

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
Mercuria
Respondent

TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	i
INDEX OF AUTHORITIES	iii
JURISDICTION	vii
QUESTIONS PRESENTED	vii
STATEMENT OF FACTS.....	viii
SUMMARY OF ARGUMENT.....	xi
ARGUMENTS AND AUTHORITIES.....	1
CLAIM : MERCURIA HAS NOT BREACHED INTERNATIONAL LAW	1
PART I : THE CARTEL OFFICE ORDER OF MARCH 13th 1990 IS COMPATIBLE WITH INTERNATIONAL LAW.....	1
A . THE CARTEL OFFICE ORDER OF MARCH 13th 1990 IS COMPATIBLE WITH CUSTOMARY INTERNATIONAL LAW.....	1
(i) THE CARTEL OFFICE HAD TERRITORIAL JURISDICTION TO MAKE THE ORDER.....	2
1. Mercuria sought only to regulate its own market.....	2
2. The Order does not target the Nicchian economy	2
(ii) THE CARTEL OFFICE HAD JURISDICTION BY REASON OF THE "EFFECTS DOCTRINE" TO MAKE THE ORDER.....	3
1. Jurisdiction by reason of the "Effects Doctrine"	3
2. The measures taken under the Order satisfy the requirement of proportionality	4
B . THE CARTEL OFFICE ORDER OF MARCH 13th 1990 CONFORMS TO INTERNATIONAL TREATY LAW	5
(i) MERCURIA HAS NOT VIOLATED ARTICLE XI [1] GATT.....	5
1. The Order does not impose import restrictions within the meaning of article XI [1] GATT.....	5
2. Article XI [1] should be interpreted restrictively in light of Nicchian consent to the 14 % sales limit	6

3. In the alternative, Mercuria submits that Nicchia has forfeited its rights under article XI [1] GATT.....	7
(ii) THE CARTEL ORDER OF MARCH 13th 1990 DOES NOT VIOLATE ARTICLE III [4] GATT	7
1. Nicchia has forfeited its rights to invoke article III [4] GATT.....	8
2. In the alternative, the 14 % limitation and the eventual imposition of a 10 % fine do not violate article III [4].....	8
C. ANY PRIMA FACIE VIOLATION OF GATT IS IN ANY EVENT JUSTIFIED.....	9
(i) THE POSSIBLE IMPOSITION OF A 10 % FINE IS AN "ANTIDUMPING" MEASURE WITHIN THE MEANING OF ARTICLE VI GATT.....	9
1. Comcar and ELEC are guilty of dumping.....	9
2. This Dumping has caused grave prejudice to the Mercurian EMO industry.....	10
3. The possible imposition of a 10 % anti-dumping fine is lawful	11
(ii) THE CARTEL OFFICE ORDER CAN BE JUSTIFIED BY REFERENCE TO ARTICLE XIX, GATT	11
1. A situation justifying recourse to article XIX GATT exists	11
2. The Measures imposed are compatible with article XIX GATT.....	12
(iii) THE CARTEL OFFICE ORDER CAN BE JUSTIFIED BY REFERENCE TO ARTICLE XX d, GATT	12
PART II: THE AMENDMENT OF NOVEMBER 1989 TO THE MERCURIAN LAW AGAINST RESTRAINTS ON COMPETITION IS LAWFUL.....	13
A. THE AMENDMENT CANNOT BE UNLAWFUL.....	13
B. IN ANY EVENT, THE DISCRETION PROVIDED FOR IN THE AMENDMENT RENDERS IT LAWFUL.....	14
(i) THE LAW AS AMENDED MAY BE APPLIED IN A MANNER COMPATIBLE WITH MERCURIA'S OBLIGATIONS UNDER GATT.....	14
(ii) THE LAW AS AMENDED MAY BE APPLIED IN A MANNER COMPATIBLE WITH GENERAL INTERNATIONAL LAW.....	15
(iii) CONCLUSION	16
COUNTERCLAIM : NICCHIA HAS BREACHED INTERNATIONAL LAW.....	17
PART I : THE COUNTERCLAIM IS ADMISSIBLE.....	17

PART II : NICCHIA'S BEHAVIOUR ON ITS HOME MARKET IS INCOMPATIBLE WITH ITS OBLIGATIONS UNDER INTERNATIONAL LAW	18
A. NICCHIA'S ORGANISATION OF ITS DOMESTIC EMO INDUSTRY IS CONTRARY TO GATT.....	18
(i) NICCHIA CONTRAVENES ARTICLES XI [1] GATT BY ENGAGING IN PRICE FIXING.....	18
(ii) NICCHIA CONTRAVENES ARTICLES XI [1] AND III [4] GATT BY ARRANGING DOMESTIC EMO DISTRIBUTION.....	19
1. Nicchia's arrangement of domestic distribution is a national breach of article XI [1] GATT	19
2. Nicchia's arrangement of domestic distribution is a material breach of article III [4] GATT	19
(iii) IN PARTICIPATING IN THE ALLOCATION OF FOREIGN MARKETS AMONG ITS DOMESTIC EMO MANUFACTURERS, NICCHIA HAS VIOLATED ARTICLES XI [1] AND III [4] GATT.....	20
1. The allocation of foreign markets under direction from the Nicchian government constitutes a violation of articles XI [1] and III [4] GATT.....	20
2. The Allocation of foreign markets under direction from the Nicchian government constitutes a violation of article III [1] GATT	20
B. NICCHIA'S ORGANISATION OF ITS DOMESTIC EMO INDUSTRY IS CONTRARY TO CUSTOMARY INTERNATIONAL LAW	21
(i) NICCHIA'S SUPPORT FOR RESTRICTIVE BUSINESS PRACTICES IS UNLAWFUL	21
(ii) NICCHIA HAS VIOLATED THE PRINCIPLE THAT NO STATE MAY USE ITS SOVEREIGNTY IN SUCH A WAY AS TO CAUSE UNWARRANTED PREJUDICE TO ANOTHER STATE.....	22
(iii) CONCLUSION	23
SUBMISSION	24

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 Omnibus 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

INDEX OF AUTHORITIES

1. TREATIES AND OTHER INTERNATIONAL AGREEMENTS

- Charter of the United Nations, 1 U.N.T.S. XVI
- Statute of the International Court of Justice, done at June 26th 1945 15 U.N.C.I.O., 355.
- Vienna Convention on the Law of Treaties, done at May 23rd 1969, UN DOC. A/Conf. 39/11 (Add.2)
- General Agreements on Tariffs and Trade, 55 U.N.T.S. 1947, 187
- United Nations Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/B/RBP/Inf. 12.3

