IN THE INTERNATIONAL COURT OF JUSTICE

# THE CASE CONCERNING THE ROTIAN UNION

2007

Republic of Adaria

v.

Republic of Bobbia, Kingdom of Cazalia, Commonwealth of Dingoth, State of Ephraim and Kingdom of Finbar

MEMORIAL FOR THE APPLICANT

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## STATEMENT OF JURISDICTION

The Republic of Adaria, the Republic of Bobbia, the Kingdom of Cazalia, the Commonwealth of Dingoth, the State of Ephraim and the Kingdom of Finbar submit the present dispute to this Court by Special Agreement, dated September 1, 2006, pursuant to article 40(1) of the Court's Statute. The parties have agreed to the contents of the Compromis submitted as part of the Special Agreement. All States parties to this dispute have accepted the compulsory jurisdiction of the Court in accordance with article 36(2) of the Court's Statute. All parties shall accept the judgment of this Court as final and binding and shall execute it in good faith in its entirety.

## QUESTIONS PRESENTED

(1) Whether Respondents violated international legal obligations owed to Adaria by denying Adaria membership in the Rotian Union.

(2) Whether Respondents have standing to make claims before this Court concerning Adaria's enforcement of its criminal laws against the Rotian Union's office, property and personnel.

(3) Whether Adaria violated international law concerning the immunity of diplomatic missions by enforcing its criminal laws against the Rotian Union's office, property, and personnel.

(4) Whether the National Industry Act constitutes a legitimate regulation of Adaria's national economic activity.

## STATEMENT OF FACTS

The Republic of Adaria (Applicant) is a developing nation located in the region of Rotia. Adaria is home to 40 million ethnic Adarians and 2 million ethnic Sophians who have a distinct language and cultural heritage. Although traditionally agricultural, Adaria's economy has been driven in recent years by its manufacturing sector which consists of several state-owned enterprises. Only the Sophian community has refused to abandon its dependence upon farming and handicraft production because of strict adherence to its religious texts. The Sophians have been able to maintain their traditional way of life due to the generosity of the Adarian government which has provided subsidies and benefits as well as significant price discounts on electricity and water. (Compromis ¶¶ 1-3).

The Republic of Bobbia, the Kingdom of Cazalia, the Commonwealth of Dingoth, the State of Ephraim and the Kingdom of Finbar (Respondents) are five contiguous and economically developed States also located in the region of Rotia. In 1964, hoping to foster greater economic cooperation and promote closer political unity within Rotia, Respondents created the Rotian Union (RU). Since its creation, the RU has successfully harmonized the economic and foreign relations of its Member States. (Compromis ¶¶ 4, 8, 9, 12).

The Treaty Establishing the Rotian Union (TRU) created four RU organs: (1) the Parliament, consisting of representatives directly elected by citizens of the Member States; (2) the Council, composed of one representative from the government of each Member State; (3) the Commission, consisting of a President and four ministers; and (4) the High Court. The TRU also created a procedure for admitting other States to membership in the RU. First, the applicant State and the Commission must negotiate an accession agreement. The Council then must unanimously ratify this agreement. Next, the applicant State must fulfill the conditions in the

agreement to the satisfaction of the Commission. Finally, the Council must approve the accession by unanimous vote. (Compromis ¶ 5, Annex I).

Seeking to improve the lives of all its citizens, Adaria filed an application to join the RU in 1995. After a four year investigation of the Adarian economy, the Commission recommended that the Council admit Adaria upon its satisfaction of three conditions: (1) the reduction of its public debt owed to non-Member States; (2) the privatization of state-owned monopolies; and (3) the elimination of government support payments to small, privately-owned businesses. The Council immediately ratified the Commission's recommendation and directed the Commission to negotiate an Accession Agreement. (Compromis ¶¶ 14-15).

On October 1, 2001, after 18 months of negotiation, the Commission and Adaria signed the Adarian Accession Agreement (AAA) incorporating the three proposed conditions. Adaria ratified the AAA on December 1, 2001. As required by the TRU, the Council obtained the opinion of Parliament which expressed its concern over the potential impact of the conditions upon Adaria's Sophian minority. Despite these concerns, the Council unanimously ratified the AAA without amendment on December 20, 2001. On February 1, 2002, the RU opened an office in Adaria which was led by Uriah Heep and was intended to assist in the integration of Adaria into the RU. (Compromis ¶¶ 15-16, Annex II).

Over the course of the following four years, Adaria made painful sacrifices in order to fulfill the conditions required by the AAA. First, Adaria decreased its foreign debt by increasing its citizens' tax burdens. Next, the government relinquished ownership of state-owned industries, including its water and electric providers, selling them to private corporations based in the RU. The RU companies then transferred much of Adaria's industrial capital to the RU and fired thousands of Adarian employees. (Compromis ¶¶ 18-21).

Adaria nevertheless remained committed to fulfilling its obligations under the AAA and the government phased out all support payments to small businesses as required by the third condition. Unfortunately, many Sophian businesses were unable to survive financially without these payments. To the dismay of the Adarian government, the RU corporations who had purchased the previously state-owned industries made life worse for the Sophians. Bobboman, Inc. cancelled its supply contracts with numerous Sophian handicraft manufacturers. The RU owners of the water and electric companies likewise eliminated the former price discounts making farming prohibitively expensive for the Sophians. The Adarian government reacted swiftly, launching a massive public works project designed to create jobs for the Sophians. However, because of the Sophians' unwillingness to participate, the project did nothing to reverse their economic situation. (Compromis ¶¶ 22-23, Clarifications ¶ 1).

Despite these difficulties, Adaria managed to meet its obligations under the AAA by October 20, 2005. On November 10, the Commission informed the Council that Adaria had timely and satisfactorily completed each of the three conditions to accession and recommended that the Council approve Adaria's admission to the RU. Without disputing the Commission's findings, the Council unanimously decided not to admit Adaria citing concerns over the situation of the Sophians. The Council stated that Adaria could reapply for admission to the RU only after satisfying these new concerns. (Compromis ¶¶ 26-28).

This decision created an immediate economic and political crisis in Adaria. On December 19, 2005, the Adarian Parliament passed the National Industry Act (NIA) in an attempt to alleviate the economic losses caused by Adaria's compliance with the AAA. The NIA encouraged investment within Adaria by regulating the exportation of capital from certain

industries to any country outside Adaria. The legality of the NIA was upheld by the Adarian Supreme Court. (Compromis ¶¶ 35-36).

At the same time, Adaria discovered that the RU's office in Adaria had violated Adarian law in several respects. On December 15, 2005, the Ministry of Justice revealed that Mr. Heep and other RU personnel had made campaign contributions to Adarian parliamentary candidates during the 2003 and 2005 elections in violation of Section 17-1031 of the Adarian Criminal Code. The next day, two agents of the Justice Ministry issued a subpoena to Mr. Heep directing him to deliver all bank records concerning transactions with Adaria. When Mr. Heep refused to comply with the lawfully issued subpoena he was taken into custody. An Adarian judge then issued a warrant to seize the bank records described in the subpoena. On December 17, Justice Ministry officials executed this warrant at the RU office in Adaria and found documents which proved that Mr. Heep and other RU officials had made illegal campaign contributions. During the course of these investigations, Adaria also discovered that the RU office had not paid its property taxes during the years 2002 to 2006. On October, 25, 2006, the Adarian Taxation Ministry formally notified the Commission that the RU owed Adaria 30 million Rotos in back property taxes. The RU office has yet to pay these taxes. (Compromis ¶¶ 30-32, Clarifications ¶¶ 4-5).

On April 20, 2006, Adaria filed an application with this Court alleging that the Respondents violated international law by denying Adaria admission to the RU. Despite their independent legal responsibility, Respondents have decided to act through common counsel in this case. On September 1, 2006, Adaria and Respondents jointly submitted the *Compromis* agreeing to the stipulated facts of this dispute. The Court has decided to hear this case. (Compromis ¶¶ 37-38).

