

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

Nicchia, Applicant

v.

Mercuria, Respondent

February, 1991

On Submission to the
International Court of Justice

MEMORIAL FOR THE RESPONDENT

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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

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). After some restructuring, however, only three manufacturers remained in Mercuria and only one or two in each of five other industrialized countries. (C. 1).. Domestic restructuring and foreign competition have led to substantial unemployment in several industrialized countries. (C. 1, 2). On the other hand, three newly industrialized countries have focused primarily on the EMO industry, dominating their domestic markets and gaining considerable shares in several foreign markets. (C. 1). In Nicchia, one of the newly industrialized countries, some 350,000 new jobs have been created. (C. 2).

*Indicates reference to Compromis.

In 1972, Nicchia announced a program to promote the production of EMO's. (C. 2). The officers of the Nicchian Association of Manufacturers of EMO's (NAME) and directors of member corporations met with officials of the Nicchian Department of Economic Affairs (DEA) to set domestic prices and prepare a mandatory distributorship agreement for use in Nicchia. (C. 2).

Foreign EMO manufacturers have been unable to successfully export to the increasingly affluent Nicchian market. (C. 2, 3). Although Nicchia imposes neither tariffs nor quantitative restrictions on EMO imports, only distributors of the respective EMO manufacturers are licensed to offer the necessary monthly battery maintenance or replacement services. (C. 3). Also, the standard Nicchian distributorship agreement forbids Nicchian distributors who terminate their contract with an EMO manufacturer from contracting again with another manufacturer for a period of five years. (C. 3). Finally, high real estate costs and deeply rooted "buy Nicchian" consumer attitudes have also discouraged foreign manufacturers from establishing the network of service and distribution facilities necessary to enter the Nicchian EMO market. (C. 3). Mercuria has frequently complained about the difficulty in gaining access to Nicchian EMO market. (C. 7).

Nicchia EMO profits are reinvested in their corporation to provide ample financing of export efforts. (C. 3). Under the direction of the DEA, two Nicchian Corporations, Comcar Inc. and ELEC Inc., have focused their EMO exports on the Mercurian EMO market. (C. 3). Comcar first entered the Mercurian EMO market in 1983, with ELEC shortly following in 1984. (C. 3). The Mercurian share of the EMO market has dropped 10% since 1983 while Nicchian EMO corporations have gained 10% of the Mercurian market. (C. 3, 4).

In early 1989, the Mercurian Minister of Economic Affairs drew attention

to the decline of the Mercurian-owned EMO industry and expressed to the Nicchian Secretary of Foreign Trade the Mercurian manufacturers' concerns. (C. 4). Subsequently, NAME and the Mercurian EMO Manufacturers Association (MEMA) met. (C. 4). The two EMO manufacturer associations issued a joint statement on June 12, 1989, in which NAME agreed to a limit Nicchian EMO exports to Mercuria to 14% of EMO sales in Mercuria. (C. 4). The respective governments stated their support for the agreement. (C. 4).

Two months later, Comcar announced plans to build an EMO manufacturing facility in Mercuria. (C. 5). The Mercurian manufacturers charged Comcar with attempting to unfairly circumvent the 14% ceiling agreed to in June. (C. 5). The Mercurian manufacturers pointed out that their market shares would continue to erode when Comcar, possibly again to be followed by ELEC, started hiring Mercurian EMO workers. An additional concern was that Nicchian EMO's would be lower priced due to subsidization by "high profits" made in Nicchia. (C. 5). Mercurian manufacturers declared that their survival was at stake with the further prospect of Nicchian manufacturers later relocating elsewhere. (C. 5).

In October, 1989, Mercuria amended its Law Against Restraints of Competition. It 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.

Each violation of the Mercurian competition law may be subject to fines up to 10% of annual sales. (C. 6).

Only after intense but abortive consultations with the Nicchian government did the Mercurian Minister of Economic Affairs instruct the Cartel Office to initiate competition law proceedings against Comcar and ELEC under the new Amendment. (C. 6). The Nicchian manufacturers were found in violation of law by 1) allocating export markets, 2) restricting access to the Nicchian EMO market with non-competition restrictions by tying distribution and service functions and 3) fixing domestic prices of EMO's. (C. 6). The Order of the Cartel Office limited sales of Nicchian EMO's to 14% of the Mercurian EMO market for one year. (C. 6). The Supreme Court of Mercuria affirmed the Order of the Cartel Office, holding that Mercurian statutory law superseded the international law defenses asserted by Comcar and ELEC. (C. 7). Although Nicchia protested these measures, Nicchia stated that it would continue to observe the 14% ceiling with respect to imported goods. (C. 7).

In September 1990, the two governments submitted the matter for adjudication to the International Court of Justice. (C. 8). Both Mercuria and Nicchia are Contracting Parties to the GATT as in force on March 1, 1969 and the Vienna Convention on the Law of Treaties. (C. 9).

QUESTIONS PRESENTED

- I. Whether Mercuria violated conventional law when it set reasonable quantitative limits on Nicchian EMO imports to protect its EMO economy industry.
- II. Whether Mercuria had jurisdiction to enforce the Cartel Office's Order when Nicchian conduct had effects in Mercuria.
- III. Whether Nicchia violated customary law when it engaged in business practices contrary to the Restrictive Business Practices Code.

SUMMARY OF ARGUMENT

The Mercurian Competition Law does not violate international law or the General Agreement on Tariffs and Trade (GATT). Although Mercuria imposed quantitative restrictions on Nicchian EMO's imported into the Mercuria market, Nicchia agreed to this limitation. Also, the restriction was a valid exercise of the escape clause of the GATT. Under this provision, Mercuria was permitted to impose trade limitations for the following reasons: infiltration of Nicchian EMO's in 1983 was unforeseeable when Mercuria entered the GATT in or before 1969; this increase caused serious harm to the Mercurian EMO industry; and obligations incurred under the GATT caused this injury. Additionally, the Mercurian Law satisfies the most favored nation clause of the GATT since it reasonably limits imports in a non-discriminatory fashion.

