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INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

THE 2007 PHILIP C. JESSUP INTERNATIONAL LAW

MOOT COURT COMPETITION

CASE CONCERNING THE ROTIAN UNION

THE REPUBLIC OF ADARIA

V.

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

MEMORIAL FOR THE APPLICANT

2007

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STATEMENT OF JURISDICTION

The Republic of Adaria, on one side, and the Republic of Bobbia, the Kingdom of Cazalia, the Commonwealth of Dingoth, the State of Ephraim and the Kingdom of Finbar, jointly on the other, have submitted by Special Agreement their differences concerning the Rotian Union, and transmitted a copy thereof to the Registrar of the Court pursuant to article 40(1) of the Statute. Therefore, both parties have accepted the jurisdiction of the ICJ pursuant to Article 36(1) of the Statute of the Court.

QUESTIONS PRESENTED BEFORE THE COURT

The Republic of Adaria respectfully asks this Court:

I.- Whether or not Respondents have violated international legal obligations owed to Adaria by denying Adaria membership in the Rotian Union;

II.- Whether or not Respondents have standing to make any claim concerning Adarian actions with respect to the Rotian Union representative office, its property, or its personnel;

III.- Whether or not Adaria violated international law concerning the immunity of diplomatic missions by seizing the premises, property, or personnel of the Rotian Union representative office; and

IV.- Whether or not the National Industry Act constitutes an illegal expropriation of Adarmoire and the other privatized concerns under international law.

STATEMENT OF FACTS

The Republic of Adaria is a developing State with a parliamentary democratic form of government. Traditionally dependant on agricultural production, over the last years it had experienced a growth of the manufacturer industry led by state-owned enterprises.

Adarian population consists of 40 million ethnic Adarians and 2 million ethnic Sophians. Although sharing religious, idiomatic and cultural differences, the Sophian minority has always been a primary concern for Adarian authorities. In light of this, the Parliament had enacted the 1975 Sophians Protection Act (SPA) aimed at protecting its craft production and farm-based economy by providing for governmental subsidies and benefits to small businesses, as well as discounts in basic public services.

On December 2, 1995, the Republic of Adaria applied for entering into the Rotian Union, an international organization created and integrated by Respondents. In accordance with the Union's rules governing accession of new members into the Organization, the Commission performed a four-years investigation and research of Adarian economy. At the end of this endeavour, on December 6, 1999, a recommendation was submitted to the Council containing a series of three conditions upon which fulfilment Adaria was suitable for election as a member. As it was the Commission's view that Adaria would successfully accomplish the requirements, said organ urged the Council to celebrate an Accession Agreement with Adaria.

After ratifying the aforementioned recommendation, the Council entrusted the Commission with the celebration of the Agreement, which was finally concluded between Adaria and that organ on 1 October 2001. This instrument reproduced the three conditions previously established by the Commission. Specifically, Adaria had to:

"a) reduce its public debt owed to non-member States,

b) privatize State-owned monopolies, and

c) eliminate government support payment to small, privately-owned businesses."

Additionally, it stipulated the creation of a Delegation of the Rotian Union in Adarian territory aimed at facilitating the accession process. The deadline for accomplishment of the three conditions was set for November 1, 2005.

After informing of the Agreement to the Adarian citizenship, the government began to undertake drastic changes in its economy in order to comply with the three requirements formulated by the Rotian Union. Specifically, it increased *ad valorem* taxes in every sector in order to reduce its foreign debt, and privatized a great number of public companies, which were all immediately acquired by corporations established in the Respondent's States.

With the view to integrate the recently purchased companies into its global network, the new owners took the measure of laying off some 20,000 employees. Additionally, they reduced a great number of supply contracts established with Sophian handicraft manufacturers and eliminated the price discounts to which they were beneficiaries under the SPA. The resultant increase of prices in basic utilities such as water and power left a great portion of the Sophian population in poor life conditions.

In order to comply with the third demand established by the Accession Agreement, Adarian government had to eliminate all subsidies to Sophian manufacturers, which, as informed by the Department of Social Studies of the Adarian National University, contributed to the impossibility to operate farm activities originated by the price increase in supplies.

With the idea of palliating this crisis, Prime Minister Mesmim announced the creation of a public works programme in the northeast region of Adaria. However, in spite of the publicly

recognized good-willingness of this measure, it resulted on a failure as no significant portion of the Sophian population was willing to participate.

Over 2004 and 2005, Adarian government continued to take measures in order to accomplish the objectives laid down in the Accession Agreement. Disregarding inner voices that opposed the idea of entering the Rotian Union, the government of Prime Minister Mesmin insisted on his endeavour, with the confidence that upon completion, Adaria would effectively become a member.

Finally, as expected, on November 10, 2005, the Commission Delegation established in Ilsa informed the Council that Adaria had fully complied with all the requirements, and urged on its accession as a member of the Rotian Union. However, on 20 November 2005, the Council adopted decision Nº 05/376 thereby declining Adarian accession to the Rotian Union on the unforeseen basis that the conditions in which the Sophian population had entered after implementation of the economic measures required for said accession were "inconsistent with membership in the Union".

Social discontent and political reaction immediately followed Adarian denial of membership. At a press conference held in November 6, 2005, Prime Minister Mesmin informally protested against the Council's decision and called on the Rotian Union to fulfil the promise it had undergone.

A few days later, on 15 November 2005, an investigation on the representatives of the Rotian Union Delegation began. It had come to the authorities attention that during the period in which the aforementioned delegation was established in Ilsa, it had made financial contributions to parliamentary candidates in violation of Section 17-1031 of the Adarian Criminal Code. Such norms specifically forbid such donations by foreign business or corporate entities.

The following day, agents of the Justice Ministry delivered a duly issued subpoena to the Delegation Chief Executive Officer, Mr. Uriah Heep, ordering to handle all electronic or paper bank records concerning transactions within Adarian territory. Following his public denial, he was arrested and taken into custody on the charges of violating Adarian Criminal Code Section 17-1031 and impeding due exercise of justice.

Seizure of the bank records withheld by Mr. Heep ultimately took place the following day when, following an order form the local magistrate, Justice Ministry officials entered into the Delegation's office.

As it was suspected, the recovered documents demonstrated that representatives of the Rotian Union had indeed violated Adarian Criminal Code by illegally financing political candidates.

Finally, on December 19, the Adarian Parliament approved the National Industry Act (NIA), forbidding the exportation of proceeds obtained by all companies privatized after ratification of the Adarian Accession Agreement, and repatriating of any of their assets. Such measure was conceived as a way to mitigate the devastating effects that the economic process ending in the denial of Adarian membership into the Rotian Union had produced.

Following contestation in national courts, Adarian Supreme Tribunal confirmed the economic measure inasmuch as it considered that no expropriation can occur when property and assets remain in the territory and within the patrimony of the companies.

SUMMARY OF PLEADINGS

The Republic of Adaria submits before this High court that the Republic of Bobbia, the Kingdom of Cazalia, the Commonwealth of Dingoth, the State of Ephraim and the Kingdom of Finbar have violated international legal obligations by denying Adarian membership into the Rotian Union. Secondly, Adaria claims that the Respondents do not have standing to make any claim concerning Adarian action with respect to the Rotian Union Representative Office, its property or its personnel. Additionally, it is submitted that Adaria did not violate international law concerning the immunity of diplomatic missions by seizing the premises, property or personnel of the Rotian Union Representative Office. Finally, Adaria claims that the National Industry Act does not constitute an illegal expropriation of Adarmoire and the other privatized concerns under international law.

In respect of the denial of membership to the Rotian Union, Adaria submits that the Respondents have violated international legal obligations owed to Adaria, given that such denial because it violated the terms of the Adarian Accession Agreement, as well as the procedure for admission established in Adaria's favor. Futhermore, Respondents are liable for the acts of the Rotian Union that affected Adaria, because generally Member States are liable for the acts of the International Organizations of which they form part and in particular because the Respondents led Adaria to rely on their liability and because the illegal conduct of the Rotian Union belongs to the field of the Member's delegated competences.

In connection with the Respondents standing to bring international claims in respect of the Rotian Union Representative Office, its property or personnel, it is maintained, firstly, that local remedies available in Adaria have not been exhausted. Furthermore, the obligations concerning privileges and immunities would be owed to the Rotian Union, being it the only

entity entitled to bring an international claim. Further, it is submitted that member States cannot bring an international claim for a breach of such obligations, neither on behalf of the organization, nor in their own right. Lastly, it is maintained that Respondents cannot bring the aforementioned claim as they have delegated foreign policy matters in the organization.

