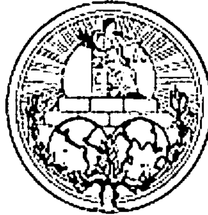
IN THE INTERNATIONAL COURT

OF JUSTICE



AT THE PEACE PALACE

THE HAGUE

THE CASE CONCERNING THE ROTIAN UNION

REPUBLIC OF ADARIA

(APPLICANT)

V

REPUBLIC OF BOBBIA, KINGDOM OF CAZALIA,

COMMONWEALTH OF DINGOTH, STATE OF EPHRAIM

AND KINGDOM OF FINBAR

(RESPONDENTS)

MEMORIAL FOR THE RESPONDENT

2007 Philip C. Jessup

International Law Moot Court Competition

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STATEMENT OF JURISDICTION

The Republic of Adaria and the Republic of Bobbia, the Kingdom of Cazalia, the Commonwealth of Dingoth, the State of Ephraim and the Kingdom of Finbar have agreed to submit this dispute to the International Court of Justice pursuant to Article 40(1) of the Statute of the International Court of Justice ['Statute'] and in accordance with the *Compromis* notified to the Court on 15 September 2006. Pursuant to Article 36(1) of the Statute, the Court has jurisdiction to decide all matters referred to it for decision.

Adaria, Bobbia, Cazalia, Dingoth, Ephraim and Finbar have agreed to act consistently with the Court's decision.

QUESTIONS PRESENTED

1. Whether Adaria was entitled under international law to admission to membership of the RU because the Respondents did not have, or were precluded from exercising, any discretion to refuse its application.

2. Whether any obligation to admit Adaria to membership of the RU was owed solely by the RU as a separate legal person, or owed instead or additionally by the Respondents.

3. Whether the Respondents have standing to make a claim concerning the Applicant's actions with respect to the 'RU Legation', its premises, property or personnel.

4. Whether the Applicant has violated international law concerning the immunity of diplomatic missions by seizing the premises, property and personnel of the 'RU Legation' in Adaria.

5. Whether the National Industry Act constitutes an illegal expropriation of Adarmoire and the other privatised concerns under international law.

STATEMENT OF FACTS

The Rotian Union

The Republic of Bobbia, the Kingdom of Cazalia, the Commonwealth of Dingoth, the State of Ephraim, and the Kingdom of Finbar are contiguous, developed democratic States. In 1964, they created the Rotian Union ['RU'] to foster economic cooperation and political unity between them, in accordance with respect for human rights and the rights of women and minorities. The Treaty Establishing the Rotian Union ['TRU'] came into force in all five States on 1 January 1966. It created four organs: the Parliament, the Council, the Commission, and the High Court. The Commission is the executive organ of the RU and consists of a President and four Ministers who conduct themselves independently of national influence. The Parliament consists of 100 representatives directly elected by the citizens of the Member States. The Council consists of one representative from each Member State.

The Member States 'intended to vest the RU with a great deal of autonomy and authority'. The Chairman of the final negotiating session on the TRU heralded the RU as a 'new legal order of international law, for the benefit of which the Member States have ceded some of their sovereign rights'. RU law directly confers rights and obligations on Member States and their nationals. Common RU policies supplant domestic laws in agriculture, fisheries, transportation and mining. In the cases where the Commission has brought a claim against a Member State for failing to give prompt effect to RU law, the Member State has complied with directions of the High Court.

The RU created a free trade area between Member States, and harmonised their economic relations through measures such as a common external tariff. The RU represents the interests of the Union and its Member States before the WTO. Additionally, since 1993 when the Convention Amending the Rotian Union Treaty ['CARUT'] came into force, the RU has coordinated non-trade relations and foreign policies and created a single currency, the 'Roto'. The RU has entered into dozens of treaties with other States, and in 2004 the President of the Commission negotiated for the release of RU citizens held hostage abroad.

The Republic of Adaria

The Republic of Adaria is a developing democratic State bordering Bobbia. The Sophians are an ethnic minority comprising roughly 5% of Adaria's 42 million people. The Sophian community is insular and religious, relying for their survival on village-level farming, the sale of traditional handicrafts, government support payments and price discounts from State-owned utilities.

Adaria's Application for Admission

On 2 December 1995, Adaria applied for admission to the RU. After a four-year investigation of Adaria's economy, the RU Commission urged the Council to authorise the negotiation of the Adarian Accession Agreement ['AAA'] on 16 December 1999. The Council unanimously did so and the RU Commission concluded the AAA with Adaria on 1 October 2001. The AAA referenced three conditions for Adaria to be eligible for admission:

(1) reducing public debt;

(2) privatising State-owned monopolies; and

(3) eliminating government support payments to small, privately-owned businesses.

Adaria promptly ratified the AAA. During debate in the RU Parliament, concern was expressed about potential ramifications of the AAA for the Sophian minority. The Parliament recommended that protection of the Sophians be made a condition of Adarian accession. However, the Council unanimously ratified the AAA without amendment on 20 December 2001.

On 15 January 2002, Prime Minister Mesmin of Adaria announced the AAA to the Adarian public. He spoke confidently of Adaria's future membership of the RU but warned of the 'unpredictable consequences' and challenges associated with meeting the conditions. The announcement was well received.

The RU Legation

The 'RU Legation' was established in Adaria on 1 February 2002, with Ambassador Heep appointed 'Chief of Legation'. Ambassador Heep presented his credentials to Prime Minister Mesmin at an official dinner on 5 February 2002. In a televised announcement, Prime Minister Mesmin welcomed Ambassador Heep and his staff 'as the representatives of the Rotian Union in Adaria'. From 2002 to 2006, Adaria levied no property taxes on the RU Legation.

Adaria's Implementation of the AAA

Adaria chose to repay foreign debts by raising *ad valorem* taxes in every sector. It auctioned several State owned enterprises. Adarmoire, the State-owned furniture company, was purchased by Bobboman, Inc., a private corporation based in Bobbia. Newly privatised companies cancelled supply contracts from Sophian businesses and eliminated price discounts for Sophians. In addition, government support payments for small businesses were eliminated. These measures forced many Sophian handicraft collectives and farmers to cease operations. Unfortunately, new measures aiming to alleviate the Sophians' hardship failed. Adarian politicians, Sophians and NGOs criticised the government's manner of implementing the AAA.

On 20 October 2005, RU auditors concluded that Adaria had met the three express conditions of the AAA. The President of the RU Commission urged the Council to approve Adaria's admission. On 24 November 2005, the Council unanimously denied Adaria's application, stating that such 'mistreatment of a minority population' was 'inconsistent with membership' in the RU.

Adaria's investigation of the RU Legation

On 15 December 2005, Prime Minister Mesmin announced an investigation into political contributions made by the RU Legation in violation of the Adarian Criminal Code. Ambassador Heep was subpoenaed and directed to surrender all bank records concerning transactions within Adaria. Ambassador Heep refused, declaring that 'international law recognises the inviolability of the Rotian Union Legation and its archives, as well as my person'. Ambassador Heep was arrested and detained.

On 17 December 2005, a warrant was issued and the subpoenaed records seized. A summary of their contents was released to the international media. President Kinga sent a diplomatic note to Prime Minister Mesmin, protesting Adaria's 'violation of its diplomatic mission'. Prime Minister Mesmin denied that the RU office had diplomatic status and insisted that Mr Heep was a 'private citizen'.

On 25 October 2006, the Adarian Taxation Ministry informed the RU Commission that it owed 30 million Rotos in back property taxes, citing abuse of its status as 'a tax-exempt not-for-profit organisation.'

The National Industry Act

Adaria passed the National Industry Act ['NIA'] on 19 December 2005. This forbade the purchasers of formerly State-owned enterprises from repatriating any of the businesses' assets, directly or indirectly, to RU Member States. Prime Minister Mesmin described the NIA as 'protection against capital flight'.

The CEO of Bobboman, Inc, purchaser of Adarmoire, characterised it as 'tantamount to expropriation' and reiterated earlier statements that the company's value lay in its integration into Bobboman's corporate structure. Bobboman's litigation in the Adaria Supreme Court failed.

***

Adaria and the five Respondents now submit their claims and counterclaims to the International Court of Justice. The Respondents jointly declared that they would present their submissions 'through common counsel in the name of the Rotian Union' in the interests of 'judicial efficiency'.

