

IN THE  
INTERNATIONAL COURT OF JUSTICE AT THE PEACE PALACE  
THE HAGUE, NETHERLANDS

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Nicchia,  
Applicant

v.

Mercuria,  
Respondent

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February, 1991

On Submission to the  
International Court of Justice

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MEMORIAL FOR THE APPLICANT

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TABLE OF CONTENTS

	PAGE
INDEX OF AUTHORITIES . . . . .	iv
JURISDICTION . . . . .	x
STATEMENT OF FACTS . . . . .	x
QUESTIONS PRESENTED. . . . .	xv
SUMMARY OF ARGUMENT. . . . .	xv
ARGUMENT . . . . .	1
I.    MERCURIA VIOLATED CUSTOMARY INTERNATIONAL LAW BY APPLYING MERCURIAN COMPETITION LAW TO ACTIVITIES TAKING PLACE SOLELY WITHIN NICCHIA. . . . .	1
A. <u>The effects doctrine is an insufficient               basis for prescriptive jurisdiction.</u> . . . . .	1
1.    The effects doctrine is not customary law. . . . .	1
2.    The equities favor Nicchia under the <u>Timberlane</u> balancing test. . . . .	4
3.    The Mercurian Cartel Office and Mercurian Supreme Court were improper forums in which to balance the competing interests involved . . . . .	5
B. <u>Mercuria violated Nicchia's State Sovereignty.</u> . . . .	6
C. <u>International law defenses are not               superseded by Mercurian domestic law</u> . . . . .	7
1.    The Act of State doctrine prevents Mercuria from inquiring into the validity of an act by the Nicchian government within Nicchian territory . . . . .	8
2.    Foreign sovereign compulsion prevents Mercuria from declaring Nicchian corporate conduct illegal when such conduct was compelled by the Nicchian government. . . . .	8

	PAGE
II. NICCHIA'S EXERCISE OF SOVEREIGNTY IN THE DEVELOPMENT OF ITS ECONOMIC POLICY DID NOT VIOLATE CUSTOMARY INTERNATIONAL LAW. . . . .	10
A. <u>The Restrictive Business Practices Code is not obligatory</u> . . . . .	10
B. <u>The Restrictive Business Practices Code is not widespread practice.</u> . . . . .	11
III. MERCURIA'S 1989 AMENDMENT ENABLING THE CARTEL OFFICE TO SET A 14% QUANTITATIVE RESTRICTION ON NICCHIAN IMPORTS VIOLATED INTERNATIONAL LAW AND SHOULD BE REPEALED . . . . .	13
A. <u>Mercuria's 1989 Amendment violated conventional law because Article XI of the GATT expressly prohibits quantitative restrictions.</u> . . . . .	13
B. <u>The June 12, 1989 Nicchian-Mercurian agreement to quantitatively restrict Nicchian imports violated both conventional and customary law</u> . . . . .	15
1. The voluntary export agreement violated conventional law. . . . .	15
2. The VER violated customary law . . . . .	15
IV. MERCURIA MAY NOT INVOKE ARTICLE XIX BECAUSE IT FAILED TO SATISFY EACH CONDITION OF ARTICLE XIX . . . . .	17
A. <u>The GATT obligations incurred by Mercuria did not cause the increase in Nicchian EMO imports.</u> . . . . .	18
B. <u>The increase in Nicchian imports did not seriously injure or threaten to seriously injure domestic producers of competitive products.</u> . . . . .	19
1. Nicchia's movement into the Mercurian EMO market does not constitute serious injury. . . . .	19
2. Mercuria has contributed to its own EMO unemployment problem . . . . .	20

	PAGE
3. Mercuria has the burden of proof to demonstrate serious injury . . . . .	21
C. <u>Mercuria's 1989 Amendment violated conventional law because Article XIII of the GATT expressly prohibits discrimination among foreign importers.</u> . . . . .	22
1. The Amendment violated Article XIII by discriminating among importers. . . . .	22
2. The Amendment violated Article XIX by discriminating among foreigners . . . . .	23
3. The Amendment's discriminatory nature offended general principles of international law . . . . .	24
CONCLUSION . . . . .	25

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PAGE

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## JURISDICTION

By agreement, Nicchia and Mercuria (the Parties) submit the present dispute to this Court. Article 36(1) of the Statute of the International Court of Justice provides that the jurisdiction of the Court comprises all cases which the parties refer to it. Since the parties have accepted this compulsory jurisdiction, the Court has jurisdiction in the present controversy and may resolve all legal questions submitted by the parties.

## STATEMENT OF FACTS

This dispute arose as a result of unilateral action taken by the Mercurian Cartel Office on March 13, 1990. (C. 6).<sup>\*</sup> The Mercurian Cartel Office held two Nicchian corporations in violation of Mercurian competition law for actions which were taken within Nicchian territory and which were coordinated by the Government of Nicchia for the implementation of its economic and trade policy. (C. 2-3, 6).

In the 1960's, electromobiles (EMO's) replaced gasoline-powered automobiles in most countries for use in intra-city traffic. (C. 1). EMO batteries must be recharged every 80-100 miles and require monthly maintenance or replacement at special facilities. (C. 1).

EMO's were first manufactured by approximately twenty corporations in industrialized countries. (C. 1). However, after some restructuring in the industry, three manufacturers remained in Mercuria and only one or two in each of five other industrialized countries. (C. 1). In addition, three newly industrialized countries made the EMO industry a focal point of their economic

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<sup>\*</sup>Indicates reference to Compromis.

activities, with manufacturers selling in both domestic and foreign markets. (C. 1). Domestic restructuring of the market, as well as foreign competition, has led to unemployment in some of the industrialized countries. (C. 2).

As a key to general industrial development, in 1972 the government of Nicchia, one of the newly industrialized countries, announced a program to promote the production of EMO's. (C. 2). Subsequently, some 350,000 new jobs were created in a previously underdeveloped region of Nicchia. (C. 2). The officers of the Nicchian Association of Manufacturers of EMO's (NAME) and directors of member corporations met regularly with officials of the Nicchian Department of Economic Affairs (DEA) and openly discussed matters of business policy. (C. 2). Nicchian EMO manufacturers compete in production, advertising, distribution and, only after review of the relative performance and other quality criteria of the various EMO's, agree upon domestic prices. (C. 2). In addition, the DEA has assisted the EMO industry in preparing a standard distributorship agreement for obligatory use in Nicchia. (C. 2).

Foreign EMO manufacturers have not successfully expanded to the Nicchian EMO market. (C. 2-3). Nicchia imposes neither tariffs nor quantitative restrictions on EMO imports. (C. 3). High real estate costs and deeply rooted "buy Nicchian" consumer attitudes have discouraged foreign manufacturers from entering the Nicchian EMO market. (C. 3).

In conformity with Nicchian law, only distributors of the respective EMO manufacturers are licensed to offer the necessary battery maintenance or replacement services. (C. 3). The standard EMO distributorship agreement requires Nicchian distributors who terminate their distribution contract with

an EMO manufacturer to refrain from domestic distribution on behalf of another manufacturer for a period of five years. (C. 3).

Nicchian shareholders have foregone taking dividends and have used these profits to promote their corporations abroad. (C. 3). Under the direction of DEA, two Nicchian corporations, Comcar Inc. and ELEC Inc., have focused their EMO exports on the Mercurian market while the other three Nicchian EMO manufacturers have concentrated on other export markets. (C. 3). Comcar first exported EMO's to Mercuria in 1983, followed by ELEC in 1984. (C. 3). Since 1983 the two corporations have increased their combined market share by an average of only 1.5 percent per year, with a corresponding decrease in Mercurian EMO manufacturers' market share. (C. 3-4).