## SUMMARY OF PLEADINGS

I. Respondents violated international legal obligations owed to Adaria by denying Adaria RU membership. Respondents' refusal to admit Adaria to the RU on account of their concerns regarding the Sophians violated their obligations under the AAA, custom, and general principles of international law. As the Council's decision was an act of Respondents themselves, they are directly responsible for its decision. Even if this Court were to view the Council decision as an act of the RU, Respondents are still responsible for three reasons. First, as Member States of the RU, Respondents are concurrently liable for the RU's violations of its legal obligations. Second, as principals, Respondents must account to Adaria for the illegal actions of their agent, the RU. Finally, Respondents bear responsibility because they directed and controlled the Council in its decision to deny Adaria admission.

II. Respondents lack standing to challenge the legality of Adaria's enforcement of its criminal laws against the RU office. Respondents have no rights which were violated by Adaria's actions with respect to the RU office. This Court has found that Member States of international organizations do not automatically have an interest in the enforcement of rights owed to the organization. Any injuries which the RU office and its personnel may have suffered as a result of Adaria's actions would be injuries to the RU, not to Respondents. Respondents cannot assert claims on behalf of the RU because only a party to whom an international obligation is owed can bring claim in respect of its breach.

III. Adaria's enforcement of its criminal laws against the RU office was consistent with international law. The RU is not a State and is not entitled to diplomatic immunity. While functional immunity may be accorded to international organizations, it must be specifically provided for in the constituent instrument of the organization. The RU is not entitled to functional immunity because the AAA does not specifically provide for such immunity. Even if functional immunity were provided for as a matter of customary international law, the RU still would not be entitled to claim its protection as the illegal political contributions of the RU office were not within its assigned functions.

IV. The National Industry Act is a lawful exercise of Adaria's right to regulate its economy. In order for an act to constitute an expropriation, it has to be established that there was an unreasonable and substantial government interference with the use of private property. The NIA is a reasonable regulation of capital flow designed to alleviate the economic crisis created by Respondents' refusal to admit Adaria to RU membership. It does not substantially deprive RU corporations of the use and enjoyment of their property rights as it leaves them free to invest the profits from their enterprises within Adaria. Even if the NIA constituted an expropriation, it was a lawful exercise of Adaria's right as a developing country to regulate its economy. The NIA was also consistent with developed countries' requirements for expropriation as it was enacted for the public purpose of restoring the Adarian economy and applied to all new owners of recently-privatized industries without regard to nationality.

## PLEADINGS

# I. RESPONDENTS VIOLATED INTERNATIONAL LEGAL OBLIGATIONS OWED TO ADARIA BY DENYING ADARIA MEMBERSHIP IN THE RU.

## A. Respondents' failure to admit Adaria to the RU violates both conventional and customary international law.

### 1. Respondents' decision to deny Adaria RU membership violated treaty obligations owed under the AAA.

Under international law, a State must make reparations for internationally wrongful acts for which it is responsible.[1] By denying Adaria admission to the RU based on their concerns regarding the Sophians, Respondents violated their obligations to Adaria and must compensate it therefore. The plain language of the AAA required Respondents to admit Adaria to RU membership upon its satisfactory completion of *three* requirements: (1) reduction of public debt owed to non-RU States; (2) privatization of state-owned monopolies; and (3) elimination of government subsidies to small, privately-owned businesses.[2] Even though Adaria timely and successfully fulfilled these conditions, Respondents denied Adaria admission, citing concerns over the living conditions of the Sophians.[3] Respondents indicated that Adaria could *only* reapply for admission *after* satisfying these new concerns.[4] Respondents' decision effectively

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[1] *See* Factory at Chorzów (Ger. v. Pol.) 1927 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13); Draft Articles on Responsibility of States for Internationally Wrongful Acts arts. 1-2, International Law Commission, U.N. GA 56th Sess., Supp. No. 10 (2001) [hereinafter Draft Articles on State Responsibility]. *See generally* OPPENHEIM'S INTERNATIONAL LAW 501 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM]; MALCOLM N. SHAW, INTERNATIONAL LAW 694 (5th ed. 2003); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 421 (6th ed. 2003).

[2] Compromis, Annex II ¶ 1.

[3] Compromis ¶ 28.

[4] *Id.*

added a *fourth* condition for Adaria's admission to membership. Adding this further accession requirement violated Respondents' obligations under the AAA.

The AAA created legal obligations enforceable by Adaria in this Court. In the *Admission* case, this Court found that a treaty which specifies the conditions for membership in an international organization creates a legal obligation for Member States to apply those, and only those, conditions to membership applicants.[5] In reaching that conclusion, the Court clarified that disputes relating to the admission of States to international organizations are legal and not political in nature.[6] While the European Court of First Instance (CFI) held in *Yedaş Tarim v. Council* that the Ankara Agreement and Protocols between the European Economic Community (EEC) and Turkey were too indefinite to create an obligation for the EEC to provide certain kinds of financial support to Turkey,[7] its holding is limited to the specific facts of that case. Unlike the Ankara Agreement which "describe[d] in general terms" its purpose of strengthening the trade relations between the EEC and Turkey,[8] the AAA established precise conditions for Adaria's admission to the RU.

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[5] Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57, 63 (May 28).

[6] *Id.* at 61-2. *See also* Legality of the Use of a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, 73-74 (July 8).

[7] Yedaş Tarim v. Council & Comm'n, Case T-367/03, Mar. 30, 2006, at ¶ 42. *See* Financial Protocol Annexed to the Agreement Establishing the Association Between the European Economic Community and Turkey, Nov. 23, 1970, 1972 O.J. (L 293) 4; Council Decision concerning the conclusion of a Financial Protocol between the European Economic Community and Turkey, Mar. 5, 1979, 1979 O.J. (L 67) 14.

[8] *Id.*

The AAA must be interpreted in accordance with the ordinary meaning of its terms in light of its purpose[9] of "facilitat[ing] the successful integration of Adaria into the RU."[10] The language of the AAA unambiguously indicates that "Adaria *shall* be eligible for admission to the [RU] upon its satisfaction" of the conditions listed therein.[11] This language does not require Adaria to comply with any conditions for admission other than those enumerated in the AAA. Furthermore, the drafting history of the AAA, which may be relied upon as a supplementary means of interpretation,[12] indicates that special protection for the Sophians was considered and rejected as a condition for Adaria's admission to RU Membership.[13]

This Court has also held that Member States of international organizations with specified conditions for membership cannot later add further conditions.[14] In the *Admission* case, the Court found that UN Member States, when voting upon the admission of new members, could not make their consent dependent upon conditions not expressly provided for in Article 4 of the

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[9] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. *See also* Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations art. 31, March 21, 1986, U.N. Doc. A/CONF.129/15 (1986), *reprinted in* 25 I.L.M. 543 (1986) [hereinafter VCLTSIO]; LORD ARNOLD MCNAIR, THE LAW OF TREATIES 365-366, 380 (1961).

[10] Compromis, Annex II ¶ 1.

[11] *Id.* (emphasis added)

[12] VCLT, *supra* note 9, art. 32. *See also* VCLTSIO, *supra* note 9, art. 32; South West Africa (Eth. v. S.Afr., Liber. v. S. Afr.), Jurisdiction Phase, 1962 I.C.J. 319, 387 (Dec. 21) (separate opinion of Judge Jessup).

[13] *See* Compromis ¶ 16.

[14] Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57, 65 (May 28).