Adaria and the five Respondents are founding members of the United Nations. All six States have ratified, prior to 1990, the Vienna Convention on the Law of Treaties (1969), the Vienna Convention on Diplomatic Relations (1961), the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), and the International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR) (1966).

SUMMARY OF PLEADINGS

Declaration A

The denial of Adaria's application to join the RU did not breach any international legal obligations owed by the Respondents to Adaria. Adaria was only *eligible for*, not *entitled to*, membership of the RU upon satisfaction of the conditions in the AAA. The Respondents retained discretion to refuse Adaria's application. The exercise of that discretion did not breach any rules of customary international law. No conduct of the Respondents precluded them from exercising their discretionary rights.

Alternatively, any obligation to admit Adaria to membership was not owed by the Respondents. The RU entered the AAA as a separate international legal person. The Respondents did not consent to incur any obligations under that treaty.

The Respondents are not responsible for any violation of obligations owed by the RU, since the RU is not their agent and they have not accepted such responsibility. Moreover, a finding of responsibility on the part of the Respondents is not open to this Court since the issue does not arise from the declaration sought.

Declaration B

The Respondents have standing to bring a claim for the Applicant's actions with respect to the RU Legation, its property and Ambassador Heep. The Respondents have a sufficient legal interest in the violation of the immunity of the RU Legation because, first, Adaria owed obligations directly to them, or because special circumstances allow them to bring a claim for breach of obligations owed solely to the RU.

Secondly, properly construed, the AAA obliged Adaria to respect the immunity of the RU Legation. If the RU does not have international legal personality, the

Respondents were owed the obligations directly as they are parties to the AAA. If the Respondents were not parties, they nevertheless have standing to sue as the parties to the AAA intended to accord them such a right.

Thirdly, the Respondents were directly owed obligations under customary international law because: (a) the observance of diplomatic immunity is an obligation *erga omnes*; or (b) the RU Legation was jointly accredited by all of the Respondents.

Fourthly, the Respondents have standing to bring a claim on behalf of the RU because the policy considerations justifying a restrictive interpretation of standing do not apply. The fact that the RU itself is incapable of bringing the claim, and that the Respondents are bringing the claim collectively, neutralises concerns about repetitious and vexatious suits impeding the efficient administration of justice.

Declaration C

The Applicant violated international law concerning the immunity of diplomatic missions by seizing the premises, property and personnel of the RU Legation. First, the RU has the necessary international legal personality and capacity under its constituent instrument to send diplomatic missions.

Secondly, the RU Legation is entitled to the same immunities as State diplomatic missions, either because: (a) the AAA, and conduct subsequent to its conclusion, conferred such immunities; or (b) the RU Legation was entitled to such immunities at customary international law. The requirements necessary for immunities to attach to diplomatic missions were satisfied.

Finally, if the RU Legation is not entitled to full diplomatic immunity, it is at least entitled at customary international law to the immunities necessary for the fulfilment of its functions; that is, immunities for official acts of personnel and official uses of property and premises. The alleged breach of s17-1031 of the Adarian Criminal Code fell within the scope of either standard of immunity because the making of donations to pro-RU candidates related to the purposes of the RU.

Declaration D

The NIA constituted an illegal expropriation of the property rights of RU nationals in Adarmoire and the other privatised concerns ['Adarian enterprises'] under international law. The property rights are the effective use, control and benefit of the Adarian enterprises. The restrictions placed on those rights by the NIA constitute expropriation. The regulatory form of the NIA does not excuse it from being expropriation because its effect on those rights is determinative.

The expropriation is unlawful since it is discriminatory, was not enacted for a public purpose, and no compensation was paid. There are no circumstances which preclude the wrongfulness of Adaria's conduct because the NIA was neither necessary nor justifiable as a countermeasure.

Pleadings

A. THE DENIAL OF ADARIA'S APPLICATION TO JOIN THE RU DID NOT BREACH ANY INTERNATIONAL LEGAL OBLIGATIONS OWED BY RESPONDENTS TO ADARIA

The Respondents exercised discretion to deny Adaria's application to the RU. Two questions arise. First, was the exercise of such discretion was permitted under the AAA, and not precluded by the Respondents' previous conduct. Secondly, if the answer to either of these is 'no', was the obligation to admit Adaria owed by the RU as a separate legal person, or by the Respondents.

I. There was no obligation to admit Adaria to the RU upon satisfaction of the three requirements

(i) The Council retained discretion under the AAA to deny Adaria's application

It is a rule of customary international law that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.[1] These principles have been codified in VCLT,[2] to which

[1] Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)(Jurisdiction and Admissibility) [1995] ICJ Rep 6, 18.

[2] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 115 UNTS 331, art 31 (in force 27 January 1980) ['VCLT'].

the Applicant and Respondents are parties,[3] and VCLTSIO,[4] to which they are signatories.[5]

The ordinary meaning of Article 1 AAA in its context does not entitle Adaria to membership. First, Adaria is described as being 'eligible' for admission upon satisfaction of the three conditions. The primary meaning of 'eligible' is 'fit or proper to be chosen; acceptable',[6] not 'entitled'. Had the parties intended that Adaria be entitled immediately upon satisfaction of the conditions laid down, they could have so provided.

Secondly, and critically, 'admission' is expressly qualified as 'pursuant to' the further process of consideration in Article 11(6) TRU. Article 11(6) is permissive, not proscriptive: it only requires the Council to 'consider' an application, which it 'may approve'. It does not confine this exercise of discretion to any particular subject matter.[7] As was noted in the Joint Dissenting Opinion in the *Admissions* case, with reference to the phrase 'may admit', '[l]anguage more discretionary, more permissive...would be difficult to find'.[8] Unlike the UN, the RU is not an open organisation. It is not a 'mere

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[3] *Compromis*, [40].

[4] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, opened for signature 21 March 1986, UN Doc.A/CONF.129/15, art 31 (not yet in force) ['VCLTSIO'].

[5] *Compromis*, [40].

[6] *Shorter Oxford English Dictionary* (5th ed., 2003), 'eligible, adj.', 807 ['OED'].

[7] *Cf.* Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Advisory Opinion) [1960] ICJ Rep 150, 160.

[8] Conditions of Admission of a State to Membership in the United Nations (Advisory Opinion) [1948] ICJ Rep 57, 89 ['Admissions'].

piece of procedural machinery'.[9] The RU Council is a political organ, entitled to make political decisions concerning membership. Had the parties meant 'entitled', they would not have included this provision. Moreover, the AAA did not define the means by which Adaria should implement the conditions. This omission necessarily reserved to the Council discretion to deny Adaria's application if the means it chose were inconsistent with RU values, expressed in the TRU, such as human rights.[10]

Thirdly, the ordinary meaning of 'conditions' in Article 1 AAA in this context requires an interpretation that preserves the Respondents' discretion to deny Adaria's application. They are not described as being exhaustive. A condition is merely 'that on which anything else is contingent; a prerequisite'.[11] Since the conditions only make Adaria eligible, not entitled to membership, they must be non-exhaustive.

This interpretation is supported by the object and purpose of the AAA. The purpose of the AAA was to inform Adaria of those prerequisites which would 'facilitate' Adarian accession (Article 1). It is merely programmatic. Whilst successful integration was expressed to be a desire of the parties,[12] like similar phrases in the Turkish/EC pre-

[9] Admissions, above n8, 85; Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion) [1950] ICJ Rep 4, 9.

[10] TRU, preamble, art 2.

[11] OED, above n6, 'condition, n.', 480.

[12] AAA, preamble.

accession agreements,[13] it is in such aspirational and general terms as not to generate legal rights and obligations.[14]

(ii) *No customary international law obligations regarding the exercise of discretion were violated*

There are no limitations in international law on how States can act unless an express customary or conventional international law rule so provides.[15] Other than, potentially, the rule of good faith, no customary rules limit the exercise of States' voting discretion in an international organisation.[16]

The denial of Adaria's application on the basis of its categorical dispossession of Sophians was done in good faith. Since the AAA expressly references the TRU, Adaria was on notice that human rights considerations, as provided in the preamble to the TRU, are an element of any RU action. Adaria's failed attempt to institute a public works program[17] demonstrates its awareness that Sophian treatment, given its obligations to protect minorities under Article 27 ICCPR, binding on the parties, would be relevant to its application.

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[13] Agreement Establishing an Association between the European Economic Community and Turkey, opened for signature 12 September 1963, OJ No. L 217, 3687 (in force 1 December 1964).

