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CONGRESS OF
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PHILIP C. JESSUP
INTERNATIONAL LAW
MOOT COURT COMPETITION
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1991 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

Case Concerning the International Trade in Electromobiles

Nicchia

v.

Mercuria

The Applicant is the Government of Nicchia.
The Respondent is the Government of Mercuria.

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exclusively for use in the 1991 Jessup Competition.
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situations.

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THE PROBLEM

Nicchia

v.

Mercuria

In the 1960's, gasoline-powered automobiles were in most countries replaced in intra-city traffic by electromobiles (EMO's) which are quieter and do not emit any air pollutants. EMO's are ideal for standard commuter driving, but are unsuitable for longer distances. Their batteries must be recharged every 80-100 miles. While routine recharging is possible on devices which can be kept in most homes, EMO batteries also require monthly maintenance or replacement at special facilities operated either by EMO distributors or by separate service companies.

EMO'S were first manufactured by about 20 companies in industrialized countries. After some restructuring only three manufacturers were left in Mercuria and one or two in each of five other industrialized countries. In addition, three newly industrialized countries made the EMO industry a primary focus of their economic activities. Manufacturers from the latter countries, besides dominating their respective home markets, engaged in direct selling to independent distributors in foreign markets, gaining a considerable share in several of those markets. Domestic

restructuring and foreign competition have led to substantial unemployment in regions of several industrialized countries where EMO manufacturers and their suppliers were once strong.

In 1972, the government of Nicchia, one of the newly industrialized countries, announced a program of promoting the establishment of plants for the production of EMO's as a key to general industrial development. Over the years some 350,000 new jobs have been created in a previously underdeveloped region of Nicchia. At luncheons regularly organized by the Nicchian Association of Manufacturers of EMO's (NAME), officers of NAME and directors of member companies meet with officials of the Nicchian Department of Economic Affairs (DEA) and openly discuss matters of business policy. At these meetings, DEA arranges for the coordination of competition in accordance with the broad framework of Nicchian competition law. As a result, Nicchian EMO manufacturers, while competing in production, advertising and distribution, set domestic prices as a matter of amicable arrangement after a review of relative performance and other quality criteria of the various types of EMO's. Further, through the luncheon meetings, DEA has assisted the EMO industry in preparing a standard distributorship agreement for obligatory use in Nicchia.

Foreign EMO manufacturers, despite numerous attempts, have been unable to successfully export to the increasingly

affluent Nicchian market of some 80 million people. Nicchia imposes neither tariffs nor quantitative restrictions on EMO imports. However, in conformity with Nicchian law, only distributors of the respective EMO manufacturers are licensed to offer the necessary monthly battery maintenance or replacement services. Moreover, the standard EMO distributorship agreement contains a clause requiring Nicchian distributors who terminate their distribution contract with an EMO manufacturer to refrain from domestic distribution on behalf of another manufacturer for a period of five years. Finally, high real estate costs and deeply rooted "buy Nicchian" consumer attitudes have also discouraged foreign manufacturers from establishing the network of service and distribution facilities necessary to enter the Nicchian market.

Only a small portion of the considerable profits made by Nicchian EMO manufacturers from sales in their home market has been distributed to shareholders. Instead, the profits have been used to provide ample financing of export efforts. Under the direction of the DEA, two Nicchian companies, Comcar Inc. and ELEC Inc., have focused their EMO exports on the Mercurian market while the other three Nicchian manufacturers have concentrated on other export markets. Comcar first exported EMOs to Mercuria in 1983, with ELEC entering that market in 1984. The two companies have increased their combined market share by an average of 1.5

percentage points per year, with a corresponding loss of domestic market share by the three Mercurian EMO manufacturers.

In early 1989, the Mercurian EMO Manufacturers Association (MEMA), along with the Mercurian Union of EMO Workers (UEW), lobbied the Mercurian government to impose a limit on EMO imports from Nicchia of 12% of the entire Mercurian market. Officials first expressed some reluctance in fear of jeopardizing Mercuria's reputation as an advocate of liberal trade policies. However, at a subsequent visit of Nicchia's Secretary of Foreign Trade, the Mercurian Minister of Economic Affairs drew attention to the decline of Mercurian EMO industry and mentioned the request for import limitations made by the Mercurian manufacturers.

Thereafter, MEMA began talks with its Nicchian counterpart, NAME. After negotiations in both countries, representatives of the two associations issued a statement on June 12, 1989, in which NAME agreed to limit Nicchian EMO exports to Mercuria to 14% of total EMO sales in Mercuria. On June 26, 1989, in a joint press communique, the Mercurian Minister of Economic Affairs and the Nicchian Secretary of Foreign Trade stated their support for "the agreement that has amicably resolved a potentially serious trade dispute between our countries."