2. DOCUMENTS

- Report of Panel on Norwegian Restrictions on Imports of Certain Textile Products, GATT (B.I.S.D.) 27/S/119
- Report of Panel on Italian Discrimination Against Imported Agricultural Machinery, GATT (B.I.S.D.) 75/60, para 12
- Report of Panel on Japanese-American Trade in Semi-Conductors, A.F.D.I., 1988 pp. 546 et seq.
- Règlement du Conseil de la Communauté Européenne no. 1761/87 du 22 Juin 1987, J.O.C.E. 1987, L. 167/9 ("Règlement Tournevis")
- Document de Synthèse de la Réunion du Groupe d'Etude "G.A.T.T. - URUGUAY ROUND" de la Section des Relations Extérieures (23 Avril 1987) E.E.C. Doc. R/CES 437/87
- Minutes of the Session Plénière du Parlement Européen du 10 au 14 octobre 1988, "Europe", 12 oct. 1988 no. 4871
- E.E.C. Press Release no. 379, 26 May 1989 : "U.S. Decision related to 301."
- E.E.C. Press Release no. 597, 24 Juillet 1989 : "La Procédure de la Section 301 de la Loi des Etats-Unis sur le Commerce."
- E.E.C. Press Release no. 849, 10 Novembre 1989 ; "Déclaration de M. Andreissen au sujet du rapport du groupe spécial du GATT concernant l'article 337 de la loi américaine de 1930."

- KELSEN, H. Principles of International Law, 2nd ed. 1966
- LAUTERPACHT, H. International Law and Human Rights, 1950
- MARYAN-GREEN, N.A. International Law, 3rd ed. 1987
- Mc NAIR, A.D. Laws of Treaties, 1961
- MENY, Y. Textes Constitutionnels et Documents Politiques, 1989
- ROUSSEAU, C. Droit International Public, 3ème éd. 1983
- SCHWARZENBERGER, G. A Manual of International Law, 6th ed. 1976
- SHAW, M. N. International Law, 2nd ed. 1988
- STARKE, J.G. Introduction to International Law, 1984
- VENDROSS, A.,
SIMMA, G. Universelles Vörlkerrecht, 3ème éd. 1984
- WALLACE, R. M. International Law, 1986
- WESTON, B. H.,
FALK, R. A.,
D'AMATO, A. A. International Law World Order, American Casebook Series, 1980.

5. ARTICLES

- CASTEL, A. Extraterritorial Effects of Antitrust Laws, 179 Recueil des Cours 1, 16 (1983)
- BIERCE, W. B.,
COSCIA, A.R. La Loi de 1984 sur le commerce et les tarifs douaniers : extension des tendances protectionnistes aux Etats-Unis, Cahiers Juridiques et Fiscaux d'exportation, No. 4, 1985 p. 1145
- FIEVET, G. Les Accords d'autolimitation, une nouvelle technique d'accords communautaires, Revue du Marché Commun, 1983 p. 597
- HUDEC, G. Developing Countries in the GATT legal system, Trade Policy Research Center, London, 1987
- JACKSON, J. H. Consistency of export-restraint arrangements with the GATT, The World Economy, December 1988 p. 485
- MANN, J. The Doctrine of Jurisdiction in International Law III Recueil des Cours (1984)

- MEESEN, K. Anti-Trust Jurisdiction, A.J.I.L. 783 et seq.
- ROESSLER, F. The Scope, limits and function of the GATT legal system,
The World Economy, 1985 p. 287
- SCHNECTER, The Twilight Existence of Non-Binding International
Agreements, 70 A.J.I.L. 229 (1976)
- "The Economist", 20 October 1990, GATT Ploughed Under p. 86
- "The Economist", 27 October 1990, Trade Betrayed, p.16
- "The Economist", 8 December 1990, A Lifeboat for trade, p.15
- "The Economist", 12 January 1991, Japan's Winning Products
- "The Economist", 9 February 1991, More Grief for GATT, p. 76
- Financial Times, Financial Times Survey : Japanese Automotive Industry, 20 December
1990.

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 . Has the State of Mercuria 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 . By way of counterclaim, is 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, negotiations 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 announcement 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 superseded 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 ARGUMENT

CLAIM:

Mercuria submits in defence that it has not violated international law either by amending its Law Against Restraints of Competition or by the issuing of the Cartel Office Order of March 13th 1990.

The Cartel Office Order is compatible with Mercuria's obligations under international customary law and under international treaty law. It constitutes a lawful exercise of Mercuria's jurisdiction over matters concerning its territory and nationals. Additionally, and in any case, Mercuria derived the requisite jurisdiction by reference to the "effects doctrine".

The Order does not constitute a breach of any of Mercuria's obligations under GATT, the relevant treaty law in this matter. Mercuria submits that the Order does not contravene articles XI [1] and III [4] GATT. It neither imposes a sanctionable import restriction nor discriminates unlawfully against the products of any foreign state.

Furthermore, any prima facie violation of GATT is justified by reference to articles VI, XIX and XX d GATT. The two Nicchian companies targeted by the Order have engaged in unlawful dumping within the meaning of article VI. Mercuria is therefore justified in providing for the imposition of a 10% anti-dumping fine. Considerable evidence of serious disruption to the Mercurian EMO industry can be adduced. Recourse to measures allowed by article XIX GATT is therefore justified. The Order can finally be justified as a necessary application of a law that is itself GATT legal, by reason of article XX d.

Mercuria also submits that the amendment of 1989 to its Law Against Restraints of Competition is lawful. It is the exercise of its sovereign right to legislate and cannot

be unlawful. In the alternative, as there is scope to apply the law in compliance with Mercuria's international obligations it is lawful.

COUNTERCLAIM:

Mercuria submits that the Court has jurisdiction both because the counterclaim formed part of the compromis under article 36 [1], Statute of the I.C.J. and also because the counterclaim is temporally and materially linked to the claim as required by article 80, Statute of the I.C.J. Nicchian administrative support for domestic price fixing and allocation of foreign markets is contrary to both GATT and customary international law. Nicchia has violated articles III [1], III [4] and XI [1] GATT. Furthermore, sufficient state practice and opinio juris exists to confirm that Nicchia's particular type of state interventionism is comprised of restrictive business practices contrary to customary international law. In addition, these practices constitute an unlawful and unwarranted abuse of sovereignty. Mercuria therefore submits to the Court that its counterclaim should succeed.

