In the
International Court of Justice
at the
Peace Palace, The Hague
The Netherlands

Nicchia

v.

Mercuria

On Submission to
the International Court of Justice
Memorial of
Nicchia
Applicant

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LIST OF ABBREVIATIONS

A.J.I.L.	American Journal of International Law
Art.	Article
A.F.D.I.	Annuaire Français du Droit International
C.E.E.	Communauté Economique Européenne
Ch.	Chapter
D.E.A.	Department of Economic Affairs
Doc.	Document
ed. (éd.)	edition, (édition)
E.E.C.	European Economic Community
E.F.T.A.	European Free Trade Association
EMO	Electromobiles
et seq.	et sequitur
G.A.	General Assembly
G.A.O.R.	General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
ibid.	ibidem
I.C.J.	International Court of Justice
I.L.M.	International Legal Materials
I.L.R.	International Law Reports
J.O.C.E.	Journal Officiel des Communautés Européennes
MEMA	Mercurian EMO Manufacturers Association
NAME	Nicchian Association of Manufacturers of EMOs
N.I.C.	Newly Industrialised Country
no.	number.
op. cit.	opus citatum
p.	page
para.	paragraph
P.C.I.A.	Permanent Court of International Arbitration
P.C.I.J.	Permanent Court of International Justice
P.I.L.	Public International law
R.I.A.A.	Reports of International Arbitral Awards
Res.	resolution
S.C.	Security Council
"Super 301"	Article 1302, United States of America Ominibus Trade and Competitiveness Act of 23th August 1988

"the law"	Mercurian Law Against Restraints of Competition
"the Order"	Mercurian Cartel Office Order of March 13th 1990
U.E.W.	Mercurian Union of EMO workers
U.K.	United Kingdom
U.N.	United Nations
U.N.C.T.A.D.	United Nations Conference on Trade and Development
U.N.R.B.P.C.	United Nations Restrictive Business Practices Code
U.N.T.S.	United Nations Treaty Series
U.S.	United States of America
v.	Versus
V.C.L.T.	Vienna Convention on the Law of Treaties

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JURISDICTION

By compromis of 11th september, 1990 the governments of Mercuria and Nicchia agreed to submit their dispute to the International Court of Justice pursuant to article 36 [1] of the Statute of the Court. There is no dispute as to the jurisdiction of the Court.

QUESTIONS PRESENTED

1. Whether the State of Mercuria has violated any rule of international law binding upon it by enacting the amendment of November 1989 to its Law Against Restraints of Competition and/or by making the Cartel Office Order of 13th March, 1990.

2. Whether by way of counterclaim, the State of Nicchia is in breach of international law by reason of its administrative support for the policies and practices of its domestic EMO manufacturers.

STATEMENT OF FACTS

Since the 1960's battery powered Electromobiles (EMOs) have, to a large extent, replaced petrol powered vehicles in short distance travel. The advantages of EMO's over conventional vehicles is that they are cleaner and less noisy. However they require recharging every 80-100 miles and their batteries require specialised servicing once a month.

Initially EMO's were manufactured exclusively in industrialized countries. However in the 1970's, Nicchia and two other newly industrialized countries (N.I.C.'s) decided to concentrate their efforts on the development of their EMO industries. At present these N.I.C.'s dominate their domestic EMO markets and enjoy considerable export success. Consequently the market share of the EMO manufacturers based in the industrialized countries (such as Mercuria) had diminished. This has led to substantial job losses in some regions.

The Nicchian EMO industry has been coordinated by its manufacturers association (N.A.M.E.) and the department of Economic Affairs (D.E.A.). In accordance with Nicchian anti-trust law, manufacturers compete freely in production, distribution and advertising. Domestic prices, however, are fixed in accordance with performance and qualitative criteria. An obligatory standard distribution agreement was prepared by the industry with the help of the D.E.A.

In spite of numerous export initiatives by foreign manufacturers the Nicchian market is dominated by domestic production. Profit from domestic sales have been utilized by Nicchian producers to help fund successful export drives into foreign markets. Two Nicchian companies, Comcar and ELEC Inc commended exports to Mercuria in 1983 and 1984 respectively. Their combined share of the Mercurian market is now in the region of 10 %.

In early 1989, faced with a decline in their domestic market share the Mercurian EMO Manufacturers Association (M.E.M.A.) and the Mercurian Union of EMO Workers (U.E.W.) lobbied their government to impose quantitative restrictions on Nicchian imports.

Consequently the Mercurian Minister of Economic Affairs drew the situation to the attention of the Nicchian Foreign Trade Secretary.

Subsequently, negociations commenced between N.A.M.E. and its Mercurian counterpart M.E.M.A. In a statement issued on June 12th 1989, the two associations agreed that imports of Nicchian EMO's would be limited to 14 % of total EMO sales in Mercuria. On June 26 1989 the Nicchian and Mercurian governments issued a joint press communiqué supporting the agreement.

In September 1989 Comcar announced plans to build a manufacturing facility for EMOs in Mercuria. Whereas this annoucement was greeted favourably by the U.E.W. it was vigorously attacked by the Mercurian EMO Manufacturers Association (M.E.M.A.)

