June 26, 1947, and Approved by the General Assembly (Oct. 31, 1947).

<sup>81</sup> Report of the International Law Commission on the work of its forty-fourth session, U.N. Doc. A/47/10 (1992), at p.53. In particular, the ILC noted that States had been reticent even to sign the Convention which preceded its work on the privileges and immunities question, the 1975 Convention on the Representation of States in their Relations with International Organizations of a Universal Character, UN Doc. A/CONF.67/16 (Mar. 14, 1975).

<sup>82</sup> Report of the International Law Commission on the work of its forty-second session, 1 May – 20 July 1990, Official Records of the General Assembly, Forty-fifth session, Supplement No. 10. A/45/10/Supp.10, at page 88, note 323 & accompanying text.

<sup>83</sup> *Id.* at note 324 & accompanying text.

<sup>84</sup> *Id.* at paras. 448-55.

In the absence of a multilateral convention, the issue of privileges and immunities has been dealt with on a case-by-case basis, by agreement between the organization and its host. In practice, States have refused absolute immunity, instead granting “functional immunity,” i.e. those privileges and immunities necessary for the effective exercise of their purposes.<sup>85</sup>

Several States have set out the privileges and immunities of all international organizations within their territory in a single, omnibus statute.<sup>86</sup> The United States, for example, grants absolute immunity to the premises and persons of international organizations’ diplomatic missions.<sup>87</sup>

Privileges and immunities are regularly granted to international organizations by bilateral or multilateral agreement. However, there is no clear practice among States as to the content of those immunities. Respondents will point to numerous bilateral agreements between international organizations and host countries, as well as the multilateral Convention on the Privileges and Immunities of the United Nations<sup>88</sup> and Convention on the Privileges and Immunities of the Specialized Agencies<sup>89</sup> and argue that a baseline level of protection has evolved into a norm of customary international law.

For example, the Convention on the Privileges and Immunities of the United Nations provides that:

“The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.”<sup>90</sup>

“The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference. . .”<sup>91</sup>

The Convention also provides functional immunities – that is, immunities necessary for the performance of their duties – to officials<sup>92</sup> and experts<sup>93</sup> of the United Nations.

The organic documents and host agreements of most other large international organizations contain similar provisions.

However, Adaria will reply that the inclusion of immunities in each of these agreements actually cuts *against* Respondents’ arguments, in that immunities would not need to be enumerated with specificity if they were generally recognized. In 1957, the Secretary of the ILC has observed that “The status of international organizations, and the privileges and immunities conferred on their

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<sup>85</sup> C.F. Amerasinghe, PRINCIPLES OF INTERNATIONAL LAW OF INTERNATIONAL ORGANIZATIONS 315-6 (2<sup>nd</sup> ed. 2005).

<sup>86</sup> See, e.g., the U.S. International Organizations Immunities Act of 1945, 22 U.S.C. 288a-k (U.S.); the UK International Organization (Privileges and Immunities), 1968, ch. 48 (U.K.); and the Canadian Foreign Missions and International Organizations Act, S.C., ch. 41 (1991) (Can.).

<sup>87</sup> U.S. International Organizations Immunities Act of 1945, *supra* note 86, at sec. 2.

<sup>88</sup> U.N.T.S. vol. 1, p. 15 (Feb. 13, 1946).

<sup>89</sup> U.N.T.S. vol. 33, p. 261 (Nov. 21, 1947).

<sup>90</sup> Convention on the Privileges and Immunities of the United Nations, *supra* note 88, at sec. 2.

<sup>91</sup> *Id.* at sec. 3.

<sup>92</sup> *Id.* at sec. 18.

<sup>93</sup> *Id.* at sec. 22.

agents . . . unlike the privileges and immunities conferred on diplomatic agents in the strict sense, were matters that had been regulated almost exclusively by conventional [*i.e.* treaty] law and to which international custom had not yet made any appreciable contribution."<sup>94</sup>

At any rate, a functional definition of the privileges and immunities of the RU Legation requires a factual discussion by the parties as to whether the specific immunities in this dispute—of the chief of legation from arrest and detention, of the property of the Legation from entry by government officials, and of the archives of the Legation from seizure—are in fact necessary to the function of the Legation.

In conclusion, Adaria may take solace in the observation of Jan Klabbers, a leading scholar in the area:

“There are so many treaties on the topic, so the argument goes, that their sheer abundance alone provides evidence of both state practice and the required *opinio juris*. While it may indeed be the case that there is a customary rule to grant privileges and immunities, such a rule is bound to remain fairly abstract, for what is usually at issue is not so much privileges and immunities per se, but rather their precise scope. It will do little good to plead privileges and immunities without being able to delimit them with some degree of precision.”<sup>95</sup>

Even if Respondent is able to show that international organizations have privileges and immunities under customary international law, they will have to consider exceptions to immunities under customary international law. Most host state agreements—which would serve as the basis for a customary law claim—contain explicit exceptions to immunities based on, for example, crimes committed by personnel.<sup>96</sup> If such agreements serve as the basis of the customary claim, those exceptions might also be part of the customary rule. Given the facts in this case, it may be that some of Applicant’s actions, particularly with respect to Mr. Heap, might well fall within any such exceptions to privileges and immunities that might be contained in such a customary rule.

#### D. Application: The Privileges and Immunities of the RU Legation

Faced with no applicable international conventions and a difficult argument on State practice, Respondents will attempt to draw inferences from the facts in this case to argue that the parties have tacitly agreed that the RU Legation enjoys diplomatic privileges and immunities.

First, Respondents will point to the language of the AAA itself. Article 3 of the Agreement establishes the RU Legation, and states “The rights, obligations, privileges and immunities of the RU Delegation shall be governed by international law.”<sup>97</sup> Respondents will argue that this

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<sup>94</sup> Yuen-li Liang in *I Yearbook of the International Law Commission*, p.5 (1957). As late as 1982, one of the leading scholars of international organizations agreed. “[I]t may be difficult to argue that privileges and immunities vest by virtue of a rule of customary international law, as is the case with diplomatic privileges and immunities. . . .” D.W. Howett, *The Law of International Institutions* 348 (1982).

<sup>95</sup> Jan Klabbers, *An Introduction to International Institutional Law* [X].

<sup>96</sup> *See, e.g.*, United States Headquarters Agreement, Pub.L. 80-357 (Aug. 4, 1947), at Sec. 13(b). (“In case of abuse of such privileges of residence by any such person in activities in the United States outside his official capacity, it is understood that the privileges referred to in Section 11 shall not be construed to grant him exemption from the laws and regulations of the United States regarding the continued residence of aliens. . . .”)

<sup>97</sup> AAA, art. 3.

language presupposes the existence of privileges and immunities, and leaves their precise content to international law. Since the AAA is a bilateral agreement between the Rotian Union and the AAA, it may qualify as an international treaty binding upon Adaria. Adaria will respond that this broad language leaves to international law even the question of *whether* such privileges and immunities exist.

Second, Respondents will argue that Adaria's conduct towards the RU Legation indicates that it believed the Legation enjoyed immunities, at least from taxation. From 2002 to 2006, the RU Legation paid no property taxes to the Adaria, apparently without complaint by the Adarian government.<sup>98</sup> Adaria will reply that its conduct is not dispositive: under Adarian law, both foreign diplomatic missions *and* not-for-profit organizations are exempt from taxation.<sup>99</sup> As such, Adaria's non-enforcement of its property tax laws could just as easily be attributed to a determination that the RU Legation is a not-for-profit organization. Consistent with this interpretation, on October 25, 2006, the Adarian Taxation Ministry cited the RU Commission for back property taxes, noting that the Legation "had abused its status as a tax-exempt organization."<sup>100</sup> Respondents will reject this last fact as merely self-serving – the Taxation Ministry did not take action until one month after the *Compromis* was delivered to the Court.

#### E. Exceeding the Functional Limits of the Immunity

Applicant may argue that, even if the RU Legation enjoys a functional immunity, its conduct places it outside the protections of that immunity. In interfering with the Adarian elections process, Mr. Heep and the Legation violated Adarian domestic law and, arguably, international law.

Adaria will argue that the same sources that Respondent relies upon to establish a customary rule of immunity for international organizations also require that such organizations respect the domestic law of the host State.<sup>101</sup> Furthermore, interference in domestic elections may rise to a violation of the U.N. Charter principle of sovereign equality<sup>102</sup> and political independence,<sup>103</sup> and against the right to vote.<sup>104</sup> Applicant will argue that extending the functional immunity to such crimes promotes impunity for international organizations and their missions, and is counter to the purposes of diplomatic immunity.

Finally, several teams have argued that the arrest of Heep and search and seizure of the Legation constitute lawful countermeasures to the unlawful abuse of the Legation's immunities. Countermeasures are the non-performance of international obligations of a State, in response to a breach of international law by another State.<sup>105</sup> Although the regime of diplomatic immunity

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<sup>98</sup> Corrections and Clarifications to the *Compromis*, Clarification #5.

<sup>99</sup> Corrections and Clarifications to the *Compromis*, Clarification #4.

<sup>100</sup> Corrections and Clarifications to the *Compromis*, Clarification #5.

<sup>101</sup> See, e.g., Convention on the Privileges and Immunities of the United Nations, *supra* note 88, art. 21, and Convention on the Privileges and Immunities of the Specialized Agencies, *supra* note 89, art. 23.

<sup>102</sup> U.N. Charter, art. 2(1).

<sup>103</sup> U.N. Charter, art. 2(4), although that principle focuses on the prohibition against the use of force.

<sup>104</sup> The right of individuals to vote is codified at International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 16, 1966), art. 25. The right of States against outside interference in their elections is contained in U.N.G.A. Res. 124 (Dec. 20, 1993), "Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes," U.N. Doc. A/RES/48/124, which condemns "any activities that attempt, directly or indirectly, to . . . sway the results of [electoral] processes." *Id.* at para. 3.

<sup>105</sup> See, e.g., the ILC's Articles on State Responsibility, "State Responsibility: Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee

does not countenance countermeasures against diplomatic missions,<sup>106</sup> Applicant will argue that this is based upon sovereign equality and principles of comity – which are not present in the asymmetrical relationship of international organization to host State.

#### *IV. Does the NIA constitute an improper expropriation?*

In 2005, Adaria enacted the "National Industry Act" (NIA). The NIA forbade the new owners of the four previously state-owned enterprises from repatriating any of the businesses' assets, directly or indirectly, to the RU Member States. Respondents claim that this action constitutes an illegal expropriation, and ask for a declaration from the court that Adaria has thereby violated international law.

Many teams will rely on examples from the European Court of Human Rights and the panels interpreting the North American Free Trade Agreement, some of which are discussed below. Counsel will attempt to argue that these decisions are indicative of customary international law. However, each of the above sources is *interpreting expropriation law within the context of a particular agreement and legal framework concerning expropriation* (the European Convention on Human Rights and NAFTA, respectively). Opposing counsel may well argue, with respect to any particular decision, that the decision holds no evidentiary value outside of the limited context of the underlying framework.

#### A. A Preliminary Matter: The doctrine of diplomatic protection

The directly affected party in the fourth claim is qualitatively different than the first three claims. In the first three claims, the States themselves (or the RU) have been harmed by the action of the other party. In the fourth claim, the harmed parties are the private corporations whose freedom to dispose of their assets has been limited by the NIA. Respondents seek to bring a claim before the ICJ on behalf of those corporations. This procedure is known in international law as "diplomatic protection."

Diplomatic protection is the right of a State to espouse a claim on behalf of its nationals who are injured by the wrongful conduct of another State.<sup>107</sup> This doctrine is based upon a centuries-old legal fiction that an injury to an individual is an injury to the State of his nationality.<sup>108</sup> In this case, the five Respondent States seek to bring a claim on behalf of their citizen-corporations.

There are two important prerequisites to the lawful exercise of diplomatic protection: first, the injured party must have a genuine link with the protected party, usually because the party is a *national* of the protecting State;<sup>109</sup> second, all local remedies must be exhausted.<sup>110</sup>

#### *Nationality*

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on Second Reading," U.N. GAOR Int'l L. Comm'n, 53d Sess., U.N. Doc. A/CN.4/L.602/Rev.1 (2001), at art. 49.

<sup>106</sup> *Id.* at art. 50(2)(b).