CLAIM: MERCURIA HAS NOT BREACHED INTERNATIONAL LAW

**PART I: THE CARTEL OFFICE ORDER OF MARCH 13th 1990
IS COMPATIBLE WITH INTERNATIONAL LAW**

**A. THE CARTEL OFFICE ORDER OF MARCH 13th 1990
IS COMPATIBLE WITH CUSTOMARY INTERNATIONAL LAW**

Mercuria submits that it did no more than exercise its jurisdiction in issuing the Cartel Order of March 13th 1990 ("the Order"). A "genuine link" exists between Mercuria and the subject matter regulated by the Order. Under customary international law, a "genuine link" granting a state jurisdiction exists where the territory or the nationals of the state are concerned. Jurisdiction also exists where the extra-territorial activities of non-nationals have repercussions of significant importance on the regulating state¹. Mercuria submits that it has jurisdiction because the activities regulated concern its territory (i) and, in the alternative, because the activities regulated have repercussions of significant importance for Mercuria (ii).

1. MANN, THE DOCTRINE OF JURISDICTION IN INTERNATIONAL LAW, 111 RECUEIL DES COURS (1964) ; I. BROWNLIE, GENERAL PRINCIPLES OF INTERNATIONAL LAW, 310, (4th ed. 1990).

**(i) THE CARTEL OFFICE HAD TERRITORIAL JURISDICTION
TO MAKE THE ORDER**

1. Mercuria sought only to regulate its own market

The Order issued by the Cartel Office and confirmed by the Supreme Court requires two Nicchian companies, ELEC and Comcar, to participate fairly in the Mercurian EMO market. The Order seeks only to bring the behaviour of ELEC and Comcar into line with that of other companies, Mercurian and foreign, that take advantage of liberal Mercurian trade policies and an open EMO market.

This order was necessary to protect other actors, national and foreign, on the Mercurian market. Therefore, in Mercuria's submission a "genuine link" exists between the order and its territory.

2. The Order does not target the Nicchian economy

The Order does not seek to impose a certain structure on the Nicchian economy. Indeed, it merely seeks to protect the Mercurian economy from the adverse effects of restrictive business practices encouraged by Nicchia. Mercuria cannot permit foreign undertakings operating on the Mercurian market to gain a competitive advantage as a result of restrictive business practices permitted elsewhere. The regulation of the Nicchian economy is entirely a matter for the Nicchian government within the framework of its obligations under international law. There is nothing in the Order which affects the production or distribution of EMOs in Nicchia. In acting only to regulate its own economy, and not seeking to intervene in Nicchia's economic policy, it has established territorial jurisdiction.

**(ii) THE CARTEL OFFICE HAD JURISDICTION BY REASON
OF THE "EFFECTS DOCTRINE" TO MAKE THE ORDER**

Should the Court not wish to follow the argument that Mercuria has territorial jurisdiction, Mercuria submits in the alternative that it derives jurisdiction by reason of the "Effects Doctrine".

1. Jurisdiction by reason of the "Effects Doctrine"

According to the "Effects Doctrine", jurisdiction exists where the extra-territorial activities of non-nationals have repercussions of significant importance on the regulating state². The doctrine is of particular relevance in international economic law, where reliance upon national and territorial jurisdiction alone ill-reflects the transnational reality of global trade. The principle which underlies this doctrine has undisputed legal status in international economic law³. Mercuria *stricto sensu* therefore, does not have to prove that the doctrine forms part of customary international law⁴ but nevertheless notes that the doctrine is confirmed both by state practice and *opinio juris*⁵.

In the present instance, Mercuria derives jurisdiction because the extra-territorial unfair practices of Nicchian EMO manufacturers have a significant impact on the Mercurian economy. Nicchia's success in the Mercurian EMO market is unfairly subsidized by profits made on its over-regulated home market. There is no other substantial reason for their success. Thus the unfair organisation of the Nicchian EMO industry results in

2. *Supra* : note 1 ; and for practical application, see *Nicaragua v. U.S.A.* 1986 I.C.J., 14, 18 ; *Corfu Channel Case (U.K. v. Albania)* 1949 I.C.J., 37

3. *CASTEL, EXTRATERRITORIAL EFFECTS OF ANTITRUST LAWS 179 RECUEIL DES COURS I 16 (1983)*

4. *EEC Law No. 1761/87 (1987) Section 301, of the 1974 Trade Act ; Article 1302 Omnibus Trade and Competitive Act (1988)*

5. *Section E 1, 2 of the annex to G.A. Res 35/63 35 U.N.G.A.O.R. Suppl. No. 48 at 223, U.N. Doc. A/35/48 (1980), U.N. Doc. TD/RBP/CONF/10 (1980)*

serious repercussions for the Mercurian market and is therefore a matter for Mercurian jurisdiction.

2. The measures taken under the Order satisfy the requirement of proportionality

A necessary check on unwarranted abuse of the "Effects Doctrine" exists, as any measure taken must satisfy the principle of proportionality. This principle requires the country claiming jurisdiction to exercise it in such a way as to take account of the interests of the other country involved⁶. Mercuria submits that for the reasons stated below, the requirement of proportionality has been satisfied.

Firstly, the Cartel Order fairly reconciles the a priori conflicting interests of the two countries. It constitutes a compromise between the requirements of a neo-liberal world economic order and the less stringent obligations normally imposed upon Newly Industrialised Countries such as Nicchia. In this light, Mercuria notes that not only is Nicchia not an underdeveloped country but also that its EMO industry is flourishing. Consequently, the increasingly rigorous position taken by Mercuria towards Nicchia is a due and lawful response to Nicchia's increased prosperity. In Mercuria's submission, the Cartel Order represents a reasonable means of restoring fair trade conditions in Mercuria, whilst at the same time reminding Nicchia of its increasing responsibilities under the world economic order.

Secondly, the Cartel Order conforms fully with Section E 1, 2 of the United Nations Restrictive Business Practices Code⁷ which recommends the adoption and complementation of legislation to counter trade restrictive measures introduced by other states and thus can in no way be viewed as disproportionate.