The Mercurian government responded to the situation under the terms by amending its existing anti-trust legislation. Under the terms of the amendment, the Mercurian Cartel Office is empowered to take unilateral action against companies controlled by non-nationals which are engaging in "restrictive business practices".

At the request of the Mercurian government, proceedings were initiated against Comcar and ELEC. On March 18th 1990 the Cartel Office found that both of these companies had breached the Mercurian Law Against Restraints of Competition (as amended). Consequently it ordered the companies to cease and desist from a number of specific "restrictive business practices" and it threatened to impose a substantial fine (10 % of arrival sales) if the order was not complied with. The order also limited the sale in Mercuria of EMOs manufactured by companies controlled by Nicchian persons to 14 % of the total Mercurian EMO sales for the previous year (1989). The Mercurian Supreme

Court upheld the decision of the Cartel Office, holding inter alia that internal law superseeded the international law defences raised by COMCAR and ELEC.

The Nicchian government protested against the Order of the Cartel Office both before the Mercurian Supreme Court and to the Mercurian government. Further it made it clear that Nicchian manufacturers would continue to abide by the previously agreed 14 % ceiling on EMO exports to Mercuria. The Mercurian government replied by accusing the Nicchian government of supporting and indeed instigating the anti-competitive conduct of their domestic EMO manufacturers and called upon it to cease and desist from such action. The two governments filed a compromis pursuant to article 36 [2] of the statute of the I.C.J. in September 1990. The government of Nicchia seeks the vacation of the order of the Mercurian Cartel Office of 13th March 1990 and the repeal of the amendment to the Mercurian anti-trust law of October 1989.

SUMMARY OF ARGUMENTS

CLAIM

In Nicchia's submission Mercuria has contravened international law both by issuing the Cartel Office Order of March 13th 1990 and in enacting the November 1989 amendment to its Law Against Restraints of Competition.

The Order is a violation of both customary international law and international treaty law within the meaning of Article 38 [1] of the Statute of the I.C.J. In Nicchia's view Mercuria did not have the requisite jurisdiction to make the order either by reference to territoriality or nationality. Nicchia does not consider that Mercuria could have derived the requisite jurisdiction by any reference to the "effects doctrine" as the effects doctrine does not form part of customary international law. In any event the application of the effects doctrine in this instance would not give rise to jurisdiction.

Nicchia submits that the Cartel Office Order also constitutes a prima facie breach of international treaty law being a violation of articles XI [1] and III [1] GATT. It is discriminatory as it imposes ill-concealed quantitative import restrictions contrary to GATT. The is no legal justification for these prima facie violations. There exists no bilateral treaty between Nicchia and Mercuria under which Nicchia has bound itself to respect any quantitative import restriction. In addition the eventual imposition of a 10 % fine does not constitute an anti-dumping measure within the terms of article VI [2] GATT. There has been no sanctionable dumping of EMOs by Nicchian undertakings and in any event the 10 % fine would not constitue a lawful response even if there had been. Mercuria cannot justify the measures taken under the Order by reference to any provision of GATT.

The amendment of November 1989 to the Mercurian Law Againts Restraints of Competition is unlawful being contrary to both international treaty and customary law. The amendment is at once a breach of articles III [4], XI [1] and XXIII GATT and is contrary to the principle of non-intervention. The reference to "restrictive business practices" is

unlawful. No international law exceptions under GATT or otherwise can justify the amendment.

COUNTERCLAIM

Mercuria's counterclaim is not admissible for it contravenes article 80 of the Statute of the I.C.J. In any case, Nicchia strongly denies that it has violated international treaty law by its support for Nicchian companies. Nicchian trade policies conform to international law because trade practices - restrictive or otherwise - are not apprehended by international treaty law. Nicchia submits that it respects all provisions of GATT in all its undertakings. The counterclaim, even if it was admissible, is unfounded. Nicchian trade practices are not contrary to customary international law. There is neither state practice nor opinio juris to suggest that restrictive trade practices in general can possibly contravene customary international law. Because Niccchian practices neither contravene treaty law nor customary international law, the counterclaim must fail.

CLAIM : MERCURIA IS IN BREACH OF INTERNATIONAL LAW

Nicchia submits that Mercuria has violated international law in respect of both the Cartel Order of March 13th 1990 and the amendment of November 1989 to the Mercurian Law Against Restraints of Competition.

PART I : THE CARTEL OFFICE ORDER OF MARCH 13th 1990 IS UNLAWFUL

A . THE CARTEL OFFICE ORDER OF MARCH 13th 1990 IS CONTRARY TO CUSTOMARY INTERNATIONAL LAW

Nicchia submits that the said Order is in breach of customary international law as it is contrary to the principle of non-intervention. This principle, which derives from the more general notion of sovereign equality, prohibits unwarranted influence in the internal affairs of other states [1]. Any action by a state that seeks to restrict the freedom of another state to define its economic policy is contrary to the principle of non-intervention. Unless the intervening state can show that it had the necessary jurisdiction to intervene, it is in breach of international law. It is submitted that by issuing the Cartel Office Order of March 13th 1990, Mercuria intervened unlawfully in the internal economic affairs of Nicchia without the necessary jurisdiction to do so.

