

INTERNATIONAL COURT OF JUSTICE
1997 PHILLIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

BRIEF FOR APPLICANT

THE CASE OF THE CHILDREN OF THE MOUNT ZOLO DISASTER

REPUBLIC OF LAURENTIA

v.

FEDERAL REPUBLIC OF CALEDON

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STATEMENT OF JURISDICTION

The Republic of Laurentia and the Federal Republic of Caledon refer this case for resolution to the jurisdiction of the International Court of Justice, in conformity with paragraph 1 of Article 36 of the Statute of this Court.

STATEMENT OF THE FACTS

Laurentia is a developing country, whose largest trading partner is Caledon, a developed country to the east. Laurentia has maintained friendly diplomatic relations with Caledon since the 1920's. Occasional misunderstandings between Laurentia and Caledon derive from differences in cultural, religious and linguistic heritages between the nations.

In February 1994, Mt. Zolo's eruption killed 150,000. Almost every member of the United Nations participated in rebuilding Laurentia. As part of this effort, Caledon's Medical Corps (CMC) established a network of field hospitals in Laurentia to triage the injured. Without permission from family or the Laurentian government, the CMC evacuated approximately 15,000 of the most seriously injured to Caledon for treatment, including 3,000 children. Many of the children were separated from their parents, and the CMC did not make any attempt to locate the families of the evacuated patients.

Every able-bodied patient over the age of 14 received airfare to return to Laurentia. About 600 children were released into their parents' or relative's care. Caledon did not attempt to locate the families of the 400 children remaining in Caledon. Instead, those children were placed in foster care in Oriente, the easternmost Caledonian

province. The only attempt Caledon made to inform Laurentia about the children was through an incomplete list kept as public record in the Caledonian capital, and sent to Laurentia through diplomatic channels.

In May 1995, Caledon's Minister of the Interior decreed that all unclaimed Laurentian children would remain in Caledon until safe conditions prevailed in Laurentia or the children's natural parents claimed the children. The decree did not define "safe conditions" or specify how Caledon would determine them. To date, the Laurentian children remain in Caledon.

Late-June 1995 elections resulted in the election of a conservative government in Oriente. The government's mandate included mandatory religious instruction and observance in schools and other public places would be mandatory. Additionally, the rights of women to access higher education, to enter such professions as law and medicine, and to own property in their own names would be restricted. Further, all abortions and homosexual activity would be legally prohibited. Finally, the government would launch an attack on federal judicial decisions claimed to have interfered with religious freedom.

Laurentia's Minister of State, concerned about the effects the conservative changes in Oriente politics would have on the Laurentian children, on 1 July 1995, through a diplomatic note to Caledon's Embassy, asked for the immediate return of all Laurentian children. In response, Caledon refused to return the children. On 9 July 1995, Oriente's governor decreed all children evacuated from Laurentia, wards of Oriente. He permitted the provincial courts to accept adoption petitions for the

Laurentian children without the parental consent, which was otherwise required by Oriente law.

On 15 July 1995, Laurentia again protested Caledon's retention of the children in Oriente through diplomatic channels. In the protest delivered to the Caledonian Ambassador, Laurentia accused Caledon of kidnapping the children and requested their immediate return. A week later, Caledon's Minister of Foreign Affairs responded that the Caledonian Federal Republic was powerless to return Laurentia's children because the adoptions were legally binding acts of Oriente's Courts.

To secure the return of its children, Laurentia suspended cigarette imports from Caledon on 29 October 1995. Due to the magnitude of cigarette sales between Laurentia and Caledon, Laurentia hoped that this trade sanction would effect the children's immediate return. Rather than returning the children, Caledon requested consultations under Article XXIII of the General Agreement on Tariffs and Trade (GATT). Consultations began on 25 April 1996, over Caledon's contention that Laurentia violated GATT Article XI. Rather than attempting to defend its action before the World Trade Organization (WTO), Laurentia's Trade Minister lifted the import ban.