6. MEESEN, ANTI-TRUST JURISDICTION A.J.I.L. 783 et seq. (1984)

7. 55 U.N.T.S. 187 (1947)

B. THE CARTEL OFFICE ORDER OF MARCH 13th 1990
CONFORMS TO INTERNATIONAL TREATY LAW

Both Mercuria and Nicchia are contracting parties to the General Agreements on Tariffs and Trade (GATT) ⁸ to which both parties are bound by virtue of the Protocol for Provisional Application ⁹. Mercuria will show in the following that the Cartel Order does not constitute a violation of GATT and in the alternative, any prima facie violations are justified under specific and general GATT provisions.

(i) MERCURIA HAS NOT VIOLATED ARTICLE XI [1] GATT

1. The Order does not impose import restrictions within the meaning of article XI [1] GATT

Article XI [1] GATT prohibits the institution or maintenance of quantitative restrictions on the importation of products emanating from Contracting Parties. Mercuria draws the attention of the Court to the fact that the Order does not impose an import restriction but sets a limit to Nicchian EMO sales in Mercuria, whatever their provenance. Therefore, there is no prima facie violation of article XI [1] GATT. Nicchia would have great difficulty demonstrating the contrary. Mercuria submits to the Court that any sales restriction has consequences on imports by definition. Nonetheless, Nicchia has had no problem with sales restrictions in the past and has even expressed its will to be bound by such restrictions.¹⁰ Therefore in the absence of an import restriction per se, there is no violation of article XI [1] GATT.

8. 55 U.N.T.S. at 308 (1947)

9. U.N. Doc. T.D./RBP/Conf.10 (1980)

10. See facts : agreement of June 12th 1989, "diplomatic notes"

2. Article XI [1] should be interpreted restrictively in light
of Nicchian consent to the 14 % sales limit

Article 31 [3] Vienna Convention on the Laws of Treaties (V.C.L.T.) ¹¹ to which both Mercuria and Nicchia are parties, provides that treaties must be interpreted with due consideration to later agreements. It will be shown below that an agreement concerning the 14 % sales restriction existed between Mercuria and Nicchia. Due consideration should be given to this agreement when determining the parties' respective obligation under article XI [1] GATT.

The joint communiqué between the Nicchian Secretary of Foreign Trade and the Mercurian Minister of Economic Affairs in the matter of the NAME/MEMA agreement constitutes a binding agreement between the states. Articles 2 and 3 (a) V.C.L.T. clearly provides that there is no prescribed form or procedure for the conclusion of treaties ¹². A legally binding agreement can be expressed in the form of a joint communiqué. The unilateral nature of the obligation does not detract from its legally binding effect ¹³. The only criterion for the establishment of such an agreement is the will of the parties to be legally bound. The Nicchian Department of Economic Affairs' intention to be legally bound may be adduced both from its close cooperation with NAME which is undisputedly bound by the agreement and from its continual expression of willingness to be bound to a 14 % sales ceiling as well as in several diplomatic notes.

11. *Vienna Convention on the Laws of Treaties, done at May 23 of 1969, U.N. Doc. A/Conf. 39/11 (Add. 2)*

12. *Art. 2, V.C.L.T. : SHAW, INTERNATIONAL LAW, 2nd ed. 1986 p. 461 : "Many of the more mundane agreements are expressed to be as between government departments, such as minor trading agreements." ; CARREAU, DROIT INTERNATIONAL, 2ème éd. 1988 p 97 et seq.*

13. *Nicaragua Case supra note 2 ; Nuclear Test Cases (New Zealand v. France) 1974 I.C.J. 457, 473 ; (Australia v. France) 1974 I.C.J. 253,567 ; Legal Statues of Eastern Greenland case (Denmark v. Norway) 1933 P.C.I.F. (ser. A/B) No. 53.*

Furthermore, Mercuria submits that this binding agreement is lawful in respect of GATT. Indeed, bilateral autolimitation agreements that have recently been brought to the attention of GATT panels have not been declared GATT illegal ¹⁴ .

3. In the alternative, Mercuria submits that Nicchia has forfeited its rights under article XI [1] GATT

The exercise of legal rights by states under international law is governed by the principles of good faith and consistency ¹⁵ . It follows from this principle that if a party consciously and consistently behaves in a manner inconsistent with such rights, it is precluded from invoking them ¹⁶ . Mercuria submits that Nicchia has systematically acted in a way incompatible with any such rights it might have under article XI [1] GATT. The continuous support shown by Nicchia for the agreement, both in the joint communiqué of June 12th 1989 and in the amicus brief filed with the Mercurian Supreme Court as well as in several diplomatic notes clearly demonstrates that Nicchia has forfeited any right to claim under article XI [1].

(ii) THE CARTEL ORDER OF MARCH 13th 1990 DOES NOT VIOLATE ARTICLE III [4] GATT

Article III [4] GATT (The "National Treatment Clause") obliges all contracting parties to "treat all imported goods" no less favourably than like products of national origin. In Mercuria's submissions, Nicchia may not invoke article III [4] . If, as is denied, Nicchia may invoke article III [4], Mercuria submits that the Cartel Order does not constitute a violation of it.

14. *CARREAU, FLORY, JUILLARD op. cit. p. 267 et seq. ; Commentaire du Rapport du Panel du GATT (C.E.E. v. Japon) A.F.D.I.*

15. *G. SCHWARZENBERG, A MANUAL OF INTERNATIONAL LAW, p. 118 b ed. (1986)*

16. *Case concerning the Temple of Oreah Vihear (Cambodia V. Thailand) 1962 I.C.J.39, 42 ; Fisheries Case (U.K. v. Norway) 1951 I.C.J. 149 et seq. ; South West Africa Cases (Ethiopia v. South Africa) (Liberia v. South Africa) 1962 I.C.J. 319,440.*

1. Nicchia has forfeited its rights to invoke article III [4] GATT

Mércuria submits that Nicchia has consistently comported itself in a manner incompatible with any rights it might have under article III [4] GATT. As discussed above ¹⁷, the consent continually expressed by Nicchia for the sales limitation agreement of June 12th 1989 is such that Nicchia cannot in good faith ask the Court to declare this limitation unlawful under article III [4]. In Mércuria's submission, Nicchia is therefore barred from invoking article III [4].