[14] Yedaş Tarim v Council & Commission (T-367/03) 30 March 2006 (Court of First Instance (Fifth Chamber) of the European Communities), [42]; Demirel v Stadt Schwäbisch. Gmünd, [1987] ECR 3719, [23]. *Cf.* Oil Platforms (Iran v USA)(Preliminary Objections) [1996] ICJ Rep 803, 820.

[15] Lotus Case (France v Turkey)(Judgment) [1927] PCIJ (ser A) No.10, 19; Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 238; Admissions, above n8, 86.

[16] Admissions, above n8, 85.

[17] *Compromis*, [23].

(iii) The Respondents' conduct does not preclude them from exercising their discretion to refuse Adaria's application

A State is only precluded from asserting its legal rights before this Court if by its acts, declarations or acquiescence it 'had consistently made it fully clear' that it would not do so, and another State relied upon this to its detriment.[18] The doctrine of preclusion does not apply here. The Respondents never represented to Adaria that they had or would waive their rights of discretion. Adaria cannot impute to the Respondents' silence on the mistreatment of Sophians that they agreed with it.

II. Further and in the alternative, the Respondents do not themselves owe any treaty obligations to Adaria under the AAA

(i) The Respondents do not owe obligations under the AAA because the RU concluded it as a separate legal person and they did not consent to be bound by it

(a) The RU, as a separate legal person, owed the obligations under the AAA

The obligations under the AAA are not owed by the Respondents because they are not parties to the AAA. The AAA was signed by the RU and ratified by its Council.[19] If an organisation has separate legal personality from its members, the member States are not parties to a treaty concluded by it.[20]

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[18] The Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) [1998] ICJ Rep 275, 303. *Cf.* The Temple of Preah Vihear (Thailand v Cambodia) [1962] ICJ Rep 6, 62 (Separate Opinion, Judge Fitzmaurice).

[19] *Compromis*, [16].

[20] SANDS and KLEIN, *Bowett's Law of International Institutions* (5th ed., 2001) 469 ['BOWETT']; HIGGINS, 'The legal consequences for member States of the non-fulfilment by international organizations of their obligations towards third parties' (1995) 66(I) *YbIIL* 249, 378; CASSESE, *International Law* (2nd ed., 2005) 136.

The RU is an international legal person. International legal personality is the capacity to bear rights and obligations as a subject of international law.[21] The test for international legal personality of international organisations is twofold.[22] First, whether its members intended to create an autonomous body capable of occupying 'a position in certain respects in detachment from its members'.[23] Secondly, whether the organisation in fact exercises autonomous powers and functions which can only be explained by the possession of international legal personality.

The Respondents intended to create the RU as an autonomous body through the TRU. First, the lack of an express provision for international legal personality does not vitiate this intention.[24] Secondly, the TRU provides the RU with personality by necessary implication in a number of ways. The RU has the power to bind Member States against their will because union law is initiated by an independent Commission and approved by majority vote.[25] Its decisions have direct effect within the domestic legal systems of its Members and overrule any conflicting domestic law.[26] It judicially

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[21] Reparation for Injuries Suffered in the Service of the United Nations [1949] ICJ Rep 174, 179 ['Reparations'].

[22] Reparations, above n21, 179; Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) [1996] ICJ Rep 66, 75 ['Nuclear Weapons']; CASSESE, above n20, 137.

[23] Reparations, above n21, 179.

[24] SCHERMERS and BLOKKER, *International Institutional Law* (4th ed., 2005) 988 ['SCHERMERS']; CASSESE, above n20, 137.

[25] TRU, art 8.

[26] TRU, art 8(4).

enforces its decisions against dissenting member States.[27] Unlike the EU,[28] when the RU enters into a treaty, it has immediate effect as if it is a decision of the corresponding domestic organ.[29] Additionally, where a treaty is ambiguous, recourse may be had to its *travaux préparatoires* as a supplementary means of interpretation.[30] The TRU *travaux* confirms that, at the time of its formation, the Respondents 'intended to vest the RU with a great deal of autonomy and authority'.[31]

The RU in fact exercises autonomous powers and functions independently of its Member States that can only be explained by the possession of personality. It is a member of the WTO,[32] and enters into agreements with non-member States[33] on matters binding on its Member States. Since recognition of personality need not be express,[34] even Adaria has recognised the international personality of the RU by entering into the AAA.

(b) The Respondents did not give any or sufficient consent to be bound by the AAA

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[27] *Compromis*, [8].

[28] See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, opened for signature 2 October 1997, [1997] OJ C.340, 173, art 24 (in force 1 May 1999).

[29] *Compromis*, [7].

[30] VCLT, above n2, art 32.

[31] *Compromis*, [6].

[32] *Compromis*, [9].

[33] *Compromis*, [12].

[34] SCHERMERS, above n24, 990-991.

It is a rule of customary international law evidenced by widespread and virtually uniform State practice,[35] supported by international tribunals[36] and eminent publicists,[37] that a treaty does not create obligations for a State not party without its express, written consent. This rule is codified in Article 35 VCLT, for treaties between States, which the parties have ratified, and Article 35 VCLTSIO for treaties between States and international organisations, which the parties have signed. The Respondents did not expressly consent in writing to owe obligations to Adaria under the AAA.

In addition, there is no rule of customary international law which establishes any circumstances other than express consent by which member States can incur obligations under treaties between their organisation and non-members.[38] First, even when final draft Article 36*bis* VCLTSIO was proposed as such a rule, it was not adopted after significant

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[35] E.g., *Austria*, *Hungary*, *France*, *Germany*, *Great Britain*, *Italy*, *the Netherlands*, *Russia*, *Spain*: 1888 Convention Respecting Free Navigation of the Suez Canal 79 BFSP 18; *US*: United States Secretary of State statement, 1924, 5 *Hackworth* 222; *Switzerland*: Treaty of Peace between the Allied and Associated Powers, signed at Versailles, in force 28 June 1919.

[36] Free Zones of Upper Savoy and the District of Gex [1932] PCIJ (ser A/B) No. 46, 147-148 ['Free Zones'].

[37] Draft Articles on the Law of Treaties with Commentaries, Report of the ILC, Eighteenth Session, UN GAOR, 21st sess., Supp.No.9, UN Doc.A/CN.4/191 (1966) 227 ['1966 Draft VCLT']; Draft Articles on the Law of Treaties Between States and International Organizations or Between International Organizations with Commentaries, Report of the ILC, Thirty-Fourth Session, UN GAOR, 37th sess., Supp.No.10, UN Doc.A/37/10, (1982) 42 ['1982 Draft VCLTSIO']; REUTER, Tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations by the Special Rapporteur, [1981] *YbILC*, vol.II(1), UN Doc.A/CN.4/341, 69 ['Tenth report']; MCNAIR, *Law of Treaties* (1961) 309ff.

[38] ILC, Responsibility of international organizations: Comments and observations received from international organizations, Fifty-Sixth Session, UN Doc.A/CN/4/545 (25 June 2004) 24.

opposition by States.[39] In any case, consistent with the practice of other international organisations such as the EC,[40] if Adaria and the RU had intended to bind the Respondents, they could and would have entered into a mixed agreement, including the Respondents as parties.

(ii) The Respondents cannot be held responsible for the RU's violation of any obligations

When States refer a dispute to this Court, its jurisdiction is confined to the legal issues arising from the declarations sought in their special agreement.[41] Under Declaration A, this Court may only determine whether the Respondents have violated international legal obligations they owed to Adaria, and not any responsibility of the Respondents for any wrongful conduct of the RU.

In any event, it is a rule of customary international law evidenced by widespread and virtually uniform State practice,[42] and supported by eminent publicists,[43] that

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[39] Draft report of the Committee of the Whole: United Nations Conference on the Law of Treaties between States and international organisations or between organisations, Vienna, 17 March 2006, UN Doc.A/CONF.129/C.1/L.74/Add.3 ['VCLTSIO Conference'].

[40] O'KEEFE and SCHERMERS (eds.), *Mixed Agreements* (1983) *passim*; REUTER, Sixth report on the question of treaties concluded between States and international organizations or between two or more international organizations by the Special Rapporteur, [1977] *YbILC* vol.II(1), UN Doc.A/CN.4/298, 126 ['Sixth report'].