Charter.[15] The Court reasoned that the text of Article 4 established an exhaustive list of criteria for admission and found that "the spirit as well as the terms of the paragraph preclude the idea that considerations extraneous to these principles and obligations can prevent the admission of a State which complies with them."[16]

Similarly, the AAA specifies "the conditions and timelines for accession" to the RU.[17] Like Article 4 of the UN Charter, the natural meaning of the words used in the AAA "leads to the conclusion that these conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example."[18] As with UN members, who may not consider factors extraneous to those listed in Article 4 when voting on the admission of other States, Respondents are not allowed to add conditions for Adaria's accession other than those specified in the AAA.

**2. Respondents' refusal to admit Adaria to RU membership violated customary international law.**

Under customary international law, a State which seeks admission to an international organization and which satisfies the conditions for membership specified by that organization must be admitted to membership. The existence of this custom is shown by the widespread and consistent practice of Member States of international organizations as well as *opinio juris*.[19] While Member States may freely set the conditions for admission of new members to

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[15] *Id.*

[16] *Id.* at 63.

[17] Compromis, Annex I art. 11(4).

[18] *Conditions of Admission*, 1948 I.C.J. at 62. *See also* C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 110 (2d ed. 2005); HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW §96 (4th ed. 2003); JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 108 (2002).

[19] *See* North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Ice.), 1969 I.C.J. 3, 42 (Feb. 20).

international organizations,[20] and may even do so on a case by case basis, [21] once they have established those conditions, Member States must admit any State which satisfactorily meets those conditions. International organizations such as the European Union (EU),[22] the World Trade Organization (WTO),[23] and the North Atlantic Treaty Organization (NATO),[24] have never denied admission to a State after the Member States of that organization have determined that the State in question has satisfactorily completed the conditions required for admission to membership. Moreover, these Member States have admitted such applicants out of a sense of legal duty.[25]

Respondents violated this custom by denying Adaria RU membership. The AAA specified the conditions which Adaria was required to satisfy in order to be admitted to the RU.

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[20] *See* AMERASINGHE, *supra* note 18, at 105; KLABBERS, *supra* note 18, at 105.

[21] *See, e.g.,* SCHERMERS, *supra* note 18, § 97.

[22] *See* Accession Treaties between: EEC Member States and Denmark, Ireland, United Kingdom, Jan. 22 1972, 1972 O.J. (L 73); the Member States of the EEC and Greece, 28, 1979, 1979 O.J. (L 291); EEC Member States and Spain, Portugal, Nov. 15, 1985, 1985 O.J. (L 302); EU Member States and Norway, Austria, Finland and Sweden, Aug. 29, 1994, 1994 O.J. (C 241); EU Member States and the Czech Republic, Estonia, Cyprus, Malta, Poland, Slovenia and Slovakia, Sept. 23, 2003, 2003 O.J. (L 236); EU Member States and Bulgaria, Romania, Jun. 21, 2005, 2005 O.J. (L 157).

[23] *See, e.g.,* Protocol on the Accession of China, Nov. 23, 2001, WT/L/432; Protocol on the Accession of the Government of Albania, July 17, 2000, WT/ACC/ALB/52; Protocol on the Accession of the Hashemite Kingdom of Jordan, Dec. 17, 1999, WT/ACC/JOR/33.

[24] *See* Protocol on the Accession of Spain, Dec. 10, 1981, 1871 U.N.T.S. 541; Protocols to the North Atlantic Treaty on the Accessions of the Czech Republic, Hungary and Poland, Dec. 16, 1997, S. Treaty Doc. No. 105-36; Protocols on the Accessions of Bulgaria, Estonia, Latvia, Lithuania, Romania, the Slovak Republic, and Slovenia, March 26, 2003, S. Treaty. Doc. No. 108-04.

[25] *See* Hermann Mosler, *Die Aufnahme in Internationale Organisationen*, 19 HEIDELBERG J. INT'L L. 275, 291-292 (1958).

Both the Commission and Respondents, as members of the Council, found that Adaria had satisfied those conditions.[26] Thus, Adaria should have been admitted to membership in the RU.

### 3. Respondents' refusal to admit Adaria violates general principles of international law.

Respondents have violated their legal obligation to perform the AAA in good faith.[27] By ratifying the AAA in their roles as members of the Council, Respondents agreed that Adaria's eligibility for RU membership was dependent only upon its completion of three specified requirements.[28] While the final decision of whether to admit Adaria to the RU was left to Respondents, the language of the AAA indicates that in making this decision Respondents could only consider whether Adaria had successfully completed the three specified conditions. However, Respondents did not base their decision upon a finding that Adaria failed to satisfy these requirements. Rather, they denied Adaria admission because of concerns extraneous to the AAA. Thus, by denying Adaria's application on this basis, Respondents breached their duty to act in good faith.[29]

Respondents are also estopped from asserting that they have a right not to admit Adaria to RU membership because Adaria has detrimentally relied upon their promises of admission.

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[26] Compromis ¶¶ 27-28.

[27] *See* VCLT, *supra* note 9, art. 26; Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57, 63 (May 28); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); Nuclear Tests (Austr. v. Fr., New Zealand v. Fr.) 1974 I.C.J. 253, 457 (Dec. 20); Certain Norwegian Loans (Fr. v. Nor.) 1957 I.C.J. 9, 53 (July 6) (separate opinion of Judge Lauterpacht); Rainbow Warrior (N.Z. v. Fr.), 82 I.L.R. 499, 550 (Fr-N.Z. Arb. Trib. 1990).

[28] *See* Compromis, Annex II ¶ 1.

[29] *See* G.D.S. Taylor, *The Content of the Rule Against Abuse of Rights in International Law*, 46 BRIT. Y.B. INT'L L. 323, 325 (1972).

This Court has consistently recognized the doctrine of estoppel as a general principle of international law.[30] It has also stated that "estoppel may be inferred from the conduct, declarations and the like made by a State which . . . has caused another State or States, in reliance on such conduct, detrimentally to change position or suffer some prejudice."[31] Adaria detrimentally relied upon Respondents' promises to admit it to membership after satisfying the conditions in the AAA. Adaria strained its developing economy and borrowed over 500 million Rotos in order to reduce its public debt.[32] Adaria also privatized several of its most profitable and developing state-owned enterprises only to see them purchased by corporations from Respondent States.[33] Adaria was then forced to watch its Sophian citizens suffer from the avarice of these RU corporations as they fired Adarian workers, cancelled supply contracts with Sophian business owners and eliminated price discounts.[34] The sacrifices made in reliance on Respondents' promises have ruined Adaria's economy. Respondents cannot now claim that they had no obligation to admit Adaria to membership.

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[30] *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392, 415 (Nov. 26); *Nuclear Tests*, 1974 I.C.J. at 253; Temple of Preah Vihear (Cam. v. Thai.), 1962 I.C.J. 6, 42 (June 15) (separate opinion of Vice-President Alfaro). *See generally* I.C. MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L. Q. 468, 477 (1958).

[31] *Military and Paramilitary Activities*, 1984 I.C.J. at 415.

[32] Compromis ¶ 25.

[33] *Id.* ¶ 19.

[34] *Id.* ¶¶ 20-21.

### B. Respondents are directly responsible for the Council's unlawful decision because the admission of RU members falls solely within Respondents' competence.

Only Member States of an international organization have the power to admit new members. As international organizations are formed by States and create obligations which exist between States,[35] the relationship which exists among these States only arises by virtue of their consent.[36] Thus, the decision to admit another State into membership must be an action of the Member States rather than an act of the organization itself.[37] For this reason, the UN Charter provides that the General Assembly, which includes all Member States, must make admission decisions.[38] Likewise, each Member State of the EU must ratify the agreements which admit other States to membership.[39] NATO requires the concurrence of all existing members to admit new members.[40] The WTO likewise provides an opportunity for any Member State to participate in the admission of new members.[41]

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[35] *See* ANTONIO CASSESE, INTERNATIONAL LAW 71 (2001); KLABBERS, *supra* note 18, at 9; BROWNLIE, *supra* note 1, at 79.