2. In the alternative, the 14 % limitation and the eventual imposition of a 10 % fine do not violate article III [4]

The measures laid out in the Cartel Order have been imposed on the basis of the Mercurian Law Against Restraints on Competition which is equally applicable to all companies operating on the Mercurian market, whether domestic or foreign. The law which Mércuria will demonstrate in Part II to be lawful, aims to secure a competitive market free of unfair trade practices. Violations of Mercurian competition law are subject to fines of up to 10 % of the annual sales of the undertakings concerned. Since the amendment to the law of November 1989, violations can also be sanctioned through limitation on sales. If Comcar and ELEC must restrict their sales to a reasonable level or otherwise face the prospect of a 10 % fine, this is a logical consequence of the indiscriminate application of the law. Had Mércuria not applied the law to the two companies it would have discriminated both against domestic producers and foreign companies which operate on its market in conformity with the law.

17. *Supra Part I B (i) 3 page 7*

C. ANY PRIMA FACIE VIOLATION OF GATT IS
IN ANY EVENT JUSTIFIED

As Mercuria will show in the following, the eventual imposition of a 10 % fine is specifically justified under article VI GATT. In addition, Mercuria submits that the Court should hold that the Cartel Order is justified under articles XIX and XX (d).

(i) THE POSSIBLE IMPOSITION OF A 10 % FINE IS AN "ANTI-DUMPING"
MEASURE WITHIN THE MEANING OF ARTICLE VI GATT

Mercuria submits that Comcar and ELEC are guilty of "dumping" Nicchian EMOs on the Mercurian market. This has caused grave prejudice to the domestic manufacturers. In these circumstances the eventual imposition of a 10 % fine is fully justified under article VI GATT.

1. Comcar and ELEC are guilty of dumping

Article VI [1] defines dumping as the introduction of one country's product on the market of another at a price less than its normal value. Dumping is considered to have taken place if the cost of production of the product in the country of origin plus a reasonable addition for selling costs and profit is greater than the price of the exported product on the foreign market. Mercuria respectfully submits that the prices commanded by Comcar and ELEC on the Mercurian market are inferior to their true costs of production. It is well known fact that only a small proportion of the considerable profits made by Comcar and ELEC on their home market have been distributed to their shareholders. In large part these profits have in fact been used to subsidize exports to Mercuria. Though it might be argued that the initial phase of an export drive may be funded by parent company's profits without dumping taking place ¹⁸, this argument can easily be discounted in the case of Comcar and ELEC. These companies have been operating successfully on the Mercurian market for several years, annually increasing their

18. Contra : the imposition of an anti-dumping measure on the AJINOMOTO-MONSANTO joint venture by the European Commission : December 3th 1990, J.O.C.E.

combined market share by 1.5 %. They currently enjoy a combined market share in excess of 10 %. In these circumstances, the continued export subsidies can no longer be justified on the count of extraordinary start-up costs and must therefore be seen as evidence of an intention to sell at below the cost of production. Mercuria concludes that Comcar and ELEC engage in dumping within the definition of article VI [1].

2. This Dumping has caused grave prejudice to the Mercurian EMO industry

The turmoil affecting the Mercurian EMO industry, the significant level of lay-offs and the annual loss in market share of some 1.5 % over 8 years are evidence of the substantial prejudice it has undergone. The total Mercurian market share has already shrunk by over 10 % and shows no signs of recovery.

The causal link between this material injury and the dumping engaged in by Nicchian manufacturers can be deduced from the fact that the annual 1,5 % loss of market share suffered by Mercurian manufacturers corresponds exactly to the percentage of annual growth enjoyed by CONCAR and ELEC in Mercuria. Mercuria submits that this correspondance confirms that Nicchian dumping is the "principal cause" ¹⁹ of "material injury" and that it is therefore sanctionable. The conditions set out in article VI [1] GATT are clearly fulfilled.

This conclusion stands, a fortiori, if the Court wishes to retain as customary international law the less stringent notion of cause ²⁰ laid down in article III 4 of the Code Relative to the Application of Article VI elaborated during the Tokyo Round Negotiations of 1979.

19. CARREAU, FLORY, JUILLARD, *DROIT INTERNATIONAL ECONOMIQUE OP. cit. p. 147.*

20. *ibid.*

3. The possible imposition of a 10 % anti-dumping fine is lawful

Article VI [2] GATT ²¹ states that an anti-dumping fine may be levied on all dumped products up to the amount of the dumping margin. The dumping margin consists of the difference between the real costs of production of the item and the price for which it is sold on the foreign market. Mercuria submits that the amount of the fine in no way exceeds the dumping margin. Given that Nicchian manufacturers subsidise their exports with a "high percentage" of the "considerable profits" that they make on their affluent domestic market, it is indeed submitted that Mercuria has exercised considerable restraint in only pitching the fine at 10 % of annual sales revenue.

(ii) THE CARTEL OFFICE ORDER CAN BE JUSTIFIED BY REFERENCE TO ARTICLE XIX, GATT

1. A situation justifying recourse to article XIX GATT exists

The general safeguard clause contained in article XIX ²² provides that a party may be relieved from its GATT obligations if increasing imports cause or threaten to cause serious injury to domestic producers as a result of unforeseen developments. Such a situation would occur where quantitatively substantial and rapidly increasing imports produce a significant decrease in the sales of domestic manufacturers ²³. Since their appearance on the Mercurian market for the first time no more than a few years ago, Nicchian EMOs have seen their market share rise annually by 1,5 %. In a relatively short time therefore they have managed to conquer over 10 % of the Mercurian EMO market. The boom in Nicchian EMO sales in Mercuria has inevitably caused serious

21. 62 U.N.T.S. 86

22. 55 U.N.T.S. 258

23. *Report of Panel on Norwegian Restrictions on Import of Certain Textile Products, GATT (BISD) 275/119 para.11 (1981)*

injury to the domestic producers ²⁴ . Mercuria submits that in the light of this situation, recourse to the article XIX safeguard clause is justified.

2. The Measures imposed are compatible with article XIX GATT

Mercuria is fully aware of the restrictions inherent to the use of article XIX and has accordingly taken only those measures which are strictly necessary to restore an orderly situation to the Mercurian EMO market. In this respect Mercuria points out that the measures are both non-discriminatory and temporary.

The measures are non discriminatory since they have been imposed after a thorough analysis of the cause of the problem. As the behaviour of the Nicchian companies is the primary cause of the disruption to the Mercurian EMO market it is only natural that these companies bear the brunt of the Mercurian emergency program. This in no way constitutes discrimination against them.

Furthermore, the measures are only temporary since they apply only for as long as Nicchia has not taken the necessary steps to inhibit unfair trading practices afflicting the Mercurian market.