In early 1989, both the Mercurian EMO Manufacturers Association (MEMA) and the Mercurian Union of EMO Workers (UEW) lobbied the Mercurian government to impose on Nicchian EMO imports a quantitative restriction of 12% of the Mercurian EMO market. (C. 4). At a subsequent meeting with Nicchia's Secretary of Foreign Trade, the Mercurian Minister of Economic Affairs, although reluctant to jeopardize Mercuria's reputation as a liberal trade advocate, mentioned the Mercurian manufacturer's request for import limitations. (C. 4).

Thereafter, MEMA began negotiations with its Nicchian counterpart NAME. (C. 4). On June 12, 1989, a statement was issued in which NAME consented to quantitatively restrict Mercuria-bound EMO exports to 14% of the Mercurian EMO market. (C. 4). Two weeks later, Mercuria and Nicchia stated their support for the "agreement." (C. 4).

In September, 1989, Comcar announced plans to build a manufacturing facility for EMO's in Mercuria. (C. 5). Although the Mercurian manufacturers

expressed concern that their market shares would decrease with the presence of Nicchian corporations, the UEW preferred local production to imports. (C. 5). Despite the fact that the planned manufacturing facilities would not lead to the import of a single car into Mercuria, Mercurian manufacturers charged Comcar with attempting to circumvent the 14% limit on imports. (C. 5).

One month later, the Mercurian government amended the Mercurian Law Against Restraints of Competition (Competiton Law). (C. 5). The Amendment allowed the Cartel Office to quantitatively restrict the sale of goods manufactured by foreign-owned corporations at any location but only if such sales: 1) materially benefit from restrictive business practices, 2) adversely affect Mercurian international trade and 3) violate Mercuria's Laws Against Restraints of Competition. (C. 5). Violations of the Mercurian Competition Law could lead to fines of up to 10% of annual sales. (C. 6).

After consultations with the Nicchian government, the Mercurian Minister of Economic Affairs ordered the Cartel Office to initiate competition law proceedings against Comcar and ELEC under the newly amended Mercurian Competition Law. On March 13, 1990, the Cartel Office held that the two corporations violated the Mercurian Competition Law through (1) allocation of foreign markets, (2) domestic price fixing and (3) foreclosure of the Nicchian EMO market by requiring unreasonable conditions concerning distributorship and service functions. (C. 6). The Cartel Office ordered Comcar and ELEC to cease and desist such activities and threatened the corporations with the imposition of fines of up to 10% of annual sales should the order not be complied with. (C. 6). The order also quantitatively restricted Nicchian-owned corporations, regardless of location, to 14% of the Mercurian

EMO market. Failure to comply with the order would expose the corporations to additional restrictions. (C. 6-7).

Nicchia protested the measures taken by Mercuria's Cartel Office in an amicus brief filed with the Mercurian Supreme Court and in several diplomatic notes. (C. 7). Nicchia argued that it is within Nicchian sovereignty to decide which industry to develop, how to organize its internal market and whether or not to encourage the allocation of exports among its manufacturers. (C. 7). Nicchia explicitly contested Mercuria's jurisdiction over such activities in Nicchia which formed an integral part of Nicchian economic policy (C. 7). The Nicchian government, however, stated it would adhere to the 14% ceiling with respect to imported goods. (C. 7). On July 9, 1990, the Supreme Court of Mercuria affirmed the Cartel Office order and held that Mercurian law superseded the international law defenses argued by the Nicchian corporations. (C. 7).

Mercuria complained about the difficulty of gaining access to the Nicchian EMO market. (C. 7). Mercuria requested the Nicchian government to discontinue its support and instigation of anti-competitive conduct. (C. 7-8).

To prevent a trade dispute in a single industry from escalating to a political controversy with a friendly nation, Nicchia proposed to submit the matter for adjudication to this Court. (C. 8). Mercuria then agreed. (C. 8). Consequently, the parties submit the dispute to this Court for resolution, pursuant to Article 36, paragraph 1 of the Statute of the Court. Both Nicchia and Mercuria are contracting parties to the GATT as in force on March 1, 1969, and the Vienna Convention on the Law of Treaties.

## QUESTIONS PRESENTED

- I. Whether Mercuria violated customary international law when it applied extraterritorially its domestic competition laws to activities occurring solely within Nicchia.
- II. Whether Mercuria violated conventional international law when it imposed quantitative restrictions on Nicchian EMO imports.

## SUMMARY OF ARGUMENT

Mercuria violated customary international law by applying Mercurian competition law to activities taking place solely within Nicchia. Customary international law does not support such an extension of jurisdictional prerogatives. Therefore, Mercuria should vacate its Cartel Office order exercising such an extension.

The "effects doctrine," which provides that a State's antitrust jurisdiction may be extended to foreign conduct which produces harmful effects on the State's commerce, is an insufficient basis for prescriptive jurisdiction. The effects doctrine is not customary international law. Many States have enacted legislation to restrict the extraterritorial application of foreign antitrust laws, and the European Court of Justice has declined to accept the doctrine. Hence, the Cartel Office order can not be justified under the effects doctrine as customary law.

The hostile international response to the effects doctrine has led to its modification. In addition to the effects test, courts which subscribe to the modified approach must balance the competing interests of the nations involved. Under this approach, the equities favor Nicchia because it is within Nicchian sovereignty to decide how to allocate its domestic markets

and, Mercuria has demonstrated insufficient evidence that the alleged Nicchian anti-competitive conduct has had a direct, substantial and reasonably foreseeable effect on Mercuria.

A State's right to prescribe and apply its laws to activities located within its territory marks an essential attribute of State sovereignty. Mercuria, through its competition laws, has attempted to regulate the competitive conditions of Nicchia's economy. Such attempted regulation violated Nicchia's State Sovereignty.

Mercuria violated customary international law by elevating its domestic laws above the international law defenses argued by the Nicchian corporations. The international law defenses of the "Act of State doctrine" and "foreign sovereign compulsion" prevent Mercuria from inquiring into the validity of Nicchian corporate conduct when such conduct occurred in Nicchia and was coordinated and compelled by the Nicchian government.

Nicchia's exercise of sovereignty in the development did not violate customary international law. For a practice to rise to the level of international law, two elements must be met: (1) a general recognition among States that the practice is obligatory and (2) widespread adherence to the practice. The Restrictive Business Practice Code does not need either of these elements.

The Restrictive Business Practices Code is not obligatory. The Code was adopted as a non-binding resolution. Since the adoption of the Code, member States of the United Nations have rejected proposals to make the Code legally binding. Adherence to the Code is not widespread practice. Hence, the Code has not risen to the level of customary international law. Furthermore,

Mercuria has failed to demonstrate that Nicchia regards the Code's principles as obligatory.

Mercuria's 1989 Amendment enabling the Cartel Office to set a 14% quantitative restriction on Nicchian EMO imports violated conventional law and should be repealed. If a domestic law of a United Nations State violates international law, that State has an obligation to repeal the violative law. The Mercurian 1989 Amendment to the Law Against Restraints of Competition directly offends Article XI of the General Agreement on Trade and Tariffs (GATT) of which both Mercuria and Nicchia are parties. As a result, Mercuria has an obligation to repeal the 1989 Amendment.