[41] Statute of the International Court of Justice, art 36(1); BROWNLIE, *Principles of Public International Law* (6th ed., 2001) 680; Anglo-Iranian Oil Co. Case (United Kingdom v Iran)(Preliminary Objections) [1952] ICJ Rep 89, 102-103.

[42] *England*: Maclaine Watson & Co. Ltd v Department of Trade and Industry, [1988] 3 All E.R. 257 (Court of Appeal) ['Maclaine Watson']; *Switzerland*: Arab Organisation for Industrialization v Westland Helicopters, 80 ILR 622, 643 (Federal Supreme Court); *Germany*: Entscheidungen des Bundesgerichtshofs in Zivilsachen (1994) 125 BHGZ 27 (Federal Court of Justice); *Australia*, *Japan*, *Malaysia*, *Nigeria*, *Thailand*: pleadings in

Member States are not responsible for the wrongful conduct of an organisation having separate legal personality. Responsibility is excluded even if the impugned conduct is that of organs comprised of member States' representatives.[44] The only exceptions to this rule are where the organisation acts as agent of its members,[45] or where the members expressly accept responsibility, either in the organisation's constituent instrument or otherwise.[46] Neither of these apply.

No agency: The RU is not the agent of the Respondents. The presumption is that international organisations do not act as agents for their Member States.[47] Agency is not established in the constituent instrument merely by the nature of the organisation's normal voting procedures,[48] because no personal mandate is intended simply by affirmative vote. In each case, it is the act of a Member as such, not as a principal.

No acceptance: The Respondents have not expressly accepted responsibility, whether in the TRU or in a representation regarding Adarian accession. The Respondents

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J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, 463 (House of Lords, England).

[43] HIGGINS, above n20, 415; Draft articles on responsibility of international organizations, Report of the ILC, Fifty-Eighth Session, UN GAOR, 61st sess., Supp.No.10, UN Doc.A/61/10 (2006) 279-281 ['ILC IO Responsibility'].

[44] HIGGINS, above n20, 412.

[45] ILC IO Responsibility, above n43, 288-291.

[46] Convention on International Liability for Damage Caused by Space Objects, opened for signature 29 March 1972, 961 UNTS 187, arts 2-3 (in force 1 September 1972); AMERASINGHE, 'Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent' (1991) 85 *AJIL* 259, 277-278.

[47] HIGGINS, above n20, 411-412.

[48] HIGGINS, above n20, 412; ILC IO Responsibility, above n43, 281; Maclaine Watson, above n42.

do not bear responsibility for the conduct of the RU by virtue only of their RU membership and participation in the Council.

B. THE RESPONDENTS MAY PROPERLY BRING A CLAIM FOR THE APPLICANT'S ACTIONS WITH RESPECT TO THE ROTIAN UNION LEGATION, ITS PROPERTY, AND AMBASSADOR HEEP

A party must have standing to make a claim before this Court. Standing requires only a sufficient legal interest in the obligation forming the basis of the claim.[49] The Respondents' claim for Declaration C concerning the Applicant's conduct with respect to the RU Legation, its property, and Ambassador Heep. That Declaration is founded on Adaria's breach of its obligation to afford diplomatic immunity to the RU Legation. The question for the Court is whether the Respondents have standing to claim based on either: (a) treaty obligations owed directly to them (under the AAA); (b) customary international law obligations owed directly to them; or (c) if the obligations are owed solely to the RU, any special circumstances justifying the Respondents' standing before the Court.

I. The Respondents have standing to sue because obligations were directly owed to them under the AAA

(i) Properly construed, the AAA obliged Adaria to respect the immunity of the RU Legation

The AAA established the RU Legation to aid in the 'diplomatic aspects' of Adarian integration. Article 3 AAA provides that the 'privileges and immunities of the RU Delegation shall be governed by international law'. The use of these words evinces an intention by both parties that Adaria would accord diplomatic privileges and immunities

[49] South West Africa (Ethiopia v South Africa; Liberia v South Africa)(Second Phase) [1966] ICJ Rep 6, 22 ['South West Africa']; Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)(Second Phase) [1970] ICJ Rep 3, 36 ['Barcelona Traction']; Northern Cameroons (Cameroon v UK)(Preliminary Objections) [1963] ICJ Rep 15, 33-34 ['Northern Cameroons']; SS Wimbledon (Question of Intervention by Poland) [1923] PCIJ (ser A) No 1, 14.

to the RU Legation. This interpretation is confirmed by the subsequent practice[50] of the parties in the application of the AAA. When Ambassador Heep, as Chief of the RU Legation, arrived in Adaria, he was welcomed at an official dinner at which he presented his credentials, a long-standing diplomatic practice,[51] to Prime Minister Mesmin. Further, throughout its three years in Adaria, the representative office referred to itself as a 'Legation',[52] a term historically used to describe diplomatic missions,[53] and Adaria dealt with it as such. Finally, throughout the same period, Adaria did not levy taxes on the RU Legation. Diplomatic missions are exempt from taxes under Article 23 VCDR. This further conduct reinforces the interpretation that Adaria was obliged under the AAA to afford immunities and privileges to the RU Legation.

(ii) The Respondents can sue for a breach of obligations owed under the AAA because they were parties to it

If the Court finds against the Respondents on their primary submission that the RU has separate legal personality, then the Respondents would have standing to sue as parties to the AAA. Anything purportedly done by an organisation without personality is in fact jointly done by its member States.[54] Consequently, when the RU Council ratified the AAA, this took effect as ratification by each Member State.

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[50] VCLT, above n2, art 31(3)(b).

[51] Vienna Convention on Diplomatic Relations, opened for signature 18 April 1961, 500 UNTS 95, art 13, (in force 24 April 1964) ['VCDR'].

[52] *Compromis*, [18].

[53] DEMBINSKI, *The Modern Law of Diplomacy* (1988) 77.

[54] CASSESE, above n20, 138; HIGGINS, above n20, 378; BOWETT, above n20, 469.

(iii) Alternatively, if the Respondents were not parties to the AAA, they nevertheless have standing to sue for its breach

The Respondents have submitted under Declaration A that there is no rule of customary international law that member States of an international organisation may incur obligations under treaties entered into by that organisation [above s.A(II)(i)(b)]. Such a rule was proposed by the ILC in the drafting of VCLTSIO (draft Article 36*bis*), but was rejected after widespread criticism.[55] This provision established the same test for both rights and obligations – that is, they arise for member States where the organisation's constituent instrument provides that member States are bound by treaties entered into by the organisation.

If the Court finds against the Respondents on this point, and holds: (a) that 36*bis* codifies a rule of custom; and (b) that the Respondents are bound by treaties entered into by the RU, then the Respondents would have standing to sue for breach of the AAA.

In that case, the Respondents submit that it is a rule of customary international law that rights arise for a third party under a treaty where the parties intend to accord such a right and the third State assents thereto.[56] This rule was codified in Article 36 VCLTSIO. The consent of the third party to such rights is presumed,[57] as opposed to obligations, for which express consent in writing is required [above s.A(II)(i)(b)]. Adaria and the RU intended to accord the Respondents the right to sue for breach of the AAA. This is necessarily to be inferred since: (a) the parties knew that the RU could not appear before

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[55] VCLTSIO Conference, above n39.

[56] Free Zones, above n36, 147-148; 1966 Draft VCLT, above n37, 228; 1982 Draft VCLTSIO, above n37, 42-43.

[57] VCLTSIO, above n4, art 36(1).

any tribunal; (b) the AAA made no other provision for dispute resolution; (c) all of the parties had accepted the compulsory jurisdiction of this Court; and (d) the AAA specified that the diplomatic status of the RU Delegation was governed by international law. This is confirmed by subsequent conduct[58] of Adaria in seeking Declaration A against the Respondents, notwithstanding that they are not parties to the AAA.

II. Alternatively, the Respondents have standing to sue because obligations were directly owed to them under customary international law

(i) The observance of diplomatic immunity is an obligation erga omnes

Obligations *erga omnes* are norms of international law so fundamental that all States have a legal interest in their protection.[59] In the *Tehran Hostages* case, this Court described the observance of diplomatic immunities as 'imperative' and 'fundamental' obligations,[60] echoing the definition of *jus cogens* in the VCLT.[61] Even if not *jus cogens*, immunity is at least an obligation *erga omnes*. Eminent publicists support the view that all States have an interest in upholding the customary regime of diplomatic immunities.[62]

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[58] VCLT, above n2, art 31(3)(b).