[36] *See* KLABBERS, *supra* note 18, at 110-111.

[37] *See* GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS VOL. III 31 (1976); Ebere Sieke, *Admission to Membership in International Organizations: The Case of Namibia*, 51 BRIT. Y. B. INT'L L. 189 (1980).

[38] U.N. Charter art. 4.

[39] Treaty on European Union art. 49, *adopted as part of* Treaty of Maastricht, Feb. 7, 1992, O.J. (C 224) 1 [hereinafter TEU].

[40] North Atlantic Treaty art. 10, Apr. 4, 1949, 34 U.N.T.S. 243.

[41] World Trade Organization, *How to Become a WTO Member*, *available at* http://www.wto.org (2006).

Similarly, the TRU recognizes that Member States bear primary responsibility for the admission of new members. Membership decisions must be made by the Council, which consists of the representatives of each Member State government.[42] Like the EU Council which on some occasions acts as an organ of the EU and on other occasions as a forum for EU Member State decisions,[43] the Council of the RU does not universally act as an organ of the RU. When the Council makes final membership decisions, the representatives of each Member State government act as proxies for their respective States. Thus, the failure of the Council to admit Adaria to membership was an act of Respondents themselves. As this act violated both conventional and customary international law, Respondents are each directly liable to Adaria and are properly parties to this case.

### C. Even if the Council's decision was an action of the RU, Respondents bear responsibility for this action as Member States of the RU.

#### 1. Respondents by virtue of their RU membership are concurrently responsible for the RU's violation of its international legal obligations.

While international organizations, such as the RU, may have independent legal personality[44] and may incur liability in their own right,[45] this fact does not preclude Member

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[42] Compromis, ¶ 5, Annex I art. 11(6).

[43] *See* T.C. HARTLEY, EUROPEAN COMMUNITY LAW 17 (4th ed. 1998); Antonio Cassese, *Remarks on Scelle's Theory of "Role Splitting"* (dédoublement fonctionnel) *in International Law*, 1 EUR. J. INT'L L. 210 (1990).

[44] *See* Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 181-182 (April 11). *See generally* Esa Paasivirta, *The European Union: From an Aggregate of States to a Legal Person?*, 2 HOFSTRA L. & POL'Y SYMP. 37 (1997); C.W. Jenks, *The Legal Personality of International Organizations*, 22 BRIT Y.B. INT'L L. 267 (1945).

[45] *See* Report of the International Law Commission on the Work of its Forty-Second Session, U.N. Doc. A/45/10, pp. 84-89 (July 20, 1990); Gerhard Hafner, *Accountability of International Organizations*, 97 AM. SOC'Y INT'L L. PROC. 236, 237 (2003).

States from being concurrently responsible for the actions of such organizations.[46] Unless liability is expressly excluded by the organization's constituent treaty, Member States are responsible for the organization's violation of its legal obligations.[47] For example, in *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, the tribunal held that Member States of the Arab Organization for Industrialization (AOI) were jointly and severally liable for the AOI's violations of its legal obligations.[48] The tribunal reasoned that "in the absence of any provision expressly or impliedly excluding the liability of the four states, this liability subsists since, as a general rule, those who engage in transactions of an economic nature are deemed liable for the obligations which flow therefrom."[49] Likewise, Judge Bustamante of this Court observed in the jurisdictional phase of the *South West Africa* case that when the League of Nations created the Mandate system, which obligated it to protect the interests of the peoples of

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[46] MacLaine Watson & Co. Ltd. v. Int'l Tin Council, [1989] 1 Ch. 72, 286 (Nourse L.J., dissenting). *See also* Rosalyn Higgins, *Report on the Legal Consequences for Member States of the Non-fulfillment by International Organizations of their Obligations toward Third Parties*, 1 Y.B. INST. INT'L L. 252 (1995); C.F. Amerasinghe, *Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent*, 85 AM. J. INT'L L. 259, 260 (1991).

[47] *See* MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES 96-195 (1995); SEIDL-HOHENVELDERN, CORPORATIONS IN AND UNDER INTERNATIONAL LAW 88 (1987); HENRY SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW § 1395 (2d ed. 1980); H.T. ADAM, LES ORGANISMES INTERNATIONAUX SPÉCIALISÉS 130 (1965); F.A. Mann, *International Corporations and National Law*, 42 BRIT. Y.B. INT'L L. 145, 160-161 (1967).

[48] Westland Helicopters Ltd. v. Arab Organization for Industrialization, 80 I.L.R. 596, 613 (I.C.C. 1984).

[49] *Id.*

former colonies, "each of [the] States Members [was] bound jointly and severally with the League."[50]

While some language in one of the *International Tin Council* cases might suggest that Member States are not automatically liable for the actions of their organization, the British House of Lords rested that specific holding upon national rather than international law.[51] The Court found that the members of the International Tin Council were not liable for its debts because of the British principle of limited liability of corporations.[52] Moreover, Lord Nourse on the Court of Appeal, the only judge to consider the international legal aspect of the case, found that under international law Member States are jointly and severally liable for the liabilities of the international organization since by joining in such an enterprise they agree to "bear the burdens together no less than the benefits."[53]

State practice further confirms the existence of a rule whereby Member States are liable for an international organization's actions unless such responsibility is disclaimed in the constituent document of the organization. Many constituent instruments of international organizations contain provisions limiting, in some fashion, the liability of Member States.[54] This practice suggests that States believe that such provisions are necessary because otherwise they

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[50] South West Africa (Eth. v. S. Afr., Liber. v. S. Afr.), Jurisdiction Phase, 1962 I.C.J. 319, 378 (Dec. 21) (separate opinion of Judge Bustamante).

[51] Australia & New Zealand Banking Group Ltd., et al. v. Australia, 29 I.L.M. 670, 674 (U.K. House of Lords 1989).

[52] *Id.* at 677.

[53] MacLaine Watson & Co. Ltd. v. Int'l Tin Council, [1989] 1 Ch. 72, 286 (Nourse L.J., dissenting).

[54] *Id.* at 253 (Annex to Judgment of Kerr L.J.). *See also* Higgins, *supra* note 46, at 252; AMERASINGHE, *supra* note 18, at 263.

could be held liable under customary rules of international law.[55] In the case of the NATO bombing campaign in the former Yugoslavia, it was NATO Member States, not NATO itself, that were summoned into this Court and to the European Court of Human Rights (ECHR) to account for the campaign.[56] The fact that the NATO States concerned declined to argue that the complaints were inadmissible because the action was carried out by a different legal person suggests that they agreed that they should be held liable by virtue of their status as NATO Member States.[57] Similarly, Respondents, as RU Member States who directly participated in the Council's decision to deny membership to Adaria, are responsible for the breaches of customary and conventional international law resulting from that decision.

### 2. Respondents are responsible for the RU actions because the RU served as an agent of Respondents.

This Court has recognized on several occasions that an agency relationship exists when a State consents to have another international agent act on its behalf with regard to particular matters.[58] Once an agency relationship is formed, the principal is held liable for the internationally wrongful acts of its agent.[59] Moreover, as the primary bearers of rights and duties in the international arena, States cannot escape their legal responsibilities simply by assigning

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[55] *MacLaine Watson*, [1989] 1 Ch. at 268 (Nourse L.J., dissenting).

[56] *See* Legality of Use of Force (Serb. & Mont. v. U.K.), 2004 I.C.J. 18 (Dec. 15); Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333 (2001).

[57] SCHERMERS, *supra* note 18, at § 1590A.

[58] *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24); Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176 (Aug. 27); Dan Sarooshi, *Conferrals by States of Powers on International Organizations: The Case of Agency*, 74 BRIT.Y.B. INT'L L. 291, 310-311 (2003).

