

THE 1991 PHILIP C. JESSUP INTERNATIONAL
LAW MOOT COURT COMPETITION

The Case Concerning the International Trade in
Electromobiles

IN THE INTERNATIONAL COURT OF JUSTICE

Republic of Nicchia, Applicant

v.

Republic of Mercuria, Respondent

February 1991
On Submission to the International Court of Justice

MEMORIAL FOR THE APPLICANT

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GATT MATERIALS

General Agreement on Tariffs and Trade, 55 U.N.T.S. 194.
(1947) (GATT). 1, 2

Introduction to GATT 2

GATT Article I 2, 12

GATT Article XI. 2, 3, 10

GATT Article XIII. 2, 14

GATT Article XVI 6

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GATT Article XIX 2, 11, 13

GATT Article XXIII 2, 4, 5, 6

GATT Article XXXVI 8, 10

GATT Article XXXVII. 10

GATT Negotiations, U.N. Doc. E/PC/T/W/170 (June 6, 1947). . . 4, 5

Agreement on Interpretation and Application of
Articles VI, XVI, and XXIII of the General Agreement on
Tariffs and Trade (GATT Subsidies Code) Geneva, 1979,
GATT, 26th Supp.B.I.S.D. 56 (1980) 6, 7

GATT Subsidies Code, Article 11 18

GATT Subsidies Code, Article 14 8, 10

GATT Subsidies Code, Annex. 7

TREATIES AND OTHER INTERNATIONAL AGREEMENTS

Organization for Economic Cooperation and Development, Guidelines
for Multinational Enterprises, 15 Int'l Legal Materials 969
(1976). 22

Treaty to Establish the European Economic Community, March 25,
1957, 298 U.N.T.S. 3. 20, 21

U.N. Conference on Restrictive Business Practices, The Set of
Multilaterally Agreed Equitable Principles and Rules for the

Control of Restrictive Business Practices, U.N. Doc.
TD/RBP/CONF/10 (May 2, 1980), reprinted in 19 Int'l Legal
Materials 813 (1980). 16, 18, 19, 20, 23

United Nations Charter, June 26, 1945, 59 Stat. 1031, T.S. No.
993, 3 Bevans 1153. 22, 23

CASES AND DECISIONS

The Australian Subsidy on Ammonium Sulphate, Report by
Contracting Parties GATT/CP.4/39 (April 3, 1950), reprinted in
GATT, B.I.S.D. Vol. II, 188 (1952). 9

Case Concerning Military and Paramilitary Activities in and
Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 99. 15

Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. 4. 15

Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3rd
Cir. 1979). 15, 24

Report on the Withdrawal by the United States of a Tariff
Concession Under Article XIX of the General Agreement on
Tariffs and Trade (Hatters' Fur Case), GATT/1951-3,
at 8-14 (Nov. 1951). 13

Review Panel Report, GATT 3d Supp. B.I.S.D. 224 (1955). 9

S.S. Lotus, 1927 P.C.I.J. Ser. A No. 10. 15, 16, 24, 25

Timberlane Lumber v. Bank of America, 549 F.2d 597 (9th Cir.
1976). 15, 24

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir.
1945). 15

W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 110 S.
Ct. 701 (1990). 24

TREATISES AND TEXTS

R. Hudec, The GATT Legal System and World Trade Diplomacy
(1976). 4, 9, 10

J. Jackson & W. Davies, Legal Problems of International Economic
Relations (1986). 8

E. Nerep, Extraterritorial Control of Competition Under
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Restatement (third) of Foreign Relations Law (1987) . . .	15, 24
M. Villiger, <u>Customary International Law and Treaties</u> (1985)	15

JOURNAL ARTICLES

Benson, <u>The U.N. Code on Restrictive Business Practices: An International Antitrust Code is Born</u> , 30 Am. U. L. Rev. 1031 (1981)	17, 24
---	--------

Bronkers, <u>Private Responses to Foreign Unfair Trade Practices - United States and EEC Complaint Procedures</u> , 6 Nw. J. Int'l L. & Bus. 651 (1984)	4
---	---

Davidow, <u>International Antitrust Codes: The Post-Acceptance Phase</u> , 26 Antitrust Bull. 567 (Fall 1981)	19
---	----

Davidow & Chiles, <u>The United States and the Issue of the binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices</u> , 72 Am. J. Int'l L. 247 (1978)	17
--	----

Fontheim and Gadbow, <u>Trade-Related Performance Requirements Under the GATT-MTN System and U.S. Law</u> , 14 Law & Pol'y Int'l Bus. 129 (1982)	3
--	---

Hudec, <u>Retaliation Against "Unreasonable" Foreign Trade Practices" The New Section 301 and GATT Nullification and Impairment</u> , 59 Minn. L. REV. 461, (1975)	4, 5, 9, 10
--	-------------

Kofele-Kale, <u>The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objectives of an Equitable World Trading System</u> , 18 Cal. W. Int'l L.J. 291, (1988)	13
--	----

Lochmann, <u>The Japanese Voluntary Restraint on Automobile Export: An Abandonment of the Free Trade Principles of the GATT and Free Market Principles of United States Antitrust Laws</u> , 27 Harv. Int'l L. 122 (1986)	11
---	----

Miller and Davidow, <u>Antitrust at the United Nations: A Tale of Two Codes</u> , 18 Stan. J. Int'l L. 347 (1982)	15
---	----

Stanford, <u>The Application of the Sherman Act to Conduct Outside the United States: A View From Abroad</u> , 11 Cornell Int'l L. J. 195 (1978)	24
--	----

MISCELLANEOUS

U.S. Int'l Trade Comm., Inv No. TA-201-44, Pub. No. 1110,2 I.T.R.D. 5241 (1980)	12
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STATEMENT OF JURISDICTION

Nicchia and Mercuria have agreed to submit this matter for adjudication to the International Court of Justice. The International Court of Justice is competent to hear this matter pursuant to article 36 of the Statute of the International Court of Justice.