On 9 June 1996 Laurentia enacted the Save the Children Act of 1996, which provided a private cause of action against any social work or psychological professional who may have contributed to a Laurentian child's adoption without the written, voluntary, and informed consent of the natural parent(s) or next of kin. Moses Doe was one Laurentian child who was adopted in Oriente without his parents' consent. The Save the Children Act supported liability in Mr. and Mrs. Doe's lawsuit filed against the

Children's Foundation, a private non-profit organization incorporated in Caledon. Ms. Yolanda Montaigne, Chief Administrative Officer of the Foundation, was served with process in this civil action while visiting the Foundation in Laurentia. The Laurentian court found liability both because the Foundation provided social workers and/or expert witnesses who supported the petitions in approximately 50 adoption proceedings, and because its workers consistently represented that adoption would be in the Laurentian children's best interests, while deliberately failing to search out or notify the Laurentian parents. The social workers, although properly licensed, merely consulted the list of names maintained in the Caledonian capital, and sent a letter to the parents if an address was provided. The Foundation did not appear in the action and the Laurentian court entered a default judgment awarding the Does actual damages equivalent to U.S. \$100,000 and exemplary damages equivalent to U.S. \$5 million. Property owned by the Foundation in Laurentia was seized and sold for equivalent U.S. \$500,000 to satisfy the judgment.

Having obtained their judgment in Laurentia, Mr. and Mrs. Doe brought an enforcement action against Ms. Montaigne in Caledon. The Oriente court refused to enforce the Does' judgment, claiming that it would violate public policy. The Court of Appeals and federal Supreme Court upheld this decision.

Further exchanges of diplomatic notes over this incident failed to reach a settlement or secure the return of the children. Laurentia and Caledon agreed to submit their disputes to the International Court of Justice, pursuant to Article 36(1) of the Court's Statute. To that end, they have agreed to the terms and language of the present

Compromis.

QUESTIONS PRESENTED

- I. WHETHER CALEDON'S RETENTION OF LAURENTIA'S CHILDREN IS WRONGFUL UNDER INTERNATIONAL LAW.
- II. WHETHER LAURENTIA IS ENTITLED TO DAMAGES FROM CALEDON TO COMPENSATE FOR THE WRONGFUL DETENTION OF LAURENTIAN CHILDREN.
- III. WHETHER CALEDON IS OBLIGATED UNDER INTERNATIONAL LAW TO ENFORCE THE LAURENTIAN JUDGMENT IN *DOE V. CHILDREN'S FOUNDATION*.
- IV. WHETHER AN AWARD OF COMPENSATION BY THE COURT FOR LAURENTIA'S TRADE SANCTION WOULD VIOLATE INTERNATIONAL LAW.

SUMMARY OF THE PLEADINGS

I.

Caledon refuses to allow the Laurentian children to return home. This, along with Caledon's allowance of the Oriente adoptions, is a continuing violation of international law. Caledon is violating the Hague Convention on the Civil Aspects of International Child Abduction (Abduction Convention) by refusing to return the children upon Laurentia's request. Caledon is failing to abide by its treaty obligations under the Convention on the Rights of the Child (Child Convention), and by the customary international law embodied in its language. This Court should order Caledon to undo the illegal adoptions in Oriente Province and return the children to Laurentia, regardless of Caledon's internal law.

II.

Since the parties have accepted the Court's jurisdiction, this Court may award damages to compensate Laurentia for Caledon's breach of international law. In Article 2 of the Compromis, the Court is requested to determine the rights and obligations for the parties. Therefore, under Article 36(1) of the Statute, the Court has jurisdiction to hear the case and determine damages since the parties have expressly agreed to its jurisdiction.

III.

The Save the Children Act regulates participation by social workers in the Caledonian adoption proceedings within international law limits on prescriptive jurisdiction. Customary international law requires Caledon to enforce the Laurentian

judgment. The Court may not compel return of property seized under the Save the Children Act because Laurentia has proper enforcement jurisdiction. Caledon may not rely on the “foreign sovereign compulsion doctrine” to avoid seizure of the property.

IV.

The Court must reject Caledon’s lost profit claim because the World Trade Organization regime is the exclusive means to settle trade disputes. This Court has given this exclusivity effect. Even without exclusivity, Laurentia meets the security exception in the WTO. Moreover, customary international law allows an otherwise illegal embargo as a countermeasure directed at settling an international dispute.

