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The 2007 Philip C. Jessup
International Law Moot Court Competition

Republic of Adaria

v.

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

The Case Concerning The Rotian Union

BEST OVERALL MEMORIAL – RESPONDENT

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IN THE INTERNATIONAL COURT OF JUSTICE

THE CASE CONCERNING THE ROTIAN UNION

2007

Republic of Adaria

v.

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

MEMORIAL FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

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

Questions Presented

I. Whether the Rotian Union Council's decision to postpone Adaria's admission breached any international legal obligations owed to Adaria by Respondents.

II. Whether Respondents have standing to bring a claim against Adaria in this Court for its actions against the Rotian Union Legation, its property and its personnel.

III. Whether Adaria violated international law governing the immunity of international organizations by invading the premises and seizing the property and personnel of the Rotian Union Legation.

IV. Whether the National Industry Act constitutes an illegal expropriation under international law.

STATEMENT OF FACTS

The Republic of Bobbia, the Kingdom of Cazalia, the Commonwealth of Dingoth, and the State of Ephraim (Respondents) are five contiguous and economically developed States in the region of Rotia. In 1964, Respondents formed the Rotian Union (RU) in order to foster greater economic cooperation and promote closer political unity within Rotia. The Treaty establishing the Rotian Union (TRU) provided for four RU organs: (1) the Parliament, directly elected by the citizens of the Member States; (2) the Council, composed of one representative from the government of each Member State; (3) the Commission, consisting of a President and four ministers; and (4) the High Court. (Compromis ¶¶ 4, 5, Annex I).

Respondents intended the RU to constitute a new legal order in international law. Thus, they endowed it with a great deal of autonomy and authority to enact legislation and further the objectives of the Union. Over the next 25 years, the RU established common policies for its Member States, supplanting domestic laws in numerous economic related spheres. The High Court also actively brought offending States to task for not enacting common legislation. Eventually, the RU began to act not only as a harmonizer of economic relations between the Member States but also as a representative of the Member States in dealing with non-Members. (Compromis ¶¶ 6, 8).

In 1991, Respondents signed the Convention Amending the Rotian Union Treaty (CARUT) which further empowered the RU to coordinate non-trade relations between Respondents and non-Member States. The CARUT also replaced the national currencies of Respondents with a single Rotian currency, the Roto. Since the CARUT entered into force, the role of the RU in coordinating foreign policies of Respondents has grown considerably. For example, in 1995, the RU negotiated mutual judgment recognition treaties with the United States

and India. In 1997, the RU became a party to the World Trade Organization in its own right. Finally, in 2004, the President of the Commission successfully negotiated for the safe release of nationals of Member States held hostage by a paramilitary organization. (Compromis ¶¶ 9, 11, 12).

In 1995, the Republic of Adaria (Applicant) applied for RU membership. Adaria is a neighboring country whose population comprises an Adarian majority and a Sophian minority with its own unique cultural and religious heritage. After reviewing Adaria's application, the Commission recommended that Adaria would be suitable for membership if it: (1) reduced its public debt owed to non-RU States; (2) privatized state-owned monopolies; and (3) eliminated government support payments to small, privately owned businesses. These conditions were incorporated into the Adarian Accession Agreement (AAA) which was ratified by the Council in 2000. The AAA provided that Adaria would be "eligible for admission" if it met those conditions. (Compromis ¶¶ 14, 15, Annex II).

The treaty further provided for the establishment of an RU Legation in Adaria, the rights, privileges, and immunities of which would be governed by international law. On February 1, 2002, in accordance with the AAA, the RU opened a Permanent Legation in Adaria led by an experienced diplomat Uriah Heep. At that time, the Adarian Prime Minister warmly welcomed Mr. Heep and his staff "as the Representatives of the Rotian Union in Adaria." (Compromis ¶ 18, Annex II).

Initially, the AAA received much popular support from Adaria and its people. However, as the Adarian government took steps to meet its obligations, support waned considerably. Among these steps were an increase in taxes to pay off national debts and the privatization of state-owned industries through public auctions. These industries were subsequently purchased

by companies based within the RU. In each case, the parent company integrated its Adarian facilities into its existing infrastructure resulting in inevitable layoffs. The newly privatized power and utility companies also modernized pricing so as to charge all consumers the same rates. (Compromis ¶ 21).

At the same time, the Adarian government began to phase out support payments to small businesses. The loss of these payments forced many Sophians out of business. In 2003, the government announced a massive public works program which was to provide employment for the Sophians. Unfortunately, and as the Adarian government was well aware, this form of employment was not suitable for the Sophians as their religion prohibited heavy labor and road-building. (Compromis ¶¶ 22, 23; Clarification ¶ 1)

Nevertheless, Adaria continued implementing measures on its own accord resulting in the increasing dissatisfaction of the Adarians. In November 2005, the Commission President reported to the Council that Adaria had met the obligations enumerated in the AAA. However, while Adaria had literally satisfied these conditions, in the process it had failed to take care of its own Sophian citizens. Concerned that a country which left its own citizens without adequate water, electricity, or jobs would not live up to RU standards, the Council voted to postpone Adaria's admission until it could demonstrate its willingness and ability to adequately care for its people. (Compromis ¶¶ 24-28).

This announcement was not well received and within days a wave of retaliation swept through Adaria. On December 16, Ambassador Uriah Heep was arrested for allegedly making illegal political donations. Armed Adarian agents entered Legation premises without the RU's consent and forcibly took Ambassador Heep into custody. The RU immediately protested this action as a violation of the Legation's diplomatic status. On December 17, more armed agents

stormed the Legation offices seizing bank records and computer diskettes, again without the RU's consent. The Adarian Attorney General has yet to present formal charges against any RU personnel. (Compromis ¶ 29, 31-32, 34)

On December 17, the Adarian Parliament also passed the National Industry Act (NIA) which prohibits the RU owners of formerly state-owned enterprises from transferring any profits earned in Adaria outside of the country. One of these RU companies brought a lawsuit in Adarian civil court alleging that its property had been expropriated. However, the lawsuit was rejected by the court which perfunctorily concluded that no expropriation had occurred. On appeal, the Adarian Supreme Court upheld the ruling. (Compromis, ¶¶ 29 – 32, 35 – 36)

On April 20, 2006, Adaria filed an application with this Court alleging that the Respondents violated international law by denying Adaria admission to the RU. In order to promote judicial efficiency, Respondents have decided to act through common counsel in this case. On September 1, 2006, both parties submitted a Compromis which contains a stipulation of agreed facts. The Court has decided to hear this case. (Compromis ¶¶ 37-38).

SUMMARY OF PLEADINGS

I. The Court is not competent to decide this dispute because the issue of whether the Rotian Union (RU) should have admitted Adaria to membership is not capable of resolution by legal principles. Even if the Court were to find that Adaria's claim is justiciable, it should find that Respondents have not breached any legal obligations owed to Adaria. Neither the AAA nor customary international law obligates Respondents or the RU to admit Adaria to membership. Rather, the AAA grants the RU Council the discretion to determine whether Adaria should be admitted. The Council properly considered the situation of the Sophians when it decided not to admit Adaria. Moreover, Respondents are not responsible for any violation of the AAA which the RU might have committed. First, the RU assumed obligations under the AAA in its own right. Second, Respondents neither assisted nor directed the RU in its decision not to admit Adaria. Finally, Respondents have not consented to be responsible for the RU's actions.