STATEMENT OF FACTS

Nicchia is a developing country with a newly formed industrial base. (C.2).¹ One of Nicchia's key new industries is the manufacture of electromobiles (hereinafter EMO). (C.2). The burgeoning EMO industry has enhanced Nicchia's economy, and creating 350,000 new jobs in previously underdeveloped areas of Nicchia. (C.2).

EMO's run on batteries which require monthly maintenance or replacement. (C. 1). The maintenance can be performed at service centers operated by either EMO distributors or an independent service company. Mercuria is one of six industrialized countries manufacturing EMOs; Nicchia is one of three other newly industrialized countries manufacturing EMOs. (C.1).

To promote the development of the EMO industry, government officials of the Nicchian Department of Economic Affairs (DEA) and members of the Nicchian Association of Manufacturers of EMOs (NAME), arranged for the coordination of competition among the five Nicchian EMO manufacturers in accordance with Nicchian competition laws. (C.2). Through this cooperative arrangement, Nicchian EMO manufacturers could stabilize their industry through coordinated domestic prices and markets. (C.2).

In order to further solidify Nicchia's EMO industry, Nicchia requires that only distributors of domestic EMO's can be licensed to do the required maintenance function. (C.3). The

¹ (C.) represents the page of the Compromis at which the item is found.

distributorship agreement also contains a clause which prohibits Nicchian distributors who terminate their distribution agreements with an EMO manufacturer from domestic distribution on behalf of another manufacturer for five years. (C.3).

Since 1983, much of Nicchia's EMO development effort has focused on exportation, with most of the profits of EMO manufacturers being funneled into export efforts. (C.3). Two EMO companies, Comcar Inc. and ELEC Inc. have focused their exportation on the Mercurian market. (C.3). Since their introduction in Mercuria, the two companies have increased their market share by 1.5 percentage points each year. (C.3)

Because of Comcar and ELEC's impressive success in Mercuria, and the resulting loss of market share for the Mercurian EMO manufacturers, the Mercurian manufacturers and their labor unions began to push for quantitative restrictions on Nicchian made EMO's. (C.4). In an effort to maintain friendly relations with Mercuria, the Nicchian agreed to limit Nicchian exports to 14 percent of Mercurian EMO sales. (C.4). This agreement was supported by the Mercurian Minister of Economic Affairs as well as the Nicchian Secretary of Foreign Trade. (C.4)

In September 1989, Comcar decided to build an EMO manufacturing facility in Mercuria. (C.5). The Mercurian EMO unions supported Comcar's decision. The Mercurian manufacturers, however, reacted with unfounded and speculative forecasts of economic disaster. (C.5). Through the efforts of the Mercurian EMO manufacturers, Mercuria passed a bill amending the Mercurian

Law Against Restraints of Competition. The Bill stated:

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. (C.5).

After a breakdown in consultation efforts, The Mercurian Cartel Office found Comcar and ELEC to be in violation of the new amendment through:

1. the allocation of markets outside Nicchia,
2. the foreclosure of access to the Nicchian market by requiring unreasonable non-competition restrictions in distributorship agreements and by tying distribution and service functions, and
3. the fixing of domestic prices of EMO's within Nicchia. (C.6).

The Cartel Office Order enforcing the decision set a quota limiting to 14 percent the total sales of Nicchian EMO's in Mercuria, with a possibility of further reductions in the future. (C.6). The Cartel Office decision was affirmed on appeal to the Mercurian Supreme Court. Nicchia adamantly contests the extraterritorial application of Mercurian law over business activities within Nicchia. (C.7).

QUESTIONS PRESENTED

1. Whether the Mercurian Cartel Office Order, limiting the sale of Nicchian electromobiles within Mercuria, violates International Law?
2. Whether Mercuria's extraterritorial application of its domestic law on Nicchian business practices violates international law?

SUMMARY OF ARGUMENT

Mercuria's Cartel Office Order, limiting the sales of Nicchian EMOs within Mercuria, violates international law under the General Agreement on Tariffs and Trade (GATT). GATT article XI expressly prohibits the use of quotas in international trade. Mercuria's action creates a quota and as such violates article XI of GATT.

Mercuria cannot rely on GATT article XXIII to justify the quota. Article XXIII would allow Mercuria to suspend its GATT obligation if Nicchia either violates GATT, or acts in a wrongful manner to deprive Mercuria of its benefit under GATT. Nicchia's conduct neither violates GATT nor wrongfully deprives Mercuria of its benefits under GATT.

Mercuria cannot rely on GATT article XIX to justify the quota. Article XIX (escape clause) would allow Mercuria to suspend its GATT obligations and initiate protective measures if goods are being imported at such an increased quantity that it causes harm to domestic industries. Nicchian EMOs are not being imported at such a quantity, nor are they causing harm to Mercurian industry. Mercuria has initiated a protective measure (quota) in a discriminating manner which violates articles XIX, and XIII. Both of these articles require Mercuria to apply any counter measure in a non-discriminating manner. Mercuria has failed to do this, thus violating articles XIX, and XIII.

International antitrust principles are not recognized under

customary international law. Customary international law is based on widely accepted norms. Only a small number of states have accepted antitrust principles. Because no widely accepted international antitrust norms exist, Nicchia's business practices cannot be in violation of customary international law.

Based on several international agreements, even if the court establishes that customary international antitrust law exists, Nicchia's conduct with regard to the EMO industry does not violate international law. The U.N. Code on Restrictive Business Practices, The Treaty of Rome, the GATT Subsidies Code and the OECD Declaration on International Investment and Multinational Enterprises all accept that certain business practices may result in restrictions on trade when the purpose of the business practices is to promote domestic economy or industry. In addition, the U.N. Code and the GATT Subsidies Code both give greater deference to the business practices of developing nations. Nicchia is a developing nation and its business practices were enacted to promote the EMO industry, which would give Nicchia an opportunity to compete in the international market. Therefore, Nicchia's conduct is not a violation of customary international antitrust law.

