Team 517 R

IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE,

THE HAGUE, NETHERLANDS

THE 2015 PHILIP C JESSUP INTERNATIONAL LAW MOOT COURT

COMPETITION

THE CASE CONCERNING THE SECESSION AND ANNEXATION OF EAST AGNOSTICA

THE FEDERAL REPUBLIC OF AGNOSTICA,

APPLICANT

v.

THE STATE OF REVERENTIA

RESPONDENT

MEMORIAL FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

The Federal Republic of Agnostica ("Agnostica") and the State of Reverentia ("Reverentia") respectfully submit the present dispute to the International Court of Justice, pursuant to article 40, paragraph 1 of the Statute of the Court and by virtue of a Special Agreement (*Compromis*) signed in The Hague, The Netherlands, on September 2, 2014, and jointly notified to the Court on the same day. The Parties agree to accept as final and binding the Judgment of this Court and shall execute it in its entirety and in good faith.

QUESTIONS PRESENTED

Claim (a)

1. *Whether* Reverentia's support for the East Agnostican referendum violated Agnostica's territorial integrity;
2. *Whether* Reverentia's public statements in support of the Agnorevs were consistent with the duty of non-intervention;
3. *Whether* Reverentia's placement of troops near the East Agnostican border was a prohibited use of force, despite Reverentia's stated lack of territorial ambitions;
4. *Whether* Reverentia's entry into East Agnostica after it became an independent state was a violation of Agnostica's territorial integrity.

Claim (b)

1. *Whether* the Agnorev people of East Agnostica had a right to self-determination and validly exercised this right;
2. *Whether* East Agnostica's peaceful referendum in favor of independence was consistent with international law;
5. *Whether* East Agnostica's secession and integration with Reverentia was consistent with international law such that the retrocession of East Agnostica should not be granted.

Claim (c)

1. *Whether* a fundamental change of circumstances justified Agnostica's unilateral denunciation of the Marthite Convention;
2. *Whether* Agnostica can demonstrate that RMT materially breached the terms of the Convention without proof of the local demand for Marthite;

3. *Whether* Reverentia afforded RMT the status of a state agency or sufficiently controlled RMT's actions to be responsible for its conduct;
4. *Whether* Agnostica's undue repudiation of the Convention, lease of the mining facilities to Baxter, and enactment of the Marthite Control Act constitute material breaches;
5. *Whether* a change in sovereign ownership over the object of the treaty, the Marthite reserves, following East Agnostica's secession is a fundamental change of circumstances.

Claim (d)

1. *Whether* title to the Marthite extraction software transferred to Agnostica along with the physical facilities;
2. *Whether* Reverentia's temporary removal of the extraction software in response to Agnostica's material breaches of the Convention was a valid countermeasure.

STATEMENT OF FACTS

The State of Reverentia and the Federal Republic of Agnostica were both former colonies of Credera. Credera's original demarcation of colonial boundaries concentrated all natural resources in Agnostica, which then exported its products to Reverentia for refining. On August 1, 1925, Reverentia and Agnostica were granted independence and formed separate states along the original colonial boundaries. Agnostica formed two provinces: East Agnostica, home to nearly all of the ethnic Reverentians ("Agnorevs") residing in Agnostica, and West Agnostica.

Within the territory of East Agnostica are the only areas in the world that contain deposits of Marthite, a mineral salt. Marthite has always been a core ingredient in Reverentian traditional medicine and therefore holds great cultural significance for ethnic Reverentians. The mineral was virtually unknown outside the Thanatosian Plains, however. Recognizing this and in order to "ensure reliable supply of Marthite to those for whom it holds cultural significance," in 1938 Reverentia and Agnostica entered into the Marthite Convention ("Convention").

Under the Convention, Reverentia agreed to construct mining facilities within the territory of East Agnostica and to provide technology and engineers to maintain, equip, and operate the facility. Upon completion, Agnostica purchased the physical facilities for 100 Swiss francs. The Reverentian Marthite Trust ("RMT"), a Reverentian state-owned corporation, was given exclusive ownership rights over the Marthite mined from the facilities and was required to pay an annual royalty. Article 4(a) of the Convention also required RMT to distribute Marthite only to traditional practitioners subject to certain price restrictions contained in Article 4(b). The Convention specified in Article 4(d), however, that when the supply of Marthite exceeded local demand by 25%, any Marthite mined in excess of 125% of demand could be sold "without restriction on price, identity of purchaser, or intended use." While Agnostica undertook few

obligations in return, it agreed to revoke and not impose further barriers to the free movement of Marthite and mining equipment across the Reverentian-Agnostican border.

Until 2011, the Marthite Convention arrangement continued without controversy and there continued to be virtually no demand for Marthite outside of traditional medicine practitioners. Scientists then discovered Marthite's potential to treat a variety of early-childhood diseases, which was revealed in a peer-reviewed journal article. With demand for its product significantly increased, RMT began to sell 75% of its Marthite to pharmaceutical companies at prices higher than it charged traditional practitioners. Though the Reverentian press reported shortages and that price increases were "inevitable," RMT assured the President of Reverentia, Antonis Nuvallus, that the supply was more than adequate to satisfy local demand.

Following the increase in Marthite's commercial value, Agnostican Prime Minister Moritz contacted President Nuvallus looking to get out of the Convention due to a "fundamental change in the science underlying the treaty." When President Nuvallus rejected her proposal, Agnostica unilaterally declared the Marthite Convention terminated and "without further effect" on April 2, 2012. Agnostica simultaneously declared that a competing multinational company, Baxter Enterprises, would immediately take over the mining facilities.

In response, President Nuvallus instructed government engineers working at the facilities to remove each facility's Marthite extraction software and return home. This did not prevent operations at the facilities from continuing but merely slowed operations. Agnostica labeled this act "sabotage," but also professed its ability to either recreate the software or work around its removal. The Reverentian Vice President replied that, "if Agnostica were willing to invite our engineers to return, and reaffirmed its commitment to the terms of the Convention, our engineers, once on-site, would be able to reverse the so-called 'sabotage' within hours."

With Marthite extraction levels severely reduced, the Agnostican Parliament passed the Marthite Control Act ("MCA") on October 1, 2012, which banned both the sale and transfer of Marthite into Reverentia and any unauthorized purchase, sale, or possession of Marthite within Agnostica. Additionally, any Agnostican citizen possessing Marthite without a government license would be subject to a mandatory prison term of between 18 months and four years. Gohandas Sugdy, a 19-year-old Agnorev miner, was convicted under the Act, hanging himself in jail when he was not permitted to bring his dying grandfather the traditional Marthite remedy.

Sugdy's death sparked peaceful protests that over time came to include long-standing Agnorev concerns, including the domination of judicial and military posts by ethnic Agnosticans, the disproportionate allocation of government scholarships to ethnic Agnostican university students, and the unrelentingly negative characterization of Agnorevs in school textbooks and the national media. In response to the peaceful protests, Prime Minister Moritz mobilized military troops and local police. On December 26, 2012, police clashed with protesters killing sixty Agnorevs in what was called "The Boxing Day Massacre." President Nuvallus expressed his "deep concern for the safety of our Reverentian brethren abroad."

As tensions continued to escalate and the Agnorevs continued to feel the brunt of Agnostica's discrimination, Tomás Bien, head of the East Agnostican provincial legislature, presented a resolution to the Agnostican Parliament proposing to "de-escalate" the police and military presence in East Agnostica. The resolution failed by a vote of 46-54, with all 33 East Agnostican members voting in favor. Concluding that the aims of the federal government had diverged from those of its Agnorev citizens, Mr. Bien next proposed dissolution of the nation, as permitted by the Federal Constitution on a three-quarters vote. This resolution was again defeated, despite 29 of the 33 delegates from East Agnostica voting in favor. Reverentia again

voiced its support of Agnorev independence, in a speech by President Nuvallus on January 9, 2013, and a parliamentary resolution authorizing, but not requiring, President Nuvallus to take certain diplomatic actions in the event of a popular referendum.