As regards international law obligations concerning the immunities of the Rotian Union representative office, its property or personnel, Adaria submits that no breach attributable to it has occurred. On the first place, diplomatic privileges and immunities are not applicable to the Rotian Union representation. Furthermore, it is argued that no conventional or customary law imposes Adaria the obligation to provide privileges and immunities to the Rotian Union office and that if any such rule were held to exist it would only bind the Members of the Organization. Finally, it is submitted that, in case Adaria's is held to be bound by such rules, no breach of the concerned obligations would have occurred because Adaria's actions fall within accepted exceptions to them..

Finally, with respect to National Industry Act, Adaria claims, firstly, that Respondents have not exhausted local remedies with regard to all the privatized concerns and thus, they can only exercise diplomatic protection in Adarmoire's case. Secondly, it is submitted that the National Industry Act does not amount to an expropriation, given that only forcible takings of property are considered as such in international law and that all other measures that affect property rights, without constituting an actual taking of property, are legal. Alternatively, it is claimed that the National Industry Act does not produce the required effect on the privatized concerns' property rights as to be deemed an indirect expropriation. Lastly, Adaria submits that the National Industry Act is a valid regulatory measure that complies with the requirements of

non-discrimination, public purpose and temporary duration and that consequently, it does not require payment of compensation.

I. RESPONDENT STATES HAVE VIOLATED INTERNATIONAL LEGAL OBLIGATIONS OWED TO ADARIA BY DENYING ADARIA MEMBERSHIP IN THE ROTIAN UNION.

Under international law, treaties must be performed in good faith.[1] The Rotian Union's [hereinafter R.U.] denial of Adarian membership is inconsistent with the Adarian Accession Agreement [hereinafter A.A.A.] and it engages Respondents´ international responsibility.

A) DENIAL OF MEMBERSHIP UNDER THE CIRCUMSTANCES OF THIS CASE IS INCONSISTENT WITH THE OBLIGATIONS UNDERTAKEN UNDER THE AAA.

1) Denial of membership violates the terms of the Adarian Accession Agreement to the Rotian Union Treaty

An organization cannot make consent for admission dependent on conditions other than those expressly specified in the pertinent treaty.[2] The A.A.A. established that Adaria was eligible for admission to the R.U. after accomplishing three specific conditions.[3] Having Adaria met them, the R.U. rejected its application on grounds not expressly contemplated in the treaty.[4] Hence, the denial is inconsistent with international law.

The reference that Adaria would only be "eligible" does not affect such conclusion. In ascertaining what "eligible" comprises, due regard must be paid to the rules set forth in the Vienna Convention on the Law of Treaties,[5] for not only do they reflect customary rules on the

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[1] Vienna Convention on the Law of Treaties, May 1969, 1155 U.N.T.S. 331, art.26 [hereinafter V.C.L.T.]; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, May 1986, 25 ILM 543, art.26 [hereinafter 1986 V.C.L.T.].

[2] Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J. 57, 65 (Dec. 12)

[3] *Compromis*, Annex I, art. 1.

[4] *Compromis*, # 28.

[5] V.C.L.T., *supra* note 1.

issue,[6] that extend to International Organizations' instruments,[7] but also all parties to this case have ratified it.[8]

In this vein, even if the ordinary meaning of the term "eligible" may imply a certain power of the Council to decide on Adaria's application, such margin of appreciation must be interpreted in good faith and has to be placed in context, including the common intention of the treaty as a whole, its object and its spirit.[9] Even if the ordinary meaning of "eligible" is broader than that provided by the context, the latter should prevail.[10]

The purpose of the A.A.A. was "*to facilitate the successful integration of Adaria into the RU*".[11] Then, any impediment had to be construed restrictively, as this type of treaties do not create obligations only for the State applying for membership but also for the organization concerned.[12]

Furthermore, the context reveals that the only conditions for admission are those established in §1. Thus, the Council's discretion must be circumscribed to assessing the fulfillment of those requisites, but not to the inclusion of other considerations, especially when

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[6] Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6 (Feb. 3), para. 41; M.SHAW, INTERNATIONAL LAW 937 (2003).

[7] Legality of the Threat or Use of Nuclear Weapons in Armed Conflict, Adv. Op., 1996 I.C.J. 66 (July 8), para 19.

[8] *Compromis* #40.

[9] V.C.L.T., *supra* note 1, art. 31; South West Africa (Ethiopia v. South Africa, Liberia v. South Africa), Preliminary Objections, 1962 ICJ 319, (Dec. 21), 336; H.Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 48 (1949), 80.-

[10] Gabčíkovo-Nagymaros-Project (Hung. v. Slovk.), 1997 I.C.J. 7, (Sept.25), para. 142, South West Africa (Preliminary Objections), *supra* note 9, 336

[11] *Compromis*, Annex II.

[12] Cfr. P.SANDS & P.KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 539 (2001).

such developments were envisioned by the Parliament prior to the conclusion of the A.A.A.[13] and the Treaty was nonetheless concluded.

Finally, resort to relevant rules of international law[14] confirms the aforementioned conclusion, for according to the *ut magis* rule, where conditions are enumerated they must be deemed exhaustive.[15]

Consequently, the denial of membership grounded on the Sophians' situation exceeds the power of the Council to decide on Adaria's application, entailing a violation of the A.A.A.

2) <u>The refusal to admit Adaria was effected in violation of the procedure established in its favor.</u>

The Treaty Establishing the Rotian Union [hereinafter T.R.U] confers the right to join the Union to every State, subject to a detailed admission procedure. The A.A.A. established that Adaria would be eligible for admission, "pursuant to Article 11, Section 6".[16] Thus, the R.U. incorporated into the A.A.A. the process provided for in the aforementioned clause, namely, the decision of the Council after obtaining the opinion of the Parliament.[17]

Furthermore, the admission procedure contemplated in the T.R.U. constitutes a stipulation established in Adaria's favor. Indeed, under the V.C.L.T a treaty may provide a right to a third State if the parties to it intend to accord such right and the third party assents thereto.[18]

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[13] *Compromis* #15 & #16.

[14] V.C.L.T., *supra* note 1, Art. 31.3.(c).

[15] Conditions of Admission of a State to Membership in the United Nations, *supra* note 2, 62-63; G.G.Fitzmaurice, *The Law and Procedure of the International Court of Justice: International Organizations and Tribunals*, 29 BRIT.Y.B.INT'L L. 1 (1952), 25.

[16] *Compromis,* Annex II, para. 1.

[17] *Compromis,* Annex I, art. 11 para. 11.

[18] V.C.L.T., *supra* note 1, art.36; S.S.Wimbledon (U.K, France, Italy, Japan v. Germany), 1923 P.C.I.J., (ser. A) Nº 1 (June 28), 22; E.Jiménez de Aréchaga, *Treaty stipulations in favor of third states*, 50 AM.J.INT'L.L. 338 (1956), 355-357.

Such assent is presumed,[19] inasmuch as existence of a substantive right,[20] or enjoyment of beneficial consequences[21] is asserted. In this connection, the possibility of becoming a party to a treaty by virtue of its own provisions is generally accepted as a right for third states.[22]

Hence, resolution Nº 05/376 rejecting Adaria's application without the Parliament's prior opinion[23] is contrary to the admission procedure as this Court has found on a similar situation.[24] Therefore, the Council's omission constitutes a breach of an obligation under the A.A.A and of the T.R.U.´s stipulation in Adaria's favor.

B) RESPONDENTS ARE LIABLE FOR THE ACTS OF THE ROTIAN UNION *VIS-À-VIS* THIRD PARTIES.

Even if denial of membership was issued by the R.U., Bobbia, Cazalia, Dingoth, Ephraim and Finbar, are still liable, since member states retain responsibility for the conduct of that organization. In the alternative, their responsibility arises from the fact that they (i) made Adaria rely on their liability and (ii) delegated their foreign affairs on the organization, thereby circumventing their own obligations.

1) Respondent States are liable for the acts of the Rotian Union.

Unless specifically limited or excluded, member States of an international organization

[19] V.C.L.T., *supra* note 1, art.32.1.

[20] Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), 1932 P.C.I.J. (ser. A/B) Nº 46 (June 7), 147-148

[21] Fifth Report on the Law of Treaties (Treaties and Third States), 1960 Yb.I.L.C. II, 76.

[22] *Ibid.* p.82.

[23] *Compromis* #28.

[24] Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4 (March 3), 9.

are responsible for the acts of the latter *vis-à-vis* third states.[25] This rule is derived from legal reasoning based upon general principles of law,[26] as this Court has often done.[27]

Responsibility of States for acts of international organizations is based on the same premises governing state responsibility.[28] Hence, relevant principles, such as the responsibility of States for internationally wrongful acts[29] should be considered. In this vein, States are responsible for bringing to life an international organization, and for all the resultant responsibility thereof,[30] since it would be unacceptable for them to shelter their acts behind the legal personality of the organization,[31] as was expressed during the debate of this issue at the

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[25] M.HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES 148 (1995); *see* I.Brownlie, *The responsibility of States for the acts of international organizations* in M.RAGAZZI(ED.), INTERNATIONAL RESPONSIBILITY TODAY ESSAYS IN MEMORY OF OSCAR SCHACHTER 355-362 (2005); and S.Yee, *The responsibility of States Members of an international organization for its conduct as a result of membership or their normal conduct associated with membership* in M.RAGAZZI(ED.), INTERNATIONAL RESPONSIBILITY TODAY ESSAYS IN MEMORY OF OSCAR SCHACHTER 435-454 (2005).

[26] I.Brownlie, in M.RAGAZZI (ED.), *supra* note 25, 357; and S.Yee, in M.RAGAZZI(ED.), *supra* note 25, 443-446.

[27] North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20), 46 para. 83-84; Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38 (June 14), paras. 46-48; Legality of the Threat or Use of Nuclear Weapons, *supra* note 7, para. 74.

[28] Report of the ILC on the Work of its 54th Sess., UN DOC. A/CN.4/529, para. 200; I.Brownlie, in M.RAGAZZI (ED.), *supra* note 25, 360.

[29] United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran), 1980 I.C.J. 3 (May 24), 29; Gabčikovo-Nagymaros-Project *supra* note 10, 54; Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/RES/56/83, Jan. 28th, 2002, [hereinafter Res. 56/83], art. 1.

[30] S.Yee, in M.RAGAZZI(ED.), *supra* note 25, 444; W.E.Holder, *Can International Organizations be Controlled? Accountability and Responsibility*, 97 AM. SOC'Y INT'L L.PROC. 231 (2003), 234-235.

[31] M.HIRSCH, *supra* note 25, 136; I.SEIDL-HOHENVELDERN, CORPORATIONS IN AND UNDER INTERNATIONAL LAW 121 (1987).

General Assembly.[32]

State practice confirms the existence of the aforementioned rule. Indeed, States -when creating international organizations – have included clauses limiting their liability in more than twenty constituent instruments.[33] The consistency and continuity of this practice is shown by the fact that after the default of the International Tin Council other six instruments establishing organizations were accordingly adopted.[34]

Further, member States of international organizations have supplied the funds to reach a settlement with creditors[35] thereby tacitly admitting their liability or full liability for all its debts when they decided to wind up the organization.[36]

Additionally, in the frame of the European Community, treaties with non-member States result in mixed agreements to apportion clearly the responsibility, in the absence of which, States are all jointly liable.[37]

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[32] Summary record of the 11th meeting of the Sixth Committee, Oct. 24th 2005, U.N.G.A. A/C.6/60/SR.11, para. 53.

[33] C.F.AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 427 (2005); United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 3, Dec. 10th 1982, Article 174 (4); Agreement of the I.B.R.D, at http:\\web.worldbank.org, art. 2(6); Agreement Establishing the Interamerican Investment Corporation, *available* at http:\\www.iic.int, art. 2(6); Convention establishing the Inter-Arab Investment Guarantee Corporation *available* at http:\\www.iaigc.org, art. 7(4).

[34] H.G.SCHERMERS & N.M.BLOKKER, INTERNATIONAL INSTITUTIONAL LAW §1589 (2003); International Cocoa Agreement, at http:\\www.icco.org, art. 23; International Coffee Agreement, at http:\\www.ico.org, art. 26.

[35] M.HIRSCH, *supra* note 25, 126-127; *Current Developments: Public International Law,* 39 INT'L&COMP.L.Q. 923, 945 (1990).

[36] I.Seidl-Hohenveldern, *Piercing the Corporate Veil of International Organizations: The International Tin Council Case in the English Court of Appeals*, 32 GERMAN YEARBOOK OF INT'L LAW 43 (1989), 51-52.

[37] P.J.Kuijper & E.Paasivirta, *Further Exploring International Responsibility: the European Community and the ILC's Project on Responsibility of International Organizations*, 1 INT'L

Furthermore, judicial decisions have confirmed the existence of this rule when affirming that "[i]n the absence of any provision expressly or impliedly excluding the liability of the four States, this liability subsists […] This rule flows from general principles of law and from good faith".[38]

The Treaty establishing the Rotian Union does not contain any provision denying liability of member states. Consequently, Respondents are liable for the conduct of the organization.

2) <u>Respondent States are liable for the acts of the Rotian Union because they led Adaria to rely on their liability</u>.

Members of an international organization are responsible *vis-à-vis* third States for the acts of the organization if they have led the injured party to rely on their responsibility.[39] In determining so, the surrounding circumstances should be examined globally.[40]

In the instant case, the final decision on membership applications rests with the Council.[41] The fact that each member state is represented there by its Head of Government,[42] coupled with the requirement of unanimous vote for admissions,[43] reflects the intention of

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ORGANIZATIONS LAW REVIEW 111 (2004), 122-123; Case 316/91, Parliament v. Council, E.C.J., 1994 E.C.R. I-625, para. 29.

[38] Westland Helicopters Ltd. v. Arab Organization for Industrialization, 80 INT'L LAW.REP. 596 (1989), 613.

[39] Report of the I.L.C., 58th Sess., U.N.G.A. A/61/10 [hereinafter I.L.C. Report 58rd, 286-291; Fourth Report on Responsibility of International Organizations, Addendum, U.N.G.A. A/CN.4/564/Add.2, para. 92; I.Seidl-Hohenveldern, *supra* note 36, 47; Westland Helicopters Ltd., *supra* note 38, para. 56; Maclaine Watson & Co. Ltd. Appellants v. Department of Trade and Industry, 3 All ER 307, 331.

[40] I.L.C. Report 58rd, *supra* note 39, 290; C.F.AMERASINGHE, *supra* note 33, 435; I.Seidl-Hohenveldern, *supra* note 36, 47.

[41] *Compromis,* Annex I, art. 11.6.

[42] *Ibid.*, art. 5.2.

[43] *Ibid.*, art. 11.6.

respondents to keep a high degree of control over the decision, being that a strong presumption of liability,[44] as it casts doubt on the sufficient independence of the organ concerned.[45] Other relevant factors are the small size of the organization,[46] and the fact that the Parliament warned about their impact on the Sophians' situation[47] making it apparent that respondents would not deny liability for any related circumstance.

Moreover, under the T.R.U., respondents ensured the fulfillment of obligations arising from the Treaty or resulting instruments,[48] a situation specially contemplated by the European Court of Justice in a similar case,[49] specially when no clause excluding members' liabilities was included.[50]

For these reasons, Adaria relied that Respondents would comply with the obligations under the A.A.A. and bear any responsibility arising thereof. Consequently, Respondents must be held liable for the organization's rejection of Adaria's application for membership.

3) Respondent States are liable for the acts of the Rotian Union because they delegated their foreign affairs to the organization.

Member states are liable for the conduct of the international organizations in the fields of

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[44] Maclaine Watson & Co., *supra* note 39, 331.

[45] First Report on Responsibility of International Organizations, March 26th 2003, U.N. Doc. A/CN.4/532, para. 19.

[46] Summary record of the 12th meeting of the 6th Committee, Nov. 23th 2005, U.N.G.A. A/C.6/60/SR.12 para. 52.

[47] *Compromis* #16.

[48] *Compromis* Annex I, art. 10(a).

[49] Meryem Demirel v. Stadt Schwabisch Gmund, E.C.J., 1987, E.C.R. 03719 (Sept. 30), recital 11.

[50] C.F.AMERASINGHE, *supra* note 33, 436.

delegated competences,[51] since States cannot evade their responsibility for what would be their ordinary competence by delegating it to an organization.[52]

In the case at bar, Respondents have delegated many of their competences to the R.U.,[53] among them, the conduction of their foreign policy,[54] including the capacity to conclude international treaties.[55] Indeed, it could be argued that the R.U. acts both in law and in fact as the agent of the Respondent States.[56] Adaria's process of admission to the R.U. is within the competences that those States delegated to the organization. Thus, Respondent States are liable for any wrongful act emerging from such process. Otherwise they would circumvent all their international responsibilities by merely deferring issues to another legal person.

II. RESPONDENTS DO NOT HAVE STANDING TO MAKE ANY CLAIM CONCERNING APPLICANT'S ACTIONS WITH RESPECT TO THE ROTIAN UNION REPRESENTATIVE OFFICE, ITS PROPERTY, OR ITS PERSONNEL.

A) RESPONDENTS CANNONT ESPOUSE THE ROTIAN UNION CLAIM BECAUSE LOCAL REMEDIES IN ADARIA HAVE NOT BEEN EXHAUSTED.

International organizations are generally recognized the capacity to institute legal proceedings in national courts.[57] Therefore, compliance with the rule of exhaustion of local

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[51] I.L.C. Report 58rd, *supra* note 39, 283-286; Fourth Report on Responsibility of International Organizations, Addendum, U.N.G.A. A/CN.4/564/Add.1, para. 64-74.

[52] P.J.Kuijper & E.Paasivirta, *supra* note 37, 130-131; Waite and Kennedy v. Germany, (2000) 30 E.H.R.R. 261, 287 para. 67; Matthews v. United Kingdom, (1999) 28 E.H.R.R. 361, 396 para. 32; Bosphorus v. Ireland, (2006) 42 E.H.R.R. 1, para. 154.

[53] *Compromis* #6, #7 & #9; Annex I, art. 2 & 8.2.

[54] *Compromis* #11 & #12.

[55] *Compromis* Annex I, art. 11.

[56] Institut de Droit Internationale, *Les consequences juridiques pour les États membres de l´inexécution par des organisations internationales de leurs obligations envers des tiers*, Article 5, at http://www.idi-iil.org/idiF/resolutionsF/1995_lis_02_fr.pdf

[57] Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15, 13 February 1946, Section 1; ILO Constitution, Article 39, 15 U.N.T.S. 35; Treaty Establishing the

remedies when claiming for damages inflicted to its delegation or agents, as it is analogically required for the exercise of diplomatic protection,[58] is required from international organizations.[59]

The R.U. has not exhausted local remedies available in Adaria and, therefore, both the Union and the Respondents are precluded from resorting to this Court with regard to this issue.

B) RESPONDENTS DO NOT HAVE STANDING BECAUSE OBLIGATIONS CONCERNING THE ROTIAN UNION PRIVILEGES AND IMMUNITIES, IF ANY, WERE OWED TO THE ORGANIZATION AND ITS MEMBERS CANNOT ESPOUSE THE CLAIM.

1) The alleged obligations would have been owed to the Rotian Union and thus only the organization would be entitled to invoke Adaria's responsibility .

As a corollary of the attribution of international personality an international organization is capable of possessing rights and obligations of its own,[60] including the capacity to invoke the responsibility of States for internationally wrongful acts.[61] Furthermore, it is generally

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European Economic Community, 298 U.N.T.S. 11 Article 211; Fourth Report on Relations Between States and International Organizations, Y.B. INT'L L.COMM'N., Vol.II, 153, Article 5, A/CN.4/424, P.SANDS & P.KLEIN, *supra* note 12, 485.

[58] Mavrommantis Palestine Concessions, PCIJ, Series A, No. 2, 1924, 12.

[59] C.Eagleton, *International Organization and the Law of Responsibility*, 76 RCADI 319, 351 (1950); A.REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 127 (1995) .

[60] Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 179 [hereinafter: Reparations]; R.HIGGINS, PROBLEMS AND PROCESS 46 (1995).

[61] Reparations, *supra* note 60*,* 179; M.Hardy, *Claims by International Organizations in respect of Injuries to their Agents*, 37 BRIT.Y.B.INT´L L. 516 (1961), 521-522; M.Rama Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 BRIT.Y.B.INT´L L. 111 (1970), 130; D.Akande, *International Institutions*, in M.EVANS(ED.), INTERNATIONAL LAW 274 (2003).

established that only the entity to which an obligation is owed possesses that capacity.[62] Therefore, the capacity to invoke a breach of an obligation owed to it must be understood as exclusive in respect of the international organization concerned.

This assertion is endorsed by international practice, as international organizations generally present international claims themselves,[63] as this Court has recognized when stating that, in bringing a claim for damages suffered by its agent, an international organization does so by invoking the breach of an obligation towards itself.[64]

In the case at bar, the circumstances surrounding Uriah Heep´s reception into Adarian territory, the presentation of credentials before governmental authorities,[65] and, most relevantly, the terms of the AAA[66] dictate that, if any obligations regarding privileges and immunities were held to bind Adaria, they would only be owed to the R.U. and not to its members. As one authority has expressed in the most conclusive terms:

> "In practice, all Organizations invoke or waive (as the case may be) privileges and immunities on behalf of their officials, and they, or the host State, could hardly accept a transfer of these functions to the State of which the officials are nationals. This is especially evident if the privileges and immunities are based upon a headquarters or host agreement to which only the Organization, not it several Member States, are parties."[67]

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[62] Report of the ILC on the Work of its 53rd Sess., Draft Articles on Responsibility of States, UN GAOR 56th Sess., Supp. No. 10, UN DOC. A/56/10, [hereinafter UN DOC. A/56/10], Article 42, paragraphs 1,2 & 3.

[63] G.A. Res.365 (IV), 1 December 1949; UNESCO-France Arbitration Award, 14 January 2003, 107 R.G.D.I.P. 221 (2003).

[64] Reparations, *supra* note 60, 182.

[65] *Compromis* #18

[66] *Compromis*, Annex II, #3

[67] F.Seyersted, *International Personality of Intergovernmental Organizations. Do Their Capacities Depend Upon Their Constitutions?* 4 INDIAN J.INT'L.L. 6 (1964).

Moreover, as in the case at bar Uriah Heep is not a national of any of the member States,[68] less reason for a transfer of the kind may exist.

Therefore, only the R.U. would be capable of invoking Adaria's international responsibility and the Respondent States lack standing in this regard.

2) Respondents cannot espouse a claim on behalf of the Rotian Union or any of its organs.

Member States of the R.U. are precluded from representing the latter in order to bring an international claim. The organization is, at least in this area, an international subject with enough capacity to act on the international plane by itself.

There is no rule of international law enabling States to espouse a claim on behalf of an international organization and no special provision on the issue has been included on the codification of international responsibility of international organizations.[69]

Lack of practice in this connection confirms the aforementioned conclusion. States can only act on the international plane on behalf of an international organization, either when the latter is devoid of international legal personality,[70] or in the specific case foreseen by the Vienna

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[68] *Clarifications* #3

[69] Report of the ILC, 55th Sess., A/CN.4/532; Report of the ILC, 55th Sess., A/CN.4/541; Report of the ILC, 57th Sess., A/CN.4/553; Report of the ILC, 58th Sess., A/CN.4/564; Report of the ILC, 58th Sess., A/CN.4/564/Add.1.

[70] Treaty of the European Union, Title 1, Article 1, Oct. 11, 1997, Offic. J. of the E.C. C325/5 (Dec. 24 2002); Additional Protocol and Financial Protocol signed on 23 November 1970 between the European Economic Community and Turkey, Official Journal L 293, 29/12/1972, p. 4.; A.S.MULLER, INTERNATIONAL ORGANIZATIONS AND THEIR HOST STATES 78 (1995); M.Gavouneli, M. *International Law Aspects of the European Union*, 8 TUL.J.INT´L & COMP.L. 147 (2000), 149.

Convention on the Law of Treaties Between States and International Organizations or Between International Organizations,[71] which is unrelated to the present circumstances.

The fact that the Statute of this Court[72] does not permit international organizations to become parties to contentious proceedings does not imply that its member States should be entitled to represent it, even if this resulted in the R.U. being incapable of enforcing its rights as this Court has already recognized that "in the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception".[73]

Furthermore, that path would result in the unacceptable consequence of the member States disregarding the international personality of the organization.[74] Certainly, this would collide against elemental principles of international law, such as good faith,[75] and the legitimate interests of Adaria[76] in having contracted with the Union.

C) ADDITIONALLY, RESPONDENTS DO NOT HAVE STANDING IN THEIR OWN RIGHT WITH RESPECT TO ADARIA'S ACTION IN CONNECTION WITH THE ROTIAN UNION LEGATION BECAUSE THEY ARE NOT INJURED STATES.

Furthermore, Respondent States do not have standing to bring a claim in their own right in connection with Adaria's action because they do not satisfy the requirements set out by the

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[71] 1986 V.C.L.T., *supra* note 1, Article 66(2)(d).

[72] I.C.J. Statute, June 26, 1945, 1060 U.S.T.S. 993, Article 34

[73] South West Africa, *supra* note 9, para. 86.

[74] M.SHAW, *supra* note 6, 243.

[75] Nuclear Tests (New Zealand v. France, Australia v. France), 1974 I.C.J. 253 (December 20), 267; G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., U.N.Doc. A/8082 (1970).

[76] J.Klabbers, *Presumptive Personality: The European Union in International Law*, in M. KOSKENNIEMI(ED.), INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 237 (1998); C.Tomuschat, *The International Responsibility of the European Union*, in E.CANNIZARO(ED.), THE EUROPEAN UNION AS AN ACTOR IN INTERNATIONAL RELATIONS 182 (2002).

international law of state responsibility in that regard.[77] Indeed, the Respondents cannot be considered as injured states[78] for the purposes of invoking Adaria's responsibility and the rule for invoking responsibility as a State other than the injured one is neither part of customary international law nor applicable to this case.