Because Nicchia did not violate international law, the extraterritorial application of Mercuria's domestic law on Nicchia is improper and is a violation of international law. By imposing its law on Nicchian conduct which has occurred completely within Nicchia, Mercuria has violated the principle of

state sovereignty. Respect for the sovereignty of foreign nations has not only been widely accepted as the basis of the U.N. Charter, but it has also been recognized by the International Court of Justice. Mercuria violated international law by imposing its domestic law on a foreign sovereign. Therefore, the decision of the Mercurian Supreme Court should be found invalid.

DISCUSSION

I. THE CARTEL OFFICE ORDER AND THE MERCURIAN LAW THAT IT ENFORCES IMPOSE TRADE RESTRAINTS IN VIOLATION OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE.

The amendment to the Mercurian Law Against Restraints on Competition, and the Cartel Office order enforcing it, impose a discriminatory quantitative restriction on Nicchian EMO exports to Mercuria in direct violation of the General Agreement on Tariffs and Trade (GATT).¹ The amendment states:

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 material benefits from restrictive business practices adversely affecting Mercurian international trade.²

The Cartel Office order enforcing the amendment additionally set a limit of 14 percent of the total of EMO sales in Mercuria in 1989 on all sales of EMO's manufactured by Nicchian controlled companies.³ The Cartel Order directly violates GATT provisions as well as the principles underlying GATT.

GATT was founded on principles of raising the standards of living of the contracting parties through mutually advantageous

¹ General Agreement on Tariffs and Trade, 55 U.N.T.S. 194 (1947) (hereinafter GATT).

² Compromis at 5.

³ Id. at 6.

agreement on trade practices.⁴ Mercuria's action invoke the following GATT articles:

1. article I (Most Favored Nation Clause) requires each party to treat every other party as it would treat its most favorite trading partner.⁵
2. article XI prohibits, with limited exceptions, the use of quotas.⁶
3. article XIII prohibits discriminatory imposition quotas, when such quotas are permitted under GATT relief measures.⁷
4. article XIX (Escape Clause), allows parties to suspend their GATT obligations when certain factors are met.⁸
5. article XXIII provides a system of dispute resolution and also allows parties to suspend their GATT obligations provided certain factor exist.⁹

Analysis of the relevant articles and their application demonstrate the illegality of Mercuria's actions under GATT.

A. MERCURIA'S AMENDMENT AND CARTEL ORDER IMPOSE A QUOTA IN VIOLATION OF GATT ARTICLE XI(1).

Mercuria's imposition of a 14 percent quota on Nicchian EMO sales in Mercuria, directly violates GATT article XI(1).¹⁰

⁴ GATT, supra note 1. The introduction to GATT states: [The parties] [r]ecognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, . . . and expanding the production and exchange of goods, . . . [h]ave through their Representatives agreed [to the articles of GATT]."

⁵ GATT, supra note 1, at art. I.

⁶ Id. at art. XI.

⁷ Id. at art. XIII.

⁸ Id. at art. XIX.

⁹ Id. at art. XXIII.

¹⁰ GATT, supra note 1, at art. XI(1). No prohibitions or restriction other than duties, taxes, or other charges, whether made effective through

Mercuria's Order is a quota because limits EMO imports from Nicchia; the 14 percent limit, by its nature, violates article XI's prohibition on quotas.¹¹ Furthermore, Mercuria's drafting of the Order to include Nicchian EMO's manufactured within Mercuria adjusts the quota to include those Nicchian EMO's.¹² The Cartel Office Order issued by Mercuria is unquestionably a quota and as such is in violation of GATT article XI.¹³

B. MERCURIA CANNOT ESCAPE ITS GATT OBLIGATIONS BY THE PURPORTED APPLICATION OF ARTICLE XXIII (NULLIFICATION OR IMPAIRMENT).

GATT article XXIII, also known as the concept of nullification or impairment, permits retaliatory action by a party deprived of GATT benefits by another party's wrongful

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
(emphasis added).

¹¹ GATT, supra note 1, at art. XI(1). "No prohibition . . . made effective through quotas . . . shall be instituted or maintained by any contracting party"

¹² Fontheim & Gadbow, Trade-Related Performance Requirements Under the GATT-MTN System and U.S. Law, 14 Law & Pol'y Int'l Bus. 129, 149 (1982). ". . . if a country set a quota on the import of a given product and then adjusted the quota in accord with the level of domestic sales of that product in order to preserve a market share of domestic producers, the quota would violate article XI."

¹³ GATT, supra note 1, art. XI. Article XI provides certain exceptions through which quotas could be permitted under GATT: 1) when a party experiences shortages of food stuffs or other essential products; 2) when the quota is necessary for the application of regulations for the classification, grading or marketing of commodities, and; 3) on agriculture or fishery products. The quota imposed by Mercuria does not fit any of these exceptions.

conduct. Article XXIII permits such action when:

. . . any contracting party should consider that any benefit accruing to it directly or indirectly under this agreement is being nullified or impaired or that the attainment of any objective of the agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with this agreement, or
- (c) the existence of any other situation.¹⁴

Article XXIII is triggered by a party's wrongful conduct which deprives another party of the benefits of GATT.¹⁵ The wrongful conduct can either be conduct that directly violates a GATT provision, or non-violative conduct that induces reliance or is in bad faith.¹⁶ The way in which article XXIII has been applied and interpreted demonstrates that Mercuria is not justified in implementing quotas.