II. Respondents have standing to assert a claim against Adaria for its violation of the RU Legation's right to functional immunity. Under this Court's precedent, Respondents have a direct legal interest in the enfocement of legal obligations owed to international organizations which they have created. As the RU's right to functional immunity derives from the mutual respect other States owe to Respondents, the Respondents have also suffered moral injury as a result of Adaria's breach of the RU Legation's immunity. Moreover, Respondents have standing to assert the RU's claim for the breach of its functional immunity. As Respondents have not explicitly granted the RU the power to assert elaims against States, they retain the power to assert claims on its behalf. The purpose of this Court would also be served by a policy allowing Member States to bring claims on behalf of their international organizations.

III. Adaria violated the functional immunity of the RU Legation by storming its premises and seizing its property and personnel. Both the AAA and customary international law required Adaria to afford the RU Legation functional immunity. Functional immunity requires, at a minimum, respect for the inviolability of an international organization's premises, property, and personnel. The RU Legation did not waive this immunity. The Legation's financial contributions to Adarian politicians fell within its duty to facilitate Adaria's integration into the RU. These contributions were also consistent with Adarian law as the RU Legation is a diplomatic mission of an international organization. Adaria's unannouneed invasion of the RU Legation office and its arrest of Ambassador Heep constitute a blatant violation of this functional immunity.

IV. The National Industry Act (NIA) illegally expropriation property owned by corporations from Respondent States. In completely prohibiting RU-based corporations from utilizing the profits from their recently-acquired Adarian industries, the NIA unreasonably interferes with Respondents' nationals' right to use and enjoy their property. This expropriation is illegal because it is a discriminatory measure of political retaliation against the RU and because the NIA fails to provide any compensation.

PLEADINGS

I. RESPONDENTS HAVE NOT BREACHED ANY LEGAL OBLIGATIONS OWED TO ADARIA.

A. The Court is not competent to resolve this dispute because it involves a non-justiciable political questiou.

This Court may only decide upon "*legal* disputes" between States.[1] A legal dispute is one that does not turn upon political considerations, but rather is "capable of being settled by the application of principles and rules of international law."[2] The question of whether the RU's denial of Adaria's application for membership was proper is not capable of resolution by legal principles. Thus, the Court is not empowered to resolve this dispute.

International organizations admit States to membership on the basis of political, rather than legal, criteria.[3] Because States create international organizations to serve certain functions,[4] the decision to admit another State into an organization turns upon a political evaluation of

[1] Statute of the International Court of Justice art. 36, para. 2, June 26, 1945, 33 U.N.T.S. 993 [hereinafter I.C.J. Statute] (emphasis added). *See also* Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 33-34 (Dec. 15); Mavrommatis Palestine Concessions (Gr. v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30).

[2] Border and Transborder Armed Actions (Nicar. v. Hond.) 1988 I.C.J. 69, 91 (Dec. 20). *See also* PAUL REUTER, INTERNATIONAL INSTITUTIONS 236 (1958).

[3] *See* Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57, 71 (May 28) (separate opinion of Judge Alvarez); C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 107 (2d ed 2005); HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW § 99 (4th ed. 2003) [hereinafter SCHERMERS]; IAN BROWLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 79 (6th ed. 2003); JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 108 (2002); ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 12 (1963); SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 149 (1958).

[4] *See, e.g.,* Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (April 11).

whether that State's admission would advance the purposes of the organization.[5] Such decisions cannot be reviewed by courts. For example, the Treaty of the European Union (TEU) provides that the conditions for admission to European Union (EU) membership must be decided upon in each particular case.[6] The TEU does not provide the European Court of Justice (ECJ) with the jurisdiction to hear disputes over membership admissions decisions.[7] Likewise, the ECJ has treated questions regarding admission to EU membership as nonjusticiable.[8] While this Court's decision in the first *Admission* case may suggest that questions regarding admission to UN membership are justiciable, its analysis is limited to the particular facts of that case which involved the interpretation of Article 4 of the UN Charter.[9]

Unlike the UN, but similar to the EU, the RU is free to determine its own criteria for the admission of new members.[10] As opposed to the UN which has the goal of universal membership,[11] the RU is a regional organization designed to foster greater economic and

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[5] *See Conditions of Admission*, 1948 I.C.J. at 85 (joint dissenting opinion of Judges Basdevant, Winiarski, McNair & Read); SCHERMERS, *supra* note 3, § 99; REUTER, *supra* note 2, at 224.

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

[7] *Id.* art. 35.

[8] Lothar Mattheus v. Doego Fruchtimport und Tiefkühlkost eG, Case 93/78, 1978 E.C.R. 2203.

[9] *See Conditions of Admission*, 1948 I.C.J. at 61.

[10] *Compare* U.N. Charter art. 4 *with* TEU, *supra* note 6, art. 49 *and* Compromis, Annex I art.11(2)-(4).

[11] *See Conditions of Admission*, 1948 I.C.J. at 71 (separate opinion of Judge Alvarez); BENEDETTO CONFORTI, THE LAW AND PRACTICE OF THE UNITED NATIONS 26 (2nd ed. 2000); GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS VOL. III 133 (1976).

political unity within Rotia.[12] Furthermore, unlike the UN Charter which specifies criteria which are sufficient for admission,[13] the TRU vests the Commission with the power to establish admission criteria and the Council with the power to determine whether such criteria have been satisfied.[14] As with EU membership decisions, there are no legal standards by which this Court can judge the RU's denial of Adaria's application. Thus, this dispute does not belong before the Court.

B. Even if Applicant's claim is justiciable, the RU did not violate any legal obligations when it exercised its discretion not to admit Adaria to RU membersbip.

1. The RU did not breach tbe AAA by finding Adaria ineligible for RU membership.

In order for the RU to breach an international obligation to admit Adaria to RU membership, such an obligation would have to exist either under the AAA or as a rule of customary international law.[15] In *Yedaş Tarim v. Council*, the European Court of First Instance (CFI) held that the Ankara Agreement, which was designed to promote balanced economic relations between the European Economic Community (EEC) and Turkey, did not create an obligation for the EEC to financially support Turkey in any particular way.[16] Rather, as the

[12] Compromis, Annex I.

[13] *See* U.N. Charter art. 4; *Conditions of Admission*, 1948 I.C.J. at 65; OPPENHEIM'S INTERNATIONAL LAW 1271-73 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM].

[14] *See* Compromis, Annex I art. 11, para. 6.

[15] *See* MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES 102-3 (1995); ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 47 (1994).

[16] Yedaş Tarim v. Council & Comm'n, Case T-367/03, Mar. 30, 2006, at ¶ 42.

Agreement was "not sufficiently precise and unconditional and [was] of necessity subject, in its implementation or effects, to the adoption of subsequent measures,"[17] the CFI found that the treaty granted the EEC a substantial amount of discretion in its implementation.[18] Indeed, the EEC has on multiple occasions entered into financial agreements with Turkey designed to more closely align Turkey's economic policies with those of the EEC, but to date the EEC has made no formal commitment to admit Turkey to the EU.[19]

Just as the Ankara Agreement created no precise obligation for the EEC to financially support Turkey, the AAA does not obligate the RU to admit Adaria to membership, but rather grants the Council final discretion to determine whether Adaria should be admitted. The terms of the AAA must be interpreted "in accordance with [their] *ordinary* meaning."[20] The AAA only guarantees that "Adaria shall be *eligible* for admission" upon its completion of the three conditions specified therein.[21] Likewise, the TRU provides that after "the applicant State has timely satisfied all the conditions for accession described in the Accession Agreement, the

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[17] *Id.*

[18] *Id.* at ¶¶ 55-6.