[59] *See id*; SHAW, *supra* note 1, at 1204.

those duties to an international organization.[60] Thus, in *Matthews v. United Kingdom*, the European Court of Human Rights held that even though Member States may transfer certain competencies to the EC, "Member State responsibility . . . continues even after such a transfer."[61] The court explicitly rejected the State's argument that it should not be responsible for the EC organ's actions because it had no control over the decision-making of the organ.[62] Rather, as the court subsequently explained in *Bosphorus v. Ireland*, even a total transfer of powers to an international organization, cannot "absolv[e] Contracting States completely from their Convention responsibility in the areas covered by such a transfer."[63]

Respondents, by signing and ratifying the TRU, consented to have the RU act on their behalf with regard to many economic and political matters.[64] Like the Member States of the EC who have allowed EC actions to have direct effect in their national order,[65] Respondents amended their own constitutions to allow for the acts of RU organs to "have effect within the domestic legal system as though they were acts of the same corresponding domestic organ."[66] If this Court were to find that Respondents did not retain power to determine membership decisions

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[60] *See* SHAW, *supra* note 1, at 1201-05; KLABBERS, *supra* note 18, 302-303.

[61] Matthews v. U.K., 1999-I Eur. Ct. H.R. 252, 372. *See also* M. & Co. v. Germany, 1990 Y.B. Eur. Conv. on H.R. 46, 52 (Eur. Comm'n on H.R.).

[62] *Id.*

[63] Bosphorus Hava Yolları Turizm v. Ireland, App. No. 45036/98, para. 154 (Eur. Ct. H.R. June 30, 2005).

[64] *See* Compromis, Annex I art. 11(6).

[65] *See* Van Gend en Loos v. Nederlandse Administratie der Belastingen, Case 26/62, 1963 E.C.R. 1; Amministrazione delle Finanze dello Stato v. Simmenthal, Case 106/77, 1978 E.C.R. 629; HARTLEY, *supra* note 43, at 187-188.

[66] Compromis ¶ 7.

themselves, then Respondents must have consented for the Council to serve as their agent in this regard.[67] Like the Member States of the EC, Respondents cannot avoid responsibility for the Council's membership decisions simply by transferring this competency to the Council. Thus, Respondents are liable for the internationally wrongful refusal of the Council to admit Adaria to membership.

### 3. Respondents are responsible for the Council's actions because they directed the Council to act and assisted in its wrongful decision.

According to the International Law Commission's (ILC) Draft Articles on the Responsibility of International Organizations, a State is responsible for the internationally wrongful acts of an organization if it "aids or assists the international organization in the commission of [the act]"[68] or if it "directs and controls an international organization in the commission of an internationally wrongful act."[69] Respondents directed and controlled the Council in its decision to deny Adaria admission to the RU. As the Council is composed of representatives of the governments of each Respondent State,[70] it *always* acts under the instructions of the Respondents. Even when it is not acting under their instructions, it clearly acts under their direction and control as their representatives actually formulate the decisions of the Council. Likewise, Respondents assisted the Council in making its decision through their

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[67] Compromis, Annex I art. 11.

[68] Draft Articles on Responsibility of International Organizations art. 25, *located in* Report of International Law Commission on the Work of its Fifty-Eighth Session, U.N. Doc. A/61/10, at pp. 246-92 (Aug. 11, 2006).

[69] *Id.* at art. 26.

[70] Compromis, Annex I art. 5(2).

provision of financial support to the Council.[71] Thus, as Respondents directed and controlled the Council's decision and assisted in its implementation, they bear responsibility for the decision.

## II. RESPONDENTS LACK STANDING TO ASSERT CLAIMS WITH RESPECT TO ADARIA'S ENFORCEMENT OF ITS CRIMINAL LAWS AGAINST THE RU OFFICE AND PERSONNEL.

### A. Respondents have no claims of their own to assert with respect to Adaria's enforcement of its criminal laws.

To have standing before this Court, a State must have a "legal right or interest in the subject matter."[72] In the merits phase of the *South West Africa* case, the Court found that in order to assert a claim against another State, the right asserted by the claimant State must be clearly granted to that State under international law.[73] That case involved a claim brought by Ethiopia and Liberia against South Africa for violations of the Mandate Agreement for South West Africa which had been negotiated with the League of Nations (League).[74] Although Ethiopia and Liberia had been members of the League, the Court held that they lacked standing to make such a claim because the Mandate Agreement did not vest in them any legal right to enforce its performance.[75] The Court reasoned that while the Mandate Agreement gave rights to the League itself, it did not grant similar rights to League members.[76] The Court found that "[i]n

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[71] *Id.* art. 9.

[72] South West Africa (Eth. v. S. Afr., Liber. v. S. Afr.), Merits Phase, 1966 I.C.J. 6, 34 (July 18). *See also* Barcelona Traction (Belg. v. Sp.) 1970 I.C.J. 3, 50-51 (Feb. 5); East Timor (Port. v. Aust.) 1995 I.C.J. 90, 99 (June 30).

[73] *South West Africa*, Merits, 1966 I.C.J. at 34.

[74] *Id.* at 10.

[75] *Id.* at 29.

[76] *Id.* at 24.

such a setting, rights cannot be derived from the mere fact of membership of the organization in itself," but rather must be explicitly provided for in the League's charter or in the Mandate Agreement.[77]

The Court also rejected the argument that Ethiopia and Liberia had intangible interests in the proper administration of South West Africa which could give them standing.[78] The applicants had argued that "States may have a legal interest in vindicating a principle of international law, even though they have, in the given case, suffered no material prejudice, or ask only for token damages."[79] The Court responded that whether or not such intangible interests may exist under international law, "such rights or interests, in order to exist, must be clearly vested in those who claim them, by some text or instrument or rule of law."[80] As Ethiopia and Liberia could not establish that any international instrument vested them with such intangible rights, they lacked standing to assert such rights before the Court.[81]

Similarly, Respondents have no rights to assert against Adaria. Just as the right to enforce the Mandate Agreement vested only in the League, any right to protect the RU office that might have been created by the AAA would have vested in the RU itself and not in Respondents.[82] No international legal instrument vests Respondents with any intangible interest

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[77] *Id.* at 25. *See also* South West Africa (Eth. v. S. Afr., Liber. v. S. Afr.), Jurisdiction Phase, 1962 I.C.J. 319, 453 (Dec. 21) (dissenting opinion of President Winiarski).

[78] *South West Africa*, Merits, 1966 I.C.J. at 32.

[79] *Id.*

[80] *Id. See also South West Africa*, Jurisdiction, 1962 I.C.J. at 456-457 (dissenting opinion of President Winiarski).

[81] *South West Africa*, Merits, 1966 I.C.J. at 32-33.

[82] *See* Compromis, Annex II.

in assuring respect for whatever immunity might be granted to the RU office under international law. Furthermore, Respondents suffered no actual injury as a result of Adaria's enforcement of its criminal laws against the RU office. Adaria did not seize any nationals, property, or diplomatic premises belonging to Respondents. Any injury which might have been suffered as a result of Adaria's enforcement of its criminal laws would be an injury to the RU, not an injury to the Respondent States. Such an injury to the RU, if it existed, would not violate any legal obligations which Adaria owes to Respondents. Therefore, Respondents lack standing to challenge the legality of Adaria's actions.

### B. Respondents cannot assert claims on behalf of the RU before this Court.

The Court has consistently recognized that "only the party to whom an international obligation is due can bring a claim in respect of its breach."[83] Likewise, Article 42 of the ILC's Draft Articles on State Responsibility provides that a State is entitled to invoke the responsibility of another State only if the obligation breached is owed to that State individually or to a group of States, including that State, and the breach of the obligation specially affects that State.[84] This Court and its predecessor, the Permanent Court of International Justice (PCIJ), have further clarified that even when a State appears to bring a claim on behalf of other legal persons, such as when it exercises diplomatic protection on behalf of its own citizens, "[it] is in reality asserting its own rights"[85] because "the defendant State has broken an obligation towards the national

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[83] Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 181-182 (April 11). *See also* Barcelona Traction (Belg. v. Sp.) 1970 I.C.J. 3, 50-51 (Feb. 5); East Timor (Port. v. Aust.) 1995 I.C.J. 90, 99 (June 30).