Mercuria's 1989 Amendment violated conventional law. Article XI of the GATT expressly prohibits quantitative restrictions. Mercuria's 1989 Amendment permits quantitative restrictions of the sale of goods manufactured at any location by foreign-owned corporations. The restrictions apply to Nicchian EMO imports. Therefore, by permitting these quantitative restrictions, the 1989 Amendment violated the GATT.

Failing to satisfy each condition of Article XIX of the GATT, Mercuria is precluded from invoking its protection. Article XIX allows Contracting Parties to enforce temporary quantitative restrictions in cases of an emergency. To invoke Article XIX, Mercuria must satisfy two conditions: 1) An increase in imports must be the causal result of unforeseen developments and obligations incurred under the GATT. 2) An increase in imports must cause or threaten to cause serious injury to domestic producers of competitive products. Mercuria has satisfied neither condition because the GATT obligations incurred by Mercuria did not cause the increase in Nicchian

imports, and the increase did not seriously injure or threaten to seriously injure domestic producers of competitive products.

The Mercurian 1989 Amendment also violated Article XIII of the GATT which expressly prohibits discrimination among importers. The Mercurian 1989 Amendment applies quantitative restrictions only to those importers who violate Mercuria's Competition Law. The Amendment does not apply to those importers who could conceivably pose an even greater threat to the Mercurian EMO market than the alleged Nicchian import threat. The 1989 Amendment discriminates and violated Article XIII. Hence, the 1989 Amendment should be repealed.

## ARGUMENT

### I. MERCURIA VIOLATED CUSTOMARY INTERNATIONAL LAW BY APPLYING MERCURIAN COMPETITION LAW TO ACTIVITIES TAKING PLACE SOLELY WITHIN NICCHIA.

The Mercurian Cartel Office, acting unilaterally, held Nicchian corporations in violation of Mercurian competition law for actions which were taken solely within Nicchian territory and coordinated by the Government of Nicchia for the implementation of its economic and trade policy. Such an extension of jurisdictional prerogatives violated customary international law.<sup>1</sup> Therefore, Mercuria should vacate its Cartel Office order exercising such an extension.<sup>2</sup>

#### A. The effects doctrine is an insufficient basis for prescriptive jurisdiction.

1. The effects doctrine is not customary law.

The "effects doctrine," which derives from the objective territorial principle,<sup>3</sup> provides that a State's antitrust jurisdiction may be extended to foreign conduct which produces harmful effects on the State's commerce.<sup>4</sup> From

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<sup>1</sup>Gerber, International Competitive Harm and Domestic Antitrust Laws: Forms of Analysis, 10 Nw. J. Int'l & Bus. 41, 50 (1989) (discussing the viewpoint that such jurisdictional extension may violate the territorial sovereignty of nations in which the offending conduct occurs).

<sup>2</sup>I. Brownlie, Principles of Public International Law 38 (2d ed. 1973) (noting that a general duty exists to bring domestic law into conformity with obligations under international law).

<sup>3</sup>A. Neale and M. Stephens, International Business and National Jurisdiction 167 (1988). Under the objective territorial principle, a State may exercise jurisdiction over an action consummated in its territory but initiated elsewhere.

<sup>4</sup>United States v. Aluminum Co. of America (ALCOA), 148 F.2d 416 (2d Cir. 1945) [hereinafter ALCOA]. Most of the cases illustrating this argument of extraterritorial jurisdiction have been decided by United States courts applying American municipal law. Neale and Stephens, supra note 3, at 165.

the inception of the doctrine in United States v. ALCOA,<sup>5</sup> many foreign governments<sup>6</sup> and publicists have stated that the effects doctrine is not customary international law.<sup>7</sup> Although there have been a few judicial decisions in which subject-matter jurisdiction depended on the effects doctrine, such cases have adopted a method that is far from convincing.<sup>8</sup> Foreign governments have been quick to respond to any actions that appeared to impinge on their sovereignty.<sup>9</sup> Legislatively, this response has generally taken the form of "blocking statutes" directed at demands for discovery of documents.<sup>10</sup> This defensive attitude toward antitrust extraterritoriality also manifested itself during multinational attempts to develop uniform regulations for international business practices.<sup>11</sup> Many states maintain that

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<sup>5</sup>ALCOA, supra note 4.

<sup>6</sup>See I.L.A., Report of the Fifty-first Conference at 565-92 (1964) (noting that so many foreign governments have protested extraterritorial discover orders that no State could contend that these orders are in conformity with international law).

<sup>7</sup>Neale and Stephens, supra note 3, at 66.

<sup>8</sup>Mann, The Doctrine of International Jurisdiction Revisited After Twenty Years, 186 Recueil Des Cours, 13, 87 (1984) (noting that such cases have occurred in the United States).

<sup>9</sup>Canada amended its Combines Investigation Act for the purpose of restricting extraterritorial application of foreign antitrust laws to Canada. S.C. 1974-75-76, c. 76, s. 31.5, now Competition Act, S.C. 1986, c. 26.

<sup>10</sup>See, e.g., the United Kingdom's recent blocking statute, Protection of Trading Interests Act, 1980, Ch. II, relevant sections reprinted in Lowe, Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 75 A.J.I.L. 257, 273-80 (1981).

<sup>11</sup>Upon adoption of the UNCTAD Restrictive Business Practices Code, Australia's representative stated that it was Australia's position that the principles of sovereignty and comity estop one State from unilaterally seeking to extend extraterritorially the enforcement of its laws to activities in another State. U.N. Doc. A/35/P.U. 84, at 9-10 (1980).

a State should not exercise jurisdiction against "a foreigner who or a foreign corporation which has committed no act within its territory."<sup>12</sup> Even among countries that have adopted the effects doctrine, the doctrine has been narrowly interpreted.<sup>13</sup>

The European Court of Justice declined to adopt the effects doctrine in the Wood Pulp case.<sup>14</sup> The Court asserted that "the community's jurisdiction to apply its competition rules [under the facts of this case] is covered by the territoriality principle as universally recognized in public international law."<sup>15</sup> When asked whether the Court had in fact adopted the effects doctrine, Judge Joliet, judge rapporteur of the Wood Pulp decision, "responded emphatically in the negative."<sup>16</sup> The hostile international response to the effects doctrine evidences that the doctrine has not been accepted as international customary law.

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<sup>12</sup>United Kingdom Aide-Memoire of 20 October 1969 to Commission of the European Communities, reprinted in I. Brownlie, Principles of Public International Law 310, 313 (3rd ed. 1979); Mann, supra note 8, at 91 (noting that the British Government, Canada, Australia, France and South Africa all favor the territorial theory).

<sup>13</sup>See, e.g., Federal Republic of Germany, B5 World Comp. L. (MB) pt. 9, §1.03[1], at 1-14 (1982) (The Court requires the existence of a reasonable nexus between the domestic effect and the foreign undertaking. The absence of such a nexus would constitute a violation of the general principles of public international law). Phillip Morris v. Bundes Kartellant, [1984] ECG 393 (Court of Appeal, Berlin) (Cartel Division) (1983).

<sup>14</sup>A. Ahlström Osakeyhtiö v. Commission of European Communities, [1988] 4 Comm. Mkt. L.R. 901 (1988) [hereinafter Wood Pulp].

<sup>15</sup>Id. at 941.

<sup>16</sup>Briebart, The Wood Pulp Case: The Application of European Economic Community Competition Law to Foreign Based Undertakings, 19 Ga. J. Int'l & Comp. L. 149, 164 n. 118 (1989).