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1. Article II (7) Charter of United Nations, I. U.N.T.S XVI ; Case concerning Military and Paramilitary Activities in Nicaragua (Nicaragua v U.S), 1986 I.C.J. 14, 108 ; Corfu Channel case (U.K. v Albania), 1949 I.C.J. I, 37.

In Nicchia's submission, Mercuria cannot show a "genuine link" between Mercuria and the matter that the Cartel Order seeks to regulate either by reference to nationality, territoriality or a fortiori by reference to the "effects doctrine".

(i) NO JURISDCTION BY REFERENCE TO NATIONALITY OR TERRITORIALITY

In customary international law, a "genuine link" granting a state jurisdiction over a particular subject exists principally where the territory or the nationals of that state are concerned [2]. Neither ELEC nor COMCAR have Mercurian nationality. Nor does the Order concern their activities on Mercurian territory. As a result, Mercuria cannot base its supposed jurisdiction upon the principles of nationality or territoriality. It has been suggested that extra-territorial activities of non-nationals having repercussions of significant importance and having a sustained impact on that state can also satisfy the requirements for jurisdiction. This has been referred to as the "effects doctrine".

(ii) THE "EFFECTS DOCTRINE" HAS NO VALIDITY IN CUSTOMARY INTERNATIONAL LAW

Customary international law [3] is constitued by state practice supported by opinio juris. The state practice must be continuous and general [4]. The "effects doctrine" does not form part of customary international law as it fails this state practice requirement. Some countries limit their jurisdiction to their nationals and their territory, others enact legislation precisely to defend their nationals or territory from external legislative inter-

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2. MANN, THE DOCTRINE OF JURISDICTION IN INTERNATIONAL LAW, III RECUEIL DES COURS 43 (1964 I) ; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 309 (4th Ed. 1990)

3. Article 38 (I) b, Statute Of the International Court of Justice, done on June 26, 1945, 15 U.N.C.I.O., 355 ;

4. Charles Rousseau, DROIT INTERNATIONAL PUBLIC (IIe edition) at 80 ;

ference [5] ; others again seek to regulate matters concerning non-nationals in other countries [6]. Neither can Mercuria derive comfort from opinio juris, for it is no less unclear.

(iii) IN THE ALTERNATIVE, THE APPLICATION OF THE "EFFECTS DOCTRINE" IN THIS INSTANCE WOULD NOT GIVE RISE TO JURISDICTION

Application of the effects doctrine (the validity of which Nicchia contests) would grant jurisdiction where the extra-territorial activities of non-nationals have repercussions of significant importance or have substantial impact on the state concerned [7]. Nicchia submits that this is not the case in the present instance and that the attempted interference is therefore unlawful. The link between the Mercurian manufactures' malaise and the success of the Nicchian EMO industry is unproven. Different and independant explanations for these essentially macro-economic phenomena can easily be provided [8].

Furthermore, the Order issued by Mercuria would have to satisfy a requirement of proportionality [9]. The principle of proportionality requires the regulating state to take into account the interets of the "target state". If the interests of the target state outweigh the interests of the regulating state the latter must tolerate the situation. Nicchia's status as a Newly Industrialised Country (N.I.C.) effectively precludes excessive interference in its long term economic development strategy. Mercuria's actions therefore would in any case not satisfy the proportionality criterion and is therefore unlawful.

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5. Ex. UK : Shipping Contracts and Commercial Documents Act 1964 as a reaction to the U.S. Bonner Amendment to the Shiping Act.

6. Ex. The Mercurian Law Against Restraints of Competition (as amended)

7. Supra. note 2.

8. Infra. PART I, C (ii) 2.

9. MEESSEN, "ANTITRUST JURISDICTION", A.J.I.L. 1984, 783 et seq.

Nicchia contends therefore that the issuing of the Cartel Office Order of March 13th 1990 is wholly incompatible with international customary law.

B. THE CARTEL OFFICE ORDER OF MARCH 13th 1990 CONSTITUTES A PRIMA FACIE BREACH OF INTERNATIONAL TREATY LAW

Both Nicchia and Mercuria are contracting parties to the General Arguments on Tariffs and Trade (GATT) [10] to which both parties are bound by virtue of the Protocol for Provisional Application [11]. Nicchia submits that Mercuria has violated GATT provisions by making the Cartel Office Order of March 1990.

(i) MERCURIA HAS VIOLATED ARTICLE XI [1] GATT

By imposing a 14% sales limit on EMOs manufactured by Nicchian companies and sold on the Mercurian market, Mercuria has violated article XI [2] GATT which expressly prohibits quantitative import restrictions. That Mercuria does not qualify the measure as an "import restriction" but choses instead to impose a "sales restriction" is immaterial and does not alter the import restricting character of the Order. Because it is neither part of the principles underlying GATT nor the policy of Nicchian companies to donate EMOs to Mercurian individuals, there can be no sales restriction that is not de facto and de jure also an import restriction. In fact, a 14% sales ceiling is actually more restrictive than a 14% import ceiling once Nicchian companies establish manufacturing plants in Mercuria. Then, non-imported EMOs, even though produced by Mercurian workers for Mercurians in Mercuria, will be subject to the 14% sales ceiling, diminishing considerably the freedom of Nicchian EMO importers to import EMOs within the terms of the Cartel Order.