<sup>107</sup> United Nations International Law Commission, First report on diplomatic protection, U.N. Doc. A/CN.4/506 (Mar. 7, 2000) at p.11. (hereinafter "2000 ILC Diplomatic Protection Report").

<sup>108</sup> 2000 ILC Diplomatic Protection Report, at 12 (quoting Emmerich de Vattel, *The Law of Nations* (1758), chap. VI, p.136, for the proposition that "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen.")

<sup>109</sup> *See, e.g.*, United Nations International Law Commission, Seventh report on diplomatic protection, U.N. Doc. A/CN.4/567 (Mar. 7, 2006), at p.12 (hereinafter "2006 ILC Diplomatic Protection Report").

<sup>110</sup> 2006 ILC Diplomatic Protection Report, at p.29.

With respect to nationality, the general rule is that the nationality of a corporation is the State under whose law the corporation was formed or in whose territory it has its registered office or seat of management.<sup>111</sup> Respondents will argue that this formulation settles the issue: since Bobboman was incorporated in Bobbia (and the other purchasers were incorporated in other Respondent States), Respondents may exercise diplomatic protection on behalf of Bobboman (and the other purchasers).

Adaria's response on nationality is implied in the decision of the Adarian civil court: "The plaintiff is an investor that purchased an ownership interest in an Adarian company."<sup>112</sup> The Adarian court is referencing *dictum* in the ICJ's *Barcelona Traction* case.<sup>113</sup> In *Barcelona Traction*, the ICJ faced the preliminary issue of whether Belgium had standing to assert diplomatic protection on behalf of Belgian super-majority shareholders of a Canadian corporation. The ICJ held that only the State of nationality of the *corporation* may assert diplomatic protection, reasoning that "[W]henver a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action."<sup>114</sup> This rule was embodied in the ILC's draft articles on diplomatic protection.<sup>115</sup> In the present case, the NIA restricts Adarmoire's power to export proceeds; Bobboman is merely the parent company of Adarmoire (an Adarian company), and therefore Bobboman's interests are only affected to the extent of its investment and interest in Adarmoire.

However, Respondents will emphasize that customary international law (and corporate realities) have evolved since *Barcelona Traction*. In its 2006 draft of the Articles on Diplomatic Protection, the ILC addressed the possibility that a corporation might have *multiple* States of nationality, reasoning that, when multiple States are entitled to exercise diplomatic protection (taking into account the State in which the corporation was formed, the State in which it has its registered office, and the State in which its seat of management is located), "the State whose nationality is predominant shall exercise that protection."<sup>116</sup>

Respondents will adhere to this formulation of international law and attempt to distinguish *Barcelona Traction* on the facts. In *Barcelona Traction*, multiple Belgian shareholders held a majority of shares in the Canadian corporation. Here, a Bobbian corporation purchased *all of* Adarmoire at auction.<sup>117</sup> Furthermore, subsequent to purchase, Bobboman and each of the other purchasers "moved swiftly to integrate the financial, supply, and distribution network of the newly-privatized company into its existing corporate structure in the RU."<sup>118</sup> The CEO of Bobboman noted at the time, "[We] will no longer operate these enterprises as stand-alone Adarian companies."<sup>119</sup>

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<sup>111</sup> 2006 ILC Diplomatic Protection Report, at pp.22-3 (recommending that nationality attach to either the State of incorporation *or* the State of principal offices)

<sup>112</sup> *Compromis*, para. 35.

<sup>113</sup> Case Concerning the Barcelona Traction, Light & Power Co., Ltd. (Second Phase) (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5) (hereinafter *Barcelona Traction*).

<sup>114</sup> *Barcelona Traction*, at para. 44.

<sup>115</sup> 2006 ILC Diplomatic Protection Report, at p.25. ("The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless... [irrelevant exceptions deleted]")

<sup>116</sup> 2006 ILC Diplomatic Protection Report, at p.23.

<sup>117</sup> *Compromis*, para. 19.

<sup>118</sup> *Compromis*, para. 19.

<sup>119</sup> *Compromis*, para. 19.

Respondents will argue that, on these facts, the seat of Adarmoire's management is in Bobbia. It has been integrated into Bobbia's RU corporate structure, and governance decisions are made by Bobboman, not by Adarmoire.