[19] *See* Financial Protocol Annexed to the Agreement Establishing the Association Between the European Economic Community and Turkey, Nov. 23, 1973, 1972 O.J. (L 293) 4; Council Decision concerning the conclusion of a Financial Protocol between the European Economic Community an Turkey, Mar. 5, 1979, 1979 O.J. (L 67) 14.

[20] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations art. 31, March 21, 1986, U.N. Doc. A/CONF.129/15 (1986), *reprinted in* 25 I.L.M. 543 (1986) (emphasis added) [hereinafter VCLTSIO]. *Accord* Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4 (March 3); Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 194-95 (July 20).

[21] Compromis, Annex II ¶ 1 (emphasis added).

Council shall *consider* the application, which it *may* approve by unanimous vote after obtaining the opinion of Parliament."[22] Thus, Adaria's fulfillment of the accession conditions was necessary, but not sufficient for becoming an RU member. The Council retained final discretion to determine whether Adaria should be admitted.

The Council properly exercised this discretion when it denied Adaria's application because of concerns over the living conditions of the Sophians. International organizations generally consider a membership applicant's ability to help advance the unique purposes and goals of the organization when deciding whether to admit it.[23] The RU was formed, in part, "to ensure the development of [its Member States'] prosperity, in accordance with the principles of the Charter of the United Nations, *including in particular respect for human rights and the rights of women and minorities*."[24] When evaluating Adaria's application, the Council properly considered Adaria's treatment of its Sophian minority. Adaria's failure to ensure that its Sophian citizens had adequate water, electricity, and economic opportunities[25] rightly caused the Council to question whether Adaria should be an RU member.[26] Thus, its denial of Adaria's application for membership was consistent with its obligations under the AAA.

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[22] Compromis, Annex I art. 11(6) (emphasis added).

[23] *See* Statute of the Council of Europe art. 4, May 5, 1949, 87 U.N.T.S. 103 [hereinafter Council of Europe Statute]; SCHERMERS, *supra* note 3, §§ 95, 97, 99.

[24] Compromis, Annex I (emphasis added).

[25] *See* Compromis ¶¶ 21, 23, 26, 28; Clarifications ¶¶ 1-2.

[26] *See, e.g.*, International Covenant on Economic Social and Cultural Rights art. 11, Dec. 16, 1966, 993 U.N.T.S. 3.

2. The RU did not violate any rule of customary international law in its treatment of Adaria's application for RU membership.

No customary rule of international law requires the RU to admit Adaria. Admission to membership in an international organization is not governed by customary international law. Rather, as Professor Amerasinghe has observed, "matters concerning membership depend primarily on the provisions of the constitutions of international organizations and on the practice of each organization."[27] Furthermore, Adaria bears the burden of demonstrating to the Court the existence of a custom regarding admission.[28] Adaria cannot meet that burden for two reasons. First, there is no widespread or consistent practice of States[29] regarding admission to membership in international organizations as the procedures for accession to membership vary with each organization.[30] Second, States share no *opinio juris*[31] regarding the legal obligation to admit States which satisfy conditions in accession agreements. For example, the UN does not require accession agreements.[32] Indeed, Security Council members have vetoed for political

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[27] AMERASINGHE, *supra* note 3, at 105. *See also* KLABBERS, *supra* note 3, at 105; KONRAD G. BUHLER, STATE SUCCESSION AND MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS 19 (2001); Ebere Sieke, *Admission to Membership in International Organizations: the Case of Namibia*, 51 BRIT. Y. B. INT'L L. 190, 192 (1980); Felice Morgenstern, *Legality in International Organizations*, 48 BRIT. Y. B. INT'L L. 241, 244 (1976).

[28] *See* Asylum (Colom. v. Peru), 1950 I.C.J. 266, 276-77 (Nov. 30).

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

[30] *Compare* TEU, *supra* note 6, art. 49 *with* North Atlantic Treaty art. 10, Apr. 4, 1949, 34 U.N.T.S. 243 *and* Constitution of the Food and Agriculture Organization art. II, Oct. 16, 1945, 12 U.S.T. 980 *and* Statute of the International Atomic Energy Agency art. IV, Oct. 23, 1956, 276 U.N.T.S. 3. *See also* Sieke, *supra* note 27, at 189.

[31] *See North Sea Continental Shelf*, 1969 I.C.J. at 42.

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

reasons the admission of applicants who have otherwise satisfied the Article 4 conditions.[33] Likewise, the EU and the Council of Europe admit new members only if all Member States politically agree upon the admission.[34] Even in cases where accession agreements govern admission to the organization, Professor Amerasinghe has concluded that:

> [I]t would not be appropriate to speak of a legal obligation to admit an applicant that fulfills the necessary conditions, since the applicant cannot be said to fulfill the conditions until the members have decided that it does, and some of the conditions are subjective, depending on the judgment of the organization.[35]

In other words, there is no automatic right in international law to be admitted to an international organization, even when a State satisfies the conditions of an accession agreement.[36] Thus, the RU was not obliged to admit Adaria to membership as a matter of custom.

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[33] *See* U.N. SCOR, 30th Sess., 1836th mtg., U.N. Doc. S/PV.1836 (Aug. 11, 1975); U.N. SCOR, 30th Sess., 1846th mtg., U.N. Doc. S/PV.1846 (Sept. 30, 1975). *See also* SCHERMERS, *supra* note 3, § 96; KLABBERS, *supra* note 3, at 110; MICHAEL P. SCHARF, THE LAW OF INTERNATIONAL ORGANIZATIONS 46 (2001); FREDERIC L. KIRGIS, JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 144, 146 (2d ed. 1993); Stephen Jacobs & Marc Poirier, *The Right to Veto Untied Nations Membership Applications: The United States Veto of the Viet-Nams*, 17 HARV. INT'L L. J. 581 (1976).

[34] *See* TEU, *supra* note 6, art. 49; Council of Europe Statute, *supra* note 23, art. 4; Eur. Parl. Ass. Res. 1055 (Feb. 2, 1995); Eur. Parl. Ass. Res. 1089 (May 29, 1996); Eur. Parl. Ass. Res. 1102 (Nov. 7, 1996). *See also* MAURICE FITZGERALD, PROTECTIONISM TO LIBERALISATION: IRELAND AND THE EEC 224-27(2001); Richard Davis, *The 'Problem of de Gaulle': British Reactions to General de Gaulle's Veto of the UK Application to Join the Common Market*, 32 J. CONTEMP. HIST. 453 (1997); Evelyne Gelin, *L'Adhesion de la Russie au Conseil de l'Europe a la Lumiere de la Crise Tchetchene*, 99 REV. GEN. PUB. INT'L L. 623, 638 (1995).

[35] AMERASINGHE, *supra* note 3, at 107.

[36] *See* SCHWARZENBERGER, *supra* note 11, at 30-31.

C. Respondents are not responsible for any internationally wrongful acts the RU may have committed.

1. Respondents are not directly responsible for the RU's actions hecause the RU assumes obligations independently from Respondents hy virtue of its separate international legal personality.