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10. Hereinafter: GATT. 55 U.N.T.S. 1947 at 187.

11. 55 U.N.T.S. 1947 at 308.

(ii) MERCURIA HAS VIOLATED ARTICLE III [4] GATT

The 14% sales restriction is also a violation of article III [4] GATT ("The National Treatment Clause"). Article III [4] GATT obliges all contracting parties to treat all imported goods "no less favorably than like products of national origin". Given that there is no equivalent sales restriction imposed on EMOs manufactured in Mercuria by Mercurian companies, the Cartel Office Order of March 13th 1990 prime facie breaches article III [4] by imposing the 14% sales restriction.

Furthermore, it is our submission that the provision in the Cartel Office Order of March 13th 1990 allowing, in the case of non-compliance, the imposition of a 10% fine on the sales of all Nicchian EMOs in Mercuria, is also a breach of article III [4] which imposes the national treatment obligation "in respect of all laws, regulations and requirements affecting [.....] internal sale". The very existence of a provision allowing for the eventual imposition of a fine is therefore a breach of article III [4].

C. THERE IS NO LEGAL JUSTIFICATION FOR THESE PRIMA FACIE VIOLATIONS OF INTERNATIONAL TREATY LAW

(i) THE 14% RESTRICTION IMPOSED BY THE ORDER CANNOT BE JUSTIFIED

The prima facie breaches of articles XI [1] and III [4] GATT cannot be justified by reference to the existence of alleged Nicchian consent. Without prejudice to Nicchia's contention that mere consent is not sufficient to allow contracting parties to derogate from their obligations under GATT, Nicchia submits that there was no such legally binding consent. The agreement between MEMA and NAME (both non-governemental organisations of internal law) is of no significance in international law. NAME was in no position to modify the GATT obligations of the Nicchian state vis-à-vis Mercuria. In any event, the 14% restriction consented to by NAME concerned only Nicchian exports to

Mercuria and not sales of EMOs manufactured in Mercuria and has been rigourously adhered to at all times. The approval expressed by the Nicchian Secretary of Foreign Trade for this agreement was simply a natural reaction of relief that what could have developped into a potentially serious trade dispute had in fact been resolved amicably at a sub-state level without any negotiation between the states themselves having been necessary.

In Nicchia's submission, no intent to be legally bond can be deduced from the joint press communiqué.

If agreement there was at inter-state level, such an agreement can only be qualified as non-binding and legally irrelevant - in effect, a "gentleman's agreement" [12].

Finally, any legally binding agreement between states has to be registered with the United Nations Secretariat pursuant to article 102 I of the United Nations Charter. Nicchia respectfully submits that no such registration has taken place. Consequently, in application of article 102 II of the United Nations Charter, such an agreement cannot be invoked before this court.

(ii) THE PROVISION FOR THE IMPOSITION OF A 10 % FINE CANNOT BE JUSTIFIED BY REFERENCE TO ARTICLE VI [2] GATT

Article VI [2] permits a contracting party to levy a duty on products "dumped" on its market. The provision for a 10% fine included in the Cartel Office Order cannot lawfully be justified by reference to article VI [2] for three reasons.

Firstly, because no such dumping took place.

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12. SCHAECHTER, "THE TWILIGHT EXISTENCE OF NON-BINDING INTERNATIONAL AGREEMENTS". 70 A.J.I.L. 229 (1976) ; "NON-BINDING AGREEMENTS", 29 RV 1,2 (1969)

Secondly, and in the alternative, because any dumping that may have taken place is not sanctionable.

Thirdly, because the 10% fine imposed by Mercuria is not a legally justified response to alleged sanctionable dumping.

1. No dumping of Nicchian EMOs on the Mercurian market has taken place

Article VI [1] GATT (as in force on March 1st 1969) defines dumping as the introduction of one country's product onto the market of another "at less than the normal value of (the) product". Article VI [1] GATT gives three criteria to determine when dumping must be considered to have taken place.

Dumping would be considered to occur where, in the ordinary course of trade, Nicchian EMOs were sold on their domestic market for a lower price than they were sold abroad. This criterion is of no use in the present context as normal commercial operations in the sense of market forces establishing a price as an equilibrium between offer and demand [13] do not exist. Article VI [1]b GATT anticipating this eventuality gives two further definitions.

Dumping occurs where a state exports a similar product to any third country in the ordinary course of trade at a higher price [14]. There is no evidence to suggest this is the case.

Dumping is also considered to have taken place if the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit is greater than the price of the exported product on the foreign market. Nicchia respectfully submits that the prices commanded on the Mercurian market are not inferior to the

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13. CARREAU, FLORY, JUILLARD : DROIT INTERNATIONAL ECONOMIQUE, p. 144 (3e ed. 1990).

14. Article VI I b (is), GATT 62 U.N.T.S., 86.

costs of production. No evidence to the contrary has been adduced. That Nicchian companies finance some of the initial costs of their export drive from capital generated on their home market is an entirely usual and lawful business practice.