The drafters of Article XXIII intended that the contracting parties define its scope through implementation.¹⁷ The parties

¹⁴ GATT, supra note 1, at art. XXIII(1).

¹⁵ Bronckers, Private Response to Foreign Unfair Trade Practices- United States and EEC Complaint Procedures, 6 Nw. J. Int'l L. & Bus. 651, 664 (1984).

¹⁶ Hudec, Retaliation Against "Unreasonable" Foreign Trade Practices" The New Section 301 and GATT Nullification and Impairment, 59 Minn. L. REV. 461, 500 (1975).

¹⁷ U.N. Doc. E/PC/T/W/170 (June 6, 1947). Dr. Coombs, one of the chief drafters of article XXIII, expressed this intent stating:

. . . it would be a very great pity if, because we could not trust an international organization formed out of our own membership to interpret this clause intelligently and with sufficient discretion, we were to deprive ourselves of the opportunity of having our

created a form of common law jurisdiction through which the article would be interpreted.¹⁸ The case-by-case interpretation is significant because the article's language broadly defines what could trigger retaliatory measures. The language needs to be broad in order to cover yet unanticipated problems.¹⁹

Analysis of case interpretations illustrate that Nicchian domestic activity is not the type of conduct that GATT intended would trigger article XXIII retaliatory measures.

1. Mercuria cannot take advantage of article XXIII because Nicchia's conduct does not violate GATT.

Mercuria cannot rely upon article XXIII because Nicchia's conduct does not violate GATT. Article XXIII allows retaliatory measures for "the failure of another contracting party to carry out its obligations under this Agreement" ²⁰ Mercuria complains that Nicchia offered organizational aid and support to Nicchian EMO manufacturers. Mercuria's claim that this support constitutes a subsidy in violation of GATT is erroneous.

Nicchian internal economic development policies do not constitute subsidies pursuant to GATT. GATT article XVI, which addresses subsidies, sets out a number of situations in which the subsidy provision would apply, but does little to define what

obligations reviewed in circumstances which made it impossible for us to carry them out.
See also R. Hudec, The GATT Legal System and World Trade Diplomacy 37 (1976).

¹⁸ Hudec, supra note 16, at 480.

¹⁹ U.N. Doc., supra note 17.

²⁰ GATT, supra note 1, at art. XXIII(1).

actually constitutes a subsidy. In general, article XVI describes a subsidy as:

. . . any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory.²¹

The language of Article XVI does not specifically address the use of non-monetary, organizational support, but it does indicate GATT's general intent to restrict the definition of subsidies to forms of monetary aid.

The contracting parties reiterated their intent to restrict subsidies to forms of monetary aid by creating an agreement on GATT interpretation, (hereafter called the GATT subsidies code).²² Neither the GATT subsidies code nor its annex suggests that organizational assistance by government would be a subsidy. The subsidies code sets out an illustrative but non-exhaustive list of possible subsidies as being:

. . . government financing of commercial enterprises, including grants, loans or guarantees; government provision or operational or support services or facilities; government financing of research and development programmes; fiscal incentives; and

²¹ GATT, supra note 1, at art. XVI(A)(1).

²² Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (GATT subsidies code), Geneva, 1979, GATT, 26th Supp. B.I.S.D. 56 (1980) (hereinafter GATT Subsidies Code). The GATT subsidies code serves as a codification of the intended principles and objectives of GATT and a codification of accepted economic principles. The GATT subsidies code was created during the Tokyo Round of GATT negotiations, to which the parties to this dispute are not parties. The subsidies code clarifies the original intent of GATT concerning subsidies, expanding upon the original principles of GATT. It is this intent which is binding on Mercuria and Nicchia as members of GATT.

government subscription to, or provision of, equity capital.²³

The GATT subsidies code includes an annex which lists a number of situations that GATT considers to be subsidies.²⁴ The only term that could be construed as being analogous to the situation in Nicchia is the subsidies code's inclusion of "government provision or operational or support services" as subsidies. The Annex, however, gives as examples of operational aid, acts such as government provided transportation of goods.²⁵ The type of government aid that GATT identifies as being subsidies bears no correlation to the assistance offered by the Nicchian government. Nicchia's governmental assistance is not a subsidy pursuant to GATT.

Even if the Nicchian system of industry and economic support were deemed to be a subsidy it would not be violative of GATT policies because Nicchia is a developing nation.²⁶ GATT

²³ Id. at art. 14.

²⁴ GATT Subsidies Code, supra note 22, at Annex (Illustrative List of Export Subsidies).

²⁵ GATT Subsidies Code, supra note 22, at Annex(d).

²⁶ GATT, supra note 1, at art. XVIII, Annex Notes and Supplementary Provisions (Ad Article XVIII, 1 and 4). Nicchia is a newly industrialized country whose EMO production began as recent as 1972. The GATT permits a countries in early stages of development to use measures in derogation of GATT to develop its industry. The GATT annex explains that:

The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development.

When they consider whether the economies of a

recognizes that developing nations require special measures to promote development.²⁷ This principle was codified in article XXXVI which states in part:

. . . the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and . . . that the attainment of these objectives is particularly urgent for less developed contracting parties.²⁸

The application of subsidies to the developing nation principle is further explicated in the GATT subsidies code which expressly permits the use of subsidies by developing nations.²⁹ The

contracting party "can only support low standards of living", the CONTRACTING PARTIES shall take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favorable conditions for the staple export product or products of such contracting party.

The phrase "in the early stages of development" is not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties the economies of which are undergoing a process of industrialization to correct an excessive dependence on primary product.

²⁷ J. Jackson & W. Davies, Legal Problems of International Economic Relations, 1141 (1986). Article XVIII gives developing nations "[a] privilege to use any measure necessary to promote a particular industry."

²⁸ GATT, supra note 1, at art. XXXVI(a).

²⁹ GATT Subsidies Code, supra note 22, at art. 14 (Developing Countries). Article 14 states in pertinent part: "Signatories recognize that subsidies are an integral part of economic development programmes of developing countries. Accordingly this Agreement shall not prevent developing country signatories from adopting measures and policies to assist their industries In particular the commitment of Article 9 [which prohibits subsidies] shall not apply to developing country signatories. . . ."

evidence of GATT's intent to permit subsidies by developing nations in furtherance of economic growth is overwhelming.

2. Article XXIII does not protect Mercuria's quota because Nicchia's conduct is neither reliance inducing nor bad faith.

Mercuria cannot invoke article XXIII to justify its imposition of tariffs because Nicchia has not acted in a way that would trigger article XXIII retaliatory measures. Past cases invoking article XXIII for non-violative conduct have formulated two basic rules for its application.³⁰ First, the parties have held that behavior which induces reliance that certain conduct will or will not occur, will permit article XXIII retaliatory measures when conduct contrary to that relied upon occurs.³¹ The second rule requires that the complained of conduct must be premised on bad faith.³²

Mercuria may not invoke article XXIII because Nicchia did not behave in a manner that would induce reliance by Mercuria. The reliance rule is tied to the benefit or obligation under GATT that is being nullified or impaired.³³ The reliance induced

³⁰ Hudec, supra note 16, at 500.

³¹ The Australian Subsidy on Ammonium Sulphate, Report by Contracting Parties GATT/CP.4/39 (April 3, 1950), reprinted in GATT, B.I.S.D. Vol. II, 188 (1952).

³² GATT, 3d Supp. B.I.S.D. 224 (1955). This rule was promulgated by a review panel established to review potential problems identified in the Australian Subsidies case.

³³ Hudec, supra note 17 at 148. "The 'reasonably anticipated' [semii m] formula was an attempt to explain the phrase benefits accruing to [the injured party] under the Agreement."

must invoke an obligation or provide a benefit under GATT.³⁴

The only action that could be construed as reliance inducing behavior is Mercuria and Nicchia's voluntary export restraint agreement (VER). The VER, however, does not invoke an obligation or provide a benefit under GATT. The VER was nothing more than a voluntary imposition of a quota. Such a quota would have the effect of artificially raising EMO prices in Mercuria, thus acting as a tariff. Both quotas and artificial tariffs are in direct contravention of GATT principles.³⁵ Because the reliance on the VER not only lacks a benefit accruing under the Agreement, but actually offends the principles of GATT, Mercuria cannot use the reliance rule as a means of invoking article XXIII.

Mercuria cannot justify the use of article XXIII by claiming bad faith on the part of Nicchia because Nicchia's conduct is in line with the express principles of GATT. GATT expressly encourages the development of less developed contracting parties, even when the conduct is in violation of GATT principles.³⁶ The type of bad faith that the GATT review committee intended to deal with concern subsidies designed to escape tariff concessions or demonstrating a willful indifference to GATT obligations.³⁷ Nicchia's actions were taken with the goal of developing an

³⁴ Id.

³⁵ GATT, supra note 1, at art. XI, and art. XXXVII.

³⁶ GATT, supra note 1, at art. XXXVI. See also GATT Subsidies Code, supra note 22, at art. 14.

³⁷ Hudec, supra note 16, at 490.

industrial base. There was no bad faith.

C. MERCURIA'S QUOTAS ARE NOT PERMITTED BY GATT ARTICLE XIX (ESCAPE CLAUSE).

GATT article XIX (the escape clause) does not permit Mercuria to impose a quota on Nicchian EMO's. Article XIX(1) permits a contracting party to suspend their GATT obligation when, as a result of unforeseen developments, products are being imported at such an increased quantity that it causes damages to domestic producers.³⁸

Mercuria may not justify its quota as an article XIX counter measure because Mercuria has not shown that Nicchia's EMO's are being imported at an unusual increased quantity. Nicchia's share of Mercuria's EMO market has never exceeded an average increase of 1.5 percent of the total Mercurian EMO market per year.³⁹ This increase is relatively nominal when it is remembered that only nine countries manufacture EMO's. Furthermore, Nicchia's market share increased over a seven year period. This undermines any Mercurian assertion that the increase resulted from unforeseen developments. Mercuria has failed to an unusual

³⁸ GATT, supra note 1, at art. XIX(1), SEE also Lochmann, The Japanese Voluntary Restraint on Automobile Export: An Abandonment of the Free Trade Principles of GATT and Free Market Principles of United States Antitrust Laws, 27 Harv. Int'l L. J. 99, 120 (1986). Lochmann sets out five specific prerequisites of article XIX: (1) the product must be imported at an unusual increased quantity; (2) the domestic industry must produce like or directly competitive products; (3) the injury, whether threatened or actual, must be serious; (4) the increased imports must result from unforeseen developments; and (5) the increase in imports must be a substantial cause of injury.

³⁹ Compromis at 3.

increase resulting from unforeseen developments.

Mercuria may not justify its quota as an article XIX counter measure because they have not shown that increased imports "caused" the injury. In a similar scenario in 1980, United States International Trade Commission found that declines in demand prompted by a changing economic environment, not an increase in imports, caused injury to the U.S. auto industry.⁴⁰ Before Mercuria could impose article XIX counter measures, they would have to prove that the cause of the injury is imports and not another cause. Mercuria has offered no such proof.

Mercuria may not justify their quota as an article XIX counter measure because Mercuria applied the EMO quota in a discriminating manner. Article XIX itself does not mandate that its counter measures be applied in a non-discriminating manner, but GATT article I does. Article I is the "Most Favored Nation" clause and requires that:

[a]ny advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like products originating in or destined for the territories of all other contracting parties.⁴¹

By implication, article I requires that any disadvantage applied to the product of one contracting party by another must also be applied immediately and unconditionally to all like products of

⁴⁰ U.S. Int'l Trade Commn, Inv. No. TA-201-44, Pub. No. 1110, 2 I.T.R.D. 5241 (1980).

⁴¹ GATT, supra note 1, at art. I(1).

all other contracting parties.⁴² Mercuria has specifically targeted Nicchia in its quota.⁴³ There are seven other nations that produce EMO's besides Nicchia, but their exports to Mercuria are unaffected.⁴⁴ Because of the discriminatory application of the measure, Mercuria is precluded from using article XIX to justify the quota.

Mercuria may not use the escape clause to justify their quota on Nicchian EMO's because the Mercurian quota is not a temporary counter measure. Article XIX counter measures must be a temporary measures.⁴⁵ The Cartel Office order attempts to extend indefinitely, the voluntary agreement between Nicchia and Mercuria which limited exports of Nicchan EMOs to 14 percent. There are no time parameters on the order nor any indication that the order or the Mercurian statute it enforces are temporary measures. Because of the permanency of the quota, Mercuria may not use article XIX to justify their violation of GATT's prohibition on quotas.

⁴² Kofele-Kale, The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objectives of an Equitable World Trading System, 18 Cal. W. Int'l L.J. 291, 297 (1988).

⁴³ Compromis at 6.

⁴⁴ Id.

⁴⁵ GATT, supra note 1, at art. XIX (1)(a). Article XIX provides that "the contracting party shall be free . . . to the extent and for such time as may be necessary [to invoke article XIX measures]." this language has been interpreted as permitting only temporary relief. See Report on the Withdrawal by the United States of a Tariff Concession Under Article XIX of the General Agreement on Tariffs and Trade (Hatters' Fur Case), GATT/1951-3, at 8- 14 (Nov. 1951). "[A]rticle XIX is essentially an emergency character and should be of limited duration."

D. THE RELIEF MEASURES ESTABLISHED BY THE CARTEL OFFICE ORDER VIOLATES GATT ARTICLE XIII.

Even If Mercuria could justify the quota on Nicchian EMO's through article XXIII or XIX, the remedy set out in the Cartel Order violates GATT article XIII. Article XIII states that:

No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.⁴⁶

The Cartel Order imposes a quantitative restriction exclusively on EMO's manufactured in Nicchia. As discussed earlier, seven other countries, besides Nicchia and Mercuria, manufacture EMO's, but none of them are mentioned in the Cartel Office Order. There is no indication that Mercuria intends to place a quota on the EMO imports from any of the other countries. The quota is being applied to Nicchian EMOs and is not being applied to like products of other countries pursuant to Article XIII(1). The Cartel Office order is therefore illegal as being in violation of GATT article XIII(1).

Mercuria's imposition of a quota on Nicchian EMO imports is in violation of GATT provisions and policy and the Court should not permit them to continue. GATT expressly prohibits quantitative restrictions imposed by Mercuria. Mercuria's action are not permitted under article XXIII relief measures nor under

⁴⁶ GATT, supra note 1, at art. XIII(1).

article XIX counter measures. Furthermore, the relief sought is discriminatory and expressly prohibited under article XIII.

II. NICCHIA'S BUSINESS PRACTICES ARE WITHIN THE BOUNDS OF INTERNATIONAL LAW.

A. INTERNATIONAL ANTITRUST PRINCIPLES ARE NOT RECOGNIZED AS CUSTOMARY INTERNATIONAL LAW.

States may only be found to have violated international law when they have committed an internationally wrongful act.⁴⁷ In determining what is an internationally wrongful act, customary law may be considered. Customary international law is a customary norm limiting the conduct of states.⁴⁸

"Customary international law results from a general and constant practice of states followed by them from a sense of legal obligation."⁴⁹ More than 100 out of 155 states have not accepted or enacted antitrust laws in their states.⁵⁰ In addition, international antitrust principles have not even been applied in a constant manner in the states that accept them.⁵¹

⁴⁷ Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. 4; Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 99, 100.

⁴⁸ See S.S. Lotus, 1927 P.C.I.J. Ser. A No. 10.

⁴⁹ Restatement (third) of Foreign Relations Law, sec. 102(2) (1987) [hereinafter Restatement (third)]; See M. Villiger, Customary International Law and Treaties, 3 (1985).

⁵⁰ Miller & Davidow, Antitrust at the United Nations: A Tale of Two Codes, 18 Stan. J. Int'l L. 348, note 4 (1982).

⁵¹ Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976) (court applied the doctrine of comity in its jurisdictional analysis); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3rd Cir. 1979) (court applied the doctrine of comity in its jurisdictional analysis); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (court did

Moreover, no known international tribunal has ruled that an international antitrust law exists.

In the absence of a customary norm which limits a states business practices, a state may lawfully engage in any practice which is not strictly prohibited.⁵² Because no widely accepted norm of international antitrust principles exist, Nicchia's business practices do not violate customary international law.

B. THE U.N. CODE ON RESTRICTIVE BUSINESS PRACTICES IS NOT BINDING ON NICCHIA.

The U.N. Code on Restrictive Business Practices is an aspirational international antitrust code of conduct, and there is no basis for holding that Nicchia be involuntarily bound. In 1980, the U.N. adopted what was considered to be an antitrust code for the international community.⁵³ The intent of the code was to establish a code of conduct to control international corporate behavior. At the insistence of the developing nations particular attention was given to the conduct of transnational corporations and the affects on developing nations.

not apply the doctrine of comity, rather it applied the "effects test").

The "effects test" has been defined as "assuming jurisdiction when the particular restraint at issue is either 'in', 'directly affecting' or 'substantially affecting' United States foreign or interstate commerce." E. Nerep, Extraterritorial Control of Competition Under International Law, vol. 1, 118 (1983).

⁵² See S.S. Lotus, supra note 48.

⁵³ U.N. Conference on Restrictive Business Practices, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/CONF/10 (1980), reprinted in 19 Int'l Legal Materials 813 (1980) (hereinafter cited as Code).

The General Assembly and parties to the Code did not intend for the Code to create norms that bind either states or enterprises.⁵⁴ Rather, the Code only has the power of recommendation. Because the Code neither has the power to bind states and enterprises, nor to enforce its recommendations, the Code must rely on its acceptance as a U.N. recommendation to give it moral force as a code of conduct by which to control states and enterprises.⁵⁵ As a code of solely recommending power, the Code is not considered to be international law. Therefore, its principles are not binding on Nicchia.

III. EVEN IF THE COURT FINDS THAT CUSTOMARY INTERNATIONAL ANTITRUST LAW EXISTS, NICCHIA HAS NOT VIOLATED THESE LAWS.

A. THE GATT SUBSIDIES CODE APPROVES OF THE USE OF NON-EXPORT SUBSIDIES IN INTERNATIONAL TRADE FOR DEVELOPING NATIONS.

Nicchia's use of non-export subsidies, such as licensing agreements, to promote the domestic EMO industry are not a violation of international law. In Article 11(1)(e) of the GATT Subsidies Code the use of non-export subsidies is recognized where the subsidies are used to implement economic programs and policies which promote the economic and social development of

⁵⁴ Benson, The U.N. Code on Restrictive Business Practices: An International Antitrust Code is Born, 30 Am. U. L. Rev. 1031, 1036 (1981).

⁵⁵ Davidow & Chiles, The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices, 72 Am. J. Int'l L. 247, 256 (1978).

developing nations.⁵⁶ Although Nicchia is not a member to the Tokyo Rounds of the GATT, the provisions are evidence of customary international law which recognizes the special needs of developing nations to compete in a free trade market.⁵⁷

The Nicchian government, as a developing nation, decided to help develop its EMO industry. The licensing agreements were necessary to give the Nicchain EMO industry a chance to develop before it met with competition. If EMOs from another country were allowed into Nicchia with no restrictions before the Nicchian industry had a chance to develop, the industry would not survive or grow to a point in which it would be competitive with other EMO manufacturers. This would tend to give already developed nations a monopoly on the EMO industry.

B. NICCHIA DID NOT VIOLATE THE RECOMMENDED STANDARDS SET BY THE U.N. CODE ON RESTRICTIVE BUSINESS PRACTICES.

Under the United Nations Code on Restrictive Business Practices, the General Assembly has defined restrictive business practices as those acts or behavior of enterprises which through an abuse of dominant market power, limits access to markets, unduly restrains competition, or has an adverse affect upon international trade.⁵⁸ Although the Code is universally

⁵⁶ GATT Subsidies Code, supra note 22, at art. 11(1)(e).

⁵⁷ See text accompanying note 26.

⁵⁸ Code, supra note 53, at Annex.

applicable in that it applies to all enterprises⁵⁹ and states⁶⁰, whether developing or developed⁶¹, the Restrictive Business Code rules exempt dealings involving firms that do not hold a dominant market position.⁶² "Thus an allegation of predatory pricing, price or service discrimination, *** resale price maintenance, tying or exclusive dealing against a firm with, say, 7 percent of a market is not cognizable under the rule."⁶³

Through an agreement between the Mercurian EMO Manufacturers Association (MEMA) and the Nicchian Association of Manufacturers of EMO's (NAME), NAME agreed to limit Nicchian EMO exports to Mercuria to 14 percent of the total EMO sales in Mercuria. Although this 14 percent ceiling is greater than a de minimus amount, it is less of the Mercurian EMO market than would be required to establish a dominant market position. Even with 14

⁵⁹ Id. at § B(ii), para. 6. The term "Enterprises" means "firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control of ownership, private or state, which are engaged in commercial activities, and include their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them." 19 I.L.M. 813, 816

⁶⁰ Id. at § B(ii), para. 6.

⁶¹ Id. at para. 7.

⁶² Code, supra note 53. The term "dominant market power" refers to "a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services." Id. at 815.

⁶³ Davidow, International Antitrust Codes: the Post-acceptance Phase, 26 Antitrust Bull. 567, 583 (Fall 1981), citing Code supra note 53 at § D-4 [which] requires "an abuse or acquisition and abuse of a dominant position of market power."

percent of the market held by two Nicchian manufacturers, 86 percent of the market remains for the three Mercurian manufacturers. The Mercurian manufacturers clearly hold the dominant market position in Mercuria. Because Nicchia does not hold a dominant market position in Mercuria, the recommendations of the U.N. Restrictive Business Code which apply to manufacturers with a dominant market position, do not apply to the allegations made by the Mercurian government.

C. NICCHIA'S BUSINESS PRACTICES ARE ACCEPTABLE UNDER CUSTOMARY INTERNATIONAL LAW.

1. Evidence of customary international law accepting restrictive business practices is presented in the Treaty to Establish the European Economic Community.

Nicchia did not violate international antitrust laws. The Treaty of Rome, which created the EEC, may be an example of a widely held general principle of international law. The founders of The Treaty of Rome also recognized that special provisions are often necessary to promote industry to a level which will allow these industries to compete in a free market. Article 85(1) of the treaty establishes the illegality of trade controls.⁶⁴ However, these provisions may be declared inapplicable where the agreement "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not afford such undertakings the

⁶⁴ Treaty to Establish the European Economic Community, March 25, 1957, art 85, 298 U.N.T.S. 3 (hereinafter cited Treaty of Rome).

possibility of eliminating competition in respect of a substantial part of the products in question."⁶⁵

The Nicchian EMO industry has only recently gained a share of the EMO world trade market. Nicchia is striving to become a fully developed nation. Therefore, it should still be afforded the protection offered to developing nations. The acts of the Nicchian government and industry are acceptable under general principles of international law where controls are being used to develop Nicchian industry and economy in order to improve its ability to compete in the international market. Moreover, the actions of Nicchia still afford the consumer a share of the profit. The consumers in Mercuria are provided with a low priced, high quality Nicchian product. The Nicchian economy then gains hard currency from its exports. As the industry grows jobs are created and the economy grows.