Under international law, international organizations possess separate legal personality[37] and are independently responsible for their own acts.[38] In the *Reparations* case, this Court found that international organizations "exercise[e] and enjo[y] functions and rights which can only be explained on the basis of the possession of a large measure of international legal personality and the capacity to operate on the international plane."[39] Considering whether non-Member States must recognize this personality, the Court held that the Member States of the UN "had the power in conformity with international law, to bring into being an entity possessing *objective* international personality, and not merely personality recognized by them alone."[40] Similarly, the EU and the EC have objective legal personality which other States must recognize.[41]

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[37] *See* OPPENHEIM, *supra* note 13, at 18-19; Esa Paasivirta, *The European Union: From an Aggregate of States to a Legal Person?*, 2 HOFSTRA L. & POL'Y SYMP. 37, 41 (1997); James E. Hickey, Jr., *The Source of International Legal Personality in the 21st Century*, 2 HOFSTRA L. & POL'Y SYMP. 1, 5 (1997); Finn Seyersted, *Objective International Personality of Intergovernmental Organizations*, 34 NORDISK TIDSSKRIFT FOR INT'L RET. I, 45 (1964).

[38] *See* Gerhard Hafner, *Can International Organizations Be Controlled? Accountability and Responsibility*, 97 AM. SOC'Y INT'L L. PROC. 236 (2003); Christian Tomuschat, *The International Responsibility of the European Union*, *in* THE EUROPEAN UNION AS AN ACTOR IN INTERNATIONAL RELATIONS 179 (Enzo Cannizzaro ed., 2002); Finn Seyersted, *The Legal Nature of International Organizations*, 51 NORDISK TIDSSKRIFT FOR INT'L RET. 203, 205 (1982).

[39] Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (April 11).

[40] *Id.* at 185.

[41] *See* Van Gend en Loos v. Nederlandse Administratie der Belastingen, Case 26/62, 1963 E.C.R. 105, 129; Comm'n v. Council, Case 22/70, 1970 E.C.R. 263, 267; TREVOR C. HARTLEY, EUROPEAN UNION LAW IN A GLOBAL CONTEXT 217 (2004); Jan Klabbers, *The Concept of Legal*

Like the UN and the EU, the RU possesses objective international legal personality. This personality is evidenced by the fact that the RU has entered into treaties with States, negotiated with other States concerning the protection of RU nationals, and become a member of another international organization, the World Trade Organization.[42] Adaria has also implicitly recognized the RU's independent legal personality by entering into a treaty with it.[43]

One of the major incidents of an organization's possession of legal personality is the ability to assume international obligations in its own right by entering into treaties.[44] When an international organization enters into such a treaty, the organization itself, not its Member States, assumes the treaty obligations.[45] The Vienna Convention on the Law of Treaties between States and International Organizations (VCLTSIO), to which both Adaria and Respondents are parties,[46] provides that such a treaty "does not create either rights or obligations for a third State or a third organization without the consent of that State or organization."[47] Obligations for a third State to such a treaty can only arise "if the *parties* to the treaty intend the provision to be

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Personality, 11 IUS GENTIUM 35, 36 (2005); Maria Gavouneli, *International Law Aspects of the European Union*, 8 TUL. J. INT'L & COMP. L. 147, 148 (2000).

[42] Compromis ¶¶ 9, 12.

[43] *Id.* at ¶ 15.

[44] *See* Report of International Law Commission on the Work of its Forty-Seeond Session, U.N. Doc. A/45/10, pp. 84-89 (July 20, 1990); Rosalyn Higgins, *Report on the Legal Consequences for Member States of the Non-fullfillment by International Organizations of their Obligations toward Third Parties*, 1 Y.B. INST. INT'L L. 252 (1995).

[45] *See* SCHARF, *supra* note 33, at 44 (2001); Tomuschat, *supra* note 38, at 179; Finn Seyersted, *United Nations Forces: Some Legal Problems*, 37 BRIT. Y.B. INT'L L. 351, 450 (1961).

[46] Compromis ¶ 40.

[47] VCLTSIO, *supra* note 20, art. 34.

the means of establishing the obligation and the third State *expressly accepts* that obligation in writing."[48] While the drafters of the VCLTSIO considered including an Article 36*bis* which would have made treaty commitments of international organizations automatically binding upon Member States, they expressly rejected this approach as inconsistent with international law.[49]

As the AAA was a treaty between Adaria and the RU,[50] it created rights and obligations only for Adaria and the RU, and not for Respondents. Neither the RU nor Respondents intended the AAA to create any obligation for Respondents since, under the TRU, the RU Council, not Respondents, is responsible for the accession process.[51] Likewise, no provision in the treaty identifies any obligations owed to Adaria by Respondents. Because the RU assumed obligations under the AAA in its own right, Respondents cannot be responsible for any violations which the RU may have committed.

2. Respondents are not concurrently responsible for the RU's violations of its legal obligations because they have not consented to be beld responsible.

As this Court's President, Rosalyn Higgins, has observed "there is no general rule of international law whereby States members are, due solely to their membership, liable concurrently or subsidiarily, for the obligations of an international organization of which they are

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[48] VCLTSIO, *supra* note 20, art. 35 (emphasis added).

[49] *See* Report of the International Law Commission on the Work of its Thirty-Fourth Session, [1982] Y.B. Int'l L. Comm'n 43, U.N. Doc. A/CN.4/SER.A/1982/Add.1; Giorgio Gaja, *A "New" Vienna Convention on Treaties Between States and International Organizations or Between International Organizations: A Critical Commentary*, 58 BRIT Y.B. INT'L L. 253, 263-4 (1987); Tomuschat, *supra* note 38, at 179.

[50] Compromis, Annex II.

[51] Compromis, Annex I art. 11.

members."[52] The constituent treaties of many international organizations clarify that Member States are not responsible for the organization's legal liabilities by expressly disclaiming such responsibility.[53] Moreover, in the *International Tin Council* case, the British House of Lords found that the Member States of the International Tin Council (ITC) could not be held liable for the ITC's failure to pay financial obligations which it owed to third parties.[54] The ITC was created by thirty-two States to buy and sell tin on the world market for the purpose of keeping the prices stable.[55] When the ITC went bankrupt in 1985, several creditors attempted to recover their debts by suing the Member States.[56] In the Court of Appeals decision, Lord Kerr could not "find any basis for concluding that . . . thcre is any rule of international law, binding on the member states of the ITC, whereby they can be held liable, let alone jointly and severally, . . . for the debts . . . resulting from contracts concluded by the ITC in its own name."[57] Writing for the majority in the House of Lords, Lord Templeman likewise reasoned that there was "no support" for the proposition that "a contract by the ITC involves a concurrent, direct, or guarantee liability on the members joint and severally."[58] Just as the ITC Member States were

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[52] *See* SCHERMERS, *supra* note 3, § 1585; Higgins, *supra* note 44, at 251.

[53] *See* MacLaine Watson & Co. Ltd. v. Int'l Tin Council, [1989] 1 Ch. 72, 253 (Annex to Judgement of Kerr L.J.). *See also* Higgins, *supra* note --, at 252; C.F. Amcrasinghe, *Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent*, 85 AM. J. INT'L L. 259, 260 (1991).

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

[55] *Id.* at 680.

[56] *Id.* at 690.

[57] *MacLaine Watson & Co.*, [1989] 1 Ch. 72, at 253.

[58] *Australia & New Zealand Banking Group*, 29 I.L.M. at 674.

not responsible by virtue of their ITC membership, Respondents, as RU member States, are not responsible for any violations of legal obligations which the RU may have committed.

The International Law Commission (ILC), a group of distinguished publicists charged with the codification of customary international law,[59] has likewise found that Member States of international organizations are not concurrently responsible for the actions of their organization simply by virtue of their membership. As the law of State responsibility does not address the issue of the responsibility of Member States for the actions of international organizations,[60] the ILC codified the emerging rules in this area in its Draft Articles on the Responsibility of International Organizations (Draft Articles).[61] These articles identify only four ways in which a Member State may be responsible for an internationally wrongful act of the organization.[62] First, a State may be responsible if it knowingly "aids or assists an international organization in the commission of an internationally wrongful act."[63] Second, a State may be responsible if it "directs and controls an international organization in the commission of an internationally

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[59] *See* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 46 (Sept. 25); Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 158 (July 20); ANTONIO CASSESE, INTERNATIONAL LAW 292 (2001); R.Y. Jennings, *Recent Developments in the International Law Commission: Its Relation to the Sources of International Law*, 13 INT'L & COMP. L.Q. 385, 386 (1964).

[60] *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 57, International Law Commission, U.N. GA 56th Sess., Supp. No. 10 (2001).

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

[62] *Id.* at 261-262.

[63] *Id.* at 261.

wrongful act."[64] Third, a State may be responsible if it "coerces an international organization" to commit such an act.[65] Finally, a Member State is responsible for the acts of the organization if "[i]t has accepted responsibility for that act or it has led the injured party to rely on its responsibility."[66] As Respondents have not consented to be responsible for the acts of the RU and have neither aided, directed, or coerced the RU in its actions, they are not responsible for any internationally wrongful acts the RU might have committed.

Respondents have never coerced the RU to act in any way. Similarly, Respondents neither directed nor assisted the RU in its consideration of Adaria's application for RU membership. In exercising its discretion regarding whether to admit Adaria to membership, the Council acted in its own right as an organ of the RU.[67] While Respondents may have had representatives on the Council, these representatives acted solely in their capacity as Council members and not as instruments of Respondents. The ILC's Commentary to the Draft Articles explains that if the State is a member of the organization "the influence that may amount to aid or assistance [can]not simply consist in participation in the decision-making processes of the organization according to the pertinent rules of the organization."[68] Likewise, the Commentary draws a distinction "between participation by a member State in the decision-making process of the organization according to its pertinent rules, and direction or control which would trigger"

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[64] *Id.*

[65] *Id.* at 262.

[66] *Id.*

[67] *See* Finn Seyersted, *Objective International Personality of Intergovernmental Organizations*, 34 NORDISK TIDSSKRIFT FOR INT'L RET. 1, 41-43 (1964).

[68] Draft Articles on Responsibility of International Organizations, *supra* note 61, at 279, 281.

responsibility.[69] Because Respondents' only participation, if any, in the Council's decision not to admit Adaria was due to the RU rules of procedure,[70] Respondents cannot be considered to have directed or assisted the RU. Respondents also never consented to be held liable for the RU's actions. Thus, Respondents are not responsible for any internationally wrongful acts the RU is alleged to have committed.

II. Respondents Have Standing to Assert a Claim Against Adaria's for Its Violation of the RU Legation's Immunity.

A. Respondents have a direct legal interest in Adaria's violation of the RU legation's immunity.

I. Respondents as RU Member States have a direct interest in the enforcement of legal obligations owed to the RU.

In the jurisdictional phase of the *South West Africa* case, this Court recognized that Member States of international organizations have a legal interest in the enforcement of obligations owed to the organization by other States.[71] The case involved a claim brought by Ethiopia and Liberia against South Africa for violations of the Mandate Agreement for South West Africa, which had been negotiated between the League of Nations (League) and South Africa.[72] South Africa objected on the grounds that Ethiopia and Liberia lacked standing because South Africa's alleged mismanagement of the territory affected no material interests of the two states.[73] The Court held that the applicants had standing by virtue of their membership in

[69] *Id.*

[70] Compromis ¶¶ 27-28, Annex I art. 11(6), Annex II.

[71] South West Africa (Eth. v. S. Afr., Liber. v. S. Afr.), Jurisdiction Phase, 1962 I.C.J. 319, 342-44 (Dec. 21).

[72] *Id.* at 321.

[73] *Id.* at 342-43.

the League.[74] In particular, the Court reasoned that League members "have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members."[75] In his separate opinion, Judge Jessup clarified that "this case establishes . . . that a State may have a legal interest in the observance, in the territories of another State, of general welfare treaty provisions and that it may assert such interest without alleging any impact upon its own nationals or its direct so-called tangible or material interests."[76]

Just as Ethiopia and Liberia had an interest in South Africa's performance of the legal obligations owed to the League, Respondents, as members of the RU, have a legal interest in Adaria's respect for the immunity guaranteed the RU Legation under the AAA. Like Ethiopia and Liberia who were concerned that South Africa was not administering South West Africa consistent with its Mandate obligations, Respondents have protested Adaria's failure to afford the RU Legation immunity under international law.[77] Moreover, as Judge Skubiszewski stated in the *East Timor* case, "to have *jus standi* before the Court, it is enough to show direct concern in the outcome of the case."[78] Because the RU represents the political and economic unity of Respondents, Adaria's failure to respect the RU Legation's immunity directly concerns Respondents.

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[74] *Id.* at 343.

[75] *Id.*

[76] *Id.* at 428 (separate opinion of Judge Jessup).

[77] Compromis ¶ 33.

[78] East Timor (Port. v. Aust.) 1995 I.C.J. 90, 225 (June 30) (dissenting opinion of Judge Skubiszewski).

2. Respondents have also suffered moral injury as a result of Adaria's violation of the RU Legation's immunity.

In his separate opinion in the *South West Africa* case, Judge Jessup observed that "[i]nternational law has long recognized that States may have legal interests in matters which do not affect their financial, economic, or other 'material', or, say 'physical' or 'tangible' interests."[79] One of these traditionally recognized legal interests is the moral injury a State suffers when another State fails to give it due respect as a co-equal sovereign.[80] One of the primary ways in which a State suffers moral injury is through "wrongs to diplomatic missions and the like."[81] Numerous international tribunals, including this Court, have recognized moral injury as a basis for awarding compensation to an injured State.[82]

Adaria's failure to accord the RU Legation immunity violates its obligation to respect the co-equal sovereign status of Respondents. In the *Reparations* case, this Court suggested that because international organizations are created by States, the respect that other States must afford these organizations derives from the respect they owe to the Member States which created the organization.[83] States accord an organization immunity with respect its functions because the

[79] South West Africa (Eth. v. S. Afr., Liber. v. S. Afr.), Jurisdiction Phase, 1962 I.C.J. 319, 425 (Dec. 21) (separate opinion of Judge Jessup).

[80] *See* IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY PART I 199-200 (1983); Jodi Wexler, *The Rainbow Warrior Affair: State and Agent Responsibility for Authorized Violations of International Law*, 5 B.U. INT'L L.J. 389, 403.

[81] BROWNLIE, *supra* note 80, at 236.

[82] *See* Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.) 2002 I.C.J. 3, 32 (Feb. 14); Borchgrave (Belg. v. Sp.), 1937 P.C.I.J. (ser. C), No. 85, at 37; Rainbow Warrior (Fr. v. N.Z.) 82 I.L.R. 500 (Fr.-N.Z. Arbitration Tribunal 1990).

[83] *See* Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 185 (April 11).

organization performs these functions to serve the interests of its Member States.[84] Thus, just as an injury to a State's citizen involves the violation of "an obligation towards the national State in respect of its nationals,"[85] an injury to an international organization constitutes a moral injury to the Member States. Here, Respondents suffered moral injury because Adaria failed show proper respect to the Legation of an international organization which they created.

B. Respondents can also assert claims before this Court on hehalf of the RU.

Because Respondents have not expressly delegated the right to assert claims to the RU, they, as Member States which created the RU, retain the right to assert claims on its behalf. Under principles of the institutional law of international organizations, "international organizations are competent to act only as far as powers have been attributed to them by member states."[86] As Respondents have not expressly given the RU the power to bring claims against States,[87] they have retained for themselves the right to assert claims regarding the violations of the RU's rights before this Court.

Respondents' retention of the right to assert the RU's claims is consistent with this Court's Statute. Article 34(1) of the Statute clarifies that "[o]nly States may be parties in cases before the Court."[88] However, Article 34(2) contemplates that international organizations may

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[84] *Id.*

[85] *Id.* at 181.

[86] SCHERMERS, *supra* note 3, § 209. *See also* AMERASINGHE, *supra* note 3, 135, 138; KLABBERS, *supra* note 3, at 63; RACHEL FRID, THE RELATIONS BETWEEN THE EC AND INTERNATIONAL ORGANIZATIONS 47 (1995); Pierre Pescatore, *Relations Extérieures Des Communates*, 103 RECUEIL DES COURS 219 (1961).

[87] Compromis, Annex I.

[88] *See* I.C.J. Statute, *supra* note 23, art. 34(1).

have legal interests involved in the disputes by explicitly allowing the Court to "request of public international organizations information relevant to cases before it."[89] Early judges of the Court, including Judge Jessup, also recognized that international organizations would have claims against States that should be presented to the Court.[90] The ability of Member States to bring claims on behalf of their organizations solves this problem.

The notion that Member States may bring claims on behalf of international organizations is also consistent with this Court's approach to standing in the *East Timor* case.[91] One of the issues raised in the case was whether Portugal had standing to assert claims against Australia on behalf of the people of East Timor.[92] While the Court did not directly decide the question of Portugal's standing because it was able to dispose of the case on other grounds,[93] several judges suggested that States could have standing to assert the claims of other international legal persons.[94] According to these judges, the only problem with Portugal's standing was that the East Timorese people had not consented to have Portugal assert their claim.[95] Here, the RU has consented to have Respondents assert its claim against Adaria. Thus, Respondents have standing to bring the RU's claim before the Court.

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[89] *Id.* art. 34(2).

[90] *See* PHILIP C. JESSUP, A MODERN LAW OF NATIONS 25 (1948).

[91] East Timor (Port. v. Aust.) 1995 I.C.J. 90 (June 30).

[92] *Id.* at 99.

[93] *Id.* at 105.

[94] *See id.* at 135 (separate opinion of Judge Vereshchetin); *Id.* at 255 (dissenting opinion of Judge Subiszewski).

[95] *East Timor*, 1995 I.C.J. at 135 (separate opinion of Judge Vereshchetin).

III. ADARIA VIOLATED INTERNATIONAL LAW GOVERNING THE IMMUNITY OF INTERNATIONAL ORGANIZATIONS BY SEIZING THE PREMISES, PROPERTY, AND PERSONNEL OF THE RU LEGATION.

A. Adaria is obligated to accord the RU Legation functional immunity under international law.

1. The RU Legation bas functional immunity under both the AAA and customary international law.

Under the AAA, Adaria agreed to accord the RU Legation "privileges and immunities" as provided for "by international law."[96] Adaria further recognized that it was obligated to afford the RU Legation such immunity when it accepted the diplomatic credentials of Ambassador Heep and the other RU diplomatic personnel.[97] As international law generally requires respect for the premises, property and personnel of international organizations,[98] the AAA should be read to incorporate such immunities.

Independently of the AAA, Adaria is obliged to afford the RU Legation functional immunity as a matter of custom. In the *Reparations* case, this Court found that international law grants international organizations immunity for the purpose of ensuring their ability to perform the functions entrusted to them by States.[99] In the *UN Privileges and Immunities* case, the Court also acknowledged that States may not establish an organization and fail to provide it with the

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[96] Compromis, Annex II ¶ 3.

[97] Compromis ¶ 18.

[98] *See infra* Section III. A. 2. *See generally* AMERASINGHE, *supra* note 3 , at 315; MALCOM N. SHAW, INTERNATIONAL LAW 1206 (4th ed., 2003); BROWNLIE, *supra* note 3, at 683.

[99] Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 184 (April 11). *See also* Rosalyn Higgins, *The Abuse of Privileges and Immunities: Recent United Kingdom Experience*, 79 AM. J. INT'L L. 641, 645 (1985).

basic immunities that ensure its independence from its host State.[100] Likewise, in *Branno v. Ministry of War*, the Italian Court of Cassation held that, even absent conventional provisions, there exists a custom that protects the functional immunity of international organizations.[101] The court reaffirmed this principle in *Food and Agriculture Organization v. Colagrossi*, expressly stating that "customary international law govern[s] the immunity of international organizations."[102] Similarly, the Swiss Labor Court in *Z.M. v. Permanent Delegation of the League of Arab States to the UN* held that "customary international law recognize[s] that international organizations, whether universal or regional, enjoy absolute jurisdictional immunity."[103] The court explained that "[t]his privilege arises from . . . the purposes and functions assigned to" international organizations as "[t]hey can only carry out their tasks if they are beyond the censure of" national courts.[104] The RU Legation thus had a right to functional immunity under customary international law.

2. The RU's right to functional immunity required Adaria to respect the inviolability of the Legation's premises, property and personnel.

The protection of premises, property, and personnel is universally recognized as necessary for an international organization's independent exercise of its functions and

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[100] Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 177, 192 (Dec. 15).

[101] Branno v. Ministry of War, 22 I.L.R. 756, 757 (It. Cass. 1954). *See also* Waite and Kennedy v. Germany, 116 I.L.R. 121, 134 (1999).

[102] Food and Agriculture Organization v. Colagrossi, 101 I.L.R. 386, 387 (It. Cass. 1992). *See also* Mendaro v. World Bank, 717 F.2d 610, 615-617 (D.C. Cir. 1984); Waite and Kennedy v. Germany, 116 I.L.R. 121, 134 (Ger. 1999).

[103] Z.M. v. Permanent Delegation of the League of Arab States to the United Nations, 116 I.L.R. 643, 647 (Switz. 1993).

[104] *Id.*

responsibilities.[105] For example, the American Restatement of the Law of Foreign Relations provides that "an international organization enjoys immunity from any exercise of jurisdiction by a member state that would interfere with official use by the organization of its premises, archives, documents, or communications."[106] This same immunity extends to officials as well.[107] Likewise, nearly all constituent treaties of international financial organizations[108] as well as the Convention on the Privileges and Immunities of the United Nations (UN Convention) [109] and the Convention on Privileges and Immunities of the Specialized Agencies (Specialized Agencies Convention)[110] specifically provide for the protection of premises, property, and personnel. The UN Convention and the Specialized Agencies Convention are so widely ratified that they are considered to embody customary international law regarding functional immunity.[111]

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[105] *See* BROWNLIE, *supra* note 3, at 346.

[106] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 469 (1987) [hereinafter RESTATEMENT].

[107] *Id.*

[108] Articles of Agreement of the International Monetary Fund, July 22, 1944, 2 U.N.T.S. 39 [hereinafter IMF Articles]; Agreement Establishing the European Bank for Reconstruction and Development, May 29, 1990, 29 I.L.M. 1077 (1990) [hereinafter EBRD Articles]; Agreement Establishing the Inter-American Development Bank, Apr. 8, 1959, 389 U.N.T.S. 69 [hereinafter IADB Agreement]; Agreement Establishing the African Development Bank, U.N. Doc. E/CN. 14/AFDB (1964) [hereinafter ADB Agreement]; Asian Development Bank Articles of Agreement, Dec. 4, 1965, 571 U.N.T.S. 134 [hereinafter Asian Agreement].