In Nicchia's submission, the activities of its EMO Manufacturers on the Mercurian market do not constitute dumping within any of the three definitions given in article VI [1] GATT. Consequently the use of article VI [2] GATT is not open to Mercuria.

2. In the alternative, any dumping which has taken place is not sanctionable

Neither Nicchia nor Mercuria are party to the Anti-Dumping Code resulting from the Tokyo Round negociation of 1979. Consequently, Nicchia's obligations under GATT in this domaine are limited to GATT as in force on March 1st 1969, specifically, the GATT anti-dumping code of 1967.

Under this regime, dumping is only sanctionable where it constitutes the principal cause of grave prejudice to the home industry. In Nicchia's submission, this is simply not the case. On a global level, the world EMO industry has undergone profound mutations since the 1970's. Of twenty EMO producers based in industrialized countries in the 1960's, only half now remain. In this context, Mercuria has fared somewhat better than its counterparts in that it has retained three EMO manufacturers.

It is difficult to see how the allegedly unfair trading practices of one or two specific companies could be responsible for a development in Mercuria that is global in scale. Mercuria would actually have to prove that her companies, against all global trends, would have fared considerably better had Nicchian companies abstained from their allegedly unfair behaviour and would not simply have lost its market share in a manner comparable to its counterparts in the industrial world.

Nicchia submits that the activities of its manufacturers are simply not the "principal cause" of the Mercurian EMO manufacturers' malaise.

3. The Mercurian response is, in any event, unlawful

The imposition of a 10% fine on all Nicchian EMO sales in Mercuria would, in any event, be unjustifiable under article VI [2] GATT for two reasons.

Firstly, there is no evidence to suggest that the 10% fine would constitute a measured response "not greater in amount than the margin of dumping in respect of (the) product" [15]. The 10% figure seems to have been arrived at in an arbitrary and punitive manner.

Secondly, any future Nicchian EMO production in Mercuria itself would be affected by the imposition of such a fine and yet by definition such production could in no way constitute dumping.

(iii) THERE IS NO OTHER JUSTIFICATION FOR THE ORDER

1. The Order cannot qualify as a retortionary measure justified in international law. Even if the Court were to decide that Nicchia has violated any of its obligations under international law (which Nicchia submits is not the case), Mercuria is bound by article XXIII GATT to seek ex ante authorisation from the Contracting Parties for any retortionary measures it wishes to take : given the questionable validity of Mercuria's counter-claim [16], it is not surprising that such authorisation has neither been sought nor given.

2. Under article XXV GATT, the Contracting Parties may, in exceptional circumstances waive an obligation imposed on a contracting party. No such derogation has been accorded to Mercuria.

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15. Article VI [2] GATT 62 U.N.T.S. 86.

16. infra p. 18

3. Mercuria cannot lawfully invoke the "general safeguard clause" of article XIX. The condition required for article XIX GATT to apply are not satisfied and in any event the measures taken by Mercuria (the Cartel Office Order) violate the principle of proportionality inherent in article XIX.

Article XIX [1] (a) provides that where, as a result of unforseen developments, any product is being imported into the territory of the contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers, the Contracting Party shall be free to the extent and for such a time as may be necessary to suspend its obligations under GATT in respect of such a product. It is submitted that no such "serious injury" or threat thereof is imputable to the increased quantities of Nicchian EMO exports to Mercuria [17].

In any case, the penetration of the Mercurian market by Nicchian companies has been neither spectacular nor unforseeable. Indeed, the growth rate of their combined market share has been at a steady 1.5% per annuum since as long ago as 1983. In addition, the MIMA-NAME agreement of June 12th 1989 limiting Nicchian EMO exports to Mercuria to 14% is evidence that the Mercurian manufacturers do not consider themselves sufficiently threatened for article XIX GATT to apply.

Secondly, the measures are contrary to the principle of proportionality inherent in article XIX [1]. The particular clauses of a treaty must be interpreted in such a way as to fulfill as effectively as possible the general goals set by the treaty [18]. The object and purpose of GATT is to eliminate or at least significantly reduce trade restrictions [19]. Therefore, any measure authorised under article XIX [1] must not affect free trade

17. Supra p. 8, para. 2

18. Article 31 I, V.C.L.T. done at May 23, 1969, UN. DOC. A-CONF. 39-11 ; BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2e ed. 1973) ; TOUCOZ, LE PRINCIPE D'EFFECTIVITE DANS L'ORDRE INTERNATIONAL; . A. Mc NAIR, LAW OF TREATIES (1961, re-issued 1986).

19. Preambule to GATT, 55 U.N.T.S., 194.

more than is absolutely necessary in order to restore an orderly market-situation. The Mercurian Order does not satisfy this requirement.

It goes beyond what would be permitted in that it imposes an absolute limit on sales regardless of where the product is manufactured even if this be in Mercuria itself and such production is contributing positively to the Mercurian economy. Nicchia notes with satisfaction that the planned construction of the Comcar plant in Mercuria has the support of the Mercurian Union of EMO Workers. Further, the Order is discriminatory in that while attempting to stabilise the Mercurian economy it targets only Nicchian Companies.