In September of 1989, Comcar announced plans to build a manufacturing facility for EMO's in Mercuria. Whereas the UEW declared that local production was preferable to imports from abroad, the Mercurian manufacturers immediately reacted by issuing various press releases in which they pointed out that their market shares would continue to erode when Comcar, possibly again to be followed by ELEC, started hiring the more qualified part of their workforce and, on the basis of the "huge profits" made in Nicchia, continued to offer low-priced EMO's. The survival of the Mercurian-owned EMO industry was declared to be at stake with the further prospect of Nicchian manufacturers afterwards relocating production back home or to yet another country. Furthermore, MEMA charged Comcar with attempting to unfairly circumvent the 14% ceiling agreed to in June.

Thereupon, in October 1989, the Mercurian government presented a bill amending the Mercurian Law Against Restraints of Competition. The amendment was adopted in the following month. It reads:

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

Violations of the Mercurian competition law continue to be subject i.a. to fines of up to 10% of annual sales of each undertaking involved.

After intensive but abortive consultations with the Nicchian government, the Mercurian Minister of Economic Affairs instructed the Cartel Office to initiate competition law proceedings against Comcar and ELEC under the newly amended Mercurian competition law. By an order of March 13, 1990, the Cartel Office found the two companies to have violated Mercurian competition law through

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

The Cartel Office ordered Comcar and ELEC to cease and desist such activities forthwith, and stated that it would consider the imposition of fines of up to 10% of annual sales should the order not be complied with. On the government's request, the order also set a limit of 14% of the total of EMO sales in Mercuria in 1989 on all sales of EMO's manufactured by enterprises controlled by Nicchian persons during the course of 1990, adding that failure to comply with the cease-and-desist order would expose the companies to

another annual limitation of sales to be set in 1991 on the basis of the sales figures of 1990. On appeal, the Supreme Court of Mercuria affirmed the order of the Cartel Office of March 13, 1990. In its decision of July 9, 1990, the court held i.a. that the international law defenses put forward by the two Nicchian companies were, pursuant to the Mercurian constitution, superseded by Mercurian statutory law.

The government of Nicchia protested the measures taken by Mercuria's Cartel Office in an amicus brief filed with the Mercurian Supreme Court and in several diplomatic notes. The government mainly argued that it is within Nicchian sovereignty to decide which industry to develop, how to organize its internal market, and whether or not to encourage the allocation of export markets among its manufacturers. Nicchia explicitly contested Mercuria's jurisdiction over such activities in Nicchia which, Nicchia argued, formed an integral part of Nicchian economic policy. The Nicchian government added, however, that the 14% ceiling would, with respect to imported goods, continue to be observed.

The Mercurian government, which had in the past frequently complained about the difficulties encountered by its EMO industry in gaining access to the Nicchian market, responded that it could not tolerate trade and investment flows to be "organized as a one-way street". Referring to the adoption of the United Nations Restrictive Business

Practices Code in 1980, it specifically requested the Nicchian government to discontinue its support for, and instigation of, anti-competitive conduct of Nicchian EMO manufacturers which was likely to gravely prejudice the Mercurian economy in general and the Mercurian-owned EMO industry in particular.

The government of Nicchia expressed its intention to prevent a trade dispute in a single industry from escalating to a political controversy with a friendly nation, and proposed to submit the matter for adjudication to the International Court of Justice (ICJ). The Mercurian government agreed. On September 11, 1990, the two governments filed a compromis pursuant to Article 36(1) of the Statute of the ICJ. In the compromis, mention was made that, as agreed by the Contracting Parties to the General Agreement on Tariffs and Trade (GATT) at the meeting of the GATT Council on September 3, 1990, the case would not be referred to GATT dispute settlement procedures since all international law aspects, including those outside GATT law, should be covered and authoritatively decided.

Nicchia asks the Court to order Mercuria

- (1) to vacate the order of the Cartel Office of March 13, 1990, as affirmed by the Supreme Court, including the limitation imposed on exports from Nicchia to Mercuria, and,
- (2) to repeal the amendment of November 1989 to the Law Against Restraints of Competition.

Mercuria asks the Court

- (1) to dismiss the complaint of Nicchia as unfounded and,

by way of a 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.

Both Nicchia and Mercuria are original members of the United Nations and parties to the Statute of the International Court of Justice. They are contracting parties to the GATT as in force on March 1, 1969, and to the Vienna Convention on the Law of Treaties. Neither is a party to any of the Tokyo Round GATT codes, nor are they members of the Organization for Economic Cooperation and Development. There are no bilateral trade or investment treaties between Nicchia and Mercuria.

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TO: JESSUP JUDGES AND PARTICIPANTS
FROM: EXECUTIVE DIRECTOR OF ILSA
RE: CLARIFICATION TO THE 1991 JESSUP PROBLEM

The following is the only clarification to the 1991 Jessup Problem:

Under the standard EMO distributorship agreement used in Nicchia, ELEC distributors, for instance, are the only companies entitled to service ELEC EMOs. Correspondingly, ELEC distributors may not service any other type of EMOs. They would, however, have the technical and commercial ability to do so, just like any of the separate service companies operating in other countries.

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