Instead of adopting the effects doctrine, the European Court formulated a two-pronged test to determine whether jurisdiction is appropriate. First, there must be the existence of an agreement or consented practice entered into by two or more parties. Second, the actual implementation of the agreement or consented practice must have occurred within the European Community.<sup>17</sup> Should this Court choose to apply the two-pronged Wood Pulp test, jurisdiction would not be appropriate because Mercuria has failed to satisfy the second prong. The alleged violations of Mercurian competition law were neither implemented in nor occurred in Mercurian territory. Mercuria has merely witnessed the effects of such implementation. Hence, Mercuria has failed to satisfy the second prong and its exercise of extraterritorial jurisdiction would be unwarranted under the Wood Pulp test.

2. The equities favor Nicchia under the Timberlane balancing test.

The hostile international response to the effects doctrine has led to its modification. In Timberlane Lumber Co. v. Bank of America, N.T. and S.A.,<sup>18</sup> the court did not reject the effects doctrine but held that such a doctrine "by itself is incomplete because it fails to consider other nations' interest."<sup>19</sup> Hence, in addition to the effects test, courts which subscribe to Timberlane must also apply a balancing test, "a jurisdictional rule of reason," involving a balancing of other nations' interests.<sup>20</sup>

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<sup>17</sup>Wood Pulp, supra note 14.

<sup>18</sup>549 F.2d 597 (9th Cir. 1976).

<sup>19</sup>Id. at 611-612.

<sup>20</sup>M. Shaw, International Law 367-71 (2d ed. 1986).

The Timberlane Test is not customary law.<sup>21</sup> Even if this Court were to apply the Timberlane Test, the equities clearly favor Nicchia. Under the Timberlane Test, jurisdiction is dependent upon a direct, substantial and reasonably foreseeable effect on the other State's interests.<sup>22</sup> While Mercuria alleges its inability to gain access to the Nicchian market is a product of "anti-competitive conduct of Nicchian EMO Manufacturers,"<sup>23</sup> Mercuria has demonstrated insufficient evidence that the alleged Nicchian anti-competitive conduct has had a direct, substantial and reasonably foreseeable effect on Mercuria. Mercuria's difficulty in entering the Nicchian EMO market could as easily be caused by the Nicchian consumer preference or the high real estate cost. Furthermore, inferior product quality or any other host of factors could have foreclosed market entrance.<sup>24</sup>

3. The Mercurian Cartel Office and Mercurian Supreme Court were improper forums in which to balance the competing interests involved.

Domestic courts do not have the competence and expertise necessary to consider international concerns and to inquire about the policies affecting

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<sup>21</sup>Meessen, Antitrust Jurisdiction Under Customary International Law, 78 A.J.I.L. 783, 784 (1984) (stating that State practice does not support the assumption that Timberlane constitutes a rule of international law).

<sup>22</sup>United States Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. sec. 6(a) (1982 & Supp. 1986).

<sup>23</sup>Compromis of Case Concerning the International Trade in Electromobiles (Nicchia v. Mercuria), signed as clarified January 6, 1991 at 7-8 [hereinafter Compromis].

<sup>24</sup>Staff of House Committee on Ways and Means, 101st Cong., 2d Sess., Report on Japan's Distribution System and Options for Improving U.S. Access: Phase II, (Investigation No. 332-283, October 1990) (reprinted in 1990 ITC Lexis 356) (discussing the various factors which make it difficult for foreign states to enter the Japanese Market).

foreign States.<sup>25</sup> Such courts are established by national constitutions and statutes to apply domestic law. The Cartel Office and Supreme Court have little expertise to evaluate the economic and social policies of a foreign country. Furthermore, such a balancing of competing interests is inherently unworkable because the competing interests present in this dispute display an irreconcilable conflict on the same plane of national policy.<sup>26</sup> Mercuria seeks to enforce its domestic competition laws to conduct occurring within Nicchia. The Nicchian government has supported and coordinated the exact conduct which Mercuria seeks to regulate with its domestic laws. The "balancing" of such contradicting actions is simply impossible.<sup>27</sup> Instead of relying on a domestic court, a better solution for handling such extraterritorial disputes is the negotiation of bilateral agreements.<sup>28</sup>

B. Mercuria violated Nicchia's State Sovereignty.

The United Nations is based on the principle of sovereign equality of all its members.<sup>29</sup> A State's right to prescribe and apply its laws to activities located within its territory marks an essential attribute of State sovereignty.<sup>30</sup> Under this well established, internationally recognized

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<sup>25</sup>Schoenbaum, The Extraterritorial Application of United States Laws Affecting Trade Between Nations, in Dynamics of Japanese-United States Trade Relations 319 (1986).

<sup>26</sup>In re Uranium Contracts Lit., 480 F. Supp. 1138, at 1148 (N.D. Ill. 1979). Judge Marshall recognized the invidious nature of the Timberlane balancing process.

<sup>27</sup>Id.

<sup>28</sup>Schoenbaum, supra note 25, at 336.

<sup>29</sup>U.N. Charter art. 2, para. 1.

<sup>30</sup>Mann, supra note 8, at 20.

principle, Nicchia possesses absolute authority to prescribe rules of law for its own nationals.<sup>31</sup> Mercuria, through its competition laws, has attempted to regulate the competitive conditions of Nicchia's economy. No treaty or custom exists between Nicchia and Mercuria which would permit Mercuria to apply its domestic competition laws to activities taking place solely within Nicchia and sanctioned and coordinated by the Nicchian government.<sup>32</sup> Because a state can not take measures on the territory of another state to enforce its national laws without the consent of the latter,<sup>33</sup> Mercuria violated Nicchia's state sovereignty.<sup>34</sup>

C. International law defenses are not superseded by Mercurian domestic law.

Mercurian statutory law does not supersede the international law defenses argued by the Nicchian corporations.<sup>35</sup> "A State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law . . . ."<sup>36</sup> Because Mercuria

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<sup>31</sup>Case of the S.S. Lotus, (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) no. 10 (Sept. 7).

<sup>32</sup>Compromis, at 9.

<sup>33</sup>Brownlie, supra note 2, at 299-301.

<sup>34</sup>J.G. Castel, Extraterritoriality In International Trade 51-52 (1988) (discussing the majority holding in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), that United States manufacturers could not recover antitrust damages based solely on alleged cartellization of the Japanese market in television sets because American antitrust laws do not regulate the competitive conditions of other nations' economies).

<sup>35</sup>Compromis, at 7. The Supreme Court of Mercuria held that international law defenses were superseded by Mercurian statutory law.

<sup>36</sup>Polish Nationals in Danzig (Advisory Opinion), 1931 P.C.I.J. (Ser. A/B) No. 44, p. 24.

elevated its domestic laws above international law, it is obligated to vacate the Mercurian Supreme Court's affirmance of the Cartel Office order.

1. The Act of State doctrine prevents Mercuria from inquiring into the validity of an act by the Nicchian government within Nicchian territory.

The "Act of State doctrine" requires a State to judicially abstain from inquiry into the validity of an act committed by a foreign sovereign in the latter's territory.<sup>37</sup> There is nothing objectionable about a country regulating the conduct of persons within its borders, even if some or all of the effects will be felt abroad.<sup>38</sup> Even if an act violates customary law, the act is valid under the law of the place where it occurred.<sup>39</sup> Thus, when the Mercurian Cartel Office inquired into the validity of activities in Nicchia which formed an integral part of Nicchian economic policy, Mercuria offended the Act of State doctrine.