### *Exhaustion of local remedies*

A second prerequisite for the exercise of diplomatic protection is the requirement of exhaustion of local remedies. This doctrine requires that, before a State can bring an international claim on behalf of its national, the national must have exhausted all legal remedies in the judicial or administrative courts of the State alleged to have caused the injury.<sup>120</sup> In this case, the Respondents may not bring a claim on behalf of the private RU corporations until the corporations have sought (and been denied) adequate remedy in the courts of Adaria.

Bobboman has, in fact, brought suit in Adarian civil court. Its suit was rejected, and the Adarian Supreme Court upheld the ruling.<sup>121</sup> Adaria may point out that the *other three* purchasers have not brought suit in Adarian courts – in fact, the purchasers subsequently opined, "Further legal action in Adarian courts would obviously be futile."<sup>122</sup>

The ICJ addressed this issue in the *ELSI Case*.<sup>123</sup> In that case, Italy argued that the two corporations (Raytheon and Machlett) on whose behalf the United States sought to exercise diplomatic protection had failed to exhaust legal remedies available in Italy.<sup>124</sup> In particular, Italy noted that the two corporations had failed to bring a particular form of action available under a bilateral Friendship, Commerce & Navigation Treaty. The ICJ rejected this argument, emphasizing that this "very question . . . was already in issue in the action brought by [ELSI's] trustee in bankruptcy."<sup>125</sup> In 2006, the ILC Special Rapporteur agreed with the U.S. interpretation of the ICJ's holding, namely, "a claim could be exhausted for international law purposes when the essence of the claim was considered by municipal tribunals, irrespective of whether the same person or entity pursued the municipal claim as was being diplomatically protected."<sup>126</sup> Since the essence of Bobboman's failed suit is the same as the claims of the other three RU corporations, the *ELSI Case* holding means that the exhaustion requirement has been met for all four corporations.

### B. Degree of Interference and Measure of Damages

It is a long-utilized rule of international law – commonly known as the "Hull Rule" – that the property of foreign nationals cannot be taken for any reason without adequate compensation.<sup>127</sup> The majority of modern bilateral investment agreements set the standard for such compensation as "prompt, adequate and effective."<sup>128</sup> In the present case, however, no compensation was offered or given. The question, rather, is whether any expropriation in fact occurred. If an expropriation occurred, since no compensation was offered, the expropriation was improper.

<sup>120</sup> 2006 ILC Diplomatic Protection Report, at p.29.

<sup>121</sup> *Compromis*, at para. 36.

<sup>122</sup> Clarifications and Corrections to the *Compromis*, Clarification #9.

<sup>123</sup> Case Concerning Elettronica Sicula S.p.a. (ELSI) (U.S.A. v. Italy), 1989 I.C.J. 15 (July 20) (hereinafter "*ELSI Case*").

<sup>124</sup> *ELSI Case*, at p.31.

<sup>125</sup> *ELSI Case*, at p.35.

<sup>126</sup> 2006 ILC Diplomatic Protection Report, at p.29.

<sup>127</sup> See, e.g., OECD Directorate for Financial and Enterprise Affairs, "*Indirect Expropriation*" and the "*Right to Regulate*" in *International Investment Law*, September 2004. (hereinafter "OECD Expropriation Report").

<sup>128</sup> *Ibid.*

Since there is no bilateral treaty here, Respondent must argue that there is a duty in customary international law to compensate. Respondent will rely upon the multitude of bilateral investment treaties, as well as several United Nations Resolutions,<sup>129</sup> to demonstrate that the Hull Rule has been adopted as a generally-applicable rule of customary international law. However, Applicant will reply that the duty to compensate (and, especially, the right to "prompt, adequate and effective" compensation) is disputed. Applicant will point to the Charter of Economic Rights and Duties of States (CERDS)<sup>130</sup> – at the very least to prove there is no consensus as to the standard of compensation, and at most to show that the standard of compensation *as regards developing States* is quite different.

CERDS states that each State has the right to "expropriate or transfer ownership of foreign property," subject to its obligation to pay "*appropriate* compensation."<sup>131</sup> (emphasis added) How much compensation is appropriate is left to the expropriating State, thus leaving open the possibility that the expropriating State, taking relevant factors into account, might determine that there *no compensation is necessary*.