[109] Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15 [hereinafter UN Convention].

[110] Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 261 [hereinafter Specialized Agencies Convention].

[111] BROWNLIE, *supra* note 3, at 346.

The UN Convention, the Specialized Agencies Convention, as well as other treaties provide that the property and assets of the organizations shall be immune from all forms of judicial process.[112] These conventions also require that "the archives of [the organization] and, in general, all documents belonging to it or held by it shall be inviolable wherever located."[113] This protection ensures the confidentiality of the organization's operations.[114] The UN Convention also provides that the premises of the UN shall be inviolable.[115] While there are no equivalent express provisions in other conventions or constituent treaties, proteetion of premises can be inferred from their various provisions regarding the protection of property.[116] Specifically, these treaties' prohibitions on searches and confiscations of property demonstrate that the premises of the organizations are outside the reach of States.[117] Finally, these conventions provide that the officials of international organizations shall be immune from legal

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[112] *See* UN Convention, *supra* note 109, art. 2 §3; Specialized Agencies Convention, *supra* note 110, §5; IMF Articles, *supra* note 108, art. IX(4); EBRD Articles, *supra* note 108, art. 47; IADB Agreement, *supra* note 108, art. XI(3); ADB Agreement, *supra* note 108, art. 52(2); Asian Agreement, *supra* note 108, art. 50(3).

[113] UN Convention, *supra* note 109, art. 2 §4. *See also* Specialized Agencies Convention, *supra* note, 110, art. VI §5; IMF Articles art. IX(5); EBRD Agreement, *supra* note 108, art. 48; IADB Agreement, *supra* note 108, art. XI(5); ADB Agreement, art. 53(2); Asian Agreement, *supra* note art. 52.

[114] AMERASINGHE, *supra* note 3, at 331.

[115] UN Convention, *supra* note 109, art. II §3.

[116] AMERASINGHE, *supra* note 3, at 330.

[117] *See* IMF Articles, *supra* note 108, art. IX(4); EBRD Agreement, *supra* note 108, art. 47; IADB Agreement, *supra* note 108, art. XI(3); ADB Agreement, *supra* note 108, art. 52(2); Asian Agreement, *supra* note 108, art. 50(3).

process.[118] This protection of personnel allows officials of such organizations to fulfill their duties without fear of repercussions from the host state.

3. Tbe RU Legation did not waive its immunity as its actions were botb lawful and within its functions.

In *FAO v INDPAI*, the Italian Court of Cassation concluded that the test for determining whether an act was within the functional immunity of an organization is whether the purpose of the activity is directly connected with the institutional aims normally pursued by the organization.[119] As agreed to by Adaria in the AAA, the RU Legation was to aid in the diplomatic and economic aspects of Adarian integration in to the RU.[120] In assisting States in the accession process, international organizations often provide financial support to pro-integration forces. For example, the EU through its Phare program has consistently provided financial aid to less economically developed European countries which seek admission to the EU.[121] Like the Phare program, the RU Legation's contributions to pro-RU Adarian politicians served its purpose of facilitating Adaria's integration into the RU.

Moreover, the Legation's political contributions did not violate Adaria's domestic laws. Section 17-1031 of the Adarian Civil Code only prohibits political contributions from a "foreign business or corporate entity."[122] The RU Legation is neither a business nor corporate entity, but

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[118] *See* UN Convention, *supra* note 109, §18(a); Specialized Agencies Convention, *supra* note 110, §19(a); IMF Articles, *supra* note 108, art. IX(8)(i); EBRD, *supra* note 108, art. 51; IADB Agreement, *supra* note 108, art. XI(8)(a); ADB Agreement, *supra* note 108, art. 56(1); Asian Agreement, *supra* note 108, art. 55(i).

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

[120] Compromis, Annex II ¶ 3.

[121] *See* Roger J. Goebel, *Joining the European Union: The Accession Procedure for the Central European and Mediterranean States*, 1 LOY. INT'L L. REV. 15, 22 (2003).

rather, as recognized by Adaria's own prime minister, it is "the representative of the Rotian Union in Adaria."[123] As the RU Legation was properly fulfilling its functions at all times while in Adaria, it was entitled to functional immunity.

B. Adaria violated tbe RU Legation's functional immunity by seizing its premises, property and personnel.

International law accords the property and archives of international organizations very broad protection.[124] In *Shearson Lehman Brothers, Inc. v. Int'l Tin Council* the British House of Lords held that the ITC had the same immunity for its archives as did diplomatic missions.[125] The Vienna Convention on Diplomatic Relations provides that the documents of such missions "shall be inviolable at any time wherever they may be."[126] The House of Lords in *Shearson* also clarified that "archives" include all documents belonging to or held by the organization. Adaria's seizure of the RU Legation's bank records as well as other files clearly violated this immunity.[127]

The personnel and premises of an international organization also enjoy broad protection. under international law. For example, in *767 Third Avenue Association v. Permanent Mission of Zaire*, the United States Second Circuit Court of Appeals found that a landlord could not forcibly enter the premises of the Zaire Mission to evict its tenants for failure to pay rent even though the

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[122] Compromis ¶ 30.

[123] Compromis ¶ 18.

[124] AMERASINGHE, *supra* note 3, at 328.

[125] Shearson Lehman Brothers, Inc. v. Int'l Tin Council (No. 2), 77 I.L.R. 107, 131 (U.K.H.L. 1987).

[126] Vienna Convention on Diplomatic Relations art. 24, April 18, 1961, 500 U.N.T.S. 95.

[127] *Shearson Lehman Brothers*, 77 I.L.R. at 131.

landlord owned the building.[128] Here, Adaria not only stormed the RU Legation without warning and without seeking its consent, but it also arrested Ambassador Heep and imprisoned him for two days without filing any official charges.[129] This blatant disrespect for the RU's premises and its personnel should not be tolerated by the Court.

IV. ADARIA'S NATIONAL INDUSTRY ACT ILLEGALLY EXPROPRIATED ASSETS OWNED BY RESPONDENTS' NATIONALS.

A. Tbe NIA constitutes an expropriation of assets owned by tbe Respondents' citizens.

Expropriation is not limited to a State's direct taking of assets but also encompasses any "unreasonable interference with the use, enjoyment or disposal of property so as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference."[130] Thus, in *Starret Housing Corp. v. Iran*, the Iran-US Claims Tribunal found that expropriation includes any interference with property rights which renders those rights useless to the owner.[131] Indeed, any "covert or incidental interference" with the use of property which deprives the owner of "the economic benefits of his property, even if not to the obvious benefit of the State," is expropriation.[132] To determine whether a governmental action is expropriation, tribunals generally consider: (1) the

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[128] 767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations, 988 F.2d 295, 300 (2d Cir. 1993).

[129] Compromis ¶¶ 31, 33.

[130] Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 10(5), *reprinted in* Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 548 (1961). *See also* BROWNLIE, *supra* note 3, at 508; SHAW, *supra* note 98, at 740.

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

[132] Metalclad Corp. v. Mexico, 616 I.L.R. 617, 639 (2000).

degree of interference with the property right; (2) the purpose and context of the governmental measures; and (3) the interference of the measure with reasonable and investment-backed expectations.[133]

Interference with property ownership which substantially impairs the owner's use or enjoyment of the property has consistently been found to be expropriation.[134] In *Revere Copper & Brass, Inc. v. OPIC*, the tribunal held that Jamaica's decision to charge the applicant increased royalties was an expropriation.[135] The tribunal reasoned that, even though the applicant still had legal title to its property and was still able to operate its business, the governmental action had effectively deprived the applicant of the right to control and use its property.[136] Similarly, in *CME (The Netherlands) v. Czech Republic*, the tribunal found that the Czech National Media Council's restrictions on the use of an exclusive license granted to the applicant's media company constituted an expropriation because the restrictions destroyed the applicant's operations, leaving the company "with assets, but without business."[137]

The NIA similarly deprives Respondents' nationals from using and enjoying their investments in Adaria. Like the exorbitant increase in royalties in *Revere Copper* which prevented applicant from deriving financial benefit from his business in Jamacia, the NIA's absolute ban on capital transfers prevents companies based in the RU from utilizing the profits of

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

[134] *Id.* at 11.

[135] Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp., 56 I.L.R. 258, 259 (1980).

[136] *Id.*

[137] CME (Netherlands) v. Czech Republic (Partial Award) (Sept. 13, 2001) available at http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf.

their Adarian enterprises. Moreover, just as the license restrictions in *CME* technically left the applicants with ownership of their assets but without a use for them, the NIA prevents the RU corporations from enjoying the integration benefits of their ownership of the formerly Adarian-run enterprises. Thus, Adaria has, for all effective purposes, taken the property of Respondents' nationals.

While governments occasionally pass regulations which affect foreign interests without amounting to expropriation,[138] the cases in which tribunals have upheld such action involved laws which granted property owners much greater freedom to manage their assets than does the NIA. For instance, in *Pope & Talbot, Inc. v. Canada*, the tribunal upheld regulation which introduced export quotas that resulted merely in a reduction of profits.[139] In contrast, the NIA totally deprives RU corporations of the use of their profits made in Adaria. In *Starrett Housing*, the detention of applicant's personnel which the Tribunal upheld did not amount to a taking of property because it did not completely deprive the asset owners of the right and ability to utilize and profit from their assets. The NIA, on the other hand, leaves no such residual right to the RU-based corporations, but rather absolutely prohibits the export of profits.

B. The NIA's expropriation of Respondents' nationals' assets is illegal hecause it is discriminatory and does not provide for compensation.

As the UN Resolution on Permanent Sovereignty over Natural Resources (Resources Resolution)[140] has been widely acknowledged by arbitral tribunals[141] and publicists[142] as reflecting customary international law, it provides the appropriate standard by which to judge whether expropriation is legitimate.[143] According to the Resolution, expropriation can be

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[138] *See* OECD Doc., *supra* note 133, at 4; BROWNLIE, *supra* note 3, at 208.

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

justified only if it is: (1) for a public purpose; (2) provided for by law; (3) non-discriminatory; *and* (4) accompanied by adequate compensation.[144] All four conditions must be met. As the NIA does not satisfy these conditions, it is illegal.

Discriminatory expropriation is illegal.[145] In *Amoco International Finance Corp. v. Iran,* the Iran-US Claims Tribunal held that customary international law prohibits discriminatory expropriation when there is not an objective and reasonable justification for the distinctions made.[146] The American Restatement of the Law of Foreign Relations provides that an governmental act is discriminatory if it is applied only to alien enterprises.[147] Expropriation is also discriminatory if it is engaged in for extraneous political reasons. Thus, in *British Petroleum Exploration Company (Libya) Ltd. v. Libya*, the arbitrator found Libya's

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

[141] *See* Texaco Overseas Petroleum Co. v. Libya, 53 I.L.R. 389, 489 (1977); Kuwait v. Aminoil, 66 I.L.R. 519, 601 (1982).

[142] *See* BROWNLIE, *supra* note 3, at 510; SHAW, *supra* note 98, at 744; REBECCA WALLACE, INTERNATIONAL LAW 191 (4th ed., 2002).

[143] OECD Doc. *supra* note 133, at 3; RESTATEMENT, *supra* note 106, § 712.

[144] Resources Resolution, *supra* note 140.

[145] OECD Doc., *supra* note 133, at 4; OPPENHEIM, *supra* note 13, at 920; SHAW, *supra* note 98, at 751.

[146] Amoco Int'l Finance Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, ¶139 (1987).

[147] RESTATEMENT, *supra* note 106, § 712.

nationalization law to be discriminatory because it was an act of political retaliation against Britain.[148]

Just as the nationalization in the *British Petroleum* case was targeted at a specific company, the NIA effectively applies only to business concerns owned by RU-based corporations. While the NIA refers to "recently privatized business concerns,"[149] all such business concerns were privatized and purchased by companies based within the RU.[150] Furthermore, like the politically retaliatory law in the *British Petroleum* case which was designed to expel the British from Libya, the NIA was meant to punish the RU for its decision to postpone Adaria's admission. The Adarian Parliament passed the NIA shortly after its unsuccessful bid for RU membership and within days of Ambassador Heep's arrest. The effect of the NIA has also been to encourage RU-based corporations to leave Adaria. In this aspect alone, the NIA is illegal.

Expropriation without "prompt, adequate and effective" compensation is also illegal.[151] The requirement to compensate is universally accepted and is provided for in the Resources Resolution[152] as well as in the Charter of Economic Rights and Duties of States.[153] National

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[148] British Petroleum Exploration Co. (Libya) Ltd. v. Libya, 53 I.L.R. 297, 329 (1974). *See also* Libyan-Am. Oil Co. v. Libya, 62 I.L.R. 141, 194 (1977).

[149] Compromis ¶ 35.

[150] Compromis ¶ 20.

[151] *See* Amoco Int'l Finance Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 223 (1987); Am. Int'l Group, Inc. v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 96, 105 (1983); OECD Doc., *supra* note 133, at 3; OPPENHEIM, *supra* note 13, at 920; SHAW, *supra* note 98, at 743.

[152] Resources Resolution, *supra* note 140.

[153] *See* Charter of Economic Rights and Duties of States art. 2(2), G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 12, 1974); Protocol No. 1 to the European

laws have also consistently found compensation to be decisive in determining whether governmental takings are illegal.[154] In *Libyan-American Oil Co. v. Libya*, the arbitrator found that the Libyan government had an obligation to compensate the applicant for concession rights which it had nationalized.[155] Similarly, the arbitral tribunal in *Benvenuti v. Congo* ordered the Congolese government to compensate the applicants for nationalizing business concerns in which they had an interest.[156] Adaria has not provided *any* compensation to RU companies. In this regard, the NIA is patently illegal.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262; American Convention on Human Rights art. 21, Nov. 22, 1969, 1144 U.N.T.S. 123; U.S. CONST. amend V.

[154] WALLACE, *supra* note 142, at 191.

[155] Libyan-Am. Oil Co. v. Libya, 62 I.L.R. 141, 201 (1977).

[156] Benvenuti v. Congo, 67 I.L.R. 345, 374 (1980). *See also* Sociedad Minera el Teniente SA v. Norddeustsche Affinerie AG, 73 I.L.R. 230, 244-245 (1973).

Conclusion and Prayer for Relief

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

1) That the denial of Adaria's application to join the RU did not a breach any international legal obligations owed to Adaria by Respondents.

2) That Respondents may properly bring a claim for Adaria's actions against the RU Legation, its property, and Ambassador Heep.

3) That Adaria violated international law concerning the immunity of diplomatic missions by seizing the premises, property, and personnel of the RU Legation.

4) That the National Industry Act constitutes an illegal expropriation of Respondents' nationals' property.

Respectfully submitted,

Agents for Respondents