2. Foreign sovereign compulsion prevents Mercuria from declaring Nicchian corporate conduct illegal when such conduct was compelled by the Nicchian government.

In the foreign restrictive business practices field, the doctrine of "foreign state compulsion" serves as a corollary to the Act of State doctrine.<sup>40</sup> If a foreign state compels corporate conduct within its own territory, the conduct is protected from antitrust liability as if it were an

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<sup>37</sup>Griffin, United States Antitrust Law and Transnational Business Transactions: An Introduction, 21 Int'l Law. 307, 329 (1986).

<sup>38</sup>Wood, International Jurisdiction in National Legal Systems: The Case of Antitrust, 10 NW. J. Int'l L. & Bus. 56, 61 (1989) (noting that an argument for the contrary position would exceed even what the strongest proponents of objective territoriality have urged).

<sup>39</sup>Castel, supra note 34, at 76.

<sup>40</sup>Castel, supra note 34, at 81.

act of the State itself.<sup>41</sup> The governments of Australia, Canada, France and the United Kingdom contend that the foreign sovereign compulsion defense is a judicial acknowledgement of the fundamental principle of international law that "a sovereign's exercise of its authority within its territory is not reviewable by the courts of another nation."<sup>42</sup>

Nicchian law compelled both the standard distributorship agreement for obligatory use<sup>43</sup> in Nicchia and that only distributors of the respective EMO manufacturers are licensed to offer the necessary maintenance and replacement services.<sup>44</sup> The defense of foreign sovereign compulsion prevents Mercuria from reviewing the validity of these State compelled practices. Furthermore, the defense of foreign sovereign compulsion prevents Mercuria from reviewing the validity of domestic price setting and market allocation. Such restrictive business practices instigated by foreign governments have been exempted from the operation of domestic law under the foreign sovereign compulsion defense and/or the act of state doctrine.<sup>45</sup> Although the Nicchian government does not actually "compel" price setting and market allocation, it does coordinate and encourage these practices.<sup>46</sup> Vital foreign legal and

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<sup>41</sup>United States v. The Watchmakers of Switzerland Info. Center Inc., 1963 Trade Cases para. 70,600 at 77,556-57 (S.D.N.Y. 1962) modified, 1965 Trade Cases para. 71,352 (S.D.N.Y. 1965).

<sup>42</sup>Brief for the governments of Australia, Canada, France and the United Kingdom as Amici Curiae in Support of Petitioners at 6, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) [hereinafter Matsushita].

<sup>43</sup>Compromis, at 2.

<sup>44</sup>Compromis, at 3.

<sup>45</sup>Meessen, supra note 21, at 797.

<sup>46</sup>Compromis, at 2-3.

policy interests can be so strongly expressed that a corporation's survival hinges upon its compliance.<sup>47</sup>

II. NICCHIA'S EXERCISE OF SOVEREIGNTY IN THE DEVELOPMENT OF ITS ECONOMIC POLICY DID NOT VIOLATE CUSTOMARY INTERNATIONAL LAW.

For a practice to rise to the level of customary international law, two elements must be met: (1) a general recognition among States that the practice is obligatory and (2) widespread adherence to the practice.<sup>48</sup> The Restrictive Business Practices Code has not risen to the level of customary law because States have neither considered themselves obligated to follow the Code nor adhered to it in widespread practice.

A. The Restrictive Business Practices Code is not obligatory.

Mercuria and the other developed countries proposed and supported the voluntary status of the Code.<sup>49</sup> The United Nations General Assembly adopted by resolution the Restrictive Business Practices Code in 1980.<sup>50</sup> The purpose of the Code was to establish guidelines for the development and implementation of an international antitrust code. Because the legal nature of codes of conduct is determined by their form, substance, and provisions for

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<sup>47</sup>Castel, supra note 34, at 82 (noting that it would be difficult for a corporation to stay in business if it did not implement such strongly expressed interests).

<sup>48</sup>Shaw, supra note 20, at 61. For a practice to be custom, there must be a subjective belief that such behavior is the "law" and the actual behavior of the States must demonstrate that the practice is widely followed.

<sup>49</sup>Third Ad hoc Group of Experts on Restrictive Business Practices, U.N. Doc. TD/B/C.2/AC.6/2 (1976).

<sup>50</sup>The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, G.A. Res. 35/63, U.N. Doc. A/RES/35/63 (1980) [hereinafter Code].

implementation and enforcement,<sup>51</sup> the Code is not intended to be legally binding on States. This non-binding character is evident in a number of ways. First, the Code was passed as a U.N. General Assembly Resolution.<sup>52</sup> Article 12 of the U.N. Charter provides that such resolutions constitute "recommendations to Member States."<sup>53</sup> Second, the Code explicitly states that it will "take the form of recommendations."<sup>54</sup> Third, the Code contains no binding mechanism for implementation or enforcement.

B. The Restrictive Business Practices Code is not widespread practice.

The Restrictive Business Practices Code is not intended to regulate the domestic economic policies of states or their subsidization of industries.<sup>55</sup> The United Nations General Assembly adopted the Code as a non-binding resolution,<sup>56</sup> and it has not risen to the level of customary international law. In 1980, member states rejected a proposal to make the Code legally binding.<sup>57</sup> Since 1980, several proposals to make the Code binding have been

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<sup>51</sup>Benson, The U.N. Code on Restrictive Business Practices: An International Antitrust Code is Born, 30 Am. U.L. Rev. 1031, 1033 (1981).

<sup>52</sup>Code, supra note 50.

<sup>53</sup>U.N. Charter art. 12.

<sup>54</sup>Code, supra note 50, at annex.

<sup>55</sup>Davidow, The UNCTAD Restrictive Business Practices Code, in Studies In Transnational Law: Legal Problems of Codes of Conduct For Multinational Enterprises 207 (1980).

<sup>56</sup>Code, supra note 50.

<sup>57</sup>Benson, supra note 51, at 1033.

unsuccessful.<sup>58</sup> Furthermore, the United Nations Conference on Trade and Development (UNCTAD) has endorsed a resolution expressing concern about the continued use of restrictive business practices and urging countries to implement the principles and rules.<sup>59</sup> For a practice to rise to the level of international custom, there must be a general recognition among States that the practice is obligatory.<sup>60</sup> The fact that States continue to use restrictive business practices and refuse to make the Code binding is evidence that the States do not view compliance with the Code as "obligatory." In addition, this Court has emphasized the well recognized principle that a claimant State which seeks to rely on a customary rule must prove that the rule has become binding on the defendant State.<sup>61</sup> The easiest way to do this is by proving that the defendant State has recognized the rule in its own State practice.<sup>62</sup> *Mercuria*, however, has failed to demonstrate<sup>63</sup> that *Nicchia* regards the Code's principles as obligatory. To the contrary, *Nicchia* has

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<sup>58</sup>See, e.g., Report of the UNCTAD Intergovernmental Group of Experts on Restrictive Business Practices, YUN 1984, at 535, reprinted in 1984 U.N.Y.B. 535-36; Report of the UNCTAD Intergovernmental Group of Experts on Restrictive Business Practices, YUN 1985, at 533, reprinted in 1985 U.N.Y.B. 563-65.