The NIA does not embody a "direct" expropriation: that is, the State is not nationalizing Adarmoire or any of its property. Rather, Respondents will argue that the NIA is "tantamount to expropriation" – an argument that has also been termed "creeping expropriation," "*de facto* expropriation," or "indirect expropriation." Adaria's counterargument is summed up in the decision of the Adarian civil court: "The company and its stock are still in existence, and their value depends on the free market. In sum, nothing has been taken, and no expropriation has occurred."<sup>132</sup> It is Adaria's position that this law is merely a regulation of Adarmoire/Bobboman's use of its property, and not an interference in its ownership interest.

In 2004, the OECD noted that "there is no generally accepted and clear definition of the concept of indirect expropriation and what distinguishes it from non-compensable regulation."<sup>133</sup> Therefore, both sides are effectively urging the ICJ to adopt a standard for distinction between regulation and expropriation.

The OECD noted, however, that three criteria emerge from recent jurisprudence and bilateral investment agreements. They are:

- (1) the degree of interference with the property right;
- (2) the character of governmental measures (*i.e.* the purpose and context of the governmental measure); and
- (3) the interference of the measure with reasonable and investment-backed expectations.<sup>134</sup>

On the first criterion, the bar seems to be quite high. The OECD Report describes the standard as "when the governmental action . . . remove[s] all or most of the property's economic value. . . . *i.e.* when it deprives the foreign investor of fundamental rights of ownership, or when it interferes

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<sup>129</sup> See, e.g., Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17<sup>th</sup> Sess., Supp. No. 17, U.N. Doc A/S217 (1962).

<sup>130</sup> Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29<sup>th</sup> Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 12, 1974) (hereinafter "CERDS")

<sup>131</sup> CERDS, art. 2(2)(c)

<sup>132</sup> *Compromis*, at para. 36.

<sup>133</sup> OECD Expropriation Report, at p.5.

<sup>134</sup> OECD Expropriation Report, at p.10.

with the investment for a significant period of time."<sup>135</sup> Another popular formulation is that "a regulation may constitute expropriation when it substantially impairs the investor's economic rights, *i.e.* ownership, use, enjoyment or management of the business, by rendering them useless."<sup>136</sup>

For example, in *S.D. Myers v. Canada*,<sup>137</sup> a NAFTA tribunal found that Canada's regulation forbidding the export of PCBs to the United States did *not* amount to an expropriation of the property interests of a U.S. company which operated a PCB remediation facility in the United States.<sup>138</sup> The tribunal reasoned that "Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference."<sup>139</sup> In *S.D. Myers*, the temporary ban on export merely eliminated claimant's competitive advantage; it did not take its property. In *Pope & Talbot Inc. v. Canada*,<sup>140</sup> a U.S. softwood lumber company argued that the Canadian government had effected a regulatory expropriation by imposing export quotas on the amount of softwood lumber the company could export to the United States. The NAFTA Tribunal disagreed noting:

Canada does not supervise the work of the officers or employees of the Investment, does not take any of the proceeds of company sales (apart from taxation), does not interfere with management or shareholders' activities, does not prevent the Investment from paying dividends to its shareholders, does not interfere with the appointment of directors or management and does not take any other actions ousting the Investor from full ownership and control of the Investment. . . . The sole 'taking' that the Investor has identified is interference with the Investment's ability to carry on its business of exporting softwood lumber to the U.S.<sup>141</sup>

Respondents will attempt to distinguish *Pope & Talbot*, and other export quota cases, by noting that Adaria has wholly forbidden export of proceeds. However, the core reasoning of the NAFTA tribunal still applies: the government has not interfered in the company's operations and has not taken any of its property.

Respondent may attempt to argue that the doctrine of "creeping expropriation" includes a broader range of activity than direct expropriation. The *S.D. Myers* tribunal cautioned against using the doctrine of "creeping expropriation" to expand the definition of expropriation. *S.D. Myers* attempted to argue that NAFTA's use of the language "tantamount to expropriation" required the tribunal to give an expansive view to expropriation. The tribunal disagreed, concluding, "The primary meaning of the word 'tantamount' . . . is 'equivalent.' Both words require a tribunal to look at the substance of what has occurred and not only at form."<sup>142</sup>

## B. Discrimination

<sup>135</sup> OECD Expropriation Report, at pp.10-11.

<sup>136</sup> OECD Expropriation Report, at p.11.

<sup>137</sup> *S.D. Myers Inc. v. Government of Canada*, Partial Award (Nov. 13, 2000), *reprinted at* 40 I.L.M. 1408 (2001).

<sup>138</sup> *Id.* at para. 288.

<sup>139</sup> *Id.* at para. 282.

<sup>140</sup> *Pope & Talbot, Inc. v. Canada*, Interim Award (June 26, 2000), *available online at* <http://www.dfait-maeci.gc.ca/tna-nac/documents/pubdocs7.pdf>.

<sup>141</sup> *Pope & Talbot*, at paras. 100-1.

<sup>142</sup> *S.D. Myers*, at para. 285.

A long-standing and widespread formulation of the law of expropriation requires that a lawful State regulation not be "discriminatory,"<sup>143</sup> *i.e.* that the measure not be based upon unreasonable distinctions without objective justification.<sup>144</sup> Respondents will argue that the NIA is on its face discriminatory, as the restrictions of the Act apply *only* to the four newly-privatized companies.<sup>145</sup>

Applicant will reply that a certain degree of discrimination is inherent in any regulation, and is permitted if it is closely related to the legitimate State purpose.<sup>146</sup> Several courts have held that, where a State nationalizes petroleum or other natural resources, limited measures targeting foreign ownership of these resources are non-discriminatory, since they are inextricably linked with the legitimate public purpose.<sup>147</sup> Respondents will attempt to distinguish these nationalization cases by characterizing the restrictions on the four companies bear *no relation* to the stated public purpose and are simple retribution.

### PART 3: SUGGESTED QUESTIONS FOR ORALISTS

*These questions are merely suggestions for the oral rounds. Judges are of course welcome to ask any questions they like.*

#### International Law Generally

1. Is there any priority or hierarchy of the sources of international law mentioned in Art. 38?
2. If a State has conflicting obligations under these two treaties (or under a treaty on the one hand and customary international law on the other), which obligation controls? What principles does the Court use to determine which obligation controls?
3. What is customary international law? What are the elements of customary international law?
4. When a student attempts to assert that a given rule is or is not an obligation under customary international law, the court should ask the student to demonstrate (1) widespread and consistent practice by States consistent with that rule, and (2) that the State practice is, in fact, motivated by a sense of obligation (*opinio juris*)?
5. Whenever a student enunciates a standard of law, (s)he should be pressed to enunciate where the standard comes from and why it binds the parties?
6. What is *opinio juris*? How is it proven?
7. Where can we find evidence of State practice? What State practice is relevant?
8. Is this Court bound by its prior decisions?
9. What are *travaux préparatoires*? When are the records of the drafting and negotiations of the treaty relevant?
10. What specific remedies is your Party looking for? Is this Court permitted by its Statute to grant those remedies?
11. If this Court determines (notwithstanding, of course, Agent's compelling arguments) that the paucity of facts allows multiple, conflicting inferences, what should this Court do then?
12. What is the standard of proof with respect to this issue? Which party bears the burden of proof?

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<sup>143</sup> *S.D. Myers*, at para. 286.

<sup>144</sup> *Oscar Chinn* (Belg. v. U.K.), 1934 P.C.I.J. (Ser. A/B) No. 63, 87.

<sup>145</sup> *Compromis*, para. 35, & *Corrections & Clarifications to the Compromis*, Clarification #8.

<sup>146</sup> *Amoco International Finance Corp. v. Iran*, 15 Iran-U.S.C.T.R. 189, para. 145 (1987).

<sup>147</sup> *Id.* See also *Libyan American Oil Company v. Libya*, Award of Apr. 12, 1977, 20 I.L.M. 1, 59 (1981).

Issue 1 – Denial of Membership in the RU

1. Is the AAA a "treaty" under international law? Does it create internationally enforceable rights?
2. If this Court imposes direct liability on the Member States, is it then denying force to the TRU? Is it proper for the Court to ignore a valid and binding treaty delegating powers and responsibilities to an intergovernmental organization?
3. If this Court relies upon the TRU to shield the Member States from liability, is this not a violation of *pacta tertiis* – the principle that treaties may not create rights or obligations in non-party States (*i.e.* Adaria)?
4. Do the RU's obligations under the AAA extend to the five Respondents, even though they were not parties to that Agreement?
5. Should membership questions be reserved to the international organization? Why should the ICJ become involved in how international organizations decide their membership?
6. Is it a fair inference from the text of the AAA that these three conditions were exclusive – *i.e.* that there were no other conditions to Adaria's membership in the RU?
7. If the Member States are represented in the RU Council by their Heads of Government (or his delegate), what international legal principle permits them to deny liability for their votes?
8. If Adaria has relied upon the RU's representations (and silence) regarding the AAA, why shouldn't international law protect Adaria's reasonable expectations?
9. How can this case be distinguished from the ICJ's opinion in the *First Admissions Case*, which concerned admission of several new States to the United Nations?
10. Is it important, when considering Adaria's right to join the Rotian Union, that the RU is a regional "closed" organization, as opposed to an "open" organization like the United Nations?
11. If the AAA does not bind the Member States to vote in favor of Adarian succession once the three conditions of membership had been fulfilled, what obligation does it impose on them?

Issue 2 – Respondents' Standing to Make Claims

1. Are the Member States protecting their own rights, or are they here on behalf of the real party in interest, the Rotian Union?
2. If the ICJ were to deny the Member States standing, what recourse would the Rotian Union have under international law?
3. Does your argument concerning the Respondents' individual responsibility for the denial of Adaria's membership (Issue 1) contradict your argument concerning the Respondents' standing with respect to this Issue?
4. Wouldn't reading discretion entirely out of the TRU put the RU Member States at risk of being forced to ally themselves (economically and politically) closely with a State, more or less against their will? What effect would this have on the functioning of the RU?
5. If the Accession Agreement does not give the Rotian Union member states discretion to vote for or against Adaria's accession despite Adaria having fulfilled the 3 conditions, why was a vote even necessary? Why couldn't the treaty have made membership in the RU automatic upon a finding that the conditions of membership had been fulfilled?

Issue 3 – Seizure of the RU Legation and Uriah Heep

1. What is Uriah Heep's status as a representative of the RU legation?
2. From what sources in international law do persons like Mr. Heep derive privileges and immunities?

3. For the purpose of privileges and immunities law, is there any difference between the RU Legation and a United Nations legation? Between the RU Legation and a State's embassy or consulate?
4. Must there be a bilateral "host agreement" between the RU and Adaria in order that the RU representatives to enjoy any privileges or immunities in Adaria?
5. Does the RU Legation enjoy absolute immunity, or is that immunity somehow limited?
6. Does Article 3 of the AAA presuppose the existence of some privileges and immunities?
7. What inferences can this Court draw from the fact that the RU Legation did not pay taxes for several years?
8. Can a State or intergovernmental organization extend diplomatic immunity to non-nationals? After all, Mr. Heep is a national of Liechtenstein.
9. Is it significant that the EU presence in Adaria is called a "Legation," as opposed to a consulate, an embassy, or a mission?
10. Even if the RU Legation and Mr. Heep have diplomatic status, don't the Adarian police have the authority to arrest him, where he was engaged in criminal activity outside the scope of his diplomatic duties?
11. What limitations does international law place on a State's rights to take countermeasures?

Issue 4 – National Industry Act and Expropriation

1. Are the Respondents making this claim on their own behalf (direct harm), or are they making a claim on behalf of their nationals, the parent corporations?
2. Have the Respondents satisfied all requirements for invocation of diplomatic protection of their nationals?
3. Can restrictions on the movement of funds constitute expropriation?
4. How can there be an expropriation when no property or funds were actually taken and no means of production were inhibited?
5. What is the standard of compensation owed for an expropriation? Is any compensation owed?
6. In the event that this Court determines that there is *no applicable customary international law or treaty* governing expropriation, what result?
7. Are decisions of NAFTA Panels, the Iran-U.S. Claims Tribunal, or the European Court of Human Rights truly evidence of customary international law, given that those tribunals are interpreting particular agreements, and not general international law?