For all the above reasons, Nicchia submits to the Court that the Cartel Office Order of March 13th 1990 is wholly incompatible with Mercuria's obligations under international law and respectfully requests the Court to vacate it.

In the alternative, and in any event, the ammended Mercurian Law Against Restraints of Competition upon which the Order is based is itself unlawful (Part II).

PART II : THE AMENDMENT TO THE MERCURIAN LAW AGAINST RESTRAINTS OF COMPETITION IS UNLAWFUL

Legislative Acts can violate international law [20]. Nicchia submits that the Mercurian Law Against Restraints of Competition as amended ("The Law") is prima facie unlawful and cannot be justified.

A . THE LAW IS CONTRARY TO INTERNATIONAL LAW

The law as amended in November 1989, states that in the event of a violation, Mercuria may impose a fine of up to 10% of the annual sales of the undertakings involved and also limit the sale of goods manufactured by undertakings under foreign control, should such sale materially benefit from restrictive business practices.

Nicchia submits that this instrument violates international law in two respects : by using the notion of "restrictive business practices" to impose fines and by imposing sales restrictions.

(i) THE REFERENCE TO "RESTRICTIVE BUSINESS PRACTICES" IN THIS CASE IS UNLAWFUL

The reference to Restrictive Business Practices in the law is merely a pretext for the application of protective and prima facie GATT-illegal measures. The very notion of

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20. CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC (11th edition) at 59.

restrictive business practices is large and ill-defined [21]. It is used to condemn not only practices prohibited by GATT, but also practices which are prima facie GATT legal [22].

If the law sanctions practices prima facie contrary to GATT, it circumvents article XXIII GATT and the procedure envisaged therein. On the other hand where the law is used to sanction practices that are prima facie not contrary to GATT, it violates the principle of non-intervention.

1. The law breaches article XXIII GATT

Article XXIII GATT forms part of the GATT obligations of each contracting party. It exists to ensure that restrictive business practices contrary to GATT are controlled within a multilateral, non-partisan, non-conflictual environment and not by individual states motivated perhaps by misunderstood self-interest. The Mercurian law as amended does not conform to the procedure set out in article XXIII.

Furthermore, Nicchia submits that the law violates article XXIII GATT not just in letter but in spirit, being an ill-concealed recourse to protectionism. Therefore, even if the amendment is used to sanction only GATT illegal practices, it is nonetheless unlawful.

2. The law is contrary to the principle of non-intervention

As discussed above [23], the notion of restrictive business practices in the law may be used to sanction activities prima facie GATT legal. In allowing for this eventuality, the law permits Mercuria to breach the principle of non-intervention. If a state considers a certain way of practicing trade in another country to be "restrictive", even through the

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21. CARREAU, FLORY, JUILLARD, DROIT INTERNATIONAL ECONOMIQUE (2ème édition 1990) at 270 et seq.

22. Ex. Art. 1302 US Omnibus Trade and Competitiveness Act of 23 August 1988 ("The Super 301 Clause")

23. Supra : PART II A (i)

practice is compatible with international law, and consequently imposes sanctions, it must be considered that that state has infringed upon the principle of non-intervention.

3. Conclusion

Whether the law is used in a "reasonable" manner to sanction practices which in Mercuria's view are GATT illegal, or whether the instrument is used more extensively, it is in either case unlawful. In the former case, it violates article XXIII GATT and in the latter it contravenes the principle of non-intervention.

(ii) THE AMENDMENT VIOLATES BOTH ARTICLE XI AND ARTICLE III [4] GATT

The law allows for the imposition of sales limits on products produced by companies controlled by foreign persons. As discussed above [24] such measures constitute import restrictions contrary to article XI GATT. Further, the imposition of sales restrictions targeting products emanating from another contracting party necessarily constitutes a violation of the "national treatment clause", article III [4] GATT [25]. This violation is all the more flagrant in that it may even be used against Nicchian manufacturers based in Mercuria.

In conclusion, Nicchia submits that, far from contributing to the effective policing of restrictive business practices, the amendment constitutes an unlawful recourse to unilateral protectionism.

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24. Supra : Part I B (i)

25. Supra : Part I B (ii)

B. THE AMENDMENT CANNOT BE JUSTIFIED BY ANY INTERNATIONAL LAW EXCEPTIONS

As discussed above the amended Mercurian law against Restraints of Competition is prima facie unlawful. Nicchia further submits that the amendment cannot be justified by reference to any exceptions allowed either by GATT or by general international law.

(i) THE AMENDMENT CANNOT BE JUSTIFIED BY ANY PROVISION OF THE GATT TREATY

Article XIX [1], GATT allows contracting parties to derogate from certain other provisions of the treaty in particular circumstances. Such derogations whilst permitted are subject to a number of conditions and are limited in their effect. Nicchia submits that the Mercurian law does not fall within the Article XIX [1] exception for two reasons. Firstly it does not satisfy the conditions required for article XIX [1] to apply {1} and secondly the measures taken go beyond what article XIX [1] would permit {2}.

1. The conditions set out for article XIX [1] to apply are not satisfied

Article XIX [1] permits certain derogations from GATT regulations in the case of "serious injury to domestic industry resulting from unforseen developments". The Mercurian law poses no such condition. It permits sales restrictions to be imposed when Mercurian international trade is merely "adversely affected". This criterion is wider and less serious than that posed by article XIX [1]. It allows Mercuria to derogate from its GATT obligations in situations where there is no real threat of serious injury to domestic industry in the sense of article XIX [1]. As such it is submitted that the amendment is unlawful.

Furthermore the Mercurian law makes no reference to the requirement that the situation be caused by an "unforseen development". Instead it stipulates that international trade be affected as a result of the restrictive business practices of another state. The difference is significant. The "unforseen development" condition ensures that the article

XIX [1] clause is used almost as an emergency brake when liberal trade policies wreak havoc on a particular domestic industry. By referring to "restrictive business practices", Mercuria would, on the other hand, permit the use of the clause where there was no urgency, no danger and no serious injury to any particular industry almost as part of domestic economic policy. The clause could in effect be used to penalize successful foreign enterprises operating in Mercuria. Furthermore the law focuses on the activities of particular foreign companies rather than measuring the peril to the market as a whole. Nicchia submits that it is unreasonable and incompatible with article XIX GATT that the behaviour of a foreign company and not the market situation as such is determinant in triggering trade restrictive measures.

2. The measures taken by Mercuria go beyond what is permitted by article XIX [1]

Article XIX GATT permits emergency action to be taken on the imports of particular products. It stipulates that such a derogation from general GATT principles is permitted only "in respect of" [26] the product concerned. The Mercurian law as amended allows measures going beyond those permitted by article XIX. It provides for sales limits to be applied not only to products immediately affected by any trade practices Mercuria considers restrictive but also any sales "materially benefitting" from such behaviour. This provision allows the limitation of free trade to an extent far greater than that which is absolutely necessary to restore order to the market that is threatened. As such it is incompatible with article XIX and is unlawful.

(ii) THERE IS NO OTHER POSSIBLE JUSTIFICATION FOR THE AMENDMENT UNDER INTERNATIONAL LAW

Nicchia notes that no derogation of Mercurian obligations has been granted in accordance with article XXV [5] GATT. Consequently Mercuria cannot claim that it is not bound by any relevant provision of the treaty.

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26. Art. XIX [1], GATT 55 U.N.T.S. 258.

Furthermore, no defence can be raised on the grounds that the sales limit is an anti-dumping measure under article VI GATT. Article VI GATT provides only for fines corresponding to the dumping margin to be levied on the products concerned. It does not permit any limitation of the sale of such products.

Finally, there is no justification under general international law. Any measures imposed would have to conform with the GATT treaty [27] which is lex specialis in the economic sphere.

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27. Art. XXIII, GATT, 55 U.N.T.S. 266.

COUNTERCLAIM : NICCHIA HAS NOT VIOLATED INTERNATIONAL LAW BY SUPPORTING THE BUSINESS POLICIES OF NICCHIAN ENTERPRISES

Nicchia submits that the counterclaim made by Mercuria is both inadmissible (part I) and unfounded (part II).

PART. I : MERCURIA'S COUNTERCLAIM IS INADMISSIBLE

Article 80 of the Statute of the International Court of Justice stipulates that in order for a counterclaim to be admissible it must be immediately linked to the claim presented by the applicant. This condition is satisfied if there is an immediate legal connection between the issues to be decided. Such a connection only exists if one claim cannot be decided without the other. Mercuria's counterclaim is inadmissible as it fails to satisfy this "immediate link" requirement.

Nicchia claims that Mercuria has violated international law by exercising its jurisdiction in an area where it should not have done so. Mercuria, in its counterclaim, has questioned the legality of Nicchian support for certain trade practices of Nicchian EMO manufacturers. There is no immediate legal connection between the two claims as a decision on one would have no necessary influence upon the outcome of the other. There is no material link between the claims. The ratio materiae requirement contained in article 80 is not satisfied.

PART II : THE COUNTERCLAIM IS UNFOUNDED

Nicchia contends, in the alternative, that neither its trading policies in general nor its support for its companies strategies is unlawful.

A. NICCHIA'S TRADING PRACTICES ARE NOT CONTRARY TO INTERNATIONAL TREATY LAW

(i) RESTRICTIVE BUSINESS PRACTICES GENERALLY ARE NOT CONTRARY TO INTERNATIONAL TREATY LAW

The only treaty regulating Nicchia's and Mercuria's economic obligations to one another is GATT. There are no bilateral trade or investment treaties between the countries. Whilst being fully aware of its rights and obligations under GATT, Nicchia contends that GATT, as in force in 1969, only concerns certain types of restrictive business practices (mainly tariff trade barriers). It is submitted that there is no general treaty prohibition of restrictive business practices. The following factors prove that treaty law in this area is incomplete :

(1) Chapter V of the Charter of Havana which focused on the wider notion of restrictive business practices was never ratified.

(2) Subsequent attempts have been made to increase the application of the GATT to other restrictive business practices both during the Tokyo Round and the Uruguay Round. Neither Nicchia nor Mercuria are party to the Tokyo Round agreements and as far as the Uruguay Round is concerned it has not yet led to any tangible results.