PLEADINGS

I. CALEDON'S RETENTION OF LAURENTIA'S CHILDREN IS WRONGFUL UNDER INTERNATIONAL LAW BECAUSE IT VIOLATES CALEDON'S OBLIGATIONS UNDER THE ABDUCTION CONVENTION, THE CHILD CONVENTION AND CUSTOMARY INTERNATIONAL LAW.

Caledon refuses to allow Laurentian children to return home. By allowing Oriente foster parents to adopt the children, Caledon is violating international law. Caledon is violating the Hague Convention on the Civil Aspects of International Child Abduction¹ (Abduction Convention) by refusing to return the children upon Laurentia's request. Caledon is failing to abide by its treaty obligations under the Convention on the Rights of the Child² (Child Convention), and by the customary international law embodied in its language. This Court should order Caledon to undo the illegal adoptions in Oriente and return the children to Laurentia, regardless of Caledon's internal law.

A. Caledon's retention of Laurentia's children violates the Abduction Convention because it breaches the rights of custody of Laurentia, where the children were habitually resident.

Both Caledon and Laurentia are parties to the Abduction Convention and are therefore bound by its provisions. The Permanent Bureau of the Hague Conference on Private International Law (Permanent Bureau) has stated that the Abduction Convention is reciprocal, in the sense that States Parties are only required to co-operate with, and

¹Convention on the Civil Aspects of International Child Abduction, Hague Conference on Private International Law, 25 Oct. 1980, 19 I.L.M. 1501.

²Convention on the Rights of the Child, 5 Dec. 1989, U.N. Doc. A/RES/44/25, 29 I.L.M. 1448 (1989).

return abducted children to, other State Parties.³ Caledon cannot avoid the Abduction Convention's binding effect by citing the lack of mutuality or reciprocity because Laurentia has been a party to the agreement since before the eruption.

The objects of the Abduction Convention are to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and to ensure that rights of custody and access under the law of one Contracting State are effectively respected in other Contracting States.⁴ The Permanent Bureau has stated that the Abduction Convention determines jurisdiction over civil child custody disputes, rather than substantive custody rights.⁵ Any dispute over final custody will be determined in the municipal courts of the child's habitual residence.

Caledon is violating the Abduction Convention by wrongfully retaining Laurentia's children in Caledon. Under the Abduction Convention, retention of a child is wrongful if it breaches the rights of custody of any person, institution, or other body arising under the law of the State in which the child was habitually resident immediately before the retention.⁶ Rights of custody may arise by operation of domestic law,⁷ and include rights

³Memorandum Prepared by the Permanent Bureau of the Hague Conference on Private International Law for Submission to the Constitutional Court of the Federal Republic of Germany, submitted 1 Sept. 1995, 35 I.L.M. 529.

⁴Abduction Convention, *supra* note 1, Article 1.

⁵Memorandum, *supra* note 3.

⁶Abduction Convention, *supra* note 1, Article 3.

⁷*Id.*

relating to the care of the child and the right to determine the child's place of residence.⁸ "Rights of custody" under the Abduction Convention do not coincide with any particular concept of "custody rights" in domestic law, but derive from the definition, structure, and purposes of the Convention.⁹ A person or institution with rights of custody who claims a breach occurred must have actually exercised those rights at the time of the wrongful retention, unless the person or institution was unable to actually exercise rights of custody because of the retention.¹⁰

Under the doctrine of *parens patriae*, Laurentia had custody rights over the children at the time Caledon wrongfully retained the children. *Parens patriae* is defined as "parent of the Country," referring traditionally to the role of the state as sovereign and guardian of persons such as minors who lack proper care and custody from their parents.¹¹ The principle is interchangeable with the terms *in loco parentis* and surrogate parent.¹² This Court has frequently invoked *parens patriae* as a general principle of law¹³

⁸*Id.* Article 5.

⁹Hague Conference on Private International Law: Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, 18-21 Jan. 1993, 33 I.L.M. 225 at 229.

¹⁰Abduction Convention, *supra* note 1, Article 3.

¹¹BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

¹²Jan Trasen, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?*, 15 B.C. THIRD WORLD L.J. 359 n.85 (1995).