(iii) THE CARTEL OFFICE ORDER CAN BE JUSTIFIED BY REFERENCE TO ARTICLE XX d, GATT

It results from article XX d GATT that measures otherwise incompatible with GATT may be justifiable, if they are necessary to enforce internal legislation which is not itself incompatible with GATT as a whole. It is clear, that, whatever its prima facie status under GATT, the Cartel Order is necessary to implement the Mercurian Law Against Restraints on Competition. The Order, as has been amply demonstrated above ²⁵, does not constitute a means of arbitrary or unjustifiable discrimination and is not a

24. *Supra Part I C. (i) 2.*

25. *Supra B (i) and (ii)*

disguised restriction on international trade. It is further submitted that the Mercurian Law Against Restraints on Competition as will be shown in Part II is fully compatible with GATT. Consequently, according to article XX d GATT the Order is lawful.

**PART II: THE AMENDMENT OF NOVEMBER 1989 TO THE
MERCURIAN LAW AGAINST RESTRAINTS ON COMPETITION
IS LAWFUL**

A. THE AMENDMENT CANNOT BE UNLAWFUL

A law in itself, independent of its application, cannot be contrary to international law. The Amendment of November 1989 to the Mercurian Law Against Restraints on Competition ("the amendment") provides that the sale of goods manufactured at any location by companies whose capital-stock is controlled by foreign persons may be limited to a reasonable level if such sale materially benefits from restrictive business practices adversely affecting Mercurian international trade.

Mercuria submits that the amendment has no immediate tangible effect on any state. No rights pertaining to another state under international law can possibly have been violated by reason only of its enactment. The amendment is merely an exercise of Mercuria's sovereign right to legislate²⁶. Furthermore, it has been shown above (Part I) that the application of this law to Nicchian companies has not breached international law. Mercuria submits, therefore, that the amendment is lawful.

26. MANN, *THE DOCTRINE OF JURISDICTION IN INTERNATIONAL LAW III RECUEIL DES COURS* (1964) ; I. BROWNLIE, *GENERAL PRINCIPLES OF INTERNATIONAL LAW* (4th ed.) p. 310 ; CARREAUX, *DROIT INTERNATIONAL* (2e ed.) 1988 p. 18.

B. IN ANY EVENT, THE DISCRETION PROVIDED
FOR IN THE AMENDMENT RENDERS IT LAWFUL

If as is denied, legislative acts can in principle contravene international law, then in the alternative, Mercuria submits that they can only do so where their application automatically constitutes such a violation. In other words, if the implementation of the amendment does not necessarily result in a breach of international law the amendment is lawful per se. Consequently, if the authorities charged with implementing the instrument have sufficient discretion to apply it in conformity with their state's international obligations, the instrument itself is compatible with international law. Mercuria will show in the following that there is sufficient discretion provided for to allow the amendment to be applied in conformity with its obligations under GATT (i) and under general international law (ii).

(i) THE LAW AS AMENDED MAY BE APPLIED IN A MANNER
COMPATIBLE WITH MERCURIA'S OBLIGATIONS UNDER GATT

The law targets "restrictive business practices adversely affecting Mercurian international trade". The notion of restrictive business practices in general is far wider than the practices which fall within the ambit of GATT²⁷. Consequently it is clear that there is scope for the application of the law to practices which are not regulated by this treaty. If the law is applied to such practices, its application cannot by definition be incompatible with GATT. As the GATT is *lex specialis* in the economic sphere, Mercuria has demonstrated that the Cartel Office may apply the law in conformity with Mercuria's international economic obligations. The amendment is, as a result, lawful.

²⁷. CARREAU, FLORY, JUILLARD, *DROIT INTERNATIONAL ECONOMIQUE? OP. cit p. 162 et seq.*

Indeed it should be noted that the law furthers the GATT ideal of establishing a neo-liberal world economic order as it focuses on those practices against which the free-trading sword of GATT remains blunt.

Stricto sensu, the legality of the Order has already been established without reference to its application to areas explicitly regulated by GATT. It is Mercuria's opinion that even when applied to such areas the law conforms to Mercuria's GATT obligations. The law does little more than take up notions already elaborated in GATT. Insofar as it does so, it should be regarded as national legislation implementing the treaty . Mercuria draws the attention of the Court to the similarity between the criterion of "serious injury to the domestic industry" set out in article XIX GATT ²⁸ and to the notion of "adverse effects" put forward in the amendment. Unlike article XIX which relieves a state from all of its obligations under the treaty, the Mercurian law is more limited in effect only allowing for certain specific measures be taken at the government's discretion.

**(ii) THE LAW AS AMENDED MAY BE APPLIED IN A MANNER
COMPATIBLE WITH GENERAL INTERNATIONAL LAW**

Mercuria submits that the amendment does not constitute an infringement upon the sovereignty of other states. Mercuria fully agrees with the principle that every state has the right to regulate its own affairs in the way it sees fit within the limits imposed by international law ²⁹ . However, for reasons discussed above ³⁰ , Mercuria submits that the amendment is a lawful exercise of its sovereign rights. In addition, as the amendment aims at establishing fair competition on the free Mercurian market, it is

28. 55 UNTS 258 ; CARREAU, FLORY, JUILLARD, DROIT INTERNATIONAL ECONOMIQUE op.cit p.136

29. Supra note

30. Supra Part I, A (i) and (ii).

entirely compatible with the principles underlying GATT ³¹ and the aims set out in the United Nations Restrictive Business Practices Code ³² .

(iii) CONCLUSION

As the Mercurian Law Against Restraints of Competition (as amended) can be applied in a manner compatible with Mercuria's obligations both under GATT and under general international law, it is respectfully submitted that its legality has been established.

31. Preamble to GATT, 55 UNTS 194.

32. U.N. Doc. TD/RBP/CONF/10 (1980).

COUNTERCLAIM : NICCHIA HAS BREACHED
INTERNATIONAL LAW

PART I : THE COUNTERCLAIM IS ADMISSIBLE

Mercuria submits that the counterclaim is admissible on two grounds. First, article 36 of the I.C.J. Statute states that "the jurisdiction of the Court comprises all cases which the parties refer to it"³³, since Mercuria's counterclaim concerning Nicchia's breach of international law is included in the compromis submitted to the Court, the admissibility of this counterclaim is thereby established.

Secondly, article 80 of the Rules of the Court³⁴ specifically provides for the admissibility of counterclaims that are both temporally and materially linked to the claim.