1) Respondents are not injured States as the alleged obligations were not owed to them individually.

Under international law, a State can be considered injured if the breached obligation was due to it on a bilateral basis.[79] Clearly, such condition is inexistent in the case at bar. No bilateral treaty exists between Adaria and Respondents regarding the R.U. Legation, neither on privileges and immunities whatsoever.[80] Furthermore, no bilateral relation can emerge from the AAA as it expressly indicates that the Legation would represent the interests of the Commission and not of the five member States.

2) Respondents are not injured States because they were not specially affected by the breach of an obligation owed to a group of States or the international community as a whole nor was there a breach of an integral obligation.

International responsibility can also be invoked by a State *specially* affected by the breach of an obligation owed to a group of States.[81] As all member states of the R.U. are claiming together and on the same facts and law,[82] no one is "affected by the breach in a way

[77] Res 56/83, *supra* note 29

[78] Res.56/83, *supra* note 29, Part III, Chap.1.

[79] UN DOC. A/56/10, *supra* note 62 Article 42, paragraph 6.

[80] *Clarifications* #12.

[81] UN DOC. A/56/10, *supra* note 62, Article 42.

[82] *Compromis* #38.

which distinguishes it from the generality of other States to which the obligation is owed."[83] Certainly, neither Uriah Heep's nationality[84] nor an eventual detriment of the diplomatic relations of any of the member States with Adaria[85] provide a basis for such differentiation.

Furthermore, in the case at bar no reciprocal obligations exist, so far as member States do not owe Adaria any privilege or immunity under the AAA thus precluding the possibility of invoking Adaria's responsibility on that basis.

3) Neither can Respondents invoke Adarian responsibility as States other than the injured State.

Finally, Respondents cannot invoke Adaria's responsibility by extensively applying the provisions of Article 48 of Draft Articles on State Responsibility.[86] Indeed, this provision is envisaged as a measure of progressive development which does not amount to international customary law up to this date[87] and the privileges and immunities supposedly granted to the R.U. cannot be said to have been instituted for the protection of a collective interest as it is the case with environmental preservation, security of a region or freedom of navigation.[88]

4) In the alternative, Respondents are incapable of invoking Adaria's responsibility by having delegated diplomatic and foreign policy matters in the organization.

[83] UN DOC. A/56/10, *supra* note 62, Article 42, paragraph 13.

[84] *Clarifications* #3.

[85] *Clarifications* #6.

[86] UN DOC. A/56/10, *supra* note 62, Article 42.

[87] *Ibid.*, Article 48, para. 12.

[88] *Ibid.*, Article 48, paragraph 5.

Respondent States are precluded from invoking Adaria's responsibility because they have delegated diplomatic and foreign policy matters in the Commission.[89] The delegated powers go beyond the scope of those accorded under article 4(1)(g) of the TRU as they have been expanded by way of practice to cover the member States' own diplomatic and foreign relations.[90]

This Court has previously held,[91] and it has been endorsed by commentators,[92] that the established practice of international organizations constitute rules to which they must conform in the development of their international activities. When said practice specifies functions or purposes of the organizations, they must be understood as duties they are called to exercise.[93] In the instant case, such practice bars Respondent States from bringing a claim on grounds that no longer pertain to the scope of their capacities.

D) IN THE ALTERNATIVE, THE ROTIAN UNION AND ITS MEMBER STATES WOULD BE PRECLUDED FROM BRINGING A CLAIM DUE TO THE ROTIAN UNION LEGATION ILLEGAL ACTIVITIES IN ADARIA.

According to international law, a State cannot make a claim on behalf of an injured national if he suffered injury as a result of engaging in improper activities.[94]

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[89] *Compromis* #12

[90] *Compromis* #12

[91] Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 22, Adv.Op., (June 21), para. 22.

[92] P.SANDS & P.KLEIN, *supra* note 12, 456; C.F.AMERASINGHE, *supra* note 33, 55.

[93] Reparations, *supra* note 60, 180.

[94] P.MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 269 (1997); Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US), 1986 I.C.J. 14, Judgement, 27 June 1986, (Schwebel, *dissenting* opinion) 272; Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53, (Anzilotti *dissenting* opinion), 95.

Illegal conduct was proved to be carried out by Uriah Heep in the exercise of his functions.[95] Said conduct, bordering undue intervention[96] in Adarian affairs, precludes both the R.U. and its Members from invoking Adarian responsibility as it analogously contravenes the aforementioned rule.[97]

III) APPLICANT DID NOT VIOLATE INTERNATIONAL LAW CONCERNING THE IMMUNITY OF DIPLOMATIC MISSIONS BY SEIZING THE PREMISES, PROPERTY, OR PERSONNEL OF THE ROTIAN UNION REPRESENTATIVE OFFICE.

The distinction between the privileges and immunities recognized to diplomatic missions of States and those accorded International Organizations is well established.[98] The RU Representative Office cannot be assimilated to an embassy or diplomatic mission and therefore the privileges and immunities pertaining to them are not applicable. Furthermore, customary international law does not require Adaria to vest the RU with privileges and immunities and, in any event, Adaria's action would not be inconsistent with such rule under the current circumstances.

A) THE DIPLOMATIC PRIVILEGES AND IMMUNITIES ACCORDED TO EMBASSIES AND DIPLOMATS ARE NOT APPLICABLE TO THE RU REPRESENTATIVE OFFICE

The RU Representative Office is not and cannot be assimilated to an embassy or diplomatic mission of a foreign State. Indeed, analogies between diplomatic or consular law and

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[95] *Compromis* #32

[96] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, (Dec. 15), 35.

[97] R.Higgins, *Les consequences juridiques pour les États membres de l´inexécution par des organisations internationales de leurs obligations envers des tiers*, 66-I YEARBOOK OF THE INSTITUT OF INTERNATIONAL LAW, Part IV, 2 (1995).

[98] J.Kunz, *Privileges and Immunities of International Organizations*, 41 AM.J.INT'L L. 828, 854 (1947); J.Lalive, *L'immunite de jurisdiction des etats et des organisations internationales*, 84 R.C.A.D.I 205, 293 (1953); A.REINISCH, *supra* note 59, 20&21.

institutional immunities are not accepted.[99] Consequently, diplomatic or consular law is not applicable to International Organizations, whose system of privileges and immunities has received separate treatment[100] as it arises from different sources and has distinct characteristics.[101]

Recognition as a diplomatic mission cannot be derived from the absence of payment of property taxes by the R.U.[102] since Adarian law also exempts not-for-profit organizations[103] and the Adarian Taxation Ministry has so qualified the R.U. Legation.[104]

Pursuant to the AAA,[105] Mr. Heep was a representative of the R.U., an International Organization. Thus, the whole body of law pertaining to diplomatic and consular immunity is *per se* inapplicable to them.

B) ADDITIONALLY, NEITHER TREATY NOR CUSTOMARY LAW REQUIRE ADARIA TO GRANT PRIVILEGES AND IMMUNITIES TO AN INTERNATIONAL ORGANIZATION

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[99] P.SANDS & P.KLEIN(EDS.), *supra* note 12, 486 (2001); I.KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW, 153 (2002); G.H.Glenn et al., *Immunities of International Organizations*, 22 VA.J.INT'L L. 247, 266 (1982); *Report of the Rapporteur of Committee IV/2*, 13 UNCIO Doc. 933, IV/2/42(2), 704 (1945).

[100] UN Doc. A/CN.4/304 (1977), A/CN.4/SER.A/1977.Add.1 (Part 1); UN Doc. A/CN.4/311 (1978), UN Doc. A/CN.4/SER.A/1978/Add.1 (Part 1); UN Doc. A/CN.4/L.383, UN Doc. A/CN.4/SER.A/1985 Add. 1 (Part 1/Add.1); UN Doc. A/CN.4/432 (1990), UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 1); UN Doc. A/CN.4/439 (1991); UN Doc. A/CN.4/SER.A/1991; GA Res. 47/33, 47 UN GAOR Supp. (No. 49), 287-8, para. 7; UN Doc. A/47/49 (Vol. 1) (1993).

[101] Explanatory Report by the sub-committee of the European Committee on Legal Co-operation, in Resolution (69) 23 by the Committee of Ministers of the Council of Europe (1969).