¹³Case Concerning Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia, Herzegovina v. Yugoslavia, Serbia and Montenegro), 1993 I.C.J. 325, 329; Case Concerning Application of Convention on Prevention and Punishment of Crime of Genocide, 1993 I.C.J. 3, 7; Case Concerning Military and

to determine a state's rights of custody.¹⁴ In Laurentia, when the natural parents of a child die or no longer exercise their rights of custody, no automatic award of custody over children to their next of kin occurs. Therefore, Laurentia has rights of custody under *parens patriae* over the Laurentian children in the absence of an exercise of custody by their parents.

Laurentia was the habitual residence of the children at the time of Caledon's retention. Habitual residence is not defined in the Abduction Convention, but should be given its meaning under international law and not with reference to a specific national law.¹⁵ The Court has not defined habitual residence under the treaty, but municipal courts interpreting the treaty have held that a residence is not habitual if it is merely temporary.¹⁶ Here, the children were taken from Laurentia, their habitual residence, to Caledon for medical treatment by the CMC. This removal was temporary and proper, but Caledon had no permission to take the children permanently. The retention became wrongful after Caledon refused Laurentia's request to return the children; manifesting an intent to keep the children in Caledon permanently. Therefore, immediately before the

Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J. 14, 19; Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) Request for the Indication of Provisional Measures, 1984 I.C.J. 169, 171.

¹⁴Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), 1958 I.C.J. 55.

¹⁵Report, *supra* note 9, at 235.

¹⁶*See In re F*, [1992] 1 F.L.R. 548 (C.A.)(Australia); *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1992); *Ponath v. Ponath*, 829 F.Supp. 363 (D.Utah 1993).

retention became wrongful, Laurentia was the children's habitual residence.

No exception to the Abduction Convention negates Caledon's wrongful retention. First, the Abduction Convention requires a court to order the return of a child when proceedings commence more than one year after a child has been wrongfully retained, unless it is demonstrated that the child is now settled in its new environment.¹⁷ Courts interpreting the Abduction Convention have uniformly held that, for the purposes of Article 3, wrongful retention of a child occurs at a specific point in time.¹⁸ In this case, retention became wrongful on 1 July 1995, when the Laurentian Minister of State delivered a note to the Caledonian Embassy asking for the return of all Laurentian children to Laurentia. Caledon apparently recognized that indefinite retention of the Laurentian children was wrongful when, between 1 July 1995 and 9 July 1995, it demanded from Oriente an assurance that no unilateral action would be taken with respect to the children.

Caledon has provided no evidence that the Laurentian children are settled in Oriente. Indeed, because of the dramatic cultural, religious, and linguistic differences between Laurentia and Oriente, the Court should not presume that the Laurentian children are settled in such an alien environment. Statements by the Oriente Governor describing Laurentia as a "pagan" culture and claiming that "the wrath of the Lord" caused the eruption only add to that alienation. Therefore, this Court must order their return to Laurentia.

¹⁷Abduction Convention, *supra* note 1, Article 12.

¹⁸Report, *supra* note 9, at 235.

Second, the Abduction Convention requires the return of a child unless a party opposing the return establishes that the person, institution or other body having custody of the child was not actually exercising the custody rights at the time of retention, or subsequently acquiesced in the retention.¹⁹ Laurentia exercised its rights of custody over the children and did not acquiesce in the Oriente adoptions. The CMC made no effort to obtain parental consent before taking the children to Caledon, nor did Caledon seek or obtain authorization from Laurentia prior to the airlift. Therefore, Laurentia could not have been aware of Caledon's intent to retain the children. As soon as Laurentian officials realized that Caledon intended to retain the children, Laurentia exercised its custody through proper channels. Further, Laurentia condemned the illegal Oriente adoptions on numerous occasions, demanding immediate return of the children.

Finally, when a return order would expose a child to a grave risk of physical or psychological harm, or would otherwise place a child in an intolerable situation, the Court is not bound to order the return of the child.²⁰ Here, Caledon has not established that returning the children to Laurentia would create any grave risk of physical or psychological harm.

There is no evidence that the children would face a grave risk of psychological harm in Laurentia. As the United Kingdom Court of Appeals held in *Re C*,²¹ the grave

¹⁹Abduction Convention, *supra* note 1, Article 13.

²⁰*Id.*

²¹139 NEW LAW JOURNAL 226 (1988), *reprinted in* Peter D. Trooboff & Mark P. Kindall, Case Note, