INTERNATIONAL LAW STUDENTS ASSOCIATION

2223 Massachusetts Avenue, N.W.
Washington, D.C. 20008-2864 U.S.A.
1-202-265-4375
CABLE "AMINTLAW"
FAX 1-202-797-7133

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1991 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

Case Concerning the International Trade in Electromobiles

Nicchia

v.

Mercuria

CONFIDENTIAL

MEMORANDUM OF LAW AND AUTHORITIES FOR JUDGES

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Written by: Dr. Karl Meessen, Professor of Law at the University of Augsburg, Germany, and at the Graduate Institute of International Studies, Geneva, Switzerland; and Ronald A. Brand, Associate Professor of Law at the University of Pittsburgh.

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MEMORANDUM FOR JUDGES

NOT TO BE SEEN BY PARTICIPANTS

I. INTRODUCTION

The case addresses two separate yet interrelated issues of international trade law: competition law ("antitrust law") jurisdiction, and substantive issues of international trade law (primarily emanating from the General Agreement on Tariffs and Trade [the "GATT"]). Agents for the Applicant, Nicchia, will argue that the Cartel Office proceedings represent an exercise of jurisdiction prohibited by international law, and that the orders resulting from those proceedings are in violation of substantive principles of international trade law. Agents for the Respondent, Mercuria, will argue that international law does not prohibit (and in fact authorizes) the exercise of jurisdiction over Nicchian companies by the Mercurian Cartel Office, that the sanctions ordered by the Cartel Office are in accordance with international law, and that actions of the government of Nicchia protecting its internal EMO market and coordinating the activities of its EMO industry in foreign markets are in violation of international law.

It would be a mistake for either side to argue points of substantive competition law or conflict of laws. The ICJ may apply only international law. The general contents of the national laws of Mercuria and Nicchia have been purposefully omitted from the problem.

The ICJ derives its jurisdiction from a compromis in accordance with Article 36(1) of its Statute. There exists no judicial precedent on how ICJ jurisdiction relates to GATT

dispute settlement.[1] In this case, that issue has been excluded by assuming that the compromis of 11 September 1990 between the two states has found the agreement of the contracting parties of the GATT. All local remedies have been exhausted in Mercuria. However, Nicchian agents might put forward non-exhaustion of local (Nicchian) remedies as a defense on the counterclaim. The scope of those remedies in Nicchian law is not part of the problem. The Mercurian agents might respond that the elements of administrative guidance it is complaining about do not seem to be subject to any kind of judicial review. No further problems related to procedural law are intended.

II. SOURCES OF INTERNATIONAL LAW

Article 38, para. 1, of the Statute of the International Court of Justice directs the Court to apply international law derived from the following sources:

> a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b) international custom, as evidence of a general practice accepted as law;
> c) the general principles of law recognized by civilized nations;
> d) subject to the provisions of Article 59,[2] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

In discussing the trade law issues of the case, reference will be to the GATT, which is conventional law to which both parties are bound. As was mentioned above, it is important for participants to understand that the ICJ applies international law, not domestic legal rules of competition law or conflicts of

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[1]In the Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J. 14, the ICJ noted that it did "not here have to concern itself with possible breaches of such international economic instruments as the General Agreement on Tariffs and Trade, referred to in passing by counsel for Nicaragua; [because] any such breaches would appear to fall outside the Court's jurisdiction, particularly in view of the effect of the multilateral treaty reservation" contained in the U.S. Declaration of Acceptance of compulsory jurisdiction under Article 36(2) of the Court's Statute. Id. at 126, para. 245.

[2]"The decision of the Court has no binding force except between the parties and in respect of that particular case."

law. However, because there are no international competition law treaties, and because international custom may be reflected, inter alia, in national legislation and judicial decisions of national courts, agents for both states will necessarily refer to national and regional (European Community) laws and cases in demonstrating that rules applied in those systems reflect "a general practice accepted as law," that is customary international law as defined in Art. 38(1)(b).

III. JURISDICTION IN MATTERS OF COMPETITION LAW

International law principles are founded on respect for the sovereignty of each state. This case represents a conflict of assertions of sovereignty in economic matters. This conflict results in the question of whether, under international law, Mercuria may assert jurisdiction as it has done over actions outside its borders by aliens.