[84] Draft Articles on State Responsibility, *supra* note 68, art. 42.

[85] Mavrommatis Palestine Concessions (Gr. v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).

State in respect of its nationals."[86] Once a State has taken up the case of one of its subjects, international law treats the State as the sole claimant.[87] Moreover, the Court's Statute clarifies that "[o]nly states may be parties in cases before this Court."[88] It would circumvent the clear limitations of the Statute to permit a State to bring before this Court claims that do not belong to it, but belong to a different international legal person who cannot appear before the Court. Thus, Respondents neither have nor should have standing to bring before this Court claims on behalf of the RU.

## III. ADARIA'S ENFORCEMENT OF ITS CRIMINAL LAWS AGAINST THE RU OFFICE AND ITS PERSONNEL WAS CONSISTENT WITH INTERNATIONAL LAW.

### A. The RU office is not entitled to diplomatic immunity because it is not a diplomatic mission of a State.

The source of immunity for international organizations is not the same as it is for States.[89] This Court recognized in the *Reparations* case that "[w]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of [an international organization] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[90] While States have the right to mutual respect, and thus diplomatic immunity, simply by virtue of their statehood, international

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[86] *Reparations*, 1949 I.C.J. at 181.

[87] *See Id.*; SHABATI ROSENNE, THE WORLD COURT 69 (6th ed. 2003).

[88] Statute of the International Court of Justice art. 34, para. 1, June 26, 1945, 33 U.N.T.S. 993.

[89] *See* AMERASINGHE, *supra* note 18, at 322; SHAW, *supra* note 1, at 1205; ROSALYN HIGGINS, PROBLEMS AND PROCESS, INTERNATIONAL LAW AND HOW WE USE IT 93 (1994).

[90] *Reparations*, 1949 I.C.J. at 184.

organizations are not automatically entitled to the same respect.[91] International organizations are only granted immunity for the purpose of ensuring their ability to perform the functions entrusted to them by States.[92] Likewise, organizations such as the RU cannot invoke any rights under the Vienna Convention on Diplomatic Relations (VCDR) as it is only meant to "to ensure the efficient performance of the functions of diplomatic missions as representing States."[93] Thus, the RU office is not entitled to any form of *diplomatic* immunity.[94]

### B. The RU office cannot claim functional immunity because the AAA does not specifically provide for such immunity.

#### 1. Customary international law does not provide for the immunity of international organizations.

The AAA provides that the privileges and immunities of the RU office will be governed by international law.[95] Generally, however, there is no custom that provides for the immunity of international organizations.[96] For such immunities to arise, they must be specifically provided for in the constituent treaties of the organization or in other relevant domestic law.[97] For example, the European Community Treaty provides that the EC's immunity must be negotiated

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[91] KLABBERS, *supra* note 18, at 36. *See also* SHAW, *supra* note 1, at 1205.

[92] *See Reparations*, 1949 I.C.J. at 184 (April 11); KLABBERS, *supra* note 18, at 36.

[93] Vienna Convention on Diplomatic Relations, Preamble, April 18, 1961, 500 U.N.T.S. 95 [hereinafter VCDR].

[94] Compromis, Annex I arts. 1-2.

[95] Compromis, Annex II ¶ 3.

[96] AMERASINGHE, *supra* note 18, at 344; BROWNLIE, *supra* note 1, at 652.

[97] AMERASINGHE, *supra* note 18, at 345.

with each Member State.[98] Similarly, the immunities of the International Criminal Court are established by separate agreements which must be individually ratified by Member States.[99] In one of the *International Tin Council* cases, the British House of Lords found that international organizations do not receive immunities from the jurisdiction of host States as a matter of customary international law.[100] In *Mendaro v. World Bank*, an American federal court grounded its finding of the World Bank's immunity upon specific language in the International Organizations Immunities Act of the United States.[101] Similarly, in *Maclaine Watson & Co Ltd v. International Tin Council*, a British court found that a U.K. statute, rather than international law, determined the issue of whether an order requiring an organization's officers to provide information relating to assets infringed their immunity.[102]

Recognizing the absence of any custom, most constituent instruments of international and regional organizations specifically provide for certain privileges and immunities. The 1946 UN Convention on Privileges and Immunities (UN Convention), for example, makes specific provisions for the immunity of property, premises, archives and officials.[103] These same immunities are also specifically provided for in the Convention on the Privileges and Immunities

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[98] Treaty Establishing the European Community art. 20, Nov. 10, 1997, 1997 O.J. (C340) 3.

[99] Agreement on the Privileges and Immunities of the International Criminal Court art. 34, Sept. 3, 2002, Official Recs. ICC-ASP/1/3.

[100] Standard Chartered Bank v. Int'l Tin Council, I W.L.R. 641, 647-648 (1987). *See also* HIGGINS, *supra* note 89, at 91.

[101] Mendaro v. World Bank, 717 F.2d 610, 613 (D.C. Cir. 1983).

[102] MacLaine Watson & Co. Ltd. v. Int'l Tin Council, [1989] 1 Ch. 72, 253.

[103] Convention on the Privileges and Immunities of the UN art. II §2-4, 11, Feb. 13, 1946, 1 U.N.T.S. 15 [hereinafter UN Convention].

of the Specialized Agencies (Specialized Agencies Convention).[104] The agreements establishing various financial and other international organizations, such as the International Monetary Fund and the International Development Association, also specifically provide for the immunity of property, premises, archives and personnel.[105] This practice demonstrates that States believe that, unless specifically provided for in its constituent instrument, an international organization is not entitled to any immunities or privileges under customary international law.

### 2. Even if customary law provided for immunity of international organizations, such immunity would not apply to the RU office in Adaria because its illegal activities were not within its functions.

If international organizations were afforded immunity under customary international law, the extent of this immunity would be determined entirely by what is necessary for the fulfillment of their functions and purposes.[106] As such, organizations can expect to be accorded *only* those privileges and immunities which are necessary for their purposes.[107] For example, Article 4 of the UN Convention grants immunity from legal process only in respect of acts done by representatives in their capacity as representatives, a more narrow privilege than that of general

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[104] Convention on the Privileges and Immunities of the Specialized Agencies, arts. III §4, III §5, III §6, V §19, Nov. 21, 1947, 33 U.N.T.S. 261 [hereinafter Specialized Agencies Convention].

[105] *See, e.g.,* Articles of Agreement of the International Monetary Fund arts. IX(4), IX(5), VI(8)(i), July 22, 1944, 2 U.N.T.S. 39 [hereinafter IMF Articles]; Articles of Agreement of the International Development Association arts. VIII(3), VIII(5), XI(8)(a), Jan. 26, 1960, 439 U.N.T.S. 249 [hereinafter IDA Articles].

[106] *See* Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 184 (April 11); Waite and Kennedy v. Germany, 30 Eur. H.R. Rep. 261, 273 (1999); Mendaro v. World Bank, 717 F.2d 610, 615-617 (D.C. Cir. 1983); Mukuro v. European Bank for Reconstruction and Development, [1994] I.C.R. 897, 903.