After the failure of the resolution, East Agnostica scheduled a plebiscite on the question of secession. Prime Minister Moritz warned, "the federal government will not stand idly by in the face of this threat to our national identity," and ordered the National Police to prepare to block the referendum. Two days later, on January 18, 2013, President Nuvallus ordered troops to Reverentia's border but gave them "specific orders not to leave Reverentian territory." In a diplomatic note to Prime Minister Moritz, President Nuvallus clarified that Reverentia "ha[d] no territorial ambitions" but was instead "deeply concerned about the state of affairs in East Agnostica, and . . . worried that violence [would] spill over." The internal movement of Reverentian troops was for the explicit purpose of offering "aid to any Agnorevs fleeing violence in East Agnostica."

On January 29, 2013, East Agnostica peacefully separated through a referendum with 73% of East Agnostican voters casting their ballots in favor of secession. There were no reports of violence or interference during the voting. Shortly after, East Agnostica formed the Agnorev People's Parliament, which ordered Mr. Bien to send a delegation to Reverentia for the purpose of entering into negotiations for integration. Following these negotiations, East Agnostica became a semi-autonomous province of Reverentia pursuant to an Integration Agreement, which was signed by President Nuvallus and Mr. Bien on February 22, 2013 and went into effect on March 1, 2013. The new territorial borders created by the Agreement have subsequently been recognized by 30 other states.

SUMMARY OF PLEADINGS

Reverentia's actions in support of the Agnorevs in East Agnostica were consistent with international law. Public speeches and remarks made by President Nuvallus supporting the oppressed Agnorev people, without any accompanying material support, were not acts of intervention. Further, a single, non-binding parliamentary resolution by the Reverentian legislature authorizing President Nuvallus to take certain actions in the event East Agnostica seceded was without international legal consequence and not an act of intervention.

Reverentia's troop movements inside its own domestic borders were also not a threat of the use of force. Such movements were out of concern for the continued unrest along Reverentia's border with East Agnostica. Agnostica was also given notice of the benign purpose of the movements through an official diplomatic communication, and Reverentian troops were given express orders not to enter Agnostica. Agnostica therefore cannot show that the troop movements were an unlawful use of force, and no violations of its territorial integrity occurred. Reverentia only entered East Agnostica after it had become an independent state and therefore never entered Agnostican territory.

Additionally, East Agnostica's referendum, secession, and integration with Reverentia were consistent with international law. The Agnorevs peacefully exercised their right to self-determination, arising from decades of cultural, social, and racial discrimination, and political marginalization by the Agnostican majority. Having failed at trying to deescalate the military and police presence in the federal Agnostican parliament, and having attempted to exercise their hollow right to politically dissolve the Agnostican state, the Agnorevs in East Agnostica legitimately resorted to a peaceful referendum to seek self-determination.

Post-secession East Agnostica met the requirements of statehood under the declaratory theory of statehood. East Agnostica then exercised its ability to enter into foreign relations with Reverentia and participated in bilateral negotiations, which ultimately led to its integration with Reverentia. Forcing the Agnorev people to rejoin Agnostica at this stage, after East Agnostica reached statehood and after the views of the Agnorev people have been so clearly expressed, would violate international law. Thus, retrocession of East Agnostica to Agnostica cannot and should not be ordered by this Court.

The Marthite Convention remained in effect until East Agnostica's integration into Reverentia on March 1, 2013, as Agnostica's denunciation of the Convention prior to this point was ineffective. First, Marthite's newfound commercial value does not constitute a fundamental change in circumstances. Marthite's limited commercial value was not an essential basis for Reverentia's consent and Agnostica's limited obligations under the Convention have not come to impose too much of a burden. A fundamental change only occurred with a change in sovereign ownership over the object of the Treaty (the Marthite reserves), following East Agnostica's secession.

Additionally, Agnostica cannot claim its denunciation was justified in response to a material breach of the Convention. To begin with, Agnostica cannot demonstrate that RMT's sale of Marthite to pharmaceutical companies violated the terms of Article 4(d) without proof of local demand or that this breach was material, because the price at which Marthite is sold to non-traditional practitioners is incidental to the object and purpose of the Convention. Even if Agnostica could prove this, however, it can point to no wrongful act of Reverentia. Reverentia did not afford RMT the status of a state agency nor did it exercise a sufficient level of control over RMT to be responsible for its actions.

Agnostica materially breached the Convention by its undue repudiation of the Convention, lease of the mining facilities to Baxter, and enactment of the Marthite Control Act. This entitled Reverentia to remove the Marthite extraction software for two independent reasons. First, title to the software did not transfer to Agnostica along with the facilities. Reverentia was therefore entitled to retrieve it after suspending the Convention. Additionally, this act was a valid countermeasure as defined by customary international law. Reverentia removed the software to induce Agnostica to respect its treaty obligations. The act was taken directly in relation to the obligation Agnostica breached, as it directly concerned the ability to extract Marthite, and did not cripple operations at the mine but merely slowed the extraction process.

WRITTEN PLEADINGS

I. REVERENTIA'S SUPPORT FOR THE REFERENDUM IN EAST AGNOSTICA WAS CONSISTENT WITH INTERNATIONAL LAW.

A. Reverentia's support for the Agnorevs in East Agnostica leading up to the referendum did not violate the duty of non-intervention.

Reverentia did not intervene in Agnostica's affairs because it never extended military, logistical, economic, or financial support for East Agnostica's referendum of independence. Customary international law recognizes that states have a duty of non-intervention in the internal and external affairs of other states.[1] A breach of non-intervention involves interference with "matters in which each state is permitted, by the principle of State sovereignty, to decide freely."[2] Nevertheless, violations of the principle of non-intervention have been limited by this Court primarily to specific situations such as military intervention, occupation, or furnishing of assistance to armed rebel movements.[3]

In *Armed Activities on the Territory of the Congo* (hereinafter *Armed Activities in the Congo*) and *Nicaragua v. United States* (hereinafter *Nicaragua*), this Court specified the types of activities constituting illegitimate intervention, such as the use of force, occupation, military activities, or assisting armed rebel groups.[4] In *Armed Activities on the Territory of the Congo,* this Court found Uganda in breach of the duty of non-intervention because it "engag[ed] in military activities against the Democratic Republic of the Congo . . . and actively extend[ed]

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[1] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), ¶ 246 [hereinafter Nicaragua] (recognizing the principle of non-intervention as customary international law); *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, Art. 3(1), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970) [hereinafter *Declaration Concerning Friendly Relations*].
[2] Nicaragua, ¶205.
[3] *Id.* ¶ 292; Armed Activities on the Territory of the Congo, (Dem. Rep. Cong. v. Uganda), 2005 I.C.J. 168 ¶153, 164-65 (Dec. 19) [hereinafter Armed Activities in the Congo].
[4] *Id.*; Nicaragua, ¶292.

military, logistic, economic, and financial support to irregular forces having operated on the territory of the DRC."[5] Similarly, in *Nicaragua*, this Court found that the United States had breached its duty of non-intervention by providing "financial support, training, supply of weapons, intelligence and logistic support" to *contra* rebels seeking to overthrow Nicaragua's government.[6] Agnostica cannot point to any similar activities by Reverentia in this case however. Reverentia neither provided financial support, training, weapons, intelligence nor logistical support to East Agnostica and therefore its actions do not rise to the level of intervention in another state's affairs.

i. President Nuvallus's various statements of support for the oppressed Agnorevs were not acts of intervention.

Public statements of encouragement are not a violation of the duty of non-intervention if they are not followed by material support.[7] In *Nicaragua*, for example, President Reagan's public statements expressing support for the *contras* were found not to violate the duty of non-intervention.[8] Instead, it was the *tangible* and material support given to *contras* by the United States, namely the provision of arms, intelligence, and logistics, which violated international law.[9] Here, neither of President Nuvallus's statements[10] was backed up by material support. Thus they can hardly be compared to the active assistance, training, and support given to the armed rebel groups in *Nicaragua*. Accordingly, President Nuvallus's statements of support, much like President Reagan's, did not constitute intervention and were consistent with international law.

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[5] Armed Activities in the Congo, ¶345.
[6] Nicaragua, ¶242.
[7] *Id.*
[8] *Id.* at ¶239-242.
[9] *Id.*
[10] Specifically his statement expressing "deep concern for the safety of our Reverentian brethren abroad" in the wake of the Boxing Day Massacre, and his speech on January 9, 2013 promising to commit to "the cause of our Reverentian brothers." *See Compromis*, ¶30,34.

ii. The Reverentian Parliament's resolution in support of East Agnostica was not an act of intervention.

Furthermore, a statement of support from a parliament is not an act of intervention if it is non-binding and purely conditional.[11] Acts of parliament are not necessarily acts of the state. In the *Nuclear Tests Case*, for example, while this Court construed the French President's unilateral statements (that France would cease nuclear testing) as a binding obligation under international law,[12] the Court stressed that the statements had come from the *president* of France, who had intended to enter into an international obligation on behalf of France.[13]

Similarly, in the WTO's Panel Report on Sections 301-310 of the Trade Act of 1974, addressing European Union challenges that American legislation violated certain GATT obligations, the panel cautioned that "a sovereign State should not normally find itself legally affected on the international plane by the casual statement of any of the numerous representatives speaking on its behalf."[14] It held that the unilateral statements made by the United States Trade Representative, that America would live up to its GATT requirements, were valid, but that the domestic legislation seemingly contravening WTO policy was not similarly binding.[15]

Here, unlike in the *Nuclear Tests Case*, the resolution of the Reverentian Parliament, "On the Crisis in East Agnostica," was not made by the President of Reverentia.[16] As a statement of the Reverentian legislature, like those of the United States Congress in the WTO's Panel Report on Sections 301-310 of the Trade Act of 1974, it was not binding, and thus could not be an act of intervention.

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[11] Nuclear Tests Case, (Austl. v. Fr.), 1974 I.C.J. 253, ¶43 (Dec. 20); Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, ¶7.118, WT/DS152/R. [hereinafter Section 301 Panel Report] (*citing* Nuclear Tests Case, ¶43).
[12] Nuclear Tests Case, ¶43,49.
[13] *Id.* at ¶46-49.
[14] Section 301 Panel Report, ¶ 7.118 (*citing* Nuclear Tests Case, ¶ 43).
[15] *Id.* at ¶¶ 7.118, 7.125, 7.131, 7.134.
[16] *Compromis*, ¶35.

Additionally, as the resolution was purely conditional, it was not intended to be internationally binding.[17] Unlike the French President's unequivocal statements in the *Nuclear Tests Case* of what France *would* do, the resolution here merely stated a number of diplomatic options that President Nuvallus could pursue should East Agnostica secede.[18] While Agnostica may point to various clauses in the parliamentary resolution that permit the president to do everything from extending diplomatic recognition to protecting East Agnostican sovereignty, such a reading ignores that the president is "authorized" rather than "required" to exercise any of the options permitted.[19]

Thus Agnostica cannot rely upon the Reverentian Parliament's resolution in support of East Agnostica to claim intervention into its sovereignty. This statement from the Reverentian legislature to its president does not even bind Reverentia's President, much less impose the will of the Reverentian legislature upon an entirely separate sovereign state.

B. Reverentia neither threatened nor utilized force against Agnostica either before or after East Agnostica's referendum of independence.

i. Reverentia's internal troop movements did not constitute a threat of the use of force.

Military movement that does not cross into another state's territory is not considered a threat against that state.[20] In *Nicaragua*, the United States placed troops near the Nicaraguan border and deployed vessels off the Nicaraguan coast during military exercises.[21] This Court did not find these actions, which did not cross into Nicaraguan territory, a threat or use of force.[22]

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[17] Nuclear Tests Case, ¶43.
[18] *Compromis*, ¶35.
[19] *Id.*
[20] Nicaragua, ¶227.
[21] *Id.* at ¶92.
[22] *Id.* at ¶227.

Here, Reverentia's actions in sending troops to its domestic borders are even less aggressive than the United States' actions in *Nicaragua*. While the United States' actions were part of military maneuvers, Reverentia's actions were taken with the explicit purpose of offering "aid to any Agnorevs fleeing violence in East Agnostica."[23] Reverentia explicitly stated it "had no territorial ambitions"[24] but was instead "deeply concerned about the state of affairs in East Agnostica, and . . . worried that violence [would] spill over."[25] President Nuvallus further supported his statement regarding Reverentia's intentions by both providing a diplomatic note to Agnostica and giving Reverentian troops "specific orders not to leave Reverentian territory."[26] Because Reverentia's acts remained within its borders and had explicit peaceful intensions, they were not a threat or use of force against Agnostica and thus consistent with international law.

ii. Reverentia did not breach Agnostica's territorial integrity because its troops never entered Agnostica.

Reverentia did not breach Agnostica's territorial integrity when Reverentian troops entered East Agnostica because East Agnostica was an independent state at that time and thus no longer part of Agnostica.[27]

II. EAST AGNOSTICA'S SECESSION FROM AGNOSTICA AND INTEGRATION WITH REVERENTIA WAS CONSISTENT WITH INTERNATIONAL LAW.

A. The Agnorev people had a right to external self-determination.

The right of a people to exercise self-determination has been repeatedly recognized by this Court and various international instruments.[28] In *Quebec*, the Supreme Court of Canada

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[23] *Compromis*, ¶37.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Compromis*, ¶41; *see infra* Section II for a discussion of why East Agnostica attained statehood.
[28] *See e.g.*, U.N. Charter art. 1; International Covenant on Civil and Political Rights, art. 1, ¶1, Dec.16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural

distinguished between internal and external self-determination.[29] In order to preserve the territorial integrity of states, a definable group may not pursue external self-determination, or the right to secede via referendum, unless it has first been denied internal self-determination, or "meaningful access to government to pursue their political, economic, cultural and social development."[30] The Supreme Court found that Quebec could not secede from Canada because the Quebecois people were able to exercise internal self-determination: Quebecois individuals were in prominent positions in the federal government, including the Prime Ministry and the Chief Justiceship of the Supreme Court, and were in no way oppressed.[31] Moreover, under the Canadian Constitution, had the population of Quebec voted to secede, the province could negotiate with the rest of Canada on appropriate terms of secession.[32]

Here, the plight of the Agnorevs is easily distinguishable from that of the Quebecois. Not only did the Agnorevs possess merely hollow political rights, but they had also been victims of cultural and social discrimination. As a people denied internal self-determination within Agnostica, the Agnorevs in East Agnostica had a right to pursue external self-determination.

i. The Agnorevs lacked meaningful political rights.

The Agnorevs did not have meaningful access to pursue their political development. While Canadian constitutional law gave Quebec the right to (eventually) secede if it voted to do so, the Agnostican Constitution denied a similar right to the Agnorevs – East Agnostica could

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Rights, art. 1, ¶1, Dec. 16, 1966, 993 U.N.T.S. 3; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, ¶52 (June 21); Western Sahara, Advisory Opinion 1975 I.C.J. 12, ¶54-59 (Oct. 16); East Timor (Port. v. Austl.), 1991 I.C.J. 84, ¶29 (Feb. 22); Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 ¶118 (Jul. 9).

[29] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶134, 154 (Can.).

[30] *Id.*

[31] *Id.* at ¶135.

[32] *Id.* at ¶151.

not secede unless three quarters of the federal parliament voted in favor of secession.[33] Consequently, the Agnostican majority could prevent dissolution of the union in spite of practically every single ethnic Agnorev in parliament voting in favor. Indeed, the resolution presented by Mr. Bien failed despite 29 of the 33 delegates from East Agnostica voting in favor, as it was supported by only 29% of the entire parliament.[34] The Agnostican majority could also dominate the Agnorevs even on matters of their own security: while every single representative of East Agnostica voted to de-escalate the military and police presence that caused the Boxing Day Massacre, the proposition was soundly defeated by the Agnsotican majority.[35] Thus, while the Quebecois people enjoyed political rights allowing them to influence federal Canadian politics, the Agnorevs' political rights were entirely hollow at the federal level.

ii. The Agnorevs have faced decades of cultural and social discrimination.

Moreover, while the Quebecois were not oppressed, the Agnorevs have been victims of racial discrimination. As a party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Agnostica is obligated not to pass any law that has the effect of perpetuating racial discrimination.[36] Yet, the Marthite Control Act has the effect of denying Agnorevs access to their traditional medicines.[37] Agnostica has further breached its commitment to encourage integrationist multiracial organizations,[38] by allowing ethnic Agnosticans to come to dominate federal judicial posts and the military, and by disproportionately allocating governmental scholarships to ethnic Agnostican students.[39] Finally, Agnostica has breached its

[33] *Compromis,* ¶8.
[34] *Id.* at ¶29, 31.
[35] *Id.* at ¶31.
[36] International Convention on the Elimination of all Forms of Racial Discrimination art. 2(1)(c), Jan. 4, 1969, 660 U.N.T.S. 195 (hereinafter ICERD). .
[37] *Compromis,* ¶23.
[38] ICERD art. 2(1)(e).
[39] *Compromis,* ¶28.

obligation to criminalize racial propaganda,[40] by allowing "unrelentingly negative" characterization of Agnorevs in popular press and media.[41]

Thus while the Quebecois people enjoyed internal self-determination and were free from oppression, the Agnorevs have no protection against political domination by ethnic Agnosticans, and were victims of racial discrimination.[42] Lacking internal self-determination, Agnorevs had the right to external self-determination.

B. A peaceful referendum was a lawful means for the Agnorevs to exercise their right to external self-determination.

A peaceful referendum, held as a last resort, is a lawful way for a people to realize its right to external self-determination. The *Kosovo Advisory Opinion* demonstrates that declarations of independence are not *per se* prohibited under international law[43] and such declarations have been recognized in instances including the breakup of the former Yugoslavia.[44] Here, the Agnorevs pursued their right to external self-determination through peaceful secession only after the federal political process failed to afford them just and effective rights.

In 2008, when political controversies within the territory of Kosovo could not be resolved, a duly constituted group purporting to represent Kosovo's domestic government issued a statement in favor of independence.[45] This Court declared that Kosovo's declaration was not illegal *per se*.[46] Similarly, in *Aland Islands,* this Court did not expressly bar the possibility that a positive right to secession could exist and in fact noted that secession could constitute a last

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[40] ICERD art. 4.
[41] *Compromis*, ¶28.
[42] *Compromis*, ¶28, *Clarifications*, ¶3.
[43] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. 403, 423 ¶123 (Jul. 22) [hereinafter Kosovo Advisory Opinion].
[44] Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A second breath for the self-determination of peoples,* 3 E.J.I.L. 178 (1992).
[45] Kosovo Advisory Opinion, ¶¶74, 75,76.
[46] *Id.* at ¶123.

resort: "The separation of a minority from a State of which it forms a part and its incorporation into another State can . . . [be] a last resort when a State lacks either the will or the power to enact and apply just and effective guarantees."[47] The Badinter Commission, in fact, recognized that the creation of Croatia, Bosnia, and Serbia, and the breakup of the former Yugoslavia in general, was caused by declarations of independence and referendums conducted in each respective state.[48]

Thus, it would not be inconsistent with this Court's jurisprudence to uphold East Agnostica's peaceful secession. Like the Croatian, Serbian, and Bosnian and Montenegrin peoples, who separated into multiple states based upon declarations of independence from the SFRY, East Agnostica's peaceful separation represents the legitimate exercise of the Agnorevs' right to external self-determination. Furthermore, in accordance with *Aland Islands*, this act came only as a last resort, after Agnostica discriminated against the Agnorevs and failed to afford them meaningful political access to change.

C. East Agnostica achieved statehood.

Regardless of the disputed status of the initial referendum of independence, this Court should nevertheless find that East Agnostica reached statehood prior to successful integration with Reverentia. The Montevideo Convention, which Agnostica and Reverentia are both a party to, codifies the declaratory theory of statehood.[49] Under this theory, the four criteria for statehood are: (1) a permanent population, (2) a defined territory, (3) government, and (4) the

[47] *The Aaland Islands Question—Report submitted to the Council of the League of Nations by the Comm'n of Rapporteurs*, League of Nations Doc. B7 21/68/106 (1921), at 28.
[48] Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A second breath for the self-determination of peoples*, 3 E.J.I.L. 178 (1992).
[49] *Montevideo Convention on Rights and Duties of States* art. 3, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter *Montevideo Convention*].

capacity to enter into relations with other states.[50] Notably, Article 3 of the Montevideo Convention specifies that the fact of statehood is *independent* of recognition by other states.[51] East Agnostica satisfied these four requirements.

i. The Agnorevs are a permanent population.

The Agnorevs have long been a permanent population in East Agnostica, initially emigrating from Reverentia prior to each party's independence.[52] They constitute a separate and distinct population within the Federal Republic of Agnostica because of their ethnic Reverentian roots. Credera originally demarcated the territories of Reverentia and Agnostica based upon the linguistic, cultural, and religious differences between their respective inhabitants.[53]

ii. The Agnorevs populate a defined territory.

There is no dispute that the Agnorev people populate a defined territory, delimited by what was formerly one of two provincial units of the Federal Republic of Agnostica.[54]

iii. The Agnorev People's Parliament was an effective government.

In addition to having a permanent population and defined territory, a state must also have an effective government.[55] An effective government consists of a centralized legislative and administrative organ that (1) has the power to enforce commands over its territory and (2) does not share this power with anybody else.[56] The Agnorev People's Parliament (APP) met both criteria for effectiveness. First, it could command authority over its territory. When it ordered Mr. Bien to lead a delegation to Reverentia and negotiate integration,[57] Mr. Bien and the

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[50] *Id.* art 1.
[51] *Id.* art 3.
[52] *Compromis*, ¶4-5.
[53] *Id.* at ¶1.
[54] *Id.*
[55] *Montevideo Convention*, art 1.
[56] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 55 (2006).
[57] *Compromis*, ¶39.

delegation complied with its command.[58] Second, the APP was unrivalled in its authority. It faced no resistance from the local population, and Agnostican forces withdrew from the territory of East Agnostica.[59] Thus, the APP was an effective government.

iv. East Agnostica had a capacity to enter into relations with other states.

Lastly, a state must have the capacity to enter into relations with other states.[60] East Agnostica demonstrated its ability to enter into relations with other states, namely with Reverentia. Not only did it enter into bilateral negotiations with Reverentia aimed at integration,[61] it also signed a bilateral treaty with Reverentia, the Integration Agreement on February 23, 2013.[62] The results of its foreign relations - "the new Reverentian borders" - have been recognized by 30 other states.[63]

D. Retrocession of East Agnostica would be an inappropriate remedy in this case.

i. Retrocession would violate the Agnorevs' right to self-determination.

Even if the Agnorevs did not have a right to secede from Agnostica, forcing them to re-join Agnostica would violate their right to self-determination. This Court may not order remedies that violate international law,[64] and international law adapts to facts on the ground.[65]

Under the "effectivity" principle, "international law may well adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation."[66] In other words, "the existence of a positive legal entitlement is quite different from a prediction that

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[58] *Id*. at ¶42.
[59] *Clarifications*, ¶1.
[60] *Montevideo Convention*, art. 1.
[61] *Compromis*, ¶39, 41.
[62] *Id.*
[63] *Clarifications*, ¶7.
[64] Statute of the International Court of Justice art. 38, ¶1, June 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute].
[65] Quebec, ¶141.
[66] Quebec, ¶141.

the law will respond after the fact to a then existing political reality. These two concepts examine different points in time."[67] In the context of secession, the question of whether a people contemplating secession has the right to secede is different from how the law will react once a people have already seceded. In *Quebec*, the Canadian Supreme Court confronted the former scenario; this Court today confronts the latter scenario. Regardless of whether the Agnorevs had a positive right to secession from Agnostica, the fact is that they have seceded and joined Reverentia. This political reality has been accepted by thirty states,[68] and it is from this reality that this Court must proceed.