<sup>59</sup>Report of the UNCTAD Intergovernmental Group of Experts on Restrictive Business Practices, YUN 1985, at 533, reprinted in 1985 U.N.Y.B. 563-65. The UNCTAD secretariat report concluded that the rules and principles of the Code had not lived up to their expectations; since their adoption, restrictive business practices had become an increasingly important component of international trade policy.

<sup>60</sup>Brownlie, supra note 2, at 4-5.

<sup>61</sup>*Asylum Case (Colum. v. Peru)*, 1950 I.C.J. 266, at 276-77 (Nov. 20).

<sup>62</sup>M. Akehurst, A Modern Introduction to International Law 32-33 (6th ed. 1987).

<sup>63</sup>Brownlie, supra note 2, at 11. The proponent of a custom has the burden of proof that such custom actually exists.

maintained that it is within Nicchian sovereignty to decide which industry to develop, how to organize its internal market, and whether or not to encourage the allocation of export markets among its manufacturers.<sup>64</sup> Therefore, the Restrictive Business Practices Code is not binding upon Nicchia.

III. MERCURIA'S 1989 AMENDMENT ENABLING THE CARTEL OFFICE TO SET A 14% QUANTITATIVE RESTRICTION ON NICCHIAN IMPORTS VIOLATED INTERNATIONAL LAW AND SHOULD BE REPEALED.

If a State's domestic law violates international law, that State has an obligation to repeal the violative law.<sup>65</sup> Mercuria's 1989 Amendment to the Law Against Restraints of Competition directly offended Article XI of the General Agreement on Trade and Tariffs (GATT),<sup>66</sup> of which both Mercuria and Nicchia are parties.<sup>67</sup> As a result, Mercuria has an obligation to repeal the 1989 Amendment and vacate the Cartel Office order regarding the 14% quantitative restrictions.

- A. Mercuria's 1989 Amendment violated conventional law because Article XI of the GATT expressly prohibits quantitative restrictions.

To maximize global prosperity<sup>68</sup> and raise the standard of living,<sup>69</sup> the GATT, by its provisions and principles, liberalizes trade policies through the

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<sup>64</sup>Compromis, at 7.

<sup>65</sup>Brownlie, supra note 2, at 38 (noting the obligation of states to bring violative laws into conformity with international law).

<sup>66</sup>The General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, art. XI, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

<sup>67</sup>Compromis, at 9.

<sup>68</sup>J. Jackson, World Trade and the Law of GATT 561 (1969).

<sup>69</sup>GATT, supra note 66, at preamble.

reduction of international trade barriers.<sup>70</sup> To further this liberalization, Article XI of the GATT prohibits measures which employ quantitative restrictions of imported products.<sup>71</sup>

In 1989 Mercuria amended its Law Against Restraints of Competition (Competition Law) to allow quantitative restrictions on the sale of goods manufactured at any location by foreign-owned corporations which violate the Competition Law.<sup>72</sup> Nicchian corporations were found in violation of the Competition Law.<sup>73</sup> Thus, Mercuria seeks to quantitatively restrict Nicchian imports, contrary to Mercuria's obligations under Article XI. By permitting these quantitative restrictions, the 1989 Amendment violated the GATT.

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<sup>70</sup>Jackson, supra note 68.

<sup>71</sup>GATT, supra note 66, para. 1. "No prohibitions or restrictions . . . 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 . . . ."

<sup>72</sup>Compromis, at 5. The Amendment reads:

In the event of a violation of this law the Cartel Office may, on the application of the Minister of Economic Affairs, limit to a reasonable level the sale of goods manufactured at any location by companies whose capital stock is controlled by foreign persons if such sale materially benefits from restrictive business practices adversely affecting Mercurian international trade.

<sup>73</sup>Compromis, at 7.

B. The June 12, 1989 Nicchian-Mercurian agreement to quantitatively restrict Nicchian imports violated both conventional and customary law.

1. The voluntary export agreement violated conventional law.

Although Nicchia and Mercuria negotiated the June 12, 1989 agreement, it is a voluntary export agreement (VER).<sup>74</sup> In effect, Nicchia unilaterally imposed importation restrictions upon itself due to implicit threats<sup>75</sup> by Mercurian EMO manufacturers and labor unions which had lobbied the Mercurian government for import restrictions. The VER violated Article XI because it quantitatively restricts the importation of Nicchian EMO's. Because the VER is invalid under the GATT, Mercuria may not invoke Nicchia's previous acquiescence to the VER as justification for the 14% quantitative restrictions.

2. The VER violated customary law.

Even if the VER lies outside the ambit of the GATT, it violated customary law<sup>76</sup> as codified in the Vienna Convention on the Law of Treaties.<sup>77</sup> Article XXVI of the Vienna Convention provides that the obligations under

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<sup>74</sup>See D. Salvatore, The New Protectionist Threat to World Welfare 5 (1987). Discussing the 1981 Japanese automobile export restriction agreement negotiated between Japan and the United States, Salvatore concludes that such agreements are essentially quotas by another name. See also B. Hindley, Taking the New Protectionism Seriously 9 (1983) (labelling such agreements between the governments of an import competing industry and an exporting industry as VER's).

<sup>75</sup>See J. Tumlrir, Protectionism: Trade Policy in Democratic Societies 39 (1985) (discussing that a threat to restrict imports usually begins in the legislature). See generally R. Langdon, The Policies of Canadian-Japanese Economic Relations, 1952-1983 48 (1983).

<sup>76</sup>Akehurst, supra note 62, at 123.

<sup>77</sup>Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, reprinted in 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

every treaty in force must be performed in good faith by the parties.<sup>78</sup> To satisfy the good faith duty of Article XXVI a party must refrain from conduct designed to frustrate the objective of the treaty<sup>79</sup> and may not "conduct itself in a manner inconsistent with its treaty obligations in the hope of securing, through tacit acquiescence, a substantive modification of these obligations."<sup>80</sup>

Because one of the objectives of the GATT is to maximize global prosperity by abolishing quantitative restrictions on imports,<sup>81</sup> the very nature of an agreement restricting exports (the VER) frustrates the purpose of the GATT. Moreover, Mercuria may not assert that Nicchia's consent to the VER justifies the quantitative restrictions. To do so, Mercuria would be "conducting itself in a manner inconsistent" with GATT obligations in "the hope of securing, through [Nicchia's] tacit acquiescence"<sup>82</sup> to the VER "a substantive modification"<sup>83</sup> to GATT obligations. As a result, the VER agreement violated customary international law as codified in Article XXVI of the Vienna Convention.

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<sup>78</sup>Id. at art. XXVI.

<sup>79</sup>R. Wetzel and D. Rauschnig, The Vienna Convention on the Law of Treaties 213 (1978) (as cited in Note, The Japanese Automotive Voluntary Import Restraint Agreements and International Law 23 Can. Y.B. Int'l L. 297, 308 (1985)).

<sup>80</sup>Stanford, The Vienna Convention on the Law of Treaties, 20 U. Toronto L.J. 32 (1970) (as cited in Note, The Japanese Automotive Voluntary Import Restraint Agreements and International Law, 23 Can. Y.B. Int'l L. 297, 309 (1985)).

<sup>81</sup>Jackson, supra note 68.

<sup>82</sup>Stanford, supra note 80.

<sup>83</sup>Id.