[59] Barcelona Traction, above n49, 32.

[60] United States Diplomatic and Consular Staff in Tehran (US v Iran)(Provisional Measures) [1979] ICJ Rep 3, 19-20 ['Tehran Hostages (Provisional Measures)'].

[61] VCLT, above n2, art 53.

[62] Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the ILC, Fifty-Third Session, UN GAOR, 56th sess., Supp. No. 10, UN Doc.A/56/10 (2001), 298 ['ILC State Responsibility'].

Whilst States invoking doctrines of State responsibility to claim compensation must show that their interests have been specially affected,[63] this is unnecessary where declaratory relief is sought or an order is sought in favour of the injured party.[64]

In any event, as member States of the RU, the Respondents are specially affected States. A party is 'specially affected' if it is affected in a way which distinguishes it from the generality of other States to whom the obligation is owed.[65] First, the purpose of the RU Legation was to facilitate Adarian accession.[66] Since the Respondents will bear the ultimate burden of integrating Adaria into their economic system, they have a special interest in ensuring the effective functioning of the RU Legation. Secondly, the Respondents share competence with the RU in the field of diplomatic relations.[67] Interference with the RU's diplomatic relations specially affects the Respondents.

(ii) The RU Legation was jointly accredited by all of the Respondents

The VCDR, to which Adaria and the Respondents are parties,[68] provides that multiple States may accredit a single diplomat in the absence of objection from the receiving State.[69] The receiving State must consent (*agrément*) to receive the person that the

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[63] ILC State Responsibility, above n62, art 42(b)(i).

[64] ILC State Responsibility, above n62, art 48; MERON, *Human Rights and Humanitarian Norms as Customary Law* (1989) 191; Barcelona Traction, above n49, 32.

[65] ILC State Responsibility, above n62, 300.

[66] AAA, art 3.

[67] *Compromis,* [11]; TRU, art 4(1)(g).

[68] *Compromis*, [40].

[69] VCDR, above n51, art 6.

sending State proposes to accredit.[70] That person's credentials must be presented to the Head of Government of the receiving State.[71]

Adaria's consent to enter into diplomatic relations is evidenced by their conclusion of the AAA. Further, Ambassador Heep presented his credentials to Prime Minister Mesmin, Adaria's Head of Government.[72]

The Respondents have standing to bring this claim whether or not the RU has international legal personality. If the RU has international legal personality, the accreditation by the Respondents is manifest through their unanimous vote to ratify the AAA, which established the RU Legation.[73] An organisation without legal personality is merely the organ of its members.[74] If the RU does not have international legal personality, any accreditation purported to be done by the RU would take effect as joint accreditation by each Member State.

III. Alternatively, the Respondents have standing by virtue of special circumstances recognised under international law

This Court has recognised special circumstances in which a party with an indirect interest in obligations owed to a separate legal person may bring a claim for their breach.[75]

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[70] *Ibid.*, art 4.

[71] *Ibid.*, arts 13-14.

[72] *Compromis*, [18].

[73] TRU, art 5(1)(e).

[74] CASSESE, above n20, 138; HIGGINS, above n20, 378; BOWETT, above n20, 469.

[75] Barcelona Traction, above n49, 39; South West Africa (Ethiopia v South Africa; Liberia v South Africa)(Preliminary Objections) [1962] ICJ Rep 319; East Timor (Portugal v Australia) [1995] ICJ Rep 90, 182.

Whilst standing is typically restricted in order to facilitate the efficient administration of justice, such considerations must be balanced by the need to do substantive justice in each case. Here, the special circumstances are that the RU is incapable of bringing its own claim before this Court, and that the Respondents bring the claim collectively.

(i) The RU is itself incapable of bringing the claim

If this Court denied the Respondents' standing, the breach would go unremedied. In the *Barcelona Traction* case, three judges of this Court held that, where a corporation with a 'legal interest' in a claim was incapable of protecting its interests, the shareholders could bring a claim, notwithstanding the indirect nature of their injury.[76] The Court ultimately rejected the standing of Belgium (the State of nationality of the shareholders) to bring a diplomatic protection claim. The result is distinguishable, as Canada (the State of incorporation) was not *incapable* of bringing the claim, but merely unwilling. Similarly, the European Court of Justice has held that where the EU is incapable of exercising competence, its member States have a duty to act jointly on the EU's behalf.[77] Consequently, the parties with an indirect interest (the Member States) should be permitted to bring the RU's claim.

[76] Barcelona Traction, above n49, 40-41, 72-75 (Separate Opinion, Judge Fitzmaurice), 134 (Separate Opinion, Judge Tanaka), 276 (Separate Opinion, Judge Gros).

[77] Opinion 2/91 (Re ILO Convention 170) [1993] ECR I-1061, [5].

(ii) The Respondents bring the claim collectively

The restriction of standing to those directly interested is designed to prevent repetitious and vexatious claims being brought by parties with mere political or moral interests.[78] In the *South West Africa* case, this Court, influenced by these factors, rejected the standing of Ethiopia and Liberia to bring a claim on behalf of the League of Nations. However, Judge Koretsky affirmed that there was nothing to prevent the members of the League of Nations Council from bringing an action collectively on behalf of the League.[79] No other judge questioned this rule.

Here, the policy has no work to do, and the ordinary rule should be disregarded.

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[78] South West Africa, above n49, 258; Barcelona Traction, above n49, 48-49.

[79] South West Africa, above n49, 246.

C. THE APPLICANT VIOLATED INTERNATIONAL LAW CONCERNING THE IMMUNITY OF DIPLOMATIC MISSIONS BY SEIZING THE PREMISES, PROPERTY AND PERSONNEL OF THE ROTIAN UNION LEGATION

The following submissions proceed upon the assumption that the RU Legation was solely accredited by the RU. The alternative submission that the RU Legation was jointly accredited by the Respondents has been addressed [above s.B(II)(ii)]. Therefore, the questions for the Court are: (a) whether the RU has the necessary international legal personality and capacity to send diplomatic missions; (b) whether the RU Legation is entitled to immunities under international law; and (c) whether these immunities were violated.

I. The RU has the necessary international legal personality and capacity to send diplomatic missions

The RU, as an international legal person, is capable of bearing international rights and obligations in respect of the RU Legation [above s.A(II)(i)(a)]. Unlike States, the international legal personality of international organisations does not automatically confer any rights, obligations or capacities. However, they have all those capacities which are expressly conferred by their constituent instruments, or are necessary for the fulfilment of their functions and purposes.[80]

The TRU grants the RU Commission a broad power to conduct 'the economic, trade and diplomatic relations of the Union with non-Member States'.[81] The capacity to send diplomatic missions is necessary for the fulfilment of this function, since foreign

[80] Reparations, above n21, 180; Nuclear Weapons, above n22, 79; BOWETT, above n20, 473.

[81] TRU, art 4(1)(g).

policy cannot be effectively coordinated without a presence in third States. This interpretation is confirmed by the subsequent conduct of the parties[82] in establishing the RU Legation. In any event, the RU Legation was sent pursuant to a treaty ratified by the RU Council and Adaria, demonstrating the respective conferral of the capacity in this case.

II. The RU Legation is entitled to the same immunities as State diplomatic missions at international law

(i) The AAA, and conduct subsequent to its conclusion, conferred such immunities

Article 3 AAA, interpreted in the light of the parties' 'subsequent practice', conferred diplomatic immunity on the RU Legation [above s.B(I)(ii)].

Alternatively, the AAA, and this subsequent conduct, form a basis for a claim of estoppel. The doctrine of estoppel, as adopted by this Court,[83] precludes one party from resiling from a clear representation where another party has relied on the representation to its detriment.

The 'subsequent practice' of the parties outlined above, including Ambassador Heep's presentation of credentials to Prime Minister Mesmin, the RU's use in Adaria of the term 'Legation', and Adaria's failure to tax the RU Legation, amounted to a representation that Adaria would afford the RU Legation full diplomatic immunity.

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[82] VCLT, above n2, art 31(3)(b).

[83] North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] ICJ Rep 3, 26; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) [1998] ICJ Rep 275, 303; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)(Application to Intervene, Judgment) [1990] ICJ Rep 92, 118.

The Respondents and the RU relied on this representation to their detriment by not concluding a separate host agreement enumerating the immunities of the RU Legation, and by investing resources in the sending of the RU Legation in the belief it was entitled to immunity.