2. Nicchia's business practices do not violate the guidelines for multinational corporations set out in the OECD Declaration on International Investment and Multinational Enterprises.

Nicchia's business practices do not violate customary international law as found in the OECD. In an attempt to improve the foreign investment climate, the OECD set guidelines under which multinational enterprises should operate. Like the U.N. Code on Restrictive Business Practices, this agreement is not legally enforceable and observance of the guidelines is strictly

⁶⁵ Id. at art. 85(3)(b).

voluntary.⁶⁶ Although Nicchia is not a member to the OECD, it is evidence of customary international law governing restrictive business practices.

Nicchia did not violate the guidelines set out by the OECD. Included in these guidelines is a condition that "[e]very State has the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction, subject to international law and to the international agreements to which it has subscribed."⁶⁷ Nicchia's actions do not violate customary international law or the agreements to which Nicchia subscribes, such as GATT. Therefore, the Nicchian government is given the right to prescribe the conditions under which it operates. The use of licensing agreements and price fixing is acceptable because Nicchia is using these practices to develop its EMO industry in order to become competitive in the world market.

IV. THE EXTRATERRITORIAL APPLICATION OF MERCURIAN DOMESTIC LAW IN NICCHIA IS A VIOLATION OF INTERNATIONAL LAW.

International law is founded on the principle that each nation has the right to exercise exclusive jurisdiction over its nationals.⁶⁸ State sovereignty is one of the basic principles of the UN Charter. Article 2 of the Charter states that the UN

⁶⁶ Organization for Economic Cooperation and Development, Guidelines for Multinational Enterprises, 15 Int'l Legal Materials 969 (1976).

⁶⁷ Id. at Annex, para. 7.

⁶⁸ United Nations Charter, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, art. 2, (hereinafter U.N. Charter).

is based on the sovereign equality of all its Members.⁶⁹

Nicchia's engagement in certain restrictive business practices are not violative of international law. Because Nicchia promoted its EMO industry in an acceptable fashion under international law, Nicchia properly exercised its state sovereign rights. Therefore, Mercuria's attempt to use its domestic law to control the conduct of Nicchian EMO manufacturers while in Nicchia is an infringement upon the Nicchian government's right to proscribe what is acceptable conduct for its nationals.

ELEC, Comcar and the DEA all engaged in conduct which was not only legal in Nicchia and was promoted by the Nicchian government, but is not a violation of international law. Mercurian law should not be applied because it would infringe upon Nicchia's sovereignty by allowing the Mercurian government to attack conduct which the Nicchian government properly defends. Moreover, application of Mercurian law would undermine a fundamental principle of the U.N. Charter.

The extraterritorial application of Mercurian law in Nicchia is a violation of general principles of international law. The U.N. Code on Restrictive Business Practices includes a provision that developed countries should take into account the economic needs of developing countries with regard to the developed countries control of restrictive business practices.⁷⁰ This is essentially a restatement of the doctrine of comity, and is a

⁶⁹ Id. at art. 2(1).

⁷⁰ Code, supra note 53, at sec. C(iii), para. 7.

basis of the U.N. Code.⁷¹ The doctrine of international comity has been defined as "respect for the sovereignty of foreign nations in their own territory"⁷² and as a rule of fair play in international relations.⁷³

Recent cases have held that the doctrine of comity should be considered in the determination of jurisdiction in foreign decisions.⁷⁴ States which have failed to apply the doctrine of comity have been criticized for ignoring the policies and concerns of foreign governments.⁷⁵ Therefore, it is necessary for Mercuria to go beyond the effects test in determining whether or not application of Mercurian law in Nicchia is proper and does not violate general principles of international law.

The doctrine of comity is also supported in the Lotus case.⁷⁶ The court sanctioned the independence of states and determined that each state has a duty to refrain from imposing its law in the territory of another state; such an exercise

⁷¹ Benson, supra note 54, at 1038.

⁷² W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 110 S.Ct. 701, 706 (1990).

⁷³ Stanford, The Application of the Sherman Act to Conduct Outside the United States: A View From Abroad, 11 Cornell Int'l L. J. 195, 207 (1978), citing, Address by Griffin B. Bell, U.S. Attorney General, before the American Bar Ass'n 6 (Aug. 8, 1977) (copy on file at the offices of the Cornell International Law Journal).

⁷⁴ Timberlane Lumber, supra note 51; Mannington Mills, supra note 51.

⁷⁵ Restatement (third) of the Foreign Relations Law of the United States § 402, reporters note 2 (1988).

⁷⁶ S.S. Lotus, supra note 48.

constitutes a violation of international law.⁷⁷ Mercuria may only be justified in applying its law in Nicchia if Nicchia has violated international law and Mercuria is given permission "derived from international custom or from a convention."⁷⁸ Nicchia's business practices are accepted under international law. Nicchia did not violate international law. Therefore, Mercuria's application of its domestic law in Nicchia violates international law. The decision of the Mercurian Supreme Court is a violation of international law and should not be upheld.

CONCLUSION

For the foregoing reasons the Applicant, Nicchia, respectfully requests that this Honorable Court find, adjudge and declare:

1. The order of the Cartel Office of March 13, 1990, as affirmed by the Supreme Court, including the limitation imposed on exports from Nicchia to Mercuria, invalid as being a violation of GATT and international law.

2. Nicchia's business practices valid under international law.

Respectfully submitted,
Team No. 122A
February 1991

⁷⁷ Id. at 18.

⁷⁸ Id.