A. The International law framework

The basic jurisdictional nexus in international law is territoriality. A state generally will have jurisdiction over acts occurring within its own territory. The territorial nexus does not solve all issues of jurisdiction, however, and at least four principles authorizing the exertion of jurisdiction by a state over matters outside its borders have been discussed in international law:[3]

(1) The nationality principle. Nationality, reflecting the allegiance of a national and the reciprocal rights of sovereignty over the national, is generally recognized as a basis for jurisdiction over acts occurring outside the territory of the sovereign.

(2) The passive personality principle. This principle authorizes the punishment of aliens for acts abroad harmful to nationals of the forum. It is not clearly accepted as a general principle of international law.

(3) The protective principle. Acts abroad by an alien which threaten the security of a state subject the alien to jurisdiction in that state's courts.

(4) The universality principle. Some types of crimes, such

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[3]For a general survey, see I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 298-315 (4th ed. 1990).

as piracy and hijacking are considered so onerous as to justify jurisdiction as a matter of international public policy. This principle is sometimes accompanied by a separate discussion of "crimes under international law," as a justification of extraterritorial jurisdiction.[4]

The exercise of extraterritorial jurisdiction in the enforcement of national competition law does not fit neatly into any of these four established categories. To the extent states have exercised jurisdiction in competition law matters over aliens for actions taken outside the state, they have justified those efforts by relying on the effects principle, which takes up the rationale of the protective principle quoted above.

There is no international convention on competition law. Although the U.N. Restrictive Business Practices Code[5] sets forth guidelines on government regulation of restrictive business practices, it does so in non-binding language. Further, its adoption by consensus as a General Assembly resolution does not give it formal validity under international law.[6]

The Lotus case decided by the Permanent Court of International Justice in 1927, deals with criminal law, and is thus of no value with respect to specific matters of competition law.[7] However, since it is the only case dealing directly with state jurisdiction decided by the International Court of Justice or its predecessor the Permanent Court of International Justice, the parties can be expected to refer to it. In Lotus, a Turkish vessel sank with lives lost as a result of a collision with a French steamer on the high sea. An officer of the French vessel was tried in Turkey and convicted of involuntary manslaughter. When Turkish jurisdiction was challenged before the PCIJ, the Court found that Turkey had not violated any principle of

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[4]Id. at 305.

[5]Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. General Assembly Res. 35/63 of 5 December 1980; identical text: U.N. Conference on Restrictive Business Practices, Res. of 22 April 1980, 19 Int'l Leg. Mat. 813 (1980).

[6]As a U.N. General Assembly Resolution, the RBP Code has no binding effect under the U.N. Charter. The General Assembly has only the the power to make recommendations. U.N. Charter Arts. 10 & 13. Although Chapter IX of the Charter, particularly Article 60, gives the General Assembly responsibility for promoting solutions to international economic problems, it does not provide authority for binding resolutions.

[7](1927) P.C.I.J., Ser. A, no. 10.

international law by exercising criminal jurisdiction.

The Lotus case is often cited for the proposition in international law that that which a state is not prohibited from doing it is permitted to do, thus recognizing the fundamental importance of sovereignty in international law. On the passive personality principle, the Court stated that it did "not think it necessary to consider the contention that a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the victim."[8] In looking to decisions of domestic courts for evidence of a rule, the Court went on to state:

> No argument has come to the knowledge of the Court from which it could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence. On the contrary, it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there. . . . . [O]nce it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship.[9]

Unlike disputes over criminal jurisdiction, jurisdictional controversies in competition law cases usually reflect a clash of differing state policies, with one state (Nicchia in the present case) encouraging practices that are considered anticompetitive and therefore prohibited by another state (Mercuria in the present case). A well-known obiter dictum in a separate opinion by Judge Fitzmaurice in the Barcelona Traction case, gives some guidance as to solving such a conflict in light of the general principle of equality of states:

> It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction in such matters (and there are of course others - for instance in the field of

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[8] Id. at 22-23.

[9] Id. at 23.

shipping, "anti-trust" legislation, etc.), but leaves to States a wide discretion in the matter. It does however (a) postulate the existence of limits - though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State.[10]

B. State practice as evidence of international law

In the United States, the exercise of extraterritorial jurisdiction in competition law matters became significant in the Alcoa case of the 1940's.[11] This case was the source of the "effects test," by which agreements abroad by aliens which are intended to have effects within the U.S. and actually have such effects are subject to U.S. jurisdiction and sanctions. This test is seen by some as going "beyond the normal application of the objective territorial principle."[12] In recent legislation, the effects test, for certain purposes, has been refined to require "direct, substantial and reasonably foreseeable effects."[13]

Even where the refined effects test is satisfied, U.S. courts have begun to question further the propriety of exercising jurisdiction. This has resulted in the judicial creation of a rule of reasonableness and balancing approaches,[14] placing

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[10]footnote: Barcelona Traction, Light & Power Company case (Belgium v. Spain), 1970 I.C.J. 3, 105 (Separate Opinion of Judge Fitzmaurice).

[11]U.S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[12]BROWNLIE, supra note 3, at 308.

[13]Foreign Trade Antitrust Improvements Act of 1982, Title IV, codified at 15 U.S.C. § 6a.

[14] See, e.g., Mannington Mills, Inc. v. Congoleum Corp, 595 F.2d 1287, 1297-99 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 614 (9th Cir. 1976). For a more skeptical view, see Laker Airways, Ltd. v. Pan American World Airways, 559 F. Supp. 1124 (D.D.C. 1983), affirmed sub nom. Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984). For other cases applying the balancing rule, see Bayer/Firestone, Kammergericht (Berlin Court of Appeal), Decision no. II of 26 November 1980, Wirtschaft und Wettbewerb / Entscheidungssammlung

limits on the exercise of jurisdiction.

In the European Community, the Wood Pulp case[15] represents current law, with commentators at odds on whether it adopts a U.S.-style effects test or represents traditional concepts of jurisdiction based on territoriality. In that case, the coordination of prices of woodpulp to be exported to the E.C., by Canadian, Finnish and U.S. producers and trade associations, was challenged by the Commission of the E.C. The relevant passage of the court's judgment reads:

> It should be observed that an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.
>
> The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.
>
> Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.[16]

C. The likely arguments for Nicchia and Mercuria

1. Extraterritorial jurisdiction: the effects test, the principle of reasonableness and the balancing rule of non-interference

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(WuW/E) OLG 2419; Philip Morris/Rothmans, Kammergericht, Decision of 1 July 1983, WuW/E OLG 3051.

[15]Ahlstrom v. Commission, Judgment of 27 September 1988, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, [1988] E.C.R. 5193.

[16]Id. at 5243.

Nicchia will favor reliance on a territorial principle of jurisdiction defined so that at least a part of the reprimanded conduct must have occurred in the territory of the state applying its competition law. Mercuria, on the other hand, will defend its Cartel Office proceedings on an effects principle, broadly interpreted.

Both sides could base their argument on the EC Wood Pulp decision: Nicchia underlining that only territoriality has been confirmed as an established connecting factor, and Mercuria arguing that the acts of implementation the court found to be covered by the principle of territoriality in fact constitute mere effects according to the effects doctrine. Applying either principle to the facts of this case will necessitate some differentiation according to the various elements of the reprimanded conduct: Adherents of the principle of territoriality will have difficulty in denying that the allocation of markets is implemented in Mercuria whereas adherents of the effects doctrine will have to address the indirect nature of the effects on Mercuria of fixing domestic prices in Nicchia.

Beyond the basic discussion of territoriality and effects, the parties may discuss the application of the principle of reasonableness and the balancing rule of non-interference. These rules are stated in the Restatement (Third)[17] in section 403 (with paragraphs (1) and (2) dealing with the principle of reasonableness and paragraph (3) dealing with the balancing test):

> § 403. Limitations on Jurisdiction to Prescribe
>
> (1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
>
> (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
>
> > (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

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[17] I RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 402, pp. 244-45 (1987).

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability to such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

Both rules suffer from inherent weaknesses. In the case of the principle of reasonableness (§ 403(1) and (2)), the weakness results from the indefinite variety of factors suggested for reference. The balancing rule (§ 403(3)) is less openended since it requires only to compare the respective state interests, and it has the advantage of reflecting traditional principles of international law, to wit the principles of non-intervention and sovereign equality. But the rule has not (yet) been attributed mandatory character by the authors of the Restatement ("should defer"). The Wood Pulp case again is not conclusive. The relevant passage reads:

As regards the argument based on the infringement of the principle of non-interference, it should be pointed out that the applicants who are members of KEA have referred to a rule according to which where two States have jurisdiction

to lay down and enforce rules and the effect of those rules is that a person finds himself subject to contradictory orders as to the conduct he must adopt, each State is obliged to exercise its jurisdiction with moderation. The applicants have concluded that by disregarding that rule in applying its competition rules the Community has infringed the principle of non-interference.

There is no need to enquire into the existence in international law of such a rule since it suffices to observe that the conditions for its application are in any event not satisfied. There is not, in this case, any contradiction between the conduct required by the United States and that required by the Community since the Webb Pomerene Act merely exempts the conclusion of export cartels from the application of United States anti-trust laws but does not require such cartels to be concluded.[18]

Reasonableness is likely to be understood differently by the two sides. Nicchia would therefore do best if it relied on the balancing rule. Mercuria may deny the existence of either rule. In applying the balancing rule Nicchia might explain its interests by reference to its policy of administrative guidance whereas Mercuria could respond by referring to the economic hardship it might suffer. The facts, of course, contain many more elements that could be introduced to that discussion.

2. The U.N Restrictive Business Practices Code

The treatment of the jurisdiction issue is further complicated by the Restrictive Business Practices Code. That code, whose official name is Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, was in 1980 adopted by the U.N. General Assembly by ways of consensus, that is all member states agreed without a formal vote being taken.[19] The passage of the code most directly addressing the issue of jurisdiction reads:

C. Multilaterally agreed equitable principles for the control of restrictive business practices

In line with the objectives set forth, the following principles are to apply:

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[18]Supra note 19, at 5244.

[19]U.N. General Assembly Res. 35/63 of 5 December 1980; identical text: U.N. Conference on Restrictive Business Practices, Res. of 22 April 1980, 19 Int'l Leg. Mat. 813 (1980).

(i) General principles

1. Appropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal with, restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of these countries.

Mercuria might argue on its counterclaim that non-observance of the code constitutes an illegal intervention into its internal economic affairs. Nicchia will respond that the code is a mere recommendation according to Article 13(1) of the U.N. Charter and, due to its language ("should"), not even meant to be binding.

Mercuria will be on more solid ground in defending its assertion of competition law jurisdiction by reference to the code. The code seeks to ban restrictive business practices adversely affecting international trade which precisely was the object of the amendment to the Mercurian competition law.

IV. IMPORT BARRIERS UNDER INTERNATIONAL LAW

Both Mercuria's limitation of EMO sales and Nicchia's alleged barriers against entering its domestic market may be characterized as import barriers. The basic source of rules governing import barriers is the General Agreement on Tariffs and Trade (GATT), to which both states are contracting parties. The important provisions of the GATT are set out in the Appendix to this Judges Memorandum. In short, Article I requires that most-favored-nation treatment be given to the importation of goods from and exportation of goods to each other contracting party. Article III provides for the related concept of national treatment of imported goods in applying tax and other laws, with Article XI prohibiting the use of quotas on the import or export of goods. The remainder of the GATT contains a number of exceptions to these basic rules.

A. Mercuria's Cartel Office Sanctions

The order of the Mercurian Cartel Office provides a quantitative restriction on the sale of EMO's manufactured by Nicchian companies, regardless of the place of manufacture. In terms of GATT obligations, this restriction is inconsistent with the most-favored-nation provision of Article I because it is targeted at Nicchia without similar restrictions on imports from other states. It is also inconsistent with the Article III:4 national treatment provision in failing to provide conditions for

Nicchian products that are the same as those applicable to domestic products. In each case, these treaty obligations are applicable only to imports and do not apply to domestically produced products. However, to the extent Nicchian companies would manufacture in Mercuria using component parts imported from Nicchia, any limits on manufacture are also limits on the importation of those component parts. The Mercurian order is also inconsistent with the GATT Article XI prohibition on quantitative restrictions.

Once GATT inconsistency is established, the following questions should be addressed in regard to potential defenses:

1) Does a GATT-authorized exception exist for the inconsistency?
2) Do other arrangements between the parties to the case prevent the application of the basic GATT rules?
3) Is there a customary international law justification for the Mercurian legislation?

As to the first question, GATT Article XX(d) may be applicable. Mercuria will have the problem of establishing the "necessity" of its trade policy sanction since its competition law seems perfectly enforceable by imposing high fines under that law. A similar provision exists in EEC competition law.

As to the second question, it may be argued that the informal agreement between the officials of Mercuria and Nicchia, supporting the voluntary restraint agreements negotiated by the industry groups, constitutes a specific international agreement superseding the GATT rules as between these two parties. This raises the related question of whether parties may bilaterally agree to arrangements otherwise inconsistent with the GATT. Although such agreements ("voluntary restraint agreements" (VRA's) and "orderly marketing agreements" (OMA's)) do exist, their legality under GATT has never been authoritatively determined, and they are seen by many as "gray area" measures at least inconsistent with the spirit of the GATT.

As to the third question, customary international law has recognized a right of states to respond to illegal acts by other states through the doctrine of "reprisal."[20] This doctrine would allow otherwise illegal acts by a state in response to a violation of its rights by another state.