The fact that Mercuria's counterclaim has been lodged at the same time as Nicchia's original claim demonstrates the existence of a temporal link between the two.

Furthermore, Mercuria submits that the claim and counterclaim could not be more materially linked. Nicchia has claimed that Mercuria has violated international law by exercising its jurisdiction in an area where it should not have done so. However, this jurisdiction was exercised to police illegal Nicchian support for the trade practices of its EMO manufacturers. In the counterclaim, Mercuria questions the legality of these restrictive trade practices. There is therefore an immediate material link between the two claims, a decision on one having a necessary influence upon the outcome of the other. In conclusion, it is respectfully submitted that the counterclaim is admissible.

33. *Statute of the I.C.J. 15 U.N.C.I.O.*, 355

34. ibid.

**PART II : NICCHIA'S BEHAVIOUR ON ITS HOME MARKET
IS INCOMPATIBLE WITH ITS OBLIGATIONS UNDER
INTERNATIONAL LAW**

Mercuria will demonstrate in the following that Nicchia's behaviour on its home market is contrary both to international treaty law (A) and to customary international law (B).

**A. NICCHIA'S ORGANISATION OF ITS DOMESTIC
EMO INDUSTRY IS CONTRARY TO GATT**

Mercuria submits that Nicchia, in the way it arranges its internal EMO industry, behaves in a manner incompatible with its obligation under GATT, specifically contravening articles III [1], III [4] and XI [1].

**(i) NICCHIA CONTRAVENES ARTICLE XI [1] GATT
BY ENGAGING IN PRICE FIXING**

As a result of the Nicchian Department of Economic Affairs' (D.E.A.) intervention in coordinating competition, domestic pricing is arranged only by reference to qualitative criteria and not to the costs of production. State intervention acts therefore in such a way as to create artificial market conditions in which there is no price-oriented competition. In such circumstances, price fixing in effect constitutes profit fixing. As discussed above³⁵, a large proportion of the significant profits made in this way are channeled towards subsidising the dumping of Nicchian EMOs on foreign markets. The Mercurian EMO industry has suffered at the hands of Comcar and ELEC, two Nicchian companies engaged in such activities. As a result, the ability of weakened Mercurian companies to undertake any export initiative to Nicchia has been severely curtailed. Thus the intervention of the Nicchian government in fixing EMO prices constitutes an indirect "measure" within the meaning of article XI [1] (?) restricting imports from Mercuria.

35. *Supra CLAIM, PART I C (i) 1, 2, 3.*

Mercuria submits that by reason of the role the Nicchian government plays in price fixing, it contravenes its obligations under article XI GATT.

(ii) NICCHIA CONTRAVENES ARTICLES XI [1] AND III [4] GATT
BY ARRANGING DOMESTIC EMO DISTRIBUTION

In accordance with the obligatory EMO distributorship agreement prepared by the Nicchian Government, distributors who terminate their distributor contracts with their manufacturers are restrained from domestic distribution on behalf of another manufacturer for five years. In addition, in accordance with Nicchian law only licenced distributors can offer the necessary monthly battery maintainance or replacement service, a requirement which is technically unnecessary. In Mercuria's submission, the participation of the Nicchian government in this arrangement constitutes a violation of article XI [1] and article III [4] GATT.

1. Nicchia's arrangement of domestic distribution is a material breach
of article XI [1] GATT

A key factor in placing a product on a foreign market is the availability of independent distributors with a developed clientele and secure market base. In effectively denying Mercurian manufacturers the possibility to "poach" key distributors, Nicchia unlawfully restricts Mercurian manufacturers' ability to export to its market. The only distributors available to Mercuria are unlicenced beginners and distributors who have not operated within the last five years. This violates article XI [1] GATT.

2. Nicchia's arrangement of domestic distribution is a material breach
of article III [4] GATT

By restricting Mercurian access to established and successful distributors, Nicchia also restricts the ability of Mercurian undertakings to implant an efficient servicing network in Nicchia. EMOs require regular monthly servicing and battery replacement. The quality of servicing and its availability must be determining factors when choosing to buy a particular make of EMO. The distributorship agreement coupled with the unnecessary servicing-licence requirement has the effect of discriminating against Mercu-

rian EMOs once they have entered the Nicchian market. This constitutes a violation of article III [4] GATT (the "National Treatment Clause").

**(iii) IN PARTICIPATING IN THE ALLOCATION OF FOREIGN MARKETS
AMONG ITS DOMESTIC EMO MANUFACTURERS, NICCHIA HAS VIOLATED
ARTICLES XI [1], III [1] AND III [4] GATT**

**1. The allocation of foreign markets under direction from the Nicchian government
constitutes a violation of articles XI [1] and III [4] GATT**

Two of the Nicchian companies Comcar and ELEC have focused or "laserbeamed" ³⁶ their activities on the Mercurian Market under the direction of the Nicchian government. These undertakings have engaged in dumping activities on the Mercurian EMO industry. The disruption of the Mercurian industry, evidenced by its recourse to forced redundancies and its loss in market share, has the effect of neutralising and indeed adulcorating its ability to engage in effective export activities. Thus the measures taken by the Nicchian government have a deliberate import restricting effect contrary to article XI [1] GATT.

**2. The Allocation of foreign markets under direction from the Nicchian government
constitutes a violation of article III [1] GATT**

The allocation of foreign markets also consequently constitutes a violation of article III [1] GATT. For the reasons given above, the focusing or "laserbeaming" on the Mercurian market has the effect of causing considerable disruption to Mercurian EMO production. The ill concealed import restricting nature of this practice also serves to "afford protection to domestic production" in a manner incompatible with article III [1] GATT. Nicchia's GATT illegal protection of its home market is central to its unlawful trade policies as a whole.

36. EEC Doc. (note de synthèse) du Groupe d'Etudes du 23 avril 1987 R/CES 437/87 vol. G/gw : in relation to Japan. The EEC went on to note, "The panapoly of subtle and effective measures designed to counter the penetration of the indiginous market".

**B. NICCHIA'S ORGANISATION OF ITS DOMESTIC
EMO INDUSTRY IS CONTRARY TO CUSTOMARY
INTERNATIONAL LAW**

Through its organisation of its domestic industry, Nicchia has violated two principles of customary international law ; the principle that restrictive business practices are unlawful and the principle of sovereignty.