Mercuria has jurisdiction over the acts of the Nicchian manufacturers. Although the practices undertaken by Comcar and ELEC--allocating export markets, price fixing, and tying arrangements--occurred in Nicchia, they affected Mercuria by decreased competition and limited access to the Nicchian market. Since Nicchian manufacturer's restrictive business practices led to these intended and substantial impacts within Mercuria, these practices may be reached under the effects doctrine.

Because the International Court of Justice does not review domestic court decisions, the decision of the Mercurian Supreme Court upholding the Cartel Office's sanctions is irrelevant. Mercuria's actions, however, are still valid under international law since Comcar and ELEC have no international law defenses available. The Act of State doctrine prohibits a State from judging the act of another sovereign nation; this defense does not apply since the Order of the Mercurian Cartel Office pertains to Nicchian

corporations, not the government itself. Additionally, the defense of sovereign foreign compulsion is not available because there is no evidence that the Nicchian government compelled Comcar and ELEC to engage in restrictive business practices.

By administratively supporting restrictive business practices, the Nicchian government violated customary international law. Currently, the Nicchian government requires non-competition restrictions in EMO distributorship agreements as well as tying the distribution and service functions. These requirements effectively restrict the Nicchian EMO market to domestic manufacturers since foreign companies are foreclosed from supplying the essential batteries. The Nicchian government also condones the price fixing and export market allocation undertaken by Comcar and ELEC.

The actions by Nicchian manufacturers--condoned by their government--violate the customary international law of free trade as codified in the Restrictive Business Practices Code (the Code). The generality of State practice prior to the Code's adoption and the basic obligation felt by States to liberalize trade indicate that the Code is international law. Additionally, the unanimous adoption of the Code by U.N. Member States reinforces the Code's status. Finally, subsequent actions by States to regulate restrictive business practices lead to the undeniable conclusion that free trade among States is international law.

Because Nicchia has restricted international trade within its own borders, its practices conflict with free trade. For this reason, Nicchia has an obligation to bring its practices into conformity with international law.

ARGUMENT

I. THE AMENDMENT TO THE MERCURIAN COMPETITION LAW COMPLIES WITH INTERNATIONAL LAW.

International law consists of principles demonstrated through conventions and customs.¹ Both Mercuria and Nicchia are Contracting Parties to a convention on international commerce, the General Agreement on Tariffs and Trade (GATT).² The GATT contains certain provisions governing the imposition of quantitative restrictions such as quotas.³ No custom concerning quantitative restrictions has arisen outside the framework of the GATT.⁴ Therefore, only the GATT and any bilateral agreements between Nicchia and Mercuria govern any controversy surrounding quantitative restrictions.

Under the GATT, disputes which cannot be settled amicably are submitted to "panels" for resolution.⁵ Subsequent dispute settlement panels often cite the decisions of previous panels.⁶ Since the decisions are often adopted by the full assembly of CONTRACTING PARTIES,⁷ they serve as strong evidence that the Contracting Parties consider them as an interpretation of the treaty under

¹I. Brownlie, Principles of Public International Law 1-2 (2d ed. 1973).

²The General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

³Id. at art. XI.

⁴Swarzenburger, The Principles and Standards of International Economic Law, 117 Reuil Des Cours 5, 14 (1988).

⁵Hurd, Some Reflections on the Nature of Litigation Between Governments, 72 Minn. L. Rev. 211, 214 (1987).

⁶J. Jackson, The World Trading System 90 (1989).

⁷Id.

the Vienna Convention of the Law of Treaties.⁸

A. Mercuria has not violated the GATT.

Nicchia has voluntarily agreed to limit its exports to 14% of the Mercurian market.⁹ Such agreements are common among the Contracting Parties.¹⁰ Mercuria's Amendment to its Law Against Restraints of Competition (Competition Law) has not been used to withdraw a GATT concession from Nicchia. Nicchia previously announced its intention not to exceed the 14% ceiling, and as a result, they have suffered no harm.

B. Mercuria's withdrawal of the privileges granted to Nicchia under Article XI of the GATT was a valid exercise of the safeguards clause in Article XIX of the GATT.

The Article XIX safeguards exception allows a nation to withdraw a trade concession granted by the GATT in time of emergency.¹¹ Since the Mercurian Amendment allows the imposition of quantitative restrictions, it conflicts with Article XI of the GATT. This tension, however, does not violate the treaty because the Amendment is a valid exercise of Mercuria's rights under

⁸J. Jackson, Restructuring the GATT 57-58 (1990) (interpreting the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] and the GATT, supra note 2, at art. XXV).

⁹Compromis of Case Concerning the International Trade in Electromobiles, (Nicchia v. Mercuria) signed as clarified Jan. 6, 1991 at 4, 9 [hereinafter Compromis].

¹⁰G. Curzon and V. Curzon, The Management of Trade Relations in the GATT, in Politics and Trade 225 (A. Shonfeld ed. 1976). The agreements are generally known as Voluntary Export Restraints and are used as a diplomatic and political tool to avoid international legal disputes which may arise if the importing country is forced to act unilaterally.

¹¹GATT, supra note 2, art. XIX, para. 1. This clause is often referred to as the "escape clause" or "safeguards clause."

Article XIX.¹²

To invoke Article XIX a State must show 1) that an unforeseen circumstance has caused an increase in imports, 2) that the increase in imports has caused or threatens to cause a serious injury and 3) that the increase in imports was caused by an obligation incurred under the GATT.¹³ Because each element has been satisfied, Mercuria has properly invoked the Article XIX safeguards exception.

1. The increase in imports was unforeseeable.

In Hatters' Fur,¹⁴ the United States invoked Article XIX to withdraw a GATT concession granted to Czechoslovakia. The injury complained of was an increase in the volume of imported Czechoslovakian felt hats.¹⁵ The working party decided that although it was foreseeable that women's fashions change, the degree and extent of change was unforeseeable.¹⁶ In the current case, Mercuria could not have foreseen the rapid growth in Nicchian EMO imports when it signed the GATT in or before 1969.¹⁷ Nicchia did not begin to develop an

¹²K. Dam, The GATT, Law and International Economic Organization 105-106 (1970). See also Trade Act of 1974 § 201, 19 U.S.C. § 2411 (allowing imposition of quotas in response to unfair trade practices).

¹³GATT, supra note 2, art. XIX, para. 1(a).

¹⁴GATT, Report on the Withdrawal by the United States of a Tariff Concession Under Article XIX of the General Assembly on Tariffs and Trade, GATT Doc. CP/106 (Oct. 1951) [hereinafter Hatters Fur].

¹⁵Id. at para. 6.

¹⁶Id. at para. 12. See also GATT, Australian Subsidy on Ammonium Sulfate Case in 2 Basic Instrument and Selected Documents, 188, 193 (1950) (applying a similar rule to an action involving Chile and Australia).

¹⁷Compromis, at 9. Nicchia and Mercuria are bound by the GATT as it stood on March 1, 1969.

EMO industry until 1972 and did not begin exporting EMO's until 1983.¹⁸ Mercuria could not have foreseen the Nicchian threat to the Mercurian EMO industry when Mercuria entered into the GATT at least fourteen years earlier.

2. Nicchian expansion had caused or threatened to cause a serious injury to Mercurian economic interests.

A large and rapidly increasing volume of imports with a corresponding domestic market reduction demonstrates injury.¹⁹ Nicchian EMO imports have taken 10% of the Mercurian EMO market in a span of only six years.²⁰ This potentially destructive trend in the Mercurian EMO market threatens to cause serious injury to the Mercurian EMO industry. Through application of the Mercurian Amendment, Mercuria only seeks to prevent the loss of more than an additional 4% of its market in a single year. Thus, the purpose of the quantitative restriction is to prevent an overly rapid decline and unwarranted market disruption in the Mercurian EMO industry. Furthermore, all reasonable inferences are drawn in favor of the party invoking Article XIX's protection, in this case Mercuria.²¹ To overcome the reasonable inferences in favor of Mercuria, Nicchia must prove that the imports did not cause the injury.²² Nicchia has failed to do so. Nicchia provides no alternative explanation for

¹⁸Id. at 2.

¹⁹Hatters' Fur, supra note 14, at para. 30.

²⁰Compromis, at 3-4.

²¹Hatters' Fur, supra note 14, at para. 30. The issue of who bears the burden of proof is discussed by Dam, supra note 12, at 102-103.

²²In a decision by the United States International Trade Commission, Japanese automobile manufacturers were able to satisfy an identical burden under an American statute by supplying statistical evidence of alternative solutions. U.S. Int'l Trade Comm'n, Pub. No. 1110, Certain Motor Vehicles and Certain Chassis and Bodies Therefore, Report to the President on FNV no. TA-20-44 (1980).

the rapid decline of the Mercurian EMO industry other than the shift of 10% of the Mercurian market to Nicchian EMO producers.²³

3. The increase in imports was caused by an obligation incurred under the GATT.

Concessions granted by Mercuria under Article XI of the GATT deprive Mercuria of the right to protect itself from unfair Nicchian competition. Because in the absence of these concessions Mercuria would be free to set quantitative restrictions on Nicchian EMO imports,²⁴ the GATT obligation to eliminate such quantitative restrictions and unconditionally accept Nicchian EMO imports has caused an increase in these imports.

The Contracting Parties have liberally interpreted the requirement that a GATT obligation cause the increase in imports.²⁵ Even though Mercuria has met the requirement that GATT obligations caused the increase in imports, this requirement has been effectively disregarded by States interpreting Article XIX. Contracting Parties have successfully invoked Article XIX and satisfied this requirement in some cases more than thirty years after incurring a GATT obligation (i.e., signing the GATT).²⁶ The frequency with which Article XIX

²³Cf. Compromis.

²⁴A. Lowenfeld, Public Controls on International Trade § 2.4(c)(v) (1983) (noting that quotas were in widespread use at the time the GATT was adopted).

²⁵See Hudec, GATT Dispute Settlement After the Tokyo Round: An Unfinished Business, 13 Cornell Int'l L.J. 145, 161 (1980) (noting that all the criterion of Article XIX, except the serious injury requirement, have been virtually forgotten).

²⁶GATT, Analytical Index-on the Drafting, Interpretation and Application of the Articles of the General Agreement at XIX-65 (1989) (listing a two year French quota on digital watches introduced on April 20, 1984, 37 years after France signed the GATT).

is invoked²⁷ and the lack of any statement by an panel or working party suggesting a stricter interpretation, establishes lax treatment of the causal requirement as a state practice regarding the interpretation of the treaty.²⁸ Even publicists who support more rigorous enforcement of the GATT's requirements acknowledge that their suggestions are contrary to the liberal interpretations and actions of the Contracting Parties in Article XIX.²⁹ Both Nicchia and Mercuria are contracting parties to the Vienna Convention on the Law of Treaties, which contains an express rule that any treaty between States shall be interpreted to include any "subsequent practice in the application of the treaty which establishes their agreement regarding its interpretation."³⁰ Therefore, because Mercuria could avert the serious harm to its economy from Nicchian imports but for obligations incurred under Article XI, the GATT obligation caused the threat of serious injury and Article XIX may be properly invoked.

- C. The Mercurian Amendment does not offend the most-favored-nation clause contained in Article I of the GATT or the Article XIII prohibition against non-discriminatory practices.

The Most-Favored-Nation (MFN) clause of Article I of the GATT provides

²⁷Id. at XIX-28-XIX-66 (listing 125 invocations of Article XIX between Jan. 1950 and Nov. 1984).