IV. MERCURIA MAY NOT INVOKE ARTICLE XIX BECAUSE IT FAILED TO SATISFY EACH CONDITION OF ARTICLE XIX.

The decline of inefficient domestic industries confronted by competing import industries marks the free trade effect promoted by the GATT.<sup>84</sup> Article XIX of the GATT<sup>85</sup> recognizes the initial burden<sup>86</sup> that inefficient domestic corporations face and allows Contracting Parties to enforce temporary quantitative restrictions to gradually shift the economic market toward the more efficient importing industry.<sup>87</sup> States wishing to invoke Article XIX must satisfy two conditions: (1) An increase in imports must be the causal result of unforeseen developments and obligations incurred under the GATT, (2) An increase in imports must cause or threaten to cause serious injury to domestic producers of like products.<sup>88</sup> Neither condition has been satisfied in this case.

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<sup>84</sup>Lochmann, The Japanese Voluntary Restraint on Automobile Exports: An Abandonment of the Free Trade Principles of the GATT and the Free Market Principles of United States Antitrust Laws, 27 Harv. Int'l L.J. 99, 119 (1986).

<sup>85</sup>GATT, supra note 66, at art. XIX.

<sup>86</sup>Lochmann, supra note 84. Although a shift toward the more efficient industry is necessary to reap the benefits of international trade, it is a burden for displaced workers and the inefficient industry.

<sup>87</sup>J. Jackson, Legal Problems of International Economic Relations 615-618 (1977). See also Tumliir, A Revised Safeguard Clause for GATT? 7 J. World Trade L. 40 (1973).

<sup>88</sup>J. Jackson, The World Trading System 155 (1989).

A. The GATT obligations incurred by Mercuria did not cause the increase in Nicchian EMO imports.

When it joined the GATT in or before 1969,<sup>89</sup> Mercuria incurred the Article XI obligation to abolish quantitative restrictions. Nicchian EMO manufacturers only began exporting to Mercuria at least fourteen years later; their growth in that market has occurred at an insignificant rate of 1.5% per year. Mercuria's GATT obligation to abolish quantitative restrictions did not cause the Nicchian increase in imports. Noted international trade publicist John Jackson questions whether such lengthy time gaps prevent a causal relationship between the increase in imports and a GATT obligation.<sup>90</sup> Furthermore, to hold that the GATT obligations have caused the increase in imports solely because in their absence Mercuria would be free to restrict imports at will<sup>91</sup> ignores the purpose of Article XIX and does violence to its language. Following this reasoning to its logical conclusion, no state practice of quantitative restrictions would ever violate this causal element of Article XIX, and the language, "effect of the obligations incurred,"<sup>92</sup> would be rendered meaningless.

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<sup>89</sup>Compromis, at 9. Nicchia and Mercuria were parties to the GATT as in force in 1969.

<sup>90</sup>Jackson, supra note 88, at 159.

<sup>91</sup>Id. at 162 (discussing the removal of the causal element from the United States Trade Act of 1974, Pub. L. No. 93-618, sec. 406, 88 Stat. 2062 (1975)).

<sup>92</sup>GATT, supra note 85, para. 1.

- B. The increase in Nicchian imports did not seriously injure or threaten to seriously injure domestic producers of competitive products.

The GATT itself remains silent on what factors constitute "serious injury."<sup>93</sup> Serious injury, however, should be determined from an examination of objective factors, not mere speculation.<sup>94</sup> In the Hatters' Fur Case,<sup>95</sup> a GATT working party noted that a large and rapidly increasing volume of imports with a corresponding domestic market reduction constituted evidence of "some weight" of a serious injury.<sup>96</sup>

1. Nicchia's movement into the Mercurian EMO market does not constitute serious injury.

Unlike the Hatters' Fur Case, the increase in Nicchian imports was not large and rapid, but moderate and even. Nicchian EMO corporations gained, over a span of seven years, an average of only 1.5% of the Mercurian EMO market per year.<sup>97</sup> Furthermore, the EMO market shift only demonstrates

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<sup>93</sup>Cf. GATT, supra note 85, passim.

<sup>94</sup>See GATT, Tokyo Declaration on Multilateral Trade Negotiations, GATT Press Release 1134 (Sept. 14, 1973), reprinted in 12 I.L.M. 1533 (1973). In 1973, several GATT Contracting Parties gathered in Japan to discuss various GATT issues; neither Mercuria nor Nicchia are members to the Tokyo round GATT Codes. Compromis, at 9. The parties drafted a code, see GATT, Multilateral Trade Negotiations: Group Safeguards, GATT Doc. MTN/SG/N/47 (Apr. 11, 1979) [hereinafter Group Safeguards], which requires a threat of serious injury to be "clearly imminent." Id. at 4.

<sup>95</sup>GATT, Report on the Withdrawal by the United States of a Tariff Concession Under Article XIX of the General Agreement on Tariffs and Trade, GATT Doc. CP/106 (October 1951) [hereinafter Hatters' Fur Case]. The United States erected trade barriers to thwart the onslaught of Czechoslovakian felt hats and hat bodies that followed a recent and sweeping change in women's fashion favoring the Czechoslovakian design.

<sup>96</sup>Id. at 21, para. 26.

<sup>97</sup>Compromis, at 24. The Compromis, filed in 1990, stated that Nicchian corporations had gained 1.5% per year since 1983 evidencing a seven year life in the Mercurian EMO market.

evidence of "some weight" of a serious injury.<sup>98</sup> Standing alone, it is not dispositive.<sup>99</sup> Without other objective evidence, the Nicchian-Mercurian EMO market shift, does not constitute a serious injury. Furthermore, Mercuria's unfounded fears that Nicchian corporations, prospective manufacturers in Mercuria, will first dominate the EMO market through lower priced EMO's, then cause a decrease of the Mercurian-owned EMO industry and in the end relocate elsewhere is mere speculation.<sup>100</sup> Because Nicchia has yet to build a plant in Mercuria, no evidence exists to support this conjecture.

2. Mercuria has contributed to its own EMO unemployment problem.

Nicchian EMO competition alone did not cause Mercuria's unemployment problems since Mercurian domestic restructuring also led to unemployment.<sup>101</sup> Furthermore, through the implementation of quantitative restrictions, Mercuria has impeded Comcar's plans to establish a plant in Mercuria which would provide employment for Mercurian EMO workers.<sup>102</sup> The Mercurian Union of EMO Workers preferred the Comcar proposal to production abroad,<sup>103</sup> yet the Mercurian government limited any Nicchian production in Mercuria to 14% of the

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<sup>98</sup>Hatters' Fur Case, supra note 95, at 22, para. 30.

<sup>99</sup>Id. Presented with only evidence of a significant market shift, the working party refused to conclude that the United States incurred serious injury.

<sup>100</sup>Matsushita, supra note 42, at 597 (holding on economic grounds that allegations of conspiracy and price depressing must be supported by evidence).

<sup>101</sup>Compromis, at 1-2.

<sup>102</sup>Id. at 5. In September, of 1989, Comcar announced plans to build a manufacturing facility for EMO's in Mercuria. One month later, the Mercurian government passed the Amendment.

<sup>103</sup>Id.

Mercurian EMO market. Not only would the 14% limitation cap Mercurian employment opportunities, but in the likely event that the 14% limitation were to blunt Nicchian incentive to build an EMO plant in Mercuria, it would deny employment opportunities altogether. Mercuria has contributed to its own EMO unemployment problem.