(ii) Alternatively, the RU Legation is entitled, under customary international law, to the same immunities as a diplomatic mission

If the Court finds that the AAA, and the conduct subsequent to its conclusion, did not confer any substantive privileges or immunities on the RU Legation, then Article 3 operates as a mere choice of law clause in favour of international law. In the absence of a convention, the content of these immunities is founded on customary international law.

It is a rule of customary international law, supported by extensive and virtually uniform State practice, that legations of international organisations are entitled to the same immunities as State diplomatic missions under the VCDR.[84] The immunities relevant to the present case include: the absolute inviolability of the premises and

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[84] *France, UK, Jordan, Cyprus*: The Practice of the United Nations, the Specialised Agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat, [1967] *YbILC* vol.II, UN Doc A/CN.4/L.118 and Add.1-2 154, 281; *Indonesia*: 'Exchange of Letters concerning the Privileges and Immunities of the United Nations Commission for Indonesia, between the Prime Minister of Indonesia and the Principal Secretary of the Commission, 23 May 1950' *Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organisations*, United Nations Legislative Series (1959) Vol.1, ST/LEG/SER B/10, 239; *Germany*: ESOC Official Immunity Case 73 *ILR* 683 (Federal Labour Court); *Nigeria*: Diplomatic Immunities and Privileges Act (1962); *Japan*: Agreement on the Establishment and the Privileges and Immunities of the Delegation of the Commission of the European Communities (Japan – EEC/ECSC/Euratom), opened for signature 11 March 1974, 1002 UNTS 222, art 3 (in force 31 May 1974); *Switzerland*: ZM v Permanent Delegation of the League of Arab States to the United Nations 116 *ILR* 643, 648 (Labour Court of Geneva); Constitution of the Food and Agriculture Organisation, art XV(2).

property of the mission,[85] the inviolability of archives,[86] the absolute inviolability of diplomatic agents from arrest or detention,[87] and the immunity of diplomatic agents from the criminal jurisdiction of the receiving State.[88] These are hereinafter referred to as 'diplomatic immunity'.

In the context of diplomatic relations among States, for customary immunities to attach to any representative the procedures of accreditation and *agrément* must be observed.[89] There is no general convention requiring this procedure for missions of international organisations. Nevertheless, the requirements have been satisfied here [above s.B(II)(ii)].

III. Alternatively, if the RU Legation is not entitled to full diplomatic immunity, it is at least entitled to the immunities necessary for the fulfilment of its functions

It is a rule of customary international law, evidenced by extensive and virtually uniform State practice,[90] and supported by the writings of eminent publicists,[91] that international

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[85] VCDR, above n51, art 22.

[86] *Ibid.*, art 24.

[87] *Ibid.*, art 29.

[88] *Ibid.*, art 31.

[89] *Ibid.*, arts 4-5.

[90] *US*: Restatement of the Law (Third)(Foreign Relations Law) (1987) §223(b) ['Restatement']; *Netherlands*: Iran-US Claims Tribunal v AS 94 *ILR* 321 (Hooge Raad); *Austria*: Law on the Granting of Privileges and Immunities to International Organizations (1977), art 1(2); *Italy*: Porru v Food and Agriculture Organisation 71 *ILR* 240, 241 (Rome Court of First Instance); *Egypt*: World Health Organisation and Egypt: Agreement (with exchange of letters) for the purpose of determining the privileges, immunities and facilities to be granted in Egypt by the Government to the Organisation, to the representatives of its Members and to its experts and officials, opened for signature 25 March 1951, 223 UNTS 86, art III(3) (in force 8 August 1951).

organisations are at least entitled to those immunities necessary for the fulfilment of their functions. Domestic legislation and a pattern of widely-ratified treaties governing the privileges and immunities of various international organisations consistently provide that the property and premises of mission are inviolable[92] and their personnel are immune from legal process, including jurisdiction and measures of execution, with respect to all acts performed in their official capacity.[93] These are hereinafter referred to as 'functional immunity'. Such immunities are necessary for international organisations to conduct themselves independently of host State interference.

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[91] BROWNLIE, above n41, 652; JENKS, *International Immunities* (1961) 114-121; AMERASINGHE, *Principles of the Institutional Law of International Organisations* (2nd ed., 1996) 341.

[92] Convention on the Privileges and Immunities of the United Nations, opened for signature 13 February 1946, 1 UNTS 15, s3, (in force 17 September 1946) ['UN General Convention']; Convention on the Privileges and Immunities of the Specialized Agencies, opened for signature 21 November 1947, 33 UNTS 261, s5 (in force 2 December 1948) ['Specialized Agencies Convention']; Agreement on the Privileges and Immunities of the International Atomic Energy Agency, opened for signature 1 July 1959, 374 UNTS 147, s4 ['IAEA Agreement']; Agreement on Privileges and Immunities of the Organization of American States, opened for signature 15 May 1949, 1438 UNTS 83, art 3 (in force 4 June 1951) ['OAS Agreement']; General Convention on the Privileges and Immunities of the Organization of African Unity, opened for signature 25 October 1965, 1000 UNTS 393, art II(2), (in force 25 October 1965) ['OAU Convention']; Supplementary Protocol No. 1 to the Convention for European Economic Co-operation on the Legal Capacity, Privileges and Immunities of the Organisation, opened for signature 16 April 1948, 888 UNTS 141, art 34 (in force 28 July 1948) ['OECD Protocol']; Protocol on the Privileges and Immunities of the European Communities, opened for signature 8 April 1965, 1348 UNTS 80, art 1 (in force 1 July 1967) ['EC Protocol']; *US*: International Organisations Immunities Act (1952) s2.

[93] UN General Convention, above n92, s18; Specialized Agencies Convention, above n92, s19(a); IAEA Agreement, above n92, art 18(a)(i); OAS Agreement, above n92, art 10; OAU Convention, above n92, art VI(2); OECD Protocol, above n92, arts 14-15; EC Protocol, above n92, art 12(a); *Ghana*: Diplomatic Immunities and Privileges Order (No. 2) (1956) art 2; *US*: International Organisations Immunities Act (1952) s7(b); *UK*: Diplomatic Privileges (Extension) Act 1944 art 8; *New Zealand*: Diplomatic Immunities and Privileges Act (1957) No 21 First Schedule.

IV. Adaria's actions violated the immunity of the premises, property and personnel of the RU Legation

Obligations to respect the immunity of diplomatic personnel are '*essential*, *unqualified*, and *inherent* in their representative character and...function'.[94] States are bound to respect their freedom from arrest or prosecution. The regime of immunities admits of no discretion. To maintain otherwise would give States a license for abuse.

(i) Adaria has breached the inviolability of the premises and property of the RU Legation

Applying either diplomatic or functional immunity, the premises and property of the RU Legation are absolutely inviolable. Adaria's entry onto the premises, without Ambassador Heep's express consent, breached the inviolability of the RU Legation. The seizure of bank records constitutes a breach of the inviolability of the RU's property.

(ii) Adaria has breached the immunity of Ambassador Heep

Applying the standard of diplomatic immunity, diplomatic agents are inviolable, and are not liable to any form of arrest or detention.[95] They are immune from the criminal jurisdiction of the receiving State.[96] The arrest and detention of Ambassador Heep breaches his right to inviolability and immunity from criminal jurisdiction.

Applying the standard of functional immunity, officials of an international organisation are immune from legal process for acts performed in their official capacity. This includes immunity from both jurisdiction and measures of execution. Adaria's arrest

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[94] Tehran Hostages (Provisional Measures), above n60, 19 (emphasis added).

[95] VCDR, above n51, art 29.

[96] *Ibid.*, art 31.

and detention of Ambassador Heep would violate his immunity from legal process only if his alleged acts were performed in his official capacity.