In doing so, this Court may not violate international law. Its founding statute requires it to decide disputes "in accordance with international law."[69] To that end, it has in the past refused to order provisional measures that would be inconsistent with UNSC Resolutions.[70] Therefore, it must also refuse to order final remedies that would violate a peoples' right to self-determination: final remedies are more intrusive than provisional measures, and in contrast to context-specific UNSC Resolutions, the right to self-determination is a ubiquitous principle of international law.[71] Forcing the Agnorevs to rejoin Agnostica would violate the Agnorevs' right to self-determination. The Agnorevs expressed their desire to secede from Agnostica, in a

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[67] Quebec, ¶110.
[68] *Clarifications*, ¶7.
[69] ICJ Statute, art. 38, ¶1.
[70] *See* Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.A.), Order on the Request for the Indication of Provisional Measures, 1992 I.C.J. 114 (Apr. 14) *and* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro), Order on the Request for the Indication of Provisional Measures, 1993 I.C.J. 3 (Apr. 8).
[71] *See supra* note 28.

referendum that conformed to international standards.[72] If this Court were to ignore this express desire, it would exceed its own authority by frustrating a right that it is bound to enforce.

ii. Retrocession would adjudicate the rights of East Agnostica, a non-party to this dispute.

Finally, even if this Court were to find the Integration Agreement between East Agnostica and Reverentia invalid, East Agnostica still became an independent state. As a non-party to this dispute, its rights cannot be adjudicated here. In *East Timor*, for example, this Court declined to exercise jurisdiction over an alleged breach of international law by Australia because a necessary third party, Indonesia as the *de facto authority* over East Timor, had not consented to the Court's jurisdiction and was not present in the case.[73] Here, if this Court does not enforce the Integration Agreement, it still cannot order retrocession as a necessary party, East Agnostica, has not consented to this Court's jurisdiction.

III. THE MARTHITE CONVENTION WAS IN EFFECT UNTIL MARCH 1, 2013, AND AGNOSTICA BREACHED ITS OBLIGATIONS UNDER THE CONVENTION.

A. There was no fundamental change of circumstances justifying Agnostica's unilateral termination of the Marthite Convention.

Agnostica relies on a "fundamental change in the science underlying the treaty"[74] to escape its obligations under the Marthite Convention (Convention). As this Court recognized in *Gabčíkovo-Nagymaros*, however, the stability of treaty relations requires that a fundamental change of circumstances be recognized only in "exceptional cases."[75] The wrongfulness of unilateral denunciation is precluded only when: (1) prior circumstances constituting an essential basis of both parties' consent unforeseeably change and (2) the change radically transforms the

[72] *Compromis*, ¶38.
[73] East Timor, ¶ 35.
[74] *Compromis* ¶13.
[75] Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, ¶104 (Sept. 25).

extent of obligations still to be performed under the treaty.[76] Agnostica can meet neither of these requirements and therefore no fundamental change of circumstances occurred.

i. Marthite's limited commercial value was not an essential basis of both parties' consent.

The first condition requires the existence of the prior circumstances to have constituted an essential basis of both parties' consent, not just the motive or inducement of one of them.[77] In *Gabčíkovo-Nagymaros,* Hungary denounced a treaty with Czechoslovakia agreeing to construct a series of locks on the Danube River designed to produce hydroelectricity and improve navigation on the Danube.[78] This Court rejected Hungary's reliance on a fundamental change of circumstances partly because the estimated profitability of the project and the prior political and economic conditions were not so closely linked to the object and purpose of the treaty that it constituted an essential basis of consent.[79]

The same can be said of Marthite's commercial value here. While the mineral's limited commercial worth may have been an essential basis for *Agnostica's* consent, it was not for Reverentia. Marthite has always been a core ingredient in Reverentian traditional medicine and for this reason the mineral's value derives from its restorative properties and cultural significance, not its commercial value.[80] Reverentia ratified the Convention to ensure reliable access to Marthite to those for whom the mineral held cultural significance.[81] It is therefore only Marthite's cultural value that is linked to the object and purpose of the Convention and was essential for both parties' consent. Accordingly, an unforeseeable increase in Marthite's

[76] Vienna Convention on the Law of Treaties art. 62, Jan. 17, 1980, 1155 U.N.T.S. 331 (hereinafter "VCLT").
[77] *Id.*; VIENNA CONVENTION ON THE LAW OF TREATIES, A COMMENTARY 1087 (Oliver Dörr & Kirsten Schmalenbach eds., 2012).
[78] Gabčíkovo-Nagymaros, ¶15.
[79] *Id.* at ¶104.
[80] *Compromis* ¶9.
[81] *Compromis,* Annex.

commercial value does not justify Agnostica's unilateral denunciation because Marthite's low commercial value was not essential for Reverentia's consent.

ii. Agnostica's obligations under the Convention have not radically transformed.

Additionally, no matter how fundamental a change of circumstances is, it cannot be invoked to obtain release from treaty obligations unless it radically transforms the extent of that party's obligations still to be performed under the treaty.[82] Agnostica undertakes very few obligations under the Marthite Convention. In fact only Articles 6 and 7, preventing Agnostica from imposing barriers to the free movement of Marthite and mining equipment, entail affirmative obligations.[83] Agnostica cannot persuasively argue that these limited requirements have come to impose too much of a burden because Marthite's commercial value is not related to the enactment of customs barriers.

Moreover, even if Agnostica's conveyance of exclusive Marthite ownership rights to RMT is construed as an enduring obligation, this Court's jurisprudence applies a high standard to economic justifications for disregarding treaty obligations. In *Gabčíkovo-Nagymaros*, while this Court recognized that a zero-profit investment might have altered Hungary's obligations to continue the project, the forecasted decrease in the dam's profitability was found quantitatively insufficient to transform the parties' obligations.[84] In the *Brazilian Loans Case*, this Court's predecessor denied that economic dislocations caused by the First World War released Brazil from its obligations.[85] Here, Agnostica is not required to fund a zero-profit investment; its loss is only the difference between the royalties received under the Convention and the profit foregone

[82] VCLT art. 62(b); Fisheries Jurisdiction (Ger. v. Ice.), 1974 I.C.J. 175, ¶36 (July 25).
[83] *Compromis*, Annex.
[84] Gabčíkovo-Nagymaros, ¶4.
[85] PCIJ Ser A Nos 21. 120.

by selling Marthite itself.[86] This opportunity cost is not sufficient to establish a fundamental change considering the exceptional circumstances this Court requires.[87]

iii. Agnostica's disregard of proper procedures underscores the shallowness of this excuse.

In *Gabčíkovo-Nagymaros*, this Court recognized that customary international law obligates states to follow certain procedures when terminating a treaty, based on the obligation to act in good faith.[88] These safeguards are considered to apply with special force where denunciation is based on fundamental change of circumstances, "since that basis for termination is particularly subject to self-serving and subjective judgments by the state invoking it."[89] Here, despite being obligated to wait three months before terminating the Treaty, Agnostica immediately leased the mining facilities to Baxter Enterprises (Baxter).[90] Furthermore, after Reverentia's objections Agnostica was required to resolve the dispute in accordance with Article 33 of the U.N. Charter, which it did not because no attempt at dispute settlement was made.[91] Thus not only does this case fail to meet the requirements for a fundamental change of circumstances but Agnostica also failed to follow its procedural obligations in good faith, underscoring the shallowness of this excuse.

B. Agnostica was not entitled to denounce the Marthite Convention because Reverentia did not breach, much less materially breach, the Convention.

i. Agnostica cannot demonstrate that RMT's sale of Marthite to pharmaceutical companies violated the terms of Article 4(d) without proof of local demand.

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[86] *Compromis,* Annex.
[87] Gabčíkovo-Nagymaros, ¶104.
[88] *Id.* at ¶108-110.
[89] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 336, cmt. (f) (1987). *See also Draft Articles on the Law of Treaties with commentaries*, [1966] 2 Y.B. INT'L L. COMM'N 262 (discussing the importance of VCLT's procedural safeguards).
[90] VCLT art. 65(2); *Compromis* ¶16.
[91] VCLT art. 65(3).

Agnostica cannot claim its denunciation was justified in response to a material breach because Reverentia never breached, much less materially breached, the Convention.[92] The terms of Article 4(d) are unambiguously clear. "Marthite mined in excess of 125% of demand from traditional practitioners may be offered for sale by RMT without restriction on price, identity of purchaser, or intended use."[93] Thus according to the text of the Convention, RMT was well within its rights to sell Marthite to pharmaceutical companies at prices higher than the restrictions contained in Article 4(b) once certain preconditions were satisfied. Agnostica simply cannot carry its burden to demonstrate that these conditions were *not* satisfied here, as local demand is unknown.[94]

Instead, what is known of local demand raises significant doubt that RMT violated the terms of Article 4(d). Until scientists discovered Marthite's potential to treat a variety of early-childhood diseases, there was virtually no demand for Marthite outside of traditional medicine practitioners.[95] With such a small and limited market, it is entirely reasonable to surmise that local demand was small and that RMT could easily mine an amount of Marthite exceeding 125% of local demand. The fact that RMT ultimately sold 75% of the total quantity of the mined Marthite to pharmaceutical companies therefore is inconclusive, because it is impossible to know what percentage of the total Marthite mined constituted local demand, and certainly not sufficient to justify unilateral termination of Agnostica's treaty obligations.

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[92] VCLT art. 60(1).
[93] *Compromis,* Annex.
[94] Agnostica carries the burden of proof with respect to factual allegations contained in its claim by a preponderance of the evidence. *See* Corfu Channel (Merits) (UK v. Alb.), 1949 I.C.J. 4, ¶18 (Apr. 9).
[95] *Compromis* ¶11.

ii. Even if RMT did breach the Convention, because this breach was not material it cannot be invoked as grounds for unilateral termination.

Even if RMT did breach Article 4(d), Agnostica still cannot justify its actions because only a material breach entitles a party to invoke it as grounds for termination.[96] A material breach is either (a) an unsanctioned repudiation of the treaty, or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.[97] Because the price at which Marthite is sold to non-traditional practitioners is incidental to the object and purpose of the Convention, the alleged breach was not material and does not convey grounds for termination.

There is ample evidence that the Marthite Convention's central purpose was to foster friendly relations between the two states by ensuring traditional Reverentians, on both sides of the border, access to Marthite.[98] First and foremost, the text of the treaty supports this interpretation. Article 4 serves to protect traditional practitioners, and only traditional practitioners, from the effects of RMT's monopoly on Marthite.[99] Indeed, once a sufficient supply for local demand is ensured, there is little mention of or concern for what RMT does with the remaining Marthite. Moreover, this interpretation is consistent with the colonial history between the two nations. Credera's original demarcation of the colonial boundaries concentrated the Thanatosian Plain's natural resources in Agnostica, which exported its products to Reverentia for refining.[100] The Convention codified existing practice, ensuring traditional practitioners continued access to Marthite after the separate states formed.

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[96] VCLT, art. 60.
[97] VCLT, art. 60(3).
[98] *Compromis*, Annex.
[99] *Compromis*, Annex.
[100] *Compromis* ¶3.

Thus RMT would have materially breached the Convention had it sold Marthite to *traditional practitioners* at excessive prices but did not do so by charging international pharmaceutical companies more. The Convention's essential purpose was not harmed in any way by RMT's actions. Though the Reverentian press reported that shortages and price increases were "inevitable," this conclusion was not supported by the facts. RMT assured President Nuvallus that the supply of Marthite was more than adequate to satisfy local demand.[101]

Additionally, RMT's actions were consistent with *pacta sunt servanda*, which obliges parties to apply treaties in a reasonable way and in such a manner that their purpose can be realized.[102] As discussed above, RMT's sale of Marthite to pharmaceutical companies does not hinder the Convention's purpose. RMT's actions were also completely expected and as this Court held in *Cameroon v. Nigeria*, a party may not invoke breach of good faith when it should have expected the allegedly breaching party's actions.[103] Finally, *pacta sunt servanda* informs the observance of legal obligations but is not a source of obligation where none would otherwise exist.[104] Thus, Agnostica cannot justify its own bad faith repudiation by appealing to amorphous notions of good faith here.

iii. Even if RMT materially breached the Marthite Convention, RMT's actions are not attributable to Reverentia and therefore Reverentia committed no internationally wrongful act.

Even if Agnostica can persuade the Court that RMT materially breached the Convention, it still cannot point to any wrongful act of Reverentia. It is well established that the actions of

[101] *Id.* at ¶13,15.
[102] Gabčíkovo-Nagymaros, ¶142.
[103] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, 1998 I.C.J. 275, ¶¶38-9.
[104] Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 ICJ Rep 69, ¶94 (Dec. 1988).

individuals or entities are generally not attributable to states.[105] Exceptions to this rule are recognized only where the individual or entity is either (a) empowered by the government to exercise governmental authority,[106] or (b) acting on the instructions or under the direction or control of the State.[107] Neither of these exceptions can serve as a basis for attribution here.

1. RMT did not exercise elements of governmental authority.

RMT cannot be considered an instrumentality of Reverentia nor somehow a state agency and therefore was not empowered to exercise elements of governmental authority. For this to be true, the entity must be empowered by the State's internal law to exercise functions of a public character normally exercised by State organs.[108] Responsibility follows from the fact that the entity is domestically afforded "the status of State officials or . . . a State's public entity."[109] In *Hyatt International Corporation v. Iran*, for example, an autonomous foundation established by the Iranian government held property for charitable purposes and had been delegated power to identify property for seizure.[110] Because it exercised elements of state power, the foundation was found to be an instrumentality of Iran and thus within the Tribunal's jurisdiction.[111]

Here it is a far cry to assert that Reverentia afforded RMT the status of a state agency. RMT was not fulfilling a public function usually reserved to the State, for example construction

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[105] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT & COMMENTARIES, 110 (2002).
[106] *See Articles on Responsibility of States for Internationally Wrongful Acts*, art. 5, in Report of the International Law Commission, Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/5 6/10 (hereinafter ASR).
[107] *Id.* at art. 8
[108] ASR art. 5.
[109] Prosecutor v. Tadić, Case No IT-94–1-A, Judgment, ¶123 (Int'l Crim. Trib. for the Former Yugoslavia, 1999).
[110] American Bell International Inc. v. Islamic Republic of Iran, 9 Iran-U.S. Cl. Trib. Rep. 72, ¶88–94 (1985).
[111] *Id.* at ¶ 94.

and maintenance of highways or broadly coordinating regional development.[112] To the contrary, extracting natural resources for a premium is traditionally a private enterprise. Agnostica can again point to no evidence that RMT acted as though it exercised public powers and consequently, RMT cannot be considered a state agency for attribution purposes.

2. RMT was not acting under the instruction or control of Reverentia.

Additionally, Agnostica cannot establish that Reverentia directed or controlled RMT and was thus responsible for RMT's actions on this basis. The mere fact that Reverentia established RMT as a state-owned entity is not a sufficient basis for attribution alone.[113] Corporate entities are prima facie considered separate from their state owner except where the "corporate veil" is a mere vehicle for fraud or evasion.[114] In *SEDCO, Inc. v. National Iranian Oil Company*, for example, the National Iranian Oil Company's de facto seizure of property was not attributed to Iran, because there was no proof that Iran had used its ownership interest to direct the seizure.[115]

To determine whether the requisite level of control exists, this Court established the "effective control" test in *Nicaragua*.[116] Under this test, a state must have effective control both generally over the entity and specifically over the acts at issue.[117] There, though the United

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[112] *Cf.* Maffezini v. Spain, ICSID Case No. ARB1/97/07, 5 ICSID Rep. 396 (2002), 124 I.L.R. 9 (2003) (Decision on Jurisdiction of 25 Jan. 2000); Salini v. Morocco, ICSID Case No. ARB/00/0, 6 ICSID Rep. 400 (2004), 42 I.L.M. 609 (2003) (Decision on Jurisdiction of 23 July 2001).

[113] *See e.g.*, Schering Corporation v. The Islamic Republic of Iran, 5 Iran-U.S. Cl. Trib. Rep. 361, 365 (1984); Otis Elevator Company v. The Islamic Republic of Iran, 14 Iran-U.S. Cl. Trib. Rep. 283, 283 (1987).

[114] Barcelona Traction Light & Power Co. Ltd (Belg. v. Spain), 1970 I.C.J. 4, ¶56–58 (Feb. 5); *see also* CRAWFORD *supra* note 23 at 112-3.

[115] 15 Iran-U.S. Cl. Trib. Rep. 23. (1987).

[116] Nicaragua, ¶115. In *Tadić* the Tribunal formulated an alternate test of overall control Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgment, ¶116 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) *but see* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb.), I.C.J. 43, ¶407 (Feb. 2007) (rejecting this test for purposes of determining state responsibility for non-official organs).

[117] Nicaragua, ¶115.

States was responsible for the "planning, direction and support" given to the paramilitary *contras*, Nicaragua nonetheless failed to show the effective control necessary for attribution.[118] While the *contra* force was equated for legal purposes with the forces of the United States,[119] the humanitarian violations at issue "could well [haven been] committed by members of the *contras* without the control of the United States."[120]

Under the effective control test, Reverentia did not exercise a level of control over RMT sufficient to pierce the corporate veil. After all, as this Court held in *Barcelona Traction*, veil piercing is "an exceptional process admissible in special circumstances only."[121] First, Reverentia did not use its ownership interest as a vehicle for directing the company. In fact, Reverentia allowed RMT a large degree of autonomy, which is evident from President Nuvallus's statement that "RMT assures me the supply of Marthite is more than adequate to satisfy local demand."[122] If Reverentia had effective control of the entity, no such assurance would be necessary as Reverentia would already know the answer. Additionally, under Article 3 of the Convention, RMT, and not Reverentia, owns the Marthite and pays Agnostica royalties.[123] Thus, there is a clear separation between RMT and Reverentia, with RMT managing its own affairs. Much like the *contras* in *Nicaragua*, RMT could have violated the terms of the Convention without Reverentia's knowledge or control.

President Nuvallus's instruction that the Reverentian mining engineers return home following Agnostica's denunciation of the Treaty[124] also does not establish effective control

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[118] *Id.*
[119] *Id.* at ¶110.
[120] *Id.* at ¶115.
[121] Barcelona Traction, ¶56.
[122] *Compromis*, ¶15.
[123] *Compromis*, Annex.
[124] *Id.* at ¶17.

here. Agnostica must demonstrate effective control in regards to the specific acts at issue, here RMT's sale of Marthite to pharmaceutical companies. President Nuvallus's instruction occurred after the alleged breach and is unrelated to RMT's selling practices. Moreover, this statement does even not speak to overall control as it had no binding effect on RMT or its workers and there is no clear evidence that the workers did return home based on these instructions.

Thus not only is there no internationally wrongful act that can serve as a basis for Agnostica's unilateral termination of the Convention, any conceivable wrong that was committed is not attributable to Reverentia. Agnostica's justifications for unilateral termination are merely hollow attempts to deny Reverentia its rights under the Marthite Convention.

iv. Reverentia did not undertake a duty to monitor RMT.

Generally, a state is not under a duty to control the activities of private individuals.[125] While such a duty can be prescribed by treaty, there is no separate article in the Marthite Convention that explicitly obligates Reverentia to ensure RMT complies with its provisions.[126] Even if the term "undertakes" in Article 4(a) is construed to convey such a duty, Reverentia fulfilled its obligations. Any duty-creating language is in contained in Article 4(a) and does not apply to other provisions, which refer only to RMT's obligations. There is therefore no basis to extend any conceivable duty beyond Article 4(a) to require a micromanagement of RMT's business operations. If Reverentia undertook any duty at all, it was to ensure the essential object and purpose of the treaty was realized by limiting RMT's ability to sell Marthite to non-traditional users. Such a duty was fulfilled with RMT's assurances that demand was more than adequate to satisfy local demand.[127]

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[125] IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY PART I, 165 (1938).
[126] *Compromis,* Annex.
[127] *Compromis*, ¶15.

C. Agnostica materially breached the Convention by unduly repudiating the Convention, leasing the mining facilities to Baxter, and by enacting the Marthite Control Act (MCA).

As Agnostica cannot rely on any provision of the treaty itself, which specifies it "shall remain in force for ninety-nine years,"[128] nor the VCLT, its denunciation of the Convention was ineffective.[129] Consequently, Agnostica's unsanctioned repudiation of the treaty, lease of the Marthite facilities to Baxter, and enactment of the MCA were material breaches.

Agnostica's unsanctioned repudiation is a material breach as defined by VCLT Article 60(3)(a), while both the lease to Baxter and enactment of the MCA violate provisions essential to the purpose of the Convention. The Baxter lease demonstrates that Agnostica no longer respects Marthite's cultural significance to Reverentia, because the lease contains no price or access guarantees to traditional practitioners, and it does not ensure a reliable supply to ethnic Reverentians on either side of the border.[130] Similarly, the MCA prevents access to the mineral by traditional practitioners in Reverentia (and likely East Agnostica too) and thus clearly prevents the object and purpose of the Convention from being realized.[131]

Agnostica is under an obligation to make reparation for the injury caused by its wrongful acts.[132] "[I]n cases involving bonds and other contractual rights, the contractual expectations will govern reparations."[133] Reverentia asks for satisfaction for the harm done to its citizens and compensation comprising RMT's lost revenue between 2 April, 2012, when Agnostica leased all

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[128] *Compromis*, Annex.
[129] VCLT art. 42(2).
[130] *Clarifications*, ¶11.
[131] *Compromis*, ¶22-23.
[132] ASR art. 36; *see also* The Factory at Chorzów (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 29 (July 26).
[133] BROWNLIE, *supra* note 45 at 228.

rights to the facilities to Baxter,[134] and March 2013, when RMT's operation of the facilities resumed.[135]

D. Reverentia has standing to make claims regarding Agnostica's breach of the Convention.

Agnostica has not challenged Reverentia's standing, thus for the Court to decide the issue would be *non ultra petita*.[136] Nonetheless, Reverentia has standing as Agnostica breached obligations directly owed to Reverentia under the Marthite Convention.[137] Moreover, even if the exhaustion of local remedies rule applied in regards to RMT's damages, since the harm accruing to RMT arose out of Agnostica's breach of its treaty obligations, and thus the violation of a duty owed to Reverentia, the rule does not apply.[138]

E. The Convention ceased to be effective upon the annexation of East Agnostica.

While a change in the scientific and economic value of Marthite does not constitute a fundamental change of circumstances, East Agnostica's secession and subsequent integration with Reverentia does. In *Gabčíkovo-Nagymaros*, this Court accepted that political changes could lie within the scope of the doctrine.[139] The European Court of Justice (ECJ) confronted a similar situation in the *Racke* case, where the European Economic Community (EEC) relied on the breakup of Yugoslavia to suspend a trade agreement.[140] In upholding the EEC's actions, the court stressed that the purpose of the agreement was to "promote overall cooperation between the contracting parties with a view to contributing to the economic and social development of

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[134] *Compromis*, ¶16.
[135] *Clarifications*, ¶3.
[136] *See* Asylum (Colom. v Peru), 1950 I.C.J. 402 (Nov. 20) (holding that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions.")
[137] ASR art. 42(a).
[138] Interhandel, Preliminary Objections, (Switz. v. U.S.), 1959 I.C.J. 6, 27 (Mar. 21).
[139] Gabčíkovo-Nagymaros, ¶104.
[140] Case C-162/96, A Racke GmbH & Co v. Hauptzollamt Mainz, 1998 E.C.R. I-3655.

[Yugoslavia]."[141] In light of this, the stability of Yugoslavia was found to constitute an essential basis for consent of the parties and, thus, its breakup a fundamental change of circumstances.[142]

Similar to the trade agreement in *Racke*, the primary purpose of the Marthite Convention was to foster friendly relations between Agnostica and Reverentia by ensuring traditional practitioners access to Marthite.[143] Thus the ECJ's reasoning applies well to this case. Analogous to the breakup of Yugoslavia, lines of state sovereignty in place at the time the Convention was ratified changed following the secession of East Agnostica. This change goes to an essential basis for consent, because it directly affects sovereign rights over the object of the Treaty, the Marthite reserves. These rights are no longer Agnostica's to control, and this is a fundamental change of circumstances.

IV. REVERENTIA'S REMOVAL OF THE MARTHITE EXTRACTION SOFTWARE WAS CONSISTENT WITH INTERNATIONAL LAW.

A. Title to the software did not transfer under the Marthite Convention and therefore Reverentia was entitled to retrieve it once Agnostica breached the Convention.

Agnostica claims it was entitled to the extraction software under the Marthite Convention.[144] The ordinary meanings of "facility" and "technology," however, along with other provisions in the Convention, demonstrate that Reverentia retained title to the software and was entitled to retrieve it after Agnostica's material breaches.

A treaty should be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose.[145] A facility is generally

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[141] *Id.* at ¶54.
[142] *Id.* at ¶55.
[143] *Compromis*, Annex.
[144] *Compromis*, ¶19.
[145] VCLT 31(1); *see also* Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, ¶8 (Mar. 3).

defined as a building or a large piece of equipment built for a specific purpose.[146] Technology, conversely, is defined as the application of scientific knowledge for practical purposes, especially in industry.[147] The mining extraction software aligns far better with the definition of technology, being specifically designed to increase extraction quantities in the Marthite-mining industry. The software was therefore not part of the "mining and mining-support facilities"[148] but the "technology"[149] Reverentia agreed to provide on an ongoing basis.

Other provisions in the Convention support this conclusion. The description of the facilities, for example, "merely denoted the specific geographical location of each building along with the proximity of the corresponding Marthite reserves."[150] Surely if the software was included within the meaning of facility, it would have been mentioned in the description of each. Moreover, an interpretation that would require Reverentia to give up its unique intellectual property, likely advanced and further developed after execution of the Convention, for a nominal 100 francs hardly seems like an interpretation in good faith.[151]

Accordingly, title to the facilities transferred under Article 2, but not title to the software. Reverentia was thus entitled to retrieve the software after suspending the Treaty so that Agnostica was not able to further profit from its breach.[152] Even if this Court were to find the software within the meaning of facilities, however, this transfer would have been conditioned on Agnostica's performance of its treaty obligations. Once Agnostica prevented RMT's access to the Marthite reserves, it failed to meet the requisite conditions for title to transfer.

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[146] *See e.g.*, OXFORD ENGLISH DICTIONARY, 27 (7th ed. 2013).
[147] *See e.g.*, OXFORD ENGLISH DICTIONARY, 27 (7th ed. 2013).
[148] *Compromis,* Annex.
[149] *Id.*
[150] *Clarifications,* ¶5.
[151] *Compromis,* Annex.
[152] VCLT art. 60(1).

B. Alternatively, removing the software was a valid countermeasure in response to Agnostica's violations of the Marthite Convention.

As this Court recognized in *Gabčíkovo-Nagymaros,* the violation of treaty obligations, regardless of their materiality, may justify the taking of countermeasures by an injured State.[153] Reverentia's removal of the software was a direct response to Agnostica's prior breach of the Marthite Convention.[154] Any assertion of wrongfulness in regards to Reverentia's removal of the software, therefore, is precluded because the act was a valid, non-forcible countermeasure.

To comply with the requirements of international law, a countermeasure must above all be taken with the intention of bringing a state back into compliance with its legal obligations, [155] and it cannot involve the use of force.[156] Accordingly, to the extent possible, countermeasures should be temporary in character and reversible in their effects.[157] These requirements are satisfied here. Reverentia removed the software to prevent Agnostica from profiting from its breach and to encourage Agnostica to respect its treaty obligations.[158] The Vice President made this intention clear, stating that "if Agnostica were willing to invite our engineers to return, and reaffirmed its commitment to the terms of the Convention, our engineers, once on-site, would be able to reverse the so-called 'sabotage' within hours," [159] as they did.[160] Removing the software also cannot be deemed a "forcible action" within the meaning of the U.N. Charter, because removing the software did not destroy any government property. Where an action and its results

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[153] Gabčíkovo-Nagymaros, ¶106.
[154] *Compromis,* ¶17-18.
[155] ASR art. 49(1). *See* ICSID, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc.* v. *the United Mexican States*, Case No. ARB(AF)/04/05, Award, 21 November 2007, ¶121 (taking articles 22 and 49 of the ASR as an authoritative statement of customary international law on countermeasures).
[156] ASR art. 52.
[157] ASR art. 49(2),(3).
[158] *Compromis,* ¶18.
[159] *Id*.
[160] *Clarifications,* ¶13.

on another state's governmental property are reversible, they cannot be considered destruction, which is by nature *irreversible*.[161]

Additionally, countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.[162] As the tribunal commented in the Air Services Arbitration, however, "judging the 'proportionality' of countermeasures is not an easy task and can at best be accomplished by approximation."[163] Countermeasures are more likely to satisfy the proportionality requirement if taken in relation to the same obligation.[164] The countermeasures at issue in the Air Services Arbitration, for example, were taken in the same field as the initial measures and concerned the same airline routes.[165] Ultimately, the tribunal found that the measures were not "clearly disproportionate when compared to those taken by France."[166]

While proportionality is a nebulous concept, Reverentia's act of removing the Marthite extraction software falls within the boundaries of appropriateness. First, much like in the Air Services Arbitration, Reverentia's countermeasure was taken directly in relation to the obligation Agnostica breached, as it directly concerned the ability to extract Marthite. Furthermore, removal of the software did not cripple operations at the mine but merely slowed the extraction process.[167] Indeed, operations at the mine resumed immediately, and Agnostica professed its ability to either recreate the software or work around its removal.[168] Thus, removal of the

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[161] *C.f.* Guyana v. Suriname, 47 I.L.M. 166 ¶446 (Perm. Ct. Arb. 2007).
[162] *Gabčíkovo-Nagymaros*, ¶85.
[163] Air Services Agreement (Fr. v. U.S.), 18 R.I.A.A. 416, ¶91, ¶¶94-6 (Perm. Ct. Arb. 1978).
[164] *Id.* at ¶40.
[165] *Id.*
[166] *Id.* at ¶83.
[167] *Compromis*, ¶20.
[168] *Id.* at ¶19.

software was anything but "clearly disproportionate."[169]

In regards to procedural conditions customarily imposed on countermeasures, while it is unclear the extent to which Reverentia notified Agnostica prior to the removal of the software, such a measure was necessary to preserve Reverentia's rights.[170] Agnostica unilaterally terminated the Marthite Convention, declaring it "without any further affect," and simultaneously announced that a competing multinational company would immediately take over the facilities.[171] Had Reverentia waited to remove the software, it would have allowed Baxter to take advantage of software that RMT developed and created; an unjust enrichment. Additionally, once Agnostica made steps to come back into compliance with the Convention by suspending its lease with Baxter, Reverentian engineers re-installed the software in accordance with ASR Article 53.[172]

[169] Air Services Agreement, ¶83.
[170] *See* ASR art. 52(2).
[171] *Compromis*, ¶16.
[172] ASR art. 53.

CONCLUSION AND PRAYER FOR RELIEF

For the aforementioned reasons, the State of Reverentia respectfully requests that this Court:

1. **DECLARE** that Reverentia's support for the referendum in East Agnostica is consistent with international law;
2. **DECLARE** that East Agnostica's secession from Agnostica and integration into Reverentia are consistent with international law, and in any event, this Court should not order the retrocession of East Agnostica to Agnostica against the expressed will of its population;
3. **DECLARE** that the Marthite Convention was in effect until March 1, 2013, and Agnostica breached that convention; and
4. **DECLARE** that Reverentia's removal of the software in the Marthite extraction facilities was consistent with international law.

Respectfully submitted on this date,

January 13, 2015

Agents for Reverentia