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[20]See Case Concerning the Air Services Agreement of 27 March 1946 between the United States and France, Arbitral Award of 9 December 1978, 54 Int'l L. Rep. 337 (1979). See also II RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 905, p. 320 (1987).

B. Nicchia's market protection policies

From Mercuria's perspective, the whole controversy originates from Nicchia's policy to protect its home market against foreign competitors. By encouraging restrictive practices in its domestic market, Nicchia has supported a quantitative restriction of zero on the import of similar foreign products (thus implicating GATT Article XI) in a manner which discriminates against foreign EMO's (implicating GATT Article III:4). However, that blend of business conduct and state action can only be considered illegal under the GATT if administrative guidance operates in a "manner equivalent to mandatory requirements." In the Semiconductors case, administrative guidance in Japan was discussed by a GATT panel as follows:

> 108. The Panel recognized that not all non-mandatory requests could be regarded as measures within the meaning of Article XI:1. Government-industry relations varied from country to country, from industry to industry, and from case to case and were influenced by many factors. There was thus a wide spectrum of government involvement ranging from, for instance, direct government orders to occasional government consultations with advisory committees. The task of the Panel was to determine whether the measures taken in this case would be such as to constitute a contravention of Article XI.
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> 109. In order to determine this, the Panel considered that it needed to be satisfied on two essential criteria. First, there were reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of the measures to restrict export of semi-conductors at prices below company-specific costs was essentially dependent on Government action or intervention. The Panel considered each of these two criteria in turn. The Panel considered that if these two criteria were met, the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the measures and mandatory requirements was only one of form and not of substance, and that there could be therefore no doubt that they fell within the range of measures covered by Article XI:1.[21]

In the instant case, facts are sufficiently unclear as to allow each side to present plausible arguments for applicability and non-applicability of this principle in the GATT context.

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[21]Japan-Trade in Semiconductors, Report of the Panel adopted on 4 May 1988, L/6309, GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 116, 154-55 (35th Supp. 1989).

Less productive for Mercuria is an argument that Nicchia is under an obligation to provide a system of competition law that prevents the type of collusive agreements engaged in by companies in the EMO industry in Nicchia or to avoid the administrative guidance it has provided to the EMO industry. This issue will produce argument that (1) international codes of conduct, particularly the U.N. Restrictive Business Practices Code, provide a customary international law framework for analysis, and (2) practice of states evidenced in existing laws and judicial decisions, have established a customary international law rule applicable to Nicchia. The first argument is addressed in the discusions of the jurisdiction issue, above. The second would require that Nicchia have in some manner indicated its consent to such a position as binding international law. This has clearly not occurred.

APPENDIX

Relevant Provisions of
the General Agreement on Tariffs and Trade
[4 GATT, Basic Instruments and Selected Documents 1-78 (1969); 55 U.N.T.S. 187; T.I.A.S. No. 1700; 61 Stat. All.][22]

Article I
General Most-Favoured-Nation Treatment

1. . . . . with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

. . . .

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

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[22]The GATT originally was intended to serve only as a provisional agreement pending the adoption of the more elaborate Charter of the International Trade Organization. Thus, the original contracting parties (and all subsequent contracting parties) have entered the GATT through a "Protocol of Provisional Application." 4 BISD 77 (1969); 55 U.N.T.S. 308 (1950); T.I.A.S. No. 1700; 61 Stat. Part 5 at A2051. In paragraph 1 of the Protocol, the contracting parties "undertake, . . . to apply provisionally . . . (a) Parts I and III of the General Agreement on Tariffs and Trade, and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation" at the time of entry into the GATT. Both Article III and Article XI are contained in Part II. However, because the EMO industry was not yet in existence at the time of entry into the GATT by the parties to this dispute, there existed no laws covered by this "grandfather" provision.

Article II
Schedules of Concessions

[editorial note: Article II of the GATT sets out a system allowing the use of tariffs as import barriers, and then further provides for the gradual reduction and elimination of tariffs through rounds of multilateral trade negotiations. Eight such rounds have been held since the inception of the GATT, with the most recent being the Uruguay Round which began in 1986 and was scheduled to end with meetings in Brussels in December 1990. Consistent with this focus on tariffs as the allowed and transparent means of import restriction, Article XI provides a prohibition on the use of quantitative restrictions]

Article III
National Treatment on Internal Taxation and Regulation

. . . .

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. . . . .

Article XI
General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

. . . .

Article XX
General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

. . . .

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;