[102] *Clarifications* #5

[103] *Clarifications* #4

[104] *Clarifications* #5

[105] *Compromis*, Annex II, §3

As regards privileges and immunities of international organizations, the test is functional,[106] and they must emerge from relevant treaties[107] as no customary rule emerges from existent practice,[108] due to its inconsistency and lack of *opinio iuris*.[109]

Privileges and immunities accorded to International Organizations were always developed on a conventional basis,[110] leaving no place for custom,[111] as evinced by the discontinuance of the work of the ILC on the topic, explaining that the existence of multilateral conventions and host agreements turned any codification on the subject unnecessary.[112]

Additionally, as confirmed by international reports,[113] general conventions,[114] domestic[115] and international[116] case law; state declarations,[117] and scholars;[118] functional

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[106] E.Fedder, *The Functional Basis of International Privileges and Immunities: A New Concept in International Law and Organization*, 9 AM. U. L. REV. 60, (1960) p.60.

[107] P.MALANCZUK (ED.), *supra* note 94, 127 (1997); International Tin Council v. Amalgamet Inc., (1998), 80 I.L.R. 30, Bank Bumiputra Malaysia BHD v. International Tin Council, High Court of Malaysia (1987), 80 I.L.R. 24; Explanatory Report, supra note 101, 14.

[108] Preliminary Report on the Second Part of the Topic of Relations between States and International Organizations, A/CN.4/304, 2 Yearbook of the ILC 139, 154 (1977)

[109] Military and Paramilitary Activities in and against Nicaragua, *supra* note 94, 186; North Sea Continental Shelf (F.R.G. v. Den. & F.R.G. v. Neth.), *supra* note 27 para. 77.

[110] D.B.MICHAELS, INTERNATIONAL PRIVILEGES AND IMMUNITIES 7 (1971)

[111] F.MORGERSTERN, LEGAL PROBLEMS OF INTERNATIONAL ORGANIZATION 3 (1986)

[112] Report of the International Law Commission on the Work of its 44th Session. Doc. A/C.N.4/446, 297; Remarks by the Representative of Israel, Official Records of the General Assembly, 32nd Session, Sixth Committee, 36th Meeting, para. 44; Remarks by the Representative of Spain, Official Records of the General Assembly, 32nd Session, Sixth Committee, 39th Meeting, para. 16.

[113] Resolution (69) 29 by the Committee of Ministers of the Council of Europe (1969) & Explanatory Report, *supra* note 101.

[114] Convention on the Privileges and Immunities of the United Nations, *supra* note 57; Agreement on the Privileges and Immunities of the Organization of American States, 2 LTTP 377 (1949); General Agreement on Privileges and Immunities of the Council of Europe (and additional Protocols), 250 UTS 12&32 (1949); General Convention on the Privileges and

necessity is the prevailing standard, implying by definition, that consistent and uniform practice cannot be found for privileges and immunities as it will reflect the particular needs and goals of each organization.

Accordingly, while the constitutions of some organizations contain immunity provisions of a very general nature,[119] others have very detailed provisions[120] and yet others have no

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Immunities of the Organization of African Unity, L.B.SOHN (ED.), BASIC DOCUMENTS OF AFRICAN REGIONAL ORGANIZATIONS 117 (1971)

[115] *Cristiani v. Italian Latin-American Institute*, Italian Court of Cassation, 87 ILR 20, 24-25; *Eckhardt v. European Organization for the Safety of Air Navigation (Eurocontrol) No. 2*, 94 ILR 331, 337-338 (1987); *Spaans v. Iran-US Claims Tribunal,* Supreme Court of the Netherlands, 438 NJ 1691 (1985)

[116] Reparations, *supra* note 60; Case C-2/88, IMM Zwartveld, E.C.J., (1990) E.C.R. I-3365, para. 19.

[117] Remarks by the Representative of Brazil, Official Records of the General Assembly, 32nd Session, Sixth Committee, 30th Meeting, para. 40; Memorandum by the Government of the United Kingdom, Foreign Office (1965). Para. 18; Reply to the Memorandum by the Government of the United Kingdom by the Federal Republic of Germany, German Federal Foreign Office, June 25th (1965), para. 2; Reply to the Memorandum by the Government of the United Kingdom by Norway, Royal Ministry for Foreign Affairs, Aug. 10th (1965), para. 3 in Resolution (69) *supra* note 113.

[118] G.WEISSBERG, THE INTERNATIONAL STATUS OF THE UNITED NATIONS (1961); Dinh, *Les Privileges et Immunites des Organismes Internationaux D'Apres les Jurisprudences Nationales Depuis 1945*, 3 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 262 (1957); 316; V.L.Maginnis, *Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations*, 28 BROOK. J. INT'L L. 989, 996 (2003); J.Groff, *A Proposal for Diplomatic Accountability Using the Jurisdiction of the International Criminal Court: The Decline of an Absolute Sovereign Right*, 14 TEMP.INT'L & COMP.L.J. 209, 216 (2000)

[119] ILO Constitution, Oct. 9 15. U.N.T.S. 35 (1946) Art. 40; UNESCO Constitution, Art. XII; Nov. 16, 4 U.N.T.S. 275 (1945); WHO Constitution, July 22, 14 U.N.T.S. 185 (1946) Arts. 67&68; ICAO Constitution, Dec. 7, 15 U.N.T.S. 295 (1944) Art. 60.

[120] IBRD Articles of Agreement, Dec. 27, 2 U.N.T.S 134 (1944), Art. VII; IMF Articles of Agreement, Dec. 27, 2 U.N.T.S. 39 (1945) Art IX; IFC Articles of Agreement, May 25, 264 U.N.T.S 117 (1955), Art. VI; MIGA Convention, Oct. 11, 1985 I.L.M 24 (1985), Arts. 43-50; EBRD Constitution, May 29, 1646 U.N.T.S 97 (1990), Arts. 46-55.

provisions at all.[121] Furthermore, States do not consider themselves bound to recognize International Organizations any minimum core of privileges and immunities for it is not necessary or desirable.[122]

In the absence of a customary rule, Respondents can only support their claim on conventional basis. However, the A.A.A. merely devolves upon general International Law to govern the matter,[123] and no international customary rule has yet crystallized in this regard. Thus, Adaria did not violate international law by its action in connection with the R.U. Legation.

C) IN THE ALTERNATIVE, CUSTOMARY INTERNATIONAL LAW WOULD NOT APPLY TO THE CIRCUMSTANCES OF THIS CASE.

1) If a customary obligation to vest International Organizations with privileges and Immunities existed, it would only extend to members of the RU

Under international law, enjoyment of privileges and immunities in the territory of non-member states remains dependent on agreement[124] - the sole exception being the United Nations – and thus, if a customary rule existed, it would solely bind members of the organization.[125]

Thus, as a non-member of the RU, Adaria owes no obligation to grant privileges or immunities to the RU Representative Office under customary international law.

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[121] NATO Constitution; April 4, 34 U.N.T.S. 243. (1949).

[122] Explanatory Report, *supra* note 101, 14, 15&16.

[123] AAA, *supra* note 105,§3

[124] *International Tin Council v. Amalgamet Inc.*, *supra* note 107; *Iran-US Claims Tribunal v. AS,* 94 ILR 321, 329 (1985)

[125] P.DUPUY, A HANDBOOK ON INTERNATIONAL ORGANIZATIONS 844 (1998) *Communaute economique des Etats de l'Afrique de l'Ouest and others v. Bank of Credit and Commerce International*, Paris Court of Appeal, 13th Jan. 1993*,* 120 JOURNAL DU DROIT INTERNATIONAL 353, 357 (1993).

2) If a customary obligation to vest International Organizations with privileges and Immunities existed, it would only cover official acts.

Privileges and Immunities of international organizations are granted solely to ensure the achievement of the entity's purposes, protecting it against undue state intervention.[126]

In this vein, privileges and immunities cease to be applicable when the representative's conduct exceeds the scope of activities strictly necessary for the administrative and technical operation of the Organization.[127] Tortious acts,[128] bribery,[129] espionage,[130] and fraudulent acts,[131] are not official acts attracting immunity, which must be interpreted restrictively having regard to the limited character of the privileges and immunities normally accorded to them.[132]

The illegal financial contributions to political candidates performed by Uriah Heep[133] clearly exceeds his functions of facilitating Adarian integration into the R.U., according to the A.A.A.[134] Hence, privileges and immunities need not be accorded to him or to the Organization in connection with those acts.

D) EVENTUALLY, ADARIA'S CONDUCT FALLS WITHIN A LAWFUL EXCEPTION TO THE GENERAL RULE OF CUSTOMARY INTERNATIONAL LAW

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[126] C.JENKS, INTERNATIONAL IMMUNITIES, 17 (1961)

[127] *Westchester County v. Ranollo,* 67 NYS (2d) 31 (1946).

[128] *L v. The Crown*, New Zealand Supreme Court, Sept. 12th, 1977, 68 ILR 175 (1985); *United States v. Coplon et al.,* US District Court EDNY, May 10th, 1949.