(3) There is no international treaty law in this area concerning services.

(4) The abolition of all restrictive business practices is frequently discussed in international fora such as the OECD and UNCTAD.

(ii) THE PARTICULAR RESTRICTIVE BUSINESS PRACTICES THAT MERCURIA COMPLAINS OF ARE NOT CONTRARY TO GATT

Contrary to Mercuria's counterclaim, Nicchia submits that its "administrative support" for arrangements on domestic distribution, allocation of foreign markets and pricing is lawful.

1. Domestic Distribution of EMOs in Nicchia is lawful

Nicchia's organisation of domestic distribution and servicing are two matters which fall outside the ambit of GATT. Even if this were not the case, however, the existing companies agreements would still be lawful under GATT. No Nicchian regulation discriminates against another country nor does any regulation stop Mercurian companies from setting up their own distribution and service network in Nicchia.

2. The allocation of foreign markets to particular Nicchian EMO manufactures is lawful

Nicchia's "support" of the allocation of foreign markets by Nicchian companies is not contrary to GATT. GATT obliges contracting parties to liberalise their own national markets. To this end, they are bound to organise their markets in such a way as not to impede the sales of foreign products by imposing tariffary trade restrictions. There is no provision under GATT that would prohibit contracting parties from aiding their companies to target foreign markets.

3. Nicchian EMO pricing policy is lawful

Nicchian arrangements on pricing are not contrary to GATT principles. Mercurian EMO manufacturers are free to compete on an equal footing with their Nicchian counterparts for a share of the domestic Nicchian market. Price-fixing per se is not anti-competitive as manufacturers compete freely in production, distribution and marketing. The emphasis of the competition is merely switched towards producing the highest quality EMO for the lowest capital expenditure. The profitability of EMO manufacturing in Nicchia depends upon the ability of each manufacturer to produce quality goods at the

lowest possible cost to itself. In real terms, this situation does not differ substantially from countries where competition focuses primarily on pricing policy.

B. NICCHIA'S TRADING PRACTICES ARE NOT CONTRARY TO CUSTOMARY INTERNATIONAL LAW

Nicchia submits that there is no customary international law complementing its GATT obligations as far as restrictive trade practices are concerned.

(i) THERE IS NO STATE PRACTICE TO SUGGEST THAT RESTRICTIVE TRADE PRACTICES IN GENERAL ARE CONTRARY TO CUSTOMARY INTERNATIONAL LAW

Recent state practice indicates that states are pursuing policies which they deem most suitable to the economic development of their countries. Whilst certain states have adopted instruments permitting them to sanction restrictive business practices of foreign countries [28] , Nicchia submits that such laws are primarily used as instruments to promote protectionism and threaten foreign enterprises. They cannot therefore be viewed as examples of state practice tending towards the universal abolition of restrictive business practices.

Furthermore, many of these laws are considered to be imcompatible with the basic principles of GATT. Indeed, in Nicchia's view they are an expression of arbitrary unilateralism which endangers the very existence of GATT itself.

(ii) THERE IS NO OPINIO JURIS

There is no opinio juris that restrictive business practices in general are a violation of customary international law. The United Nations Set of Multilateraly Agreed Prin-

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28. Supra : note 22.

ciples and Rules for the Control of Restrictive Business Practices [29] is merely a resolution under article 131 (b), United Nations Charter. As such, it qualifies as a recommendation and not as a manifestation of any will to be legally bound. The non-binding character of these recommendations was reiterated in the 1985 review of the agreement [30].

Furthermore, many of the states that have adopted far-reaching laws to counter restrictive trading do not consider all such restrictive trading to be contrary to international law. For example, the United States of America, whose disputed "super 301" clause [31] takes one of the toughest lines against restrictive business practices, envisages three types of sanctionable behaviour. One such type targets restrictive business practices contrary to international law. Thus, a contrario, the United States Legislature considers that the other two categories of restrictive business practices are not contrary to international law.

Finally, the failure of the Uruguay Round to produce tangible results is somewhat surprising if all that was necessary was a codification of a body of customary international law rules that the Contracting Parties already felt legally bound to.

Thus it is submitted that there is no customary international law upon which Mercuria can base its allegation that Nicchia's actions concerning domestic EMO distribution, allocations of foreign EMO markets and EMO pricing policy are unlawful.

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29. U.N. Doc. T.D./RBP/Conf. 10

30. U.N. Doc. TD/RBP/CONF. 2/8.

31. Supra : note 22.

FOR THESE REASONS MAY IT PLEASE THE COURT TO:

1. VACATE THE ORDER OF THE CARTEL OFFICE OF MARCH 13th 1990 AS AFFIRMED BY THE SUPREME COURT, INCLUDING THE LIMITATION IMPOSED ON EXPORTS FROM NICCHIA TO MERCURIA,

2. REPEAL THE AMENDMENT OF NOVEMBER 1989 TO THE LAW AGAINST RESTRAINTS OF COMPETITION,

3. SUBSEQUENTLY, TO DISMISS MERCURIA'S COUNTERCLAIM.