[107] AMERASINGHE, *supra* note 18, at 316.

diplomatic immunity.[108] Likewise, this Court's President has observed that while "[t]he relevant test under international law is whether immunity from jurisdiction to prescribe is *necessary* for the fulfillment of the organization's purposes . . . it is not always necessary for an international organization to have full immunity from suit and enforcement for it to fulfill its purposes."[109] In *Iran-US Claims Tribunal v. AS*, the Dutch High Court recognized that an international organization's immunity is limited to, "disputes which are immediately connected with the performance of the tasks entrusted to the organization in question."[110] In addition, the Italian Court of Cassation qualified organizational immunity in *FAO v. INPDAI* by holding that it applied to "activities closely affecting the institutional purposes of the international organization."[111]

Functional immunity for representatives of international organizations is also limited.[112] Generally, officials of international organizations enjoy immunity from jurisdiction only in respect of their official acts.[113] Like diplomatic personnel of States, officials of international organizations must "respect the laws and regulations of the receiving State."[114] However, in cases of abuse, the UN Convention and the Specialized Agencies Convention both require

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[108] UN Convention, *supra* note 103, art. 4, §11(a).

[109] HIGGINS, *supra* note 89, 93 (emphasis added).

[110] Iran-US Claims Tribunal v. AS, 94 I.L.R. 321, 329 (Neth. 1985).

[111] FAO v. INPDAI, 87 I.L.R. 1, 6-7 (It. Cass.1982).

[112] Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations, 85 I.L.R. 300, 320 (1989). *See also* AMERASINGHE, *supra* note 18, at 341.

[113] UN Convention, *supra* note 103, art. 18(a); Specialized Agencies Convention, *supra* note 104, §19(a); IDA Agreement, *supra* note 105, art. VIII(8)(i); IMF Agreement, *supra* note 105, art. IX(8)(i).

[114] VCDR, *supra* note 93, art. 4.

waiver of such privileges and immunities by the organization or its representative.[115] Article 24 of the Specialized Agencies Convention further provides for consultation, reference to this Court and, where the Court finds abuse, withholding of the particular immunity or privilege from the agency concerned.[116] Thus, even if these Conventions embodied a rule of custom, the RU office and its personnel would only be afforded immunity for actions falling within the scope of their functions.

The RU office was established "in order to facilitate the work of the RU Commission and its experts and to aid in the diplomatic and economic aspects of Adarian integration in the RU."[117] However, during the 2003 and 2005 Adarian parliamentary elections, Mr. Heep and members of his staff made contributions to one or more parliamentary candidates in violation of Section 17-1031 of the Adarian Civil Code.[118] This illegal interference into the domestic politics of Adaria was unrelated to the office's purpose and functions. The personnel of the RU office are not entitled to immunity for these actions. Likewise, its property and premises are not immune from Adarian judicial process. Adaria thus properly exercised its sovereign right to enforce its criminal laws against the RU office.

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[115] UN Convention, *supra* note 103, arts. 14, 20, 21, 23; Specialized Agencies Convention, *supra* note 104, arts. 18, 22, 23. *See also* Rosalyn Higgins, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Materials*, 79 AM. J. INT'L L. 641, 649 (1985).

[116] Specialized Agencies Convention, *supra* note 104, art. 24.

[117] Compromis, Annex II ¶ 3.

[118] Compromis ¶ 30.

## IV. THE NATIONAL INDUSTRY ACT IS A LAWFUL REGULATION OF NATIONAL ECONOMIC ACTIVITY.

### A. The NIA does not constitute an expropriation of assets owned by corporations from Respondent States.

Expropriation occurs only when there is an *unreasonable* government interference with the use of private property.[119] To determine whether an act constitutes expropriation, courts consider: (1) the degree of interference with the property right; (2) the purpose and the context of the governmental measure; and (3) the interference of the measure with reasonable and investment-backed expectations.[120] A lawful exercise of a government's power may have a considerable affect on foreign interests without amounting to expropriation.[121] Only "substantial" or "significant" deprivations of property rights are deemed to be expropriations.[122]

In fact, only those acts that have the effect of rendering all property rights completely useless to the owner have been deemed substantial enough to constitute an expropriation. In *Starrett Housing Corporation v. Iran*, for example, the Iran-U.S. Claims Tribunal held that the appointment of a manager by the Iranian Housing Ministry was an expropriation because it deprived the claimants of management rights as well as effective control and use of their property.[123] Similarly, in *Biloune v. Ghana Investment Centre*, the tribunal found that a stop

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[119] Harza Eng'g Co. v. Iran, 1 Iran-U.S. Cl. Trib. Rep. 499, 504 (1982).

[120] Indirect Expropriation and the Right to Regulate in International Investment Law, OECD Doc. No. 2004/4, 10 (2004) [hereinafter OECD Doc.].

[121] BROWNLIE, *supra* note 1, at 509. *See also* Tabar Claim (No. I), 20 I.L.R. 211, 213 (1953); OPPENHEIM, *supra* note 1, at 911.

[122] OECD Doc., *supra* note 120, 10. *See also* Sea-Land Service, Inc. v. Iran, 6 Iran-U.S. Cl. Trib. Rep. 149, 166 (1984).

[123] Starrett Housing Corp. v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 122, 154 (1983).

order on construction work constituted a taking because it caused the irreparable cessation of work on the project.[124]

Actions falling short of this degree of severity have generally been found not to constitute an expropriation. In *Pope v. Talbott*, where the introduction of export quotas resulted in a reduction of profits for the applicant, but did not entirely prevent overseas sales, the tribunal found that there was no compensable expropriation as the deprivation was not substantial.[125] In *S.D. Myers, Inc. v. Canada*, the NAFTA Tribunal found that there was no expropriation when Canada imposed a temporary export ban on toxic wastes from Canada to the United States. That tribunal further concluded that regulatory actions are generally not considered to be expropriation.[126] In *Starrett Housing*, the Iran-U.S. Claims Tribunal found that armed incursions and detention of personnel, intimidation and interference with supplies and needed facilities did not amount to an expropriation. Finally, in the *Mitzi Schoo* case the United States Foreign Claims Settlement Commission held that the refusal to permit the transfer of funds abroad does not constitute a taking.[127]

The NIA does not substantially interfere with any private property rights of RU corporations. The corporations who purchased industries from Adaria did so by acquiring stock

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[124] Biloune v. Ghana Investment Centre, 95 I.L.R. 183, 207-210 (1989).

[125] Pope & Talbot, Inc. v. Canada, Interim Award of June 26, 2000, NAFTA/UNCITRAL Tribunal, *reprinted in* 23 HASTINGS INT'L & COMP. L. REV. 455, 479 (2000).

[126] S.D. Myers, Inc. v. Canada, 121 I.L.R. 72, 122 (NAFTA Tribunal 2002).

[127] Mitzi Schoo, Decision No. CZ-279 (1960), U.S. Foreign Claims Settlement Comm'n, Fourteenth Semiannual Report (1961). *See also* G. C. Christie, *What constitutes a Taking of Property Under International Law?*, 38 BRIT. Y.B. INT'L L 307, 318 (1962).

ownership.[128] The NIA does not deprive them of this ownership interest. Neither does the NIA require a transfer of any assets of the RU corporations to the Adarian government. Rather, like the export ban in *S.D. Meyers* and the prohibition on overseas funds transfers in *Mitzi Schoo*, the NIA reasonably regulates the way in which capital flows from enterprises within Adaria. The NIA simply requires that capital gained from recently-privatized industries must stay within Adaria. RU corporations can continue to, and are in fact encouraged to, use and invest these assets within Adaria. As the Iran-U.S. Claims Tribunal recognized in *Starrett Housing*, investors in foreign countries assume certain risks with regard to disturbances and changes in local law.[129] The fact that "these risks materializ[e] does not necessarily mean that property rights affected by such events can be deemed to have been taken."[130]

### B. Even if the NIA is an expropriation, it is a legitimate exercise of Adaria's sovereign right to regulate its economy.

As a sovereign State, Adaria possesses the "unquestionable" right to regulate foreign ownership of property.[131] In *Amoco International Finance Corp. v. Iran*, the Iran-U.S. Claims Tribunal found this right to be "unanimously accepted" by the international community.[132] Furthermore, the UN General Assembly has explicitly recognized that every State has an

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[128] Compromis ¶ 36.

[129] *Starrett Housing*, 4 Iran-U.S.Cl. Trib. Rep. at 154.

[130] *Id.*

[131] Texaco Overseas Petroleum Co. v. Libya, 53 I.L.R. 389, 469 (1977). *See also* OECD Doc., *supra* note 120, at 3; OPPENHEIM, *supra* note 1, at 911; Eduardo Arechaga, *Application of the Rules of State Responsibility to the Nationalization of Foreign-Owned Property, reprinted in* LEGAL ASPECTS OF THE NEW ECONOMIC ORDER, 220 (Kamal Hossain ed., 1980).

[132] Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 196 (1987).

inviolable right to adopt the economic system which it deems most favorable to its development.[133] Adaria exercised this sovereign right by enacting the NIA.

**1. The NIA is consistent with Adaria's obligations as a developing State.**

As Adaria is a developing country, the appropriate standard to consider when determining whether the NIA is illegal is that embodied in the Charter of Economic Rights and Duties of States (Charter),[134] which reflects the position taken by developing States,[135] as opposed to the position adopted by developed States as embodied in the UN Resolution on Permanent Sovereignty over Natural Resources (Resources Resolution).[136] While the Resources Resolution provides that expropriation will be legal only when it is for a valid public purpose, is non discriminatory and includes appropriate compensation,[137] this approach is not reflective of custom nor of the position adopted by the global community. Developing States have expressly rejected these principles in favor of more equitable relations with developed States as emphasized in the Charter.[138] In the absence of widespread and consistent State practice, the

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[133] G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (Dec. 17, 1973).

[134] Charter of Economic Rights and Duties of States, G.A. Res. 3281, Preamble, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 12, 1974) [hereinafter Charter of Economic Rights].

[135] REBECCA WALLACE, INTERNATIONAL LAW 191 (4th ed. 2002).

[136] Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/S217 (1962) [hereinafter Resources Resolution].

[137] *Id.*

[138] *See* Charter of Economic Rights, *supra* note 134; BROWNLIE, *supra* note 1, at 517; WALLACE, *supra* note 135, at 191.

traditional approach cannot be said to constitute custom for both developing and developed States alike.[139]

The Charter is recognized as an "emergent principle,"[140] reflective of a new international economic order.[141] It provides that each State has the right "to expropriate or transfer ownership of foreign property" if it pays "appropriate compensation" taking into consideration all circumstances that the *State* considers pertinent.[142] Thus, where the relevant factors weigh in favor of the regulation, a State is entitled to conclude that no compensation is required.[143] The Charter states that questions regarding compensation shall be settled under the domestic law of the nationalizing State and makes no mention of requirements for a valid public purpose or non-discrimination.[144]

Adaria is entitled to claim the deference granted to the lawful exercise of sovereign powers because it acted in order to mitigate the losses suffered in reliance on Respondents' representations. As the NIA was necessary to restore the Adarian economy to its original position prior to the losses suffered as a result of trying to satisfy the AAA conditions, it is only appropriate that no compensation be required. Moreover, the provisions of the NIA have been

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[139] North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Ice.), 1969 I.C.J. 3, 42 (Feb. 20).

[140] BROWNLIE, *supra* note 1, at 518.

[141] *See* Declaration on the Establishment of a New International Economic Order, GA Res. 3201 (S-VI) 6th Sess., UN Doc. A/9956 (1974); OPPENHEIM, *supra* note 1, at 336.

[142] Charter of Economic Rights, *supra* note 134, art 2 ¶2(c).

[143] Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 277 (1982).

[144] Charter of Economic Rights, *supra* note 134, art 2 ¶2(c)

carefully considered by the Adarian Supreme Court which ultimately concluded that the NIA was a lawful exercise of Adaria's sovereign rights.[145]

### 2. The NIA also satisfies the requirements for expropriation advocated by developed States.

According to developed States, expropriation is justified if it is: (1) lawfully enacted; (2) for a public purpose; (3) non-discriminatory; and (4) accompanied by compensation.[146] The NIA satisfies each of these conditions.

The Adarian Parliament lawfully enacted the NIA to serve the legitimate public purpose of protecting capital flight and reducing the economic damage caused by Respondents' denial of RU membership.[147] While "public purpose" has not been precisely defined, tribunals have afforded States extensive discretion in acting,[148] because national authorities are "better placed . . . to appreciate what is in the 'public interest.'"[149] Indeed, tribunals have rarely rejected a government's submission that a measure was in the public interest.[150] Here, the Adarian need to restore its shattered economy through protections on capital flight cannot be seriously challenged.

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[145] Compromis ¶ 36.

[146] *See* North American Free Trade Agreement, art. 1110, 32 I.L.M. 605, 641-642 (1993); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 433 (1964); OECD Doc., *supra* note 120, at 3. *See also* Resources Resolution, *supra* note 136, at ¶ 4; Ian Brownlie, *Legal Status of Natural Resources in International Law*, 162 RECUEIL DES COURS 253 (1979).

[147] Compromis ¶ 35.

[148] Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep.189 (1987).

[149] James v. United Kingdom, 8 Eur. H.R. Rep. 123, 142 (1986).

[150] Helen Mountfield, *Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights*, 11 N.Y.U. ENVTL. L. J., No. 1, 136, 141 (2002).

The NIA is also non-discriminatory. State actions are discriminatory only if they predominantly intend to harm foreign nationals.[151] In the *LIAMCO* case for example, the tribunal found that although Libya's nationalization targeted American companies, it was not discriminatory because it was part of Libya's rightful efforts to maintain ownership of its petroleum resources.[152] Furthermore, in the *Aminoil* case, the tribunal found that the nationalization of Aminoil was non-discriminatory because the purpose of the law which terminated Aminoil's concession rights was economic development.[153] Like the law in *Aminoil*, the NIA was designed to stimulate Adarian economic development by protecting capital flight. The NIA neither favors national companies nor discriminates against foreign corporations. It affects new owners of recently privatized Adarian industries without regard to their nationality. There is no evidence that the act has a discriminatory purpose.

Non-discriminatory measures taken by a State which are regarded as essential to the efficient functioning of the State and whose purpose are to promote the public good are non-compensable.[154] The European Convention of Human Rights, for example, qualifies its provisions on expropriation by stating that they shall not "in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest."[155] As the NIA was enacted to reduce the damage caused by Respondents'

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[151] OECD Doc., *supra* note 120, at 5 n.10.

[152] Libyan-Am. Oil Co. v. Libya, 62 I.L.R. 141, 194 (I.C.J. Arbitration 1977).

[153] Kuwait v. Aminoil, 66 I.L.R. 519, 585 (1982).

[154] OECD Doc., *supra* note 120, at 5 n.10; M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 283 (1994); Higgins, *supra* note 143, at 277-278.

[155] Protocol I to European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, March 20, 1952, 213 U.N.T.S. 262.

denial of RU membership,[156] it may be deemed essential to Adaria's general interest and therefore non-compensable. Thus, even if the NIA constitutes an expropriation, it was a lawful exercise of Adaria's sovereign rights.

## CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Adaria respectfully requests this Honorable Court to find, adjudge, and declare as follows:

1) That Respondents' refusal to admit Adaria to membership in the RU, violated international legal obligations owed to Adaria.

2) That Respondents do not have standing to make claims concerning Adaria's enforcement of its criminal laws against the RU office, its property, and its personnel.

3) That Adaria did not violate international law concerning the immunity of diplomatic missions by enforcing its criminal laws against the RU office, its property, and its personnel.

4) That the National Industry Act is a lawful exercise of Adaria's right to regulate its economy.

Respectfully submitted,

Agents for the Applicant

[156] Compromis ¶ 35.

# The 2007 Philip C. Jessup
# International Law Moot Court Competition

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 – INTERNATIONAL ROUNDS
(Respondent)

*Memorial Contained in Baxter Section*

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