[129] *Arab Monetary Fund v. Hashim and others,* Court of Appeal (Civil Division), Feb. 1st, 1996, 1 LLOYD'S REPORTS 589, 596 (1996)

[130] *United States v. Melekh*, 32 ILR 308 (1961)

[131] *People v. Coumatos*, 35 ILR 222 (1962)

[132] Explanatory Report, *supra* note 101, 42.

[133] *Compromis* #32.

[134] *Compromis*, Annex, Section 3

1) Privileges and Immunities do not apply as Adaria's national security was at stake.

Organizations and their representatives must respect the laws of the state in whose territory they conduct activities, without interfering with its internal affairs.[135] Furthermore, every state retains the right to adopt necessary precautions and measures in the interest of its security,[136] particularly in cases of flagrant and serious misconduct, for there would be no further cause for protecting the international administration, since the acts involved are alien to its nature.[137]

The RU Office's illegal interference into the domestic politics of Adaria compromised its national security, of which the political and electoral process is a decisive factor. Thus, Adaria acted in accordance with international standards, which entitles it to derogate privileges and immunities of the Organization and its personnel where the national security of the State is at stake.

IV) THE NATIONAL INDUSTRY ACT DOES NOT CONSTITUTE AN ILLEGAL EXPROPRIATION OF ADARMOIRE AND THE OTHER PRIVATIZED CONCERNS UNDER INTERNATIONAL LAW

A) RESPONDENTS HAVE NOT COMPLIED WITH THE REQUIREMENTS FOR THE EXERCISE OF DIPLOMATIC PROTECTION WITH REGARD TO THE ADARDRINK, ADARENERGY AND ADARFLEET

[135] Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 45 (April 18, 1965) Art. 41.1.

[136] Explanatory Report, supra note 101, 21; ILC Summary Record of the 2232nd Meeting, *Relations between States and International Organizations (Second part of the topic)*, A/CN.A/438, A/CN.4.439, A/CN.4/L.456, sect. F, A/CN.4/L.466, Draft Art. 17 (1991); European Launcher Development Organisation (ELDO) Protocol, Feb. 29, 1964 U.K.T.S. 30 (1964) Art. 22 ; *United States ex rel. Casanova v. Fitzpatrick*, 34 ILR 154, 159-160 (1963); Restatement (Third) of the Foreign Relations Law of the United States, 1 American Law Institute 524, §470, reporters' note 3 [hereinafter: Third Restatement].

[137] A.PLANTEY, THE INTERNATIONAL CIVIL SERVICE – LAW AND MANAGEMENT, 106 (1981)

Local remedies must be exhausted before a State can bring a claim on behalf of its nationals by virtue of diplomatic protection.[138] In the case at bar, only Bobboman Inc. has exhausted Adarian local remedies.[139]

There is no basis to believe that action by the other privatized concerns would be futile.[140] Indeed, in order to find that the exhaustion of local remedies is not required on such basis "the test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief".[141] Clearly, Adaria is reasonably capable of providing effective relief and the decision in Adarmoire should not be considered as precluding that possibility since that decision is not necessarily applicable to all other cases. Adarfleet, Adardrink and Adarenergy could very well argue the case different, or the fact of the cases be different, so that a different outcome is achieved.

Consequently, respondents are precluded from espousing the claims of the privatized concerns other than Adarmoire.

B) THE NATIONAL INDUSTRY ACT DOES NOT CONSTITUTE AN ILLEGAL EXPROPRIATION OF THE PRIVATIZED CONCERNS.

1) Under international law only forcible takings of property constitute an expropriation and are thus illegal

[138] Mavrommatis Palestine Concessions, *supra* note 58, 12; Nottebhom (Liech. v. Guat.), 19595 I.C.J. 4 (Apr. 6), at 20; Interhandel (Switz. v. U.S.), 1959 I.C.J. 6 (Mar. 21), at 27.

[139] *Compromis*, #36; *Clarifications*, #9.

[140] *Clarifications* #9.

[141] Draft Articles on Diplomatic Protection with Commentaries, Yearbook of the International Law Commission, Vol. II, Part Two, 79.

Under international law, direct expropriation is the forcible taking and appropriation by the State of individuals' property by means of administrative or legislative action.[142]

In the present case it is not possible to argue that an expropriation has occurred because the foreign investors have retained property over the stocks of Adarmoire, Adardrink, Adarenergy and Adarfleet, which are still in existence and whose value depends on the free market.[143]

2) General International Law does not deem as illegal measures other than a forcible taking regardless of their effect on property rights.

There is no rule of customary law concerning other State measures that produce an interference with the use of property or enjoyment of its benefits when there is no formal transfer of property.[144]

The lack of uniformity in State practice regarding this subject is evidenced in the disparity found in domestic legislation, in which States have subordinated the right to private

[142] A.MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN-U.S. CLAIMS TRIBUNAL 65 (1994); I.BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2003), 508-509; LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc. v. Argentine Republic [hereinafter LG&E], ICSID Case N° ARB/02/01, 3 October 2006, para. 187; Amoco International Finance Corporation v. Iran, 15 IRAN-U.S. CL. TRIB. REP. 189 (1987), para. 108, 114; S.D. Myers Inc. v. Canada, NAFTA/UNCITRAL Trib, 40 I.L.M. 1408, 1440 (2003) para. 280; Técnicas Medioambientales Tecmed S.A. v. United Mexican States [hereinafter Tecmed], ICSID, Case No. ARB (AF)/00/2, 29 May 2003, 43 I.L.M. 133, para. 113; Seismograph Service Corp v. Iranian National Oil Co. (1989), 22 IRAN-U.S. CL.TRIB.REP. 3, para. 267.

[143] *Compromis*, #36.

[144] OECD Working Paper on International Investment, No. 2004/4, "*Indirect expropriation" and the "right to regulate" in International Investment Law*, 3, (Sept. 2004), at www.oecd.org/dataoecd/22/54/33776546.pdf;

property to social interests.[145] Additionally, the fact that Free Trade Agreements[146] and Bilateral Investment Treaties[147] contemplate explicitly these measures evinces that indirect expropriation does not form part of customary international law. Furthermore, the Iran-U.S. Claims Tribunal had the power to rule on "other measures affecting property rights" and grant compensation solely because it was specially foreseen in its constitutive treaty. [148]

Furthermore, the assertion that the National Industry Act [hereinafter N.I.A] is "tantamount to expropiation,"[149] does not result in broadening the ordinary meaning of expropriation,[150] because the ordinary meaning of the term "tantamount" is that of being almost equivalent.

Therefore, there is no consolidated rule on indirect expropriation and the N.I.A. is thus consistent with current international law.

3) <u>In the alternative, the N.I.A. is consistent with General International Law concerning indirect expropriations.</u>

a) The N.I.A. does not produce the effects on property rights required to deem it an indirect expropriation.

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[145] S.FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 7 (1981); BRAZ. CONSTITUTION, art. 5, XXII; COSTA RICA CONSTITUTION, art. 45; PANAMÁ CONSTITUTION, art. 48; MEXICO CONSTITUTION, art. 27; JAPAN CONSTITUTION art. 29(2).

[146] North American Free Trade Agreement, Dec.17, 1992, Ch.11, art. 1110, 32 ILM 605 (1993); United States-Australia Free Trade Agreement, Mar. 3, 2004, art. 11.7(1); US-Chile Free Trade Agreement, June 6, 2003, art. 10.9(1); Canada-Chile Free Trade Agreement, Dec.5, 1996, art. G-10(1)(a), 36 I.L.M.1067.

[147] 2004 United States Model Bilateral Investment Treaty, art. 6(1); United States-Turkey Bilateral Investment Treaty, Dec. 3, 1985, art. III; United States-Poland Business and Economic Relations Treaty, Mar. 21, 1990, art. VII, at http://www.ustr.gov/.

[148] Claims Settlement Declaration, January 19, 1981, Art. II, 1 IRAN-U.S. CL.TRIB.REP. 9.

[149] *Compromis*, #16.

[150] Pope & Talbot Inc. v. Canada, Interim Award (June 26, 2000), para 96, www.naftaclaims.com; S.D. Myers Inc. v. Canada, *supra* note 142, 1440.

Even if indirect expropriation existed under international law, the deprivation suffered in Adarmoire, Adarfleet, Adardrink and Adarenergy's property rights is not enough to affirm that an expropriation has occurred.

Indeed, indirect expropriation occurs when the State in question effectively neutralizes the benefits of the investment, by supervising the activities of the company, taking the proceeds of its sales, interfering with its management or appointing a manager or director.[151] The need of a significant degree of deprivation, the fact that the property rights are rendered useless and the unjust enrichment of the State, have all been deemed essential in determining the existence of indirect expropriation.[152]

In the case at bar, even if respondents argue that the value of the privatized concerns in Adaria is affected, the Act does not prevent said companies from directing their activities and enjoying its benefits within Adaria's territory.