3. Mercuria has the burden of proof to demonstrate serious injury.

Because Mercuria has superior knowledge of its alleged injuries it has the burden of proof to demonstrate serious injury.<sup>104</sup> By invoking Article XIX to justify quantitative restrictions, Mercuria admits a breach of a GATT obligation. Fairness requires that Mercuria explain why it should be excused from treaty obligations it entered voluntarily.<sup>105</sup> Holding otherwise would force Nicchia to seek and obtain relevant information about injuries suffered by Mercurian industries that is more accessible to Mercuria itself.<sup>106</sup>

Although the Hatters' Fur Case resolved all doubts in the United States' favor,<sup>107</sup> placing the burden of proof on Czechoslovakia,<sup>108</sup> the case was decided not by a panel but by a working party<sup>109</sup> whose very credibility as objective

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<sup>104</sup>K. Dam, The GATT: Law and International Economic Organization 102 (1970); Group Safeguards, supra note 94.

<sup>105</sup>Id. (noting surprise that the working party placed the burden of proof on Czechoslovakia).

<sup>106</sup>Id. (commenting on the inaccessibility of facts confronting Czechoslovakia, the exporting country in the Hatters' Fur Case).

<sup>107</sup>Hatters' Fur Case, supra note 95, at 22-23, para. 30.

<sup>108</sup>Dam, supra note 104. Dam equates giving the United States the benefit of the doubt with placing the burden of proof on Czechoslovakia.

<sup>109</sup>A GATT working party is composed of representatives of individual Contracting Parties. After the Hatters' Fur Case the Contracting Parties switched to panel members who are selected not as representatives but as mediators chosen in their personal capacities. Dam, supra note 104, at 365;

and dispassionate mediators has come under scholarly criticism.<sup>110</sup> The working party's analysis regarding the burden of proof is flawed. As a result, Mercuria has the burden of proof to demonstrate serious injury.

C. Mercuria's 1989 Amendment violated conventional law because Article XIII of the GATT expressly prohibits discrimination among importers.

1. The Amendment violated Article XIII by discriminating among importers.

Article XIII of the GATT,<sup>111</sup> echoing the "most-favored-nation"<sup>112</sup> (MFN) principle embodied in Article I,<sup>113</sup> states that no restriction shall be applied by any Contracting Party on the importation of a product unless all other countries are similarly prohibited or restricted.<sup>114</sup> The GATT's success is largely due to this principle of non-discrimination among importers.<sup>115</sup>

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J. Jackson, Restructuring the GATT System 69 (1990).

<sup>110</sup>Dam, supra note 104, at 365. See also R. Hudec, Adjudication of International Trade Disputes 7 (1978). Hudec refers to pre-1952 decision-making as "primitive"; The Hatters' Fur Case was decided in 1951; J. Jackson, The Birth of the GATT MTN System: A Constitutional Appraisal, 12 L. & Pol'y Int'l Bus. 21, 41-43 (1980) (asserting that the GATT dispute process is subject to political pressures).

<sup>111</sup>GATT supra note 66, at art. XIII.

<sup>112</sup>Most-favored-nation principle maintains that one Contracting Party must accord immediately and unconditionally the same treatment of like products to all other contracting parties. 6 A. Lowenfeld, International Economic Law: Public Controls on International Trade sec. 2.3 (1979).

<sup>113</sup>GATT, supra note 66, at art. I. See Gudgeon, United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards 4 Int'l Tax & Bus. L. 105 (1986) (citing the prevalence of either national or MFN treatment in bilateral investment treaties).

<sup>114</sup>GATT, supra note 111, para. 1.

<sup>115</sup>Jackson, supra note 68, at 565 n. 5.

The Mercurian Amendment discriminates among importers because it applies quantitative restrictions only on those importers who violate Mercuria's Competition Law.<sup>116</sup> Under the Amendment, an EMO importer who controls Mercuria's EMO market escapes the imposition of quantitative restrictions if that importer did not violate Mercuria's Competition Law. On the other hand, Mercuria imposes quantitative restrictions on EMO importers (like Comcar or ELEC) that contribute only a small percentage of EMO's to the Mercurian market if that foreign corporation violates Mercuria's Competition Law. By invoking Article XIX, Mercuria seeks to protect its domestic EMO market with quantitative restrictions on encroaching imports;<sup>117</sup> therefore, the only relevant inquiry is the increase in imports and the degree to which it bears upon the Mercurian EMO market. In protecting domestic industry, it is completely irrelevant whether foreign corporations conduct themselves in conformity with Mercuria's Competition Law while within their own state boundaries. Since the Mercurian Amendment discriminates among importers by conducting an inquiry unrelated to its goals, it violated Article XIII.

2. The Amendment violated Article XIX by discriminating among foreigners.

Any quantitative restrictions applied under Article XIX of the GATT must not discriminate among imports from Contracting Parties.<sup>118</sup> Contracting Parties are adamantly opposed to discriminatory application; in fact, even

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<sup>116</sup>Compromis, at 5.

<sup>117</sup>Cf. GATT, supra note 85. Article XIX can only be invoked under certain emergency circumstances to excuse a contracting party from a GATT obligation.

<sup>118</sup>GATT, Analytical Index-Notes on the Drafting, Interpretation and Application of the Articles of the General Agreement, at XIX-5 (1989). Due to Article XIX's silence on the discrimination issue, a sub-committee expressly stated Article XIX's tacit annexation of the MFN principle.

emergency situations do not justify discriminatory practice.<sup>119</sup> The GATT itself prohibits discrimination among importers, even when VER's support the quantitative restrictions.<sup>120</sup> Regardless of whether Mercuria's 1989 Amendment permitting quantitative restrictions satisfies the other provisions of Article XIX, (i.e. serious injury and causation), the Amendment discriminates and violated Article XIX.

3. The Amendment's discriminatory nature offends general principles of international law.

Non-discrimination principles ensure equal treatment among states of different strength.<sup>121</sup> To selectively apply quantitative restrictions would cause friction and discontent, possibly disrupting free trade.<sup>122</sup> Additionally, temporary but discriminatory restrictions often develop into permanent barriers.<sup>123</sup> When non-discriminatory restrictions are applied, all affected states have an incentive to expedite the revocation of the restriction.<sup>124</sup> Therefore, the Amendment's discriminatory nature offends the general non-discrimination principle of international law.

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<sup>119</sup>GATT, The Report on the Accession of Japan, GATT Doc. L/76, para. 7 (Feb. 13, 1953) (stating that prior approval of the CONTRACTING PARTIES under Article XXIII would serve better in emergency situations).

<sup>120</sup>See GATT, EEC's Article XIX Action on Imports into the United Kingdom of Television Sets from Korea, GATT Doc. C/M/124 (March 1978). See also GATT, The Report of the Panel on EEC Restrictions on Imports of Apples from Chile, BISD 27 Supp. 98 (1980). The panel found that EEC quantitative restrictions, despite VER's of other South American exporters, discriminated against Chile.

<sup>121</sup>Tumlrir, supra note 87, at 409; D. Robertson, Fail Safe System for Trade Liberalisation 66 (1977).

<sup>122</sup>Price, Surplus Capacity and What the Tokyo Round Failed to Settle 2 World Econ. 305, 312-313 (1979).

<sup>123</sup>Tumlrir, supra note 87.

<sup>124</sup>Id.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Government of Nicchia respectfully requests the International Court of Justice to:

1. DECLARE that Mercuria has an obligation to vacate the order of the Cartel Office, as affirmed by the Supreme Court, including the limitation imposed on exports from Nicchia to Mercuria.
2. DECLARE that Mercuria has an obligation to repeal the Amendment to the Law Against Restraints of Competition.

Respectfully submitted,

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