Acts performed in an official capacity are those that relate to the accomplishment of the purposes of the international organisation.[97] The purpose of the RU Legation was to 'aid in the diplomatic and economic aspects of Adarian integration into the RU'.[98] The donations *allegedly* made to Adarian political candidates[99] related to the purposes of the RU since they provided support for pro-RU candidates at a time when the merits of integration into the RU were being challenged by the Adarian public.[100]

(iii) Interference in internal affairs, if proven, would not divest the RU Legation of its immunities under international law

Article 41(1) of the VCDR provides that diplomats shall not interfere in the internal affairs of the receiving State. If, *in arguendo*, this same obligation applies to officials of international organisations, and the alleged breach of s17-1031 did constitute an 'illegal interference...into the domestic politics of Adaria',[101] it is no justification for Adaria's actions. In the *Tehran Hostages* case, this Court rejected a contention by Iran that the

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[97] GONZALES, Sixth Report on relations between States and international organizations (second part of the topic), (1991) *YbILC*, Vol.II(1) UN Doc.A/CN.4/439, 123, art 22; Council of Europe, Council of Ministers Resolution 69(29), Annex, Report of the Subcommittee on Privileges and Immunities of International Organisations (26 September 1969), 35.

[98] AAA, art 3.

[99] *Compromis*, [32].

[100] *Compromis*, [24].

[101] *Compromis*, [30].

CIA's interference in its internal politics justified its failure to protect the US diplomatic mission.[102]

Further, there is no right of countermeasures for breaches of the VCDR.[103] The VCDR is a 'self-contained regime'[104] and provides a sufficient sanction in the form of a declaration of *persona non grata*[105] in the case of such interference. The proper course of conduct would have been simply for Adaria to request the RU to recall Ambassador Heep.

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[102] United States Diplomatic and Consular Staff in Tehran (US v Iran) [1980] ICJ Rep 3, 38, 40 ['Tehran Hostages'].

[103] HIGGINS 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' (1985) 79 *AJIL* 641, 646; Foreign Affairs Committee, Abuse of Diplomatic Immunities and Privileges (1984-85), House of Commons, Paper 127, xxix; ILC, Record of 456th Meeting, *YbILC* (1958) Vol I, 129, 129-30.

[104] Tehran Hostages, above n102, 38.

[105] VCDR, above n51, art 9.

D. THE ADARIAN NATIONAL INDUSTRY ACT CONSTITUTES AN ILLEGAL EXPROPRIATION OF ADARMOIRE AND THE OTHER PRIVATIZED CONCERNS UNDER INTERNATIONAL LAW

International law recognises that the national State of shareholders may claim on their behalf where their property rights as shareholders have been unlawfully expropriated. Expropriation of alien property is the compulsory taking by a State of the private property of foreigners.[106] It is unlawful if: (a) it is not compensated; or (b) it is compensated but done for impermissible purposes.

RU investors own formerly State-owned Adarian enterprises which were privatised.[107] The NIA, passed shortly after the RU's refusal of Adaria's application for membership, prevents those investors, as shareholders in those enterprises, from 'repatriating any of the businesses' assets, directly or indirectly, to the RU Member States'.[108] Although framed as regulation, the question for this Court is whether the NIA's restrictions on RU investors exercising their rights as owners of the Adarian enterprises nevertheless constitutes unlawful expropriation of their property under international law.

The Declarations sought by the parties do not raise any question of admissibility based on exhaustion of local remedies.[109] In any event, these have been exhausted by the

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[106] HIGGINS, 'The Taking of Property by the State: Recent Developments in International Law', 176 *Recueil des Cours* 263 (1982-III), 267.

[107] *Compromis*, [19]-[20].

[108] *Compromis*, [35].

[109] Ambatielos Arbitration (1956) RIAA XII, 83.

Bobboman, Inc. litigation, and the 'obviously futile'[110] prospects of further litigation by other investors in Adarian courts.[111]

I. The NIA injures the property rights of RU nationals

A State has standing to assert the claim of its injured nationals before this Court where another State causes direct injury to their rights as shareholders.[112]

The Respondents do not claim for losses suffered directly by the Adarian enterprises themselves since those injuries are to companies of Adarian nationality. However, as the State of nationality of the RU investors, the Respondents claim for losses suffered, because of the NIA, to their rights as owners of the Adarian enterprises. Under the international law of expropriation, property includes not only the ownership of property, such as a share in a company, but also the effective use, control and benefit of such assets.[113]

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[110] Panevezys-Saldutiskis Railway [1939] PCIJ (ser A/B) No.76, 18.

[111] See *Compromis*, [36]; *Clarifications*, [9].

[112] Barcelona Traction, above n49, 33-34; Diplomatic Protection, Report of the ILC, Fifty-Sixth Session, UN GAOR, 59th sess., Supp No.10, UN Doc.A/59/10 (2004) 20.

[113] HIGGINS, above n106, 267; Certain German Interests in Polish Upper Silesia (Germany v Poland) [1926] PCIJ (ser A) No.7, 44 ['Chorzów Factory'].

II. The deprival of the RU investors' effective use, control and benefit of the Adarian enterprises constitutes an expropriatory taking of property

(i) The NIA is a taking of the RU investors' property

Expropriation can occur in the absence of formal divesture of title.[114] Indirect expropriation occurs when the State deprives owners of the effective use, control and benefit of their property.[115] A deprivation of the 'effective' use, control and benefit occurs when the character of the property has been so substantially changed as to render it a different investment.[116] The determinative issue is the effect of the State's measures on the property owner, not the expropriating State's intent.[117] Indicia of a taking which constitutes indirect expropriation include: significant depreciation in the commercial value of the property;[118] deprivation of owners' 'fundamental rights of ownership',[119]

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[114] DOLZER, 'Indirect Expropriations: New Developments?' (2002) 11 *NYUEnvLJ* 64, 65.

[115] UNCTAD, 'Taking of Property' (2000) 2; Draft Convention on International Responsibility of States for Injuries to Aliens, in SOHN & BAXTER, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 *AJIL* 545, 553 ['Harvard Convention']; Metalclad v Mexico (2001) 5 ICSID Case No. ARB(AF)/97/1, [103] ['Metalclad']; CMS Gas v Argentina (2003) ICSID Case No. ARB/01/8, [262] ['CMS Gas']; Biloune and Marine Drive Complex Ltd. v Ghana Investments Centre and the Government of Ghana (27 October 1989) UNCITRAL (Jurisdiction Award), [209] ['Biloune']; Tippetts v TAMS-AFFA Consulting Engineers of Iran (1984) 6 Iran-USCTR 219, 225 ['Tippetts'].

[116] See above n115.

[117] Tippetts, above n115, 225; Starrett Housing Corp v Iran (1983) 4 Iran-USCTR 122, 154 ['Starrett']; Metalclad, above n115, [103]; Phelps Dodge Corp. v Iran (1986-I) 10 Iran-USCTR 121, 130 ['Phelps Dodge']; Biloune, above n115, [209]; Compañía del Desarrollo de Santa Elena S.A. v Republic of Costa Rica (2000) ICSID Case No. ARB/96/1, [54] ['Santa Elena'].

[118] CME v Czech Republic, (13 September 2001) UNCITRAL (Partial Award) [591] ['CME'].

such as the benefit of property and the ability to dispose of it;[120] permanency of interference;[121] and disappointment of legitimate investor expectations.[122] A taking of property need not benefit the State to constitute indirect expropriation.[123]

The NIA deprives the RU investors of their effective use, control and benefit of the Adarian enterprises. The NIA prevents these owners from: (a) receiving dividends in the RU; (b) exercising their power as shareholders, through control of the company, to direct the making of investments by those enterprises in the RU; and (c) receiving the proceeds of sale of the assets of those enterprises on a sale of its business or business assets on a winding up. The effect of these measures, which have no time-limit, is to negate their rights of ownership to dispose of their property and reinvest in stable markets. Furthermore, the NIA substantially depreciates the commercial value of the property by making it undesirable to other foreign purchasers.[124] These factors demonstrate that the

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[119] Tippetts, above n115, 225.

[120] CME, above n118, [604]; Harvard Convention, above n115, art10(3)(a); Pope & Talbot v Canada, (2002) 41 ILM 1347, [102] ['Pope & Talbot']; Metalclad, above n115, [103]; Restatement, above n90, §712(g); HIGGINS, above n20, 351; Starrett, above n117, 162-163 (Separate Opinion, Member Holtzmann).

[121] Elettronica Sicula S.p.A (USA v Italy), [1989] ICJ Rep 15, 71; S.D. Myers, Inc. v. Government of Canada, (2001) 40 ILM 1408, [279] ['Myers']; Lauder v Czech Republic (3 September 2002) UNCITRAL (Final Award) [283]-[284]; CME, above n118, [604].

[122] DOLZER, above n114, 78-79; Kuwait v AMINOIL, Final Award (24 March 1982), 21 ILM 976, [148]; INA Corp v Iran, (1985) 8 Ian-USCTR 373, 386 (Separate Opinion, Member Lagergren).