Specifically, the denial of permission to transfer funds abroad does not constitute taking of property under international law.[153] Accordingly, arbitral tribunals have denied compensation

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[151] Tecmed, *supra* note 142, para. 113; LG&E, *supra* note 142, para. 188; Pope & Talbot Inc. v. Canada, *supra* note 150, para 100; OECD Working Paper on International Investment, *supra* note 144, 8.

[152] E.Jimenez de Aréchaga, *State Responsibility for the Nationalization of Foreign Owned Property* (1978), 11 N.Y.U.J.INT'L L.& POL. 179, 182; Sea-Land Service Inc v. Iran, 6 IRAN-U.S.CL.TRIB.REC. 149, 161 (1984); Sporrong and Lönnroth v. Sweeden, 5 E.H.R.R. 35 (1983) para. 63; Starret Housing Corp. v. Iran, 4 IRAN-US CL. TRIB. REC. 122, 144-145 (1983); Tippets v. TAMS-AFFA Consulting Engineers of Iran, 6 IRAN-U.S. CL.TRIB.REP. 219, 223 (1984); Tecmed, *supra* note 142, para. 115.

[153] G.C.Christie, *What constitutes a taking of property under international law?*, 38 BRIT.Y.B.INT'L L. 307, (1962), 318; B.WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 107 (1959).

for restrictions on international transfer of funds[154] and restrictions on bank account transfers.[155] Additionally, it has been found that conditions imposed upon the re-export of property were lawful and not expropriation when the owner retained the right to sell the property.[156]

It is clear that Adaria's Act does not amount to an indirect expropriation because the companies' assets are in existence and at their disposal and Adaria's Government has not interfered with the companies management.[157]

4) <u>In the further alternative, the N.I.A. constitutes a valid regulatory measure.</u>

It is a well accepted principle of customary law that all States have the right to adopt regulatory measures, known as "an ordinary expression of the exercise of the State's police power that entails a decrease in assets or rights"[158] as long as they are not discriminatory.[159] Both necessary elements for the existence of customary law, State practice and *opinio juris,*[160] can be found.

Regarding State practice, domestic courts of Holand, the U.S.A., Sweden, Great Britain and Germany have recognized the right of States to pass regulatory measures and, when the

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[154] Dallal v. Iran, 3 IRAN-U.S. CL. TRIB. REP. 10; Hood Corporation v. Iran, 7 IRAN-U.S.CL. TRIB.REP. 36.

[155] Sea-Land Service Inc v. Iran, *supra* note 152.

[156] Seismograph Service Corp v. Iranian National Oil Co., *supra* note 142, para. 301.

[157] *Compromis*, #36.

[158] Tecmed, *supra* note 142, para. 115.

[159] I.BROWNLIE, *supra* note 142, 509; H.Burns Weston, "*Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation",* 16 VA.J. INT'L L. 104, 121 (1975-1976); G.C.Christie, supra note 153 331-332; Third Restatement, *supra* note 136, § 712, cmt. (g); Oscar Chinn *affaire*, P.C.I.J, 1934, Ser A/B, Case No. 63; LG&E, *supra* note 142, para. 195.

[160] North Sea Continental Shelf, *supra* note 27, 45; Military and Paramilitary Activities in and Against Nicaragua, *supra* note 94, 97; H.Thirlway, *The Sources on International Law*, in M.EVANS(ED.), INTERNATIONAL LAW 117, 125 (2003).

decisions were against the Government measures, it was only based on their discriminatory nature.[161]

Evidence of existence of *opinio juris* can be drawn from instruments approved by international organizations that affirm the power of States to pass this kind of measures unless they withhold a clear intention of taking the property by applying them[162] and the right of States to regulate foreign investment and the activities of transnational corporation within its territory "in conformity with its national objectives and priorities."[163] Furthermore, the existence of this rule of customary international law is confirmed by the work of prominent scholars.[164]

a) The N.I.A. pursues a legitimate purpose.

Even if a measure carries some negative effects on property rights, it can be validly adopted in order to protect public interests, such as health, morals, safety or welfare.[165] In this vein, the N.I.A. is aimed to protect Adaria against capital flight[166] and to minimize the damage

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[161] Weiss v. Simon (1919-1942 Supp.) Ann. Dig. 108 (No. 57) (Supreme Court, Sweden 1941); Novello and Co., Ltd. v. Hinrichsen Edition, Ltd., (1951) 1 Ch. 595; Latvian Shipping Company v. Montan Export Ltd., District Court of The Hague, (1950) I.L.R. 32; Kozicki v. Baltycka Spolka Rybna, Supreme Court, Sweden, (1951) I.L.R. 37; Molnar v. Wilsons A/B, Supreme Court, Sweden, (1954) I.L.R. 30; Expropriation of Eastern Zone Company (Germany) Case, Supreme Court, Germany, (1955) I.L.R. 14.

[162] Draft Convention on the Protection of Foreign Property, 2 I.L.M. 241 (1963), art. 3, cmt. 3.(a); OECD Working Paper on International Investment, *supra* note 144, 8.

[163] U.N.G.A. Res. 3281 (XXIX) of 12 Dec. 1974, 14 I.L.M. 251, Article 2.1(a),(b).

[164] Draft Convention on the International Responsibility of States for Injuries to Aliens, 15 Apr. 1961, Article 10.5, 55 AM. J. INT'L L. 545, 554; Third Restatement, *supra* note 136, § 712, cmt. (g).

[165] G.C.Christie, *supra* note 153, 338; Draft Convention on the Protection of Foreign Property, Article 3, 7 ILM 124 (1968); Draft Convention on the International Responsibility of States for Injuries to Aliens, *supra* note 164, Article 10.5, 554; Convention Establishing the Multilateral Investment Guarantee Agency Article 11(a)(ii), (1985) 24 I.L.M. 1605, 1611-1612; Oscar Chinn *affaire*, *supra* note 159.

[166] *Compromis*, #35.

caused by the closure of companies and layoffs,[167] as well as at diminishing the impact on the Sophians.[168] The N.I.A. was aimed at addressing the situation of a pauperized minority and can therefore be considered to fulfill the requirement of pursuing a legitimate purpose.

b) The N.I.A. is not discriminatory.

It is generally acknowledged that regulatory measures are not unreasonable when they are not discriminatory.[169] Discrimination implies "unreasonable distinction."[170]

In the present case, the N.I.A. affects only those companies which are owned by R.U. nationals. However, the measure cannot be said to have been aimed at those individuals in a discriminatory manner but rather it identified the companies that were deemed essential for its economic development.[171] The nationality of the shareholders was not taken into consideration when distinguishing the concerns that would be targeted by the measure and thus the N.I.A. cannot be considered as discriminatory.

c) The N.I.A. is a temporary measure.

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[167] *Compromis*, #20.

[168] *Compromis*, #21.

[169] Third Restatement, *supra* note 136, § 712, cmt. (g); North American Free Trade Agreement, *supra* note 146; Draft Convention on the Protection of Foreign Property, *supra* note 165, Article 3.

[170] Third Restatement, *supra* note 136, § 712, cmt. (f);

[171] *Compromis*, #1

A temporary regulation of property rights cannot be seen as expropriation but only as a mere delaying of an opportunity.[172] Only if the effect on the property rights extended for a long period of time, the deprivation could be considered as not merely ephemeral.[173]

In the case at bar, Adaria's regulation was passed as a protection against capital flight and with the intention of reducing the damages caused by the denial of membership in the R.U.[174] thus being temporarily by definition. Additionally, the freezing of the assets is a measure that can be reversed at any time, given that the assets exist and the companies have retained ownership over them.[175]

V) PRAYER FOR RELIEF

Therefore, it may please the Court to adjudge and declare:

I.- That Respondents have violated international legal obligations owed to Adaria by denying Adaria membership in the Rotian Union.

II.- That Respondents do not have standing to make any claim concerning Adaria's actions with respect to the Rotian Union representative office, its property, or its personnel.

III.- That Adaria did not violate international law concerning the immunity of diplomatic missions by seizing the premises, property, or personnel of the Rotian Union representative office.

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[172] A.F.LOWENFELD, INTERNATIONAL ECONOMIC LAW 480 (2003); S.D.Myers Inc. v. Canada, *supra* note 142, 1440.

[173] OECD Working Paper on International Investment, *supra* note 144, 14; Third Restatement, *supra* note 136, § 712, cmt. (g).

[174] *Compromis*, #35.

[175] *Compromis*, #36.

IV.- The National Industry Act does not constitute an illegal expropriation of Adarmoire and the other privatized concerns under international law.

In respectful submission before the International Court of Justice.

The Republic of Adaria