**(i) NICCHIA'S SUPPORT FOR RESTRICTIVE BUSINESS PRACTICES
IS UNLAWFUL**

State practice and opinio juris confirm that restrictive business practices are in general contrary to international law. State practice since the 19th Century ³⁷ has always had for its objective the creation of a liberal world economic order. More recently, several leading states have taken the initiative to combat the threat of restrictive business practices through legislation ³⁸ . Some countries have even obliged themselves to eliminate such practices such as the E.E.C., E.F.T.A. and other regional groupings. Various UNCTAD reports published in the 1980's note that the legislation of both developed and developin countries is increasingly aimed at abolishing trade restrictions ³⁹ .

Opinio juris in general is strongly in favour of the dismantling of restrictive business practices ⁴⁰ . Support also comes from other international fora dealing with the question. Of particular note are numerous decisions in the context of the O.E.C.D. and most importantly the United Nations Set of Multilaterally Agreed Principles and Rules

37. UNCTAD RESTRICTIVE BUSINESS PRACTICE INFORMATION, U.N. Doc. TO/B/RBP/inf. 12 at 3.

38. USA : Section 301, Trade Act 1974, also art. 1302 Omnibus Trade and Competitiveness Act 1988 ; MERCURIA : LAW AGAINST RESTRAINTS OF COMPETITION 5AS AMENDEE) ; E.E.C. : Dir 176/87

39. Ex : U/N. Doc. TD/B/RBP/II at 26 (1982) ; U.N. Doc. TD/B/RBP/III at 12 (1983)

40. CARREAU, FLORY, JUILLARD : DROIT INTERNATIONAL ECONOMIQUE 3ème éd.) 1990 at 212

for the control of restrictive business practices ⁴¹, a resolution taken under article 131 (b) [6] of the United Nations Charter.

Indeed, even though Chapter V of the Havana Charter dealing with such practices was never ratified for technical reasons ⁴², its general principles are taken up in article XXIX [1] GATT ⁴³ and all contracting parties undertake to observe them. Non-tariffary trade restrictions were successfully addressed in Tokyo Round and a further extension in the domain of services is envisaged in the Uruguay Round. In Mercuria's submission, there can be no question of the unlawfulness of restrictive trade practices.

(ii) NICCHIA HAS VIOLATED THE PRINCIPLE THAT NO STATE MAY USE ITS SOVEREIGNTY IN SUCH A WAY AS TO CAUSE UNWARRANTED PREJUDICE TO ANOTHER STATE

State practice and opinio juris confirm that a state must not cause unwarranted harm to another state through the exercise of its sovereignty ⁴⁴.

Mercuria submits that Nicchia has acted in breach of this principle of customary international law in its administrative support of its domestic EMO industry. As elaborated above ⁴⁵, the effect of this support has been to throw the Mercurian EMO industry into a state of turmoil. The Mercurian manufacturers' malaise and the consequential prejudice to the Mercurian EMO economy can be indisputedly linked to the ef-

41. U.N. Doc. 1. D./RBP/ConF 10

42. CARREAU, FLORY, JUILLARD *op. cit.* at 95.

43. Article XXIX [1], GATT, 138 UNTS 340.

44. TRAIL SMELTER ARBITRATION (U.S. v. Canada) 1941 R. INT'L. ARB. AWARDS. 1905 at 1965 ; L'AFFAIRE DU DETROIT DE CORFOU (R.U. v. Albanie) (Fond) 1949 C.I.J. p. 4 et seq. ; LAC LANOUX ARBITRATION (France v. Spain) 12 R. INT'L ARB. AWARDS (1957) p. 837.

45. supra : Counterclaim Part II A.

fect of Nicchia's administrative support for its EMO producers. It is submitted that by reason of this support, Nicchia is in breach of customary international law.

(iii) CONCLUSION

In conclusion, the extent of Nicchia's breach of its obligations under international law may be better appreciated when one conceives Nicchian trade policy as a whole. It appears, in fact, that Nicchia has devised an intricate strategy by which its national companies can forcefully infiltrate foreign markets. Having announced a program of promoting the establishment of plans for the production of EMO's as a key to general industrial development, Nicchian authorities have first created the appropriate conditions that enable national EMO manufacturers to operate in a non-competitive environment. The latter has been achieved through coordination of domestic prices under the supervision and blessing of the D.E.A. , and through the effective proofing of the home market from foreign competition. Trading under such advantageous terms has provided these companies with considerable profits that have unsurprisingly not been distributed to shareholders but have been channelled into export financing. Nicchian ulterior intent seems thus to have consisted in insulating the home market from any kind of competition in the prospect of getting the necessary financial capacity to support dumping activities in foreign markets.

The targetting of export markets under the direction of the DEA further indicates that Nicchian companies act in concertation and do not enter into competition with each other on the particular foreign market allocated to them. It is therefore submitted that Nicchia has carefully planned a trade policy which results, by an ingenious manipulation of unloyal and restrictive practices, in attacking a foreign market and putting this market's national manufacturers in jeopardy.

It is Mercuria's respectful submission that this behaviour constitutes a flagrant violation of international law and cannot be allowed to continue.

FOR THE REASONS MAY IT PLEASE THE COURT TO :

1. DISMISS THE CLAIM BY NICCHIA AS UNFOUNDED,

AND BY WAY OF COUNTERCLAIM,

2. TO DECLARE NICCHIA OBLIGED TO DISCONTINUE ALL ADMINISTRATIVE SUPPORT OF RESTRICTIVE BUSINESS PRACTICES , SUCH AS ARRANGEMENTS ON PRICING , DOMESTIC DISTRIBUTION AND ALLOCATION OF FOREIGN MARKETS LIKELY TO ADVERSELY AFFECT TRADING INTERESTS OF MERCURIA.

The Philip C. Jessup International Law Moot Court Competition

1991 PART I

NICCHIA

v.

MERCURIA

Case concerning
**The International Trade in
Electromobiles**

BEST MEMORIAL - INTERNATIONAL SEMIFINALS
(Applicant)

Best Memorial - International Semifinals (2nd Place)
(Alona E. Evans Award)

University of Georgia
U.S.A.
See Baxter Award, Winner, Applicant

The Philip C. Jessup International Law Moot Court Competition

1991 PART I

NICCHIA

v.

MERCURIA

Case concerning
**The International Trade in
Electromobiles**

BEST MEMORIAL - INTERNATIONAL SEMIFINALS
(Respondent)

Best Memorial - International Semifinals (2nd Place)
(Alona E. Evans Award)

University of Georgia
U.S.A.
See Baxter Award, Winner, Respondent