²⁸Jackson, supra note 8, at 68-69. See also V. Muhammad, The Legal Framework of World Trade 192 (1958) (concluding that the escape clauses in the GATT were already "very wide" only 11 years after the agreement was concluded).

²⁹J. Jackson, World Trade Law and the Law of GATT 559 (1969). See also Savemilch, Market Safeguards Against Import Competition, 14 Case W. Res. J. Int'l L. 83, 98 (1985) (concluding that simply showing a rise in imports of an item covered by a GATT obligation may be sufficient to satisfy the causal element).

³⁰Vienna Convention, supra note 8, at art. 31(3)(b).

that each Contracting Party is to be treated equally.³¹ Similarly, Article XIII of the GATT prohibits the discriminatory application of quantitative restraints.³² The Mercurian Amendment satisfies both provisions because it sets reasonable limits on importers in a non-discriminatory fashion.

The Amendment only allows the Cartel Office to set quantitative limits on foreign-owned companies that violate the Mercurian Competition Law.³³ All corporations that violate the Mercurian Competition Law, including Nicchian-owned corporations, are subject to restrictions. Since no other foreign-owned corporations receive more favorable treatment than Nicchian corporations, the law is non-discriminatory and in conformity with both Article I's MFN provision and Article XIII.

D. Production in Mercuria by foreign corporations is not covered by the GATT.

The GATT does not apply to any limitation set on Nicchian investment in Mercuria because the treaty pertains only to the trade in goods across international boundaries.³⁴ The GATT does not prevent Mercuria from protecting its economy by screening or capping foreign investments.³⁵ Customary law does not require a free flow of investment.³⁶ Because neither

³¹GATT, supra note 2, at art. I, para. 1.

³²GATT, supra note 2, at art. XIII.

³³Compromis, at 5. The Amendment refers to "foreign persons," not any specific nationality.

³⁴Cf. GATT, supra note 2.

³⁵Id. The GATT contains no provisions on investment.

³⁶See Friedmann, General Course in Public International Law, 117 Recueil Des Cours 39, 177 (1969) (noting that countries often subject foreign investment to conditions including initial permission to invest).

the GATT nor customary law definitively addresses Nicchian investment in Mercuria, the Mercurian Amendment is in conformity with international law.

II. THE ACTIONS OF THE MERCURIAN CARTEL OFFICE WERE WITHIN THE JURISDICTION OF THE MERCURIAN GOVERNMENT AND DID NOT VIOLATE NICCHIAN SOVEREIGNTY.

A. Jurisdiction may be exercised for acts which occur beyond a State's borders.

This Court's predecessor recognized in the Case of the S.S. Lotus³⁷ that a State may punish certain actions which violate its laws even if those actions occur outside its borders.³⁸ As the court noted, the issue is not whether international law permits Mercuria to sanction the actions of Nicchian corporations, but whether international law prevents the Mercurian action.³⁹

The violations of the Mercurian Competition Law cited by the Cartel Office were conducted in Nicchia but produced and continue to produce substantial effects in Mercuria. First, the allocation of export markets by Nicchian EMO manufacturers unfairly limits competition among Nicchian manufactures in the Mercurian market. Second, price fixing in Nicchia's domestic EMO market maintains artificially high profit margins,⁴⁰ which allow Nicchian manufacturers to subsidize their EMO exports efforts. Third, the tying arrangement between manufacturing, distribution and maintenance erects a barrier which forecloses the Nicchian market to foreign competition.⁴¹

B. Objective Territorial Jurisdiction is acknowledged state practice for regulating restrictive business practices.

³⁷Case of the S.S. Lotus, (Fr. v. Turk), 1927 P.C.I.J. (Ser. A) no. 10 (Sept. 7).

³⁸Id. at 19.

³⁹Id. at 17.

⁴⁰Compromis, at 5.

⁴¹Id. at 3.

Objective territorial jurisdiction is the punishment of crimes "which are commenced outside the State, but consummated within its territory."⁴² Crimes generally consist of well-defined elements which make an activity illegal.⁴³ If any element occurs within a State, the State has jurisdiction over the crime. Statutes criminalizing restrictive business practices often do not contain a specific list of the constituent elements which causes difficulty in determining who has proper jurisdiction.⁴⁴ As a result, several different ways of dealing with extraterritorial jurisdiction have arisen.

C. Nicchian Companies engaging in restrictive business practices can be reached under the "effects doctrine".

The "effects doctrine"⁴⁵ permits a State to prosecute a party whose unfair business practices outside its borders produce intended and substantial effects within the State's borders.⁴⁶ Several States have adopted this position in their legal codes.⁴⁷ The most recent trend is a modified form of

⁴²Research in International Law under the Auspices of the Faculty of the Harvard Law School, Draft Convention on Jurisdiction with Respect to Crime, 29 Am. J. Int'l. L. 439, 487 (1935).

⁴³See 2 M. Bassiouni and V. Nanda, A Treatise on International Criminal Law § 4.2 (1973) (describing the manner used to determine the location of most criminal jurisdiction).

⁴⁴J.G. Castel, Extraterritoriality in International Trade 12 (1988).

⁴⁵The effects doctrine was first applied in United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) [hereinafter ALCOA].

⁴⁶Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 Brit. Y.B. of Int'l L. 146, 165 (1957) (quoting an extensive passage from ALCOA leading to this conclusion).

⁴⁷Denmark, Austria, and the Federal Republic of Germany all have legislation which allows the regulation of effects. Brownlie, supra note 1, at 300. See also E. Nerip, Extraterritorial Control of Competition under International Law 298 (1983) (discussing sec. 2 of the Swedish Competition Act which employ the "principle of effects" in determining jurisdiction).

the effects doctrine established in the Timberlane case.⁴⁸ Under the Timberlane test, the effects must be substantial,⁴⁹ and the court must take into account the interests of all States involved.⁵⁰ The equities of any balancing test are in Mercuria's favor. Nicchia's interest in sheltering its EMO industry from competition is minimal because Nicchia's mature and thriving EMO industry no longer needs protection. When the Nicchian manufacturers, with the aid of their government, entered into these restrictive business practices eighteen years ago, it was in order to rapidly develop a new industry.⁵¹ The continuation of these practices at this advanced stage allows Nicchian corporations to enhance their position in the Mercurian market while operating from a large, affluent Nicchian EMO market that is a safe haven from free competition.⁵²

1. States that have not adopted the pure effects doctrine have adopted numerous other forms of extraterritorial jurisdiction.

Nations that have not adopted the effects doctrine have acknowledged the need for some application of extraterritorial jurisdiction.⁵³ The question is

⁴⁸Timberlane Lumber Co. v. Bank of America N.T. and S.A., 549 F.2d 597 (9th Cir. 1977) [hereinafter Timberlane].

⁴⁹A. Neale and M. Stephens, International Business and National Jurisdiction 37 (1988).

⁵⁰Id. United States courts have conducted the balancing test using a variety of factors and questions, see Gill, Two Cheers for Timberlane, 10 Revue Suisse Du Droit International De La Concurrence 3, 15-20 (Sept. 1980).

⁵¹Compromis, at 2.

⁵²Id. The population of Nicchia is approximately 80 million.

⁵³Eg. Address by the Attorney-General of Australia to the International Law Assoc., Sydney, 23 April 1982 reprinted in P. O'Keefe, Australia in International Commercial Law in International Law in Australia (Ed. K. Ryan) 340 (1984).

not whether any exercise of extraterritorial jurisdiction is permitted under international law, but instead how much is permitted.⁵⁴ For example, some States, which have laws that regulate "effects,"⁵⁵ have interpreted those statutes narrowly to avoid interference with actions that, unlike market allocations, occur entirely abroad.⁵⁶ Other States' laws reach only effects which constitute "acts" within their borders.⁵⁷ Again, this second group has merely determined that the interests of other States outweigh their own. These States have, in effect, performed the balancing test of Timberlane, since the legal disputes are dismissed for what the jurisdictions consider a lack of sufficient contact. All of these States support some measure of extraterritorial jurisdiction.⁵⁸

2. Mercuria may reach the Nicchian corporations under the Wood Pulp test of extraterritorial jurisdiction.

⁵⁴Lotus, supra note 37. See Limbin Kteik Tin Lat v. Union of Burma, Decision of the Dist. Ct. of Tokyo of Jan. 1954.

⁵⁵German Law Against Restraints of Competition [GWB] sec. 98(2)(i) (ed. Fed. Regulation Ger.), applies the "act" to all restraints of competition which take effect in the territory by this act even if they are arranged outside that territory.

⁵⁶Philip Morris v. Bundeskartellamt, [1984] ECC 393 (Court of Appeal, Berlin) (Cartel Division) (1983) (deciding that the Federal Republic's Cartel Office could not interfere with the merger of two foreign corporations owned German subsidiaries. The court did state, however, that the subsidiaries could be pursued as if they had conducted an independent merger).

⁵⁷Cf. Castel, supra note 44, at 30-48 (summarizing Canada's position opposing American civil antitrust actions, but acknowledging the need for some control in its own legislation).

⁵⁸A prominent British writer on the subject has stated the United Kingdom, the most vocal opponent of the pure effects doctrine, has never intended to deny that there are some effects of foreign anti-competitive actions that states may treat as violations of their own law. Mann, The Doctrine of International Jurisdiction Revisited After Twenty Years, 186 Reuil des Cours 1, 86 (1984)

In the Wood Pulp Case,⁵⁹ the European Court of Justice upheld the European Commission's ruling on a restrictive business arrangement entered into outside the Community. Although the court did not expressly adopt the effects doctrine, the test it established is even broader than the Timberlane test⁶⁰ because it does not consider the interests of other affected nations.⁶¹

In Wood Pulp the court established a two-prong test. First, an agreement must be entered into between two or more parties. Second, the agreement must be implemented within the State's territory. The first prong is satisfied because the five Nicchian EMO manufacturers have concluded several agreements concerning competition which violate Mercuria's Competition Law. The agreement to allocate markets satisfies the second prong because it was implemented in Mercuria.⁶²

D. No international law defenses are available to the Nicchian corporations.

1. The decision of the Mercurian Supreme Court is not before this Court.

Whether Mercurian constitutional law may supercede international law defenses is not an issue necessary to the disposition of this case. The request that the parties submitted to the Court asks the Court to "vacate the

⁵⁹A. Ahlström Osakeyhtiö v. Commission of the European Communities, [1988] 4 Comm. Mkt. L.R. 901 (1988)[hereinafter Wood Pulp].

⁶⁰Messen, Competition and Competition Laws, 10 Nw. J. Int'l. L. & Bus. 17, 26 (1989).

⁶¹Cf. Wood Pulp, supra note 59. (No mention is made of taking into account the interests of other effected governments).

⁶²Implement is defined as "carry into effect, perform, complete." Oxford English Dictionary, Vol. 7, 722 (2nd ed. 1989).

Order of the Cartel Office, as affirmed by the Mercurian Supreme Court."⁶³
This Court is not a court of appeals for domestic court decisions. Thus, the decision of the Mercurian Court is irrelevant in determining the international legality of the Cartel Office Order. If the Court rules against Mercuria, it will be incumbent upon Mercuria to bring its laws into conformity with international law.

2. The "Act of State doctrine" is not available to private Nicchian corporations.

The "Act of State doctrine" developed from the principle of sovereign equality of nations.⁶⁴ The doctrine precludes a State's courts from judging the acts of another sovereign. The Act of State doctrine is not available in this dispute because the Cartel Office Order pertains to corporations, not the Nicchian government.⁶⁵ The companies are not instrumentalities of the government under the meaning of the doctrine.⁶⁶

3. Nicchian manufacturers cannot rely on the "foreign sovereign compulsion" defense because the Nicchian government did not compel price-fixing or export market allocation.

Under the defense of "foreign sovereign compulsion," if a sovereign State compels a domestic corporation to commit an act, no other State may punish

⁶³Compromis, at 8.

⁶⁴M. Shaw, International Law 120 (2d ed. 1986).

⁶⁵Timberlane, supra note 48, at 608. The defendant Honduran corporations made exactly the same argument the Nicchian corporations have made and were denied the defense on the grounds that the Honduran government was not a party.

⁶⁶See S. Sucharitkul, State Immunities and Trading Activities in International Law 126-131 (1959) (discussing the status of non-government owned corporations under the doctrine).

that action.⁶⁷ The Nicchian government did not compel its nationals to break Mercurian laws. In cases where such compulsion does take place, it is standard for one sovereign to inform the other of the compulsion through amicus briefs or diplomatic notes.⁶⁸ Such declarations are conspicuous by their absence in this case. The compromis speaks only about "policy" and "arrangement of internal markets."⁶⁹ This arrangement has continued amicably and with no formal enforcement structure for eighteen years. If the corporations were compelled to participate in the Nicchian cartel arrangement, the Nicchian government would have stated it in the compromis. No indications exist that Comcar and ELEC's participation in the Nicchian cartel was involuntary. They can assert no international law defense against Mercurian jurisdiction.

III. THE NICCHIAN GOVERNMENT VIOLATED CUSTOMARY INTERNATIONAL LAW BY ADMINISTRATIVELY SUPPORTING RESTRICTIVE BUSINESS PRACTICES.

If a United Nations State violates customary law, that State has an obligation to bring its practices into conformity with international law.⁷⁰ Nicchia's EMO policy violated the Restrictive Business Practices Code

⁶⁷United States v. The Watchmakers of Switzerland Information 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).

⁶⁸Brief for the governments of Australia, Canada, France and the United Kingdom as Amici Curiae in Support of Petitioners at 6, Matsushita Elec. Inds. Co., Ltd. v. Zenith, 475 U.S. 574 (1986) (expressing concern over the failure of the court of appeals to give conclusive effect to statements by the Japanese government that it compelled certain behavior).

⁶⁹Compromis, at 3.

⁷⁰Brownlie, supra note 1, at 38.

(Code).⁷¹ Because the Code is customary law, Nicchia has an obligation to discontinue their restrictive business practices and bring them into conformity with the Code.

The Nicchian government has violated customary international law by encouraging the use of restrictive business practices which are detrimental to international free trade. By requiring non-competition restrictions in distributorship agreements and by tying the distributorship and service functions, Nicchia effectively closed its market to foreign goods.⁷² Since Nicchia does not assert a legitimate business purpose for the tying functions, such as quality, this arrangement clearly violated the Code.⁷³ Nicchia further violated the Code by arranging meetings where the five manufacturers allocated EMO export markets and conspired to fix prices.⁷⁴ Moreover, to obtain a greater market share abroad, Nicchian EMO manufacturers used shareholder profits to subsidize EMO exports to Mercuria.⁷⁵ These practices, by undermining trade liberalization, violated basic principles embodied in the Code.⁷⁶

⁷¹United Nations Conference on Restrictive Business Practices, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practice, U.N. Doc. TD/RBP/Conf./10 (1980) [hereinafter Code].

⁷²Compromis, at 3.

⁷³UNCTAD, Consideration of the Revised Draft of a Model Law or Laws on Restrictive Business Practices, U.N. Doc. TD/B/RBP/15 Rev. 1 Dec. II(e)(108) (1984) [hereinafter Commentary].

⁷⁴Id. at II (a) and (c) (describing price fixing and market allocation as in restrictive business practices prohibited by the Code).

⁷⁵Compromis, at 3.

⁷⁶Code, supra note 71, sec. A(1) (listing fundamental principles of the Code).

For the Code to rise to the level of customary law two elements must be met: 1) generality of State practice and 2) "opinio juris."⁷⁷ Opinio juris is the belief of States that they must adhere to the practice.⁷⁸ Because the Code satisfies these elements, it is customary law.

A. Nicchia violated customary law as codified in the Restrictive Business Practices Code.

The U.N. General Assembly unanimously adopted by resolution in 1980 the Restrictive Business Practices Code.⁷⁹ A resolution may "codif[y] ... existing international custom by declaring that a rule has previously become generally accepted."⁸⁰ Due to the growing interdependence of nations, States realized that an international code controlling restrictive business practices was necessary for both developed and developing States.⁸¹ The Code's success, despite philosophical differences among U.N. Member States, is attributed to the overall consensus between developed and developing countries on "a relatively narrow, technical set of principles generally considered detrimental to free trade."⁸² The ability to agree on these code provision

⁷⁷Shaw, supra note 64, at 61.

⁷⁸Id.

⁷⁹Code, supra note 71.

⁸⁰Falk, On the Quasi-Legislative Competence of the General Assembly, 60 Am. J. Int'l L. 782, 785 (1965).

⁸¹Czako, Recent Development: The Set of Multilaterally Agreed Principles and Rules for Control Restrictive Business Practice, 13 L. Pol'y & Int'l Bus. 313, 336 (1981) (noting the growing cooperation between developed and developing countries in relation to their mutual economic interest).

⁸²Benson, The U.N. Code on Restrictive Business Practices: An International Antitrust Code is Born, 30 Am. U.L. Rev. 1031, 1032 (1981) (discussing how many developed countries desired free competition and developing countries desired protection from transnational corporations).

suggest the presence of a previously established customary law. Therefore, the Code embodied preexisting customs of international law which prohibit restrictive business practices.

1. The antitrust practices prior to 1980 demonstrated generality of practice.

To satisfy the first element of international customary law, generality of practice, two conditions must be met.⁸³ First, a reasonable number of States; belonging to various regional groups, must adhere to the practice.⁸⁴ Second, other States not adhering to the practice must at least acquiesce to it before the practice will rise to customary law.⁸⁵ Because a reasonable number of States of various regional groups adhered to the antitrust legislative practices and because others not adhering to antitrust legislation at least have acquiesced to it, antitrust legislation is customary law.

Many countries of different regional areas had antitrust legislation prior to the 1980 adoption of the Code.⁸⁶ Almost all of the free market

⁸³Sohn, Generally Accepted Rules of International Law, 61 Wash. L. Rev. 1073, 1074 (1986).

⁸⁴Id.

⁸⁵Id.

⁸⁶U.N. publications on restrictive business practices note that the following countries had legislation dealing with these practices prior to 1980: the Federal Republic of Germany, India, Korea, Pakistan, New Zealand, Norway, Denmark, Japan, France Annual Report 1981 on Legislative and Other Developments in the Control of Restrictive Business Practices, U.N. Doc. TD/B/RBP/9 (1982); Hungary and Switzerland Annual Report 1983-1984 on Legislative and Other Developments in the Control of Restrictive Business Practices, U.N. Doc. TD/B/RBP/29 (1985); Senegal Restrictive Business Practices Information, U.N. Doc. TD/B/RBP/INF.26 (1990); Ireland Annual Report 1989 on Legislative and other Developments in the Control of Restrictive Business Practices, U.N. Doc. TD/B/RBP/61 (1989); Egypt, Philippines, Sri Lanka, Syria, and the United States of America Review of the Operation of and Experience Arising from the Application and Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules, U.N. Doc. TD/B/RBP/14 (1983); Belgium and Sweden Review of the Operation of and Experience Arising

economies had antitrust legislation prior to 1980.⁸⁷ Developing South American countries such as Brazil and Argentina had antitrust legislation prior to the enactment of the Code.⁸⁸ Even Yugoslavia, a communist country, had antitrust legislation.⁸⁹

The lack of protest from other States regarding enforcement of antitrust legislation as embodied in the Code satisfied the necessary acquiescence requirement. Silence is acquiescence.⁹⁰ Because antitrust legislation was prevalent among a number of different regional groups prior to 1980 and because States not adhering to antitrust have not objected to it, antitrust practices prior to 1980 demonstrate generality of practice.

2. Antitrust practices prior to 1980 demonstrated the necessary evidence that the practices are opinio juris.

Opinio juris may be inferred upon the basis of material acts or omissions by the States.⁹¹ Declarations of State officials are not necessary to prove the subjective basis for each State's motives.⁹² The fact that States enacted antitrust legislation throughout various regions suggests in

from the Application and Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules, U.N. Doc. TD/B/RBP/14/Add.1 (1983).

⁸⁷Grendall, The Antitrust Legislation of the United States, The European Economic Community, Germany and Japan, 29 Int'l & Comp. L.Q. 64 (1980).

⁸⁸Miller & Davidow, Antitrust at the United Nations: A Tale of Two Codes, 34 Stan. L. Rev. 347, 352 (1982) (discussing the rapid development of antitrust legislation since 1954).

⁸⁹Id.

⁹⁰Shaw, supra note 64, at 74 (noting that the absence of a protest implies agreement).

⁹¹Restatement (Third) The Foreign Relations Law of the United States § 102 comment c (1987) [hereinafter Restatement].

⁹²Id.

itself a sense of obligation to promote free trade.

Those States which did not have legislation regarding restrictive business practices still give evidence of opinio juris through their acquiescence.⁹³ "[A]ctual protest" is necessary before the evolutionary process of customary law is broken.⁹⁴ To the extent that antitrust legislation was enforced in the domestic arena, there has been no protest by other countries. Therefore, the Code is a codification of preexisting customary law.

B. The Restrictive Business Practices Code upon adoption instantly became customary law.

Resolutions of the General Assembly have considerable weight as evidence of customary law because they are the "leading force supporting obligations established by international law."⁹⁵ Even if the Code does not codify the customary law of antitrust legislation to promote free trade, the Code upon its adoption became instant customary law. Because resolutions of the United Nations reflect a consensus among States, they express "the common will of member countries"⁹⁶ and thus provide important evidence of opinio juris.

Although some rules of customary law during their early development are not clearly identifiable as being based on a sense of obligation, a resolution

⁹³Shaw, supra note 64, at 74.

⁹⁴Id.

⁹⁵Sloan, The Binding Force of a "Recommendation" of the General Assembly of the United Nations, Brit. Y.B. Int'l 31, 22-33 (1948) (explaining how U.N. resolutions reflect a collective world conscience).

⁹⁶Higashi, The Role of Resolutions of the United Nations General Assembly in the Formation Process of International Customary Law, 24 Japanese Ann. of Int'l L. 1, 11 (1982).

may provide evidence of the necessary opinio juris.⁹⁷ States may have lacked the technological or geographical basis to have taken part in formulation of the general practice,⁹⁸ but may still express their support through U.N. resolutions.⁹⁹ In the present case, all States expressed their acceptance of the Code which is evidenced by their consensus on the resolution.

Adopting the Code by consensus, U.N. Member States demonstrated strong approval for its principles. Many states attach "special significance" to resolutions which are unanimously supported.¹⁰⁰ Statements and votes of governments are types of State practices which reflect the opinio juris.¹⁰¹ Indeed, resolutions may simply identify a "latent" opinio juris which gives the Code a force quite apart from non-binding resolution form.¹⁰² If the general practice of states prior to the Code's adoption was not sufficient to infer the requisite opinio juris, the unanimous support of the Code in resolution form is sufficient. Therefore, the Code became instant customary law upon its adoption and Nicchia's violation of the Code was a violation of customary law.

⁹⁷Cheng, United Nations Resolution on Instant Customary Law, 5 Indian J. Int'l L. 23, 33 (1965) (describing how a resolution not only provides evidence of the contents of a rule, but also the necessary opinio juris).

⁹⁸D. Amato, The Concept of Custom, 42 (1971).

⁹⁹Id.

¹⁰⁰Cheng, supra note 97, at 33. (describing the sentiments of several delegates with regard to their feelings of legal obligation with regard to the space law).