[123] Metalclad, above n115, [103]; Tippetts, above n115, 82; Myers, above n121, [280]; AMCO Asia Corp. v Republic of Indonesia (1985) 24 ILM 1022, [113]-[115].

[124] *Compromis*, [36].

NIA has so substantially changed the RU investors' property as to render it a different investment, and so a taking of property.

(ii) The 'regulatory' form of the NIA does not prevent it from being expropriation

Regulatory intent does not alter the expropriatory character of a State's conduct.[125] The *effect* of the conduct, rather than its purpose or form, determines whether a taking has occurred.[126] It is irrelevant that the NIA was purportedly instituted for domestic economic or regulatory reasons.

Alternatively, if regulatory intent is relevant, the NIA still constitutes expropriation. To permissibly interfere with property, a State must, at a minimum, act non-discriminatively and for a public purpose.[127] For the reasons set out below [(III)], the NIA fails these requirements.

Additionally, if a State's intention to regulate is relevant and Adaria is regulating its economy, its intention must be weighed against the effect of the measure on the investors' property. Even those international tribunals which have emphasised the importance of regulatory intent have not regarded it as solely determinative of the

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[125] Phelps Dodge, above n117, 130; Tecnicas Medioambientales Tecmed S.A. v The United Mexican States, ICSID Case No. ARB(AF)/00/2, [116] ['Tecmed']; Santa Elena, above n117, [133].

[126] DOLZER, above n114, 78-90; UNCTAD, 'World Investment Report' (2003) 112; Metalclad, above n115, [103], Santa Elena, above n117, [77], Tippetts, above n115, 225-226; Biloune, above n115, 209.

[127] Restatement, above n115, 201; Additional Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, opened for signature 20 March 1952, 9 ETS, art 1(2) (in force 18 May 1954); Harvard Convention, above n115, art 10(5); Marvin Feldman v Mexico, (2002) ICSID Case No. ARB(AF)/99/1, [103] (NAFTA) ['Feldman']; Tippetts, above n115, 225-226.

claim.[128] The effect of a measure on an investor's property is always crucial.[129] The more substantial the effect, the more likely the measure constitutes indirect expropriation. As submitted, the effect of the NIA deprived the RU investors of the effective use, control and benefit of the Adarian enterprises. Despite any regulatory form, it constitutes indirect expropriation.

III. Adaria's expropriation was done without compensation and for unlawful purposes

It is a rule of customary international law evidenced by widespread and virtually uniform State practice,[130] and supported by decisions of international tribunals[131] and eminent publicists,[132] that an expropriation is unlawful when it is discriminatory, not for a public purpose, or not accompanied by compensation. Adaria's expropriation is unlawful on each of these grounds.

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[128] Norwegian Shipowners' Claims Case (1922) RIAA I, 307, 332; Oscar Chinn [1934] PCIJ (ser A/B) No.63, 88; Myers, above n121, [286]-[288].

[129] DOLZER, above n114, 91; Sedco Inc. v National Iranian Oil Co., (1985) 9 Iran-USCTR 248, 276-279.

[130] Resolution on Permanent Sovereignty over Natural Resources, GA Res 1803 (XVII), UN GAOR, 17th sess., Supp.17, UN Doc.A/5217 (1962); Resolution on Permanent Sovereignty over Natural Resources, GA Res 3171, UN GAOR, 28th sess., Supp.52, UN Doc.A/9030 (1973); Charter of Economic Rights and Duties of States, GA Res 3281(XXIX), UN GAOR, 29th sess., Supp. No.17, UN Doc A/9631 (1974) art 2(1).

[131] Chorzów Factory, above n113, 4; Amoco International Finance Corp. v Iran (1987) 15 Iran-USCTR 189, [142]; Texaco Overseas Petroleum Company v Government of the Libyan Arab Republic (1978) 17 ILM 1, [80].

[132] DOLZER, 'Expropriation and Nationalization', in BERNHARDT, 2 *Encyclopaedia of Public International Law* (1995) 319, 322; SORNARAJAH, *The International Law on Foreign Investment* (2004) 239.

Public purpose measures are those which customary international law recognises as necessary for a social, economic or cultural need.[133] Widespread and virtually uniform State practice demonstrates,[134] and eminent publicists confirm,[135] that retaliatory measures are not for a public purpose. Capital flight restrictions only serve the public purpose of protecting the economy if they are applied economy-wide.[136] The NIA is not a permissible regulatory measure. Although Adaria asserts that the NIA intends to restrict capital flight, its purpose was to retaliate against the Respondents, as its timing[137] aptly demonstrates. It followed a suite of other measures and illegal conduct by Adaria against the RU, including a grave violation of the diplomatic immunity of the RU Legation.

Moreover, non-discriminatory measures do not target a particular investor's operations.[138] By targeting only 'certain recently-privatized business concerns',[139] and

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[133] WEINER, 'Indirect Expropriations: The Need for a Taxonomy of 'Legitimate' Regulatory Purposes' (2003) *International Law FORUM* 166, 173-174.

[134] *Netherlands*: Note to Indonesia, 18 December 1959 (1960) 54 *AJIL* 484; *US*: Note to Libya, 8 July 1973, (1973) *Digest of US Practice*, 334-335; *Afghanistan, India*: Treaty of Commerce between Afghanistan and India, opened for signature 4 April 1950, 167 UNTS 112, art III (in force 4 April 1950); *EC*: Nigeria, Country Report, (1996) 1 *Economist Intelligence Unit* 1, 8–9; *Singapore*: Letter from Minister for Trade and Industry of Singapore to US Trade Representative, 6 May 2003, [4(b)].

[135] WEINER, above n133, 174; UNCTAD, 'Taking of Property', 13.

[136] DOLZER, above n114, 93.

[137] *Compromis*, [35].

[138] CMS Gas, above n115, [25]; Feldman, above n127, [184].

[139] *Compromis*, [35].

specifically, only the repatriation of funds to RU Member States,[140] the NIA discriminates against RU nationals. It leaves unaffected all other actors in the Adarian economy who might also contribute to capital flight.

Additionally, the NIA is unlawful expropriation because it provided no compensation.

IV. There are no circumstances which preclude the wrongfulness of Adaria's expropriation

The doctrines of necessity and countermeasures may preclude the wrongfulness of an expropriation. Neither apply here. An act is necessary if it was the 'only means' by which a State could protect an essential interest against a grave and imminent peril.[141] A countermeasure is justified only where it (a) is a proportional response to a prior breach of an international obligation by another state; and (b) follows a request by the injured State for reparation from that other State.[142]

The NIA was not 'necessary'. There was no evidence of actual or threatened capital flight in the weeks between the Council vote and the enactment of the NIA. Even if necessity is established, Adaria's duty to compensate is only temporarily suspended, not finally annulled.[143] Nor was the NIA a justifiable countermeasure. The denial of

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[140] *Ibid.*

[141] Gabcíkovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ Rep 7, 42 ['Gabcíkovo-Nagymaros'].

[142] Commentaries to the Draft Articles on State Responsibility for Internationally Wrongful Acts, Report of the ILC, Fifty-Third Session, UN GAOR, 56th sess., Supp. No.10, UN Doc.A/56/10 (2001) art 25 ['ILC State Responsibility']; Restatement, above n115, 200-201.

[143] Gabcíkovo-Nagymaros, above n141, 39; ILC State Responsibility, above n142, art 25.

Adarian accession to the RU did not breach any international obligation owed to Adaria by the Respondents. Even if there was a breach, the NIA is neither proportional to the breach, nor subsequent to a request for reparation by Adaria.

PRAYER FOR RELIEF

Respondents request the Court to:

(a) Declare that the denial of Adaria's application to join the RU did not breach any international legal obligations owed by Respondents to Adaria;

(b) Declare that Respondents may properly bring a claim for the Applicant's actions with respect to the RU Legation, its property, and Ambassador Heep;

(c) Declare that Applicant violated international law concerning the immunity of diplomatic missions by seizing the premises, property and personnel of the RU Legation; and

(d) Declare that the NIA constitutes an illegal expropriation of Adarmoire and the other privatized concerns under international law.

The 2007 Philip C. Jessup
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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

BEST MEMORIAL – NATIONAL/REGIONAL COMPETITIONS
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Memorial contained in Evans Award section

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