¹⁰¹Restatement, supra note 91, comment b and comment c.

¹⁰²Cheng, supra note 97, at 58.

C. Nicchia violated customary law as developed since the adoption of the U.N. Restrictive Business Practice Code.

1. The Code's adoption in 1980 and subsequent state practice evidence that the Restrictive Business Practices Code has become customary international law.

Even if the adoption of the Code did not create instant customary law, its principles and guidelines have developed into customary law through state practice and obligation.

As shown above, previous state practice and the Code's unanimous adoption evidences the necessary elements. Yet further evidence that the Code has risen to the level of customary law is shown by subsequent inherence to the Code's provision. This suggests a feeling of obligation among the States to conform to the Code's provisions. Since 1980, numerous countries have enacted antitrust legislation.¹⁰³ Many States have amended preexisting antitrust legislation to bring it into compliance with the Code.¹⁰⁴ Clearly, numerous States have fulfilled their commitment to the Code's objectives.

Nicchia's administrative support of price fixing, market allocation,¹⁰⁵ and the tying arrangement distribution and service functions contrasts sharply

¹⁰³The following countries have enacted legislation to control restrictive business practices in response to the Code: Gabon Restrictive Business Practices Information, U.N. Doc. TD/B/RBP/INF. 25 (April 4, 1990); Peru, Cuba Annual Report 1983-1984 on Legislative and Other Developments in Developed and Developing Countries in Control of Restrictive Business Practices, supra note 86; Poland, Sri Lanka Legislative and other Developments in Developed and Developing Countries in Control of Restrictive Business Practices (1985-1989), U.N. Doc. TD/B/RBP/51 (1988); Kenya Restrictive Business Practices Information, U.N. Doc. TD/B/RBP/INF. 23 (1989).

¹⁰⁴India, Pakistan Annual Report 1983-1984 on Legislative and other Developments in Developed and Developing Countries in the Control of Restrictive Business Practices, supra note 86.

¹⁰⁵Commentary, supra note 73.

with the principles and guidelines outlined in the Code.¹⁰⁶ In adopting the Code, countries have made a moral commitment to carry out its objectives.¹⁰⁷ By allowing such restrictive business practices to continue, the Nicchian government undermines the principles to which they showed solemn commitment as a United Nations Member State. Because Nicchia has violated customary law, it has an obligation to discontinue its administrative support of restrictive business practices regulation.¹⁰⁸

2. The second necessary element of customary law, *opinio juris* is evidenced by the subsequent adherence to the Code.

By adopting the Code as a U.N. resolution, States have already shown the requisite *opinio juris*.¹⁰⁹ They have made a solemn expression endorsing the Code's principles.¹¹⁰ Combining a solemn expression and the subsequent adherence to the Code's policies elevates a non-binding code to the level of customary international law.¹¹¹ State practice following adoption of the Code confirms and supports its aims; thus, the actions by the States built [antitrust] customary law. Although passage of time is not necessary,

¹⁰⁶See supra note 71-75.

¹⁰⁷Oesterle, United Nations Conference on Restrictive Business Practices, 14 Cornell Int'l L.J. 1, 6 (1981) (discussing that states generally recognize a commitment to conform to the resolution in order to promote their reputation).

¹⁰⁸See Brownlie, supra note 1.

¹⁰⁹Cheng, supra note 97.

¹¹⁰Horn, International Rules for Multinational Enterprises The ICC, OECD, and ILO Industries, 30 Am. U.L. Rev. 923, 936-937 (1981) (noting that a solemn common expression of policy, such as those embodied in a resolution, can lead to future international law despite its non-binding form).

¹¹¹Cf. J. Jackson and W. Davey, International Economic Relations and Foreign Affairs 1054-1056 (2d ed. 1986).

adherence to a general practice over time substantiates the existence of opinio juris through the acquiescence of countries.¹¹²

An example of a feeling of obligation among the States to promote free trade is illustrated by the Structural Impediments Initiative (SII). The SII negotiated by the United States and Japan in 1989, is an agreement concerning the balance of trade between two economic superpowers. Greater access to the Japanese market is a central objective of SII.¹¹³ Not only does SII recognize the goal of greater domestic antitrust enforcement, it also affirms an obligation to eliminate barriers to free trade even within the State.¹¹⁴ The SII's existence and its principles further evidence a sense of obligation to maintain an open market. Nicchia's tying arrangement between Nicchian EMO manufacturers and EMO services has foreclosed potential foreign market entrance.¹¹⁵ Nicchia has violated the open market principles reflected in the SII and the Restrictive Business Practice Code, thereby violating customary law.

In developing customary law, silence can evidence opinio juris and dissent can defeat it.¹¹⁶ However, Nicchia not only failed to dissent, but

¹¹²Brownlie, supra note 1, at 6. (discussing examples of "instant customary law" in areas of airspace and the continental shelf).

¹¹³BNA, Key Elements of U.S.-Japan Structural Impediments Initiative Report, Antitrust & Trade Reg. Rep. No. 1473, 28-29 (July 25, 1990) (discussing objectives of SII).

¹¹⁴E.g., Id. at 28-29. Japan agreed to reallocate land resources to reduce the sharp rise in real estate prices which discouraged foreign business from entering the market. Japan also agreed they would increase infrastructure at airports to allow greater access to the Japanese market.

¹¹⁵Compromis, at 3.

¹¹⁶Shaw, supra note 64, at 74.

actually upheld the Code as enacted in 1980. Failure to comply with the Code which is viewed as obligatory by most States is an act in violation of customary law.

CONCLUSION

For all the foregoing reasons, the State of Mercuria request this honorable court to:

1. DECLARE the Cartel Office's Order valid as affirmed by the Supreme Court, including the limitation imposed on imports from Nicchia to Mercuria.
2. DECLARE that Nicchia is obligated to discontinue further restrictive business practices.

Respectfully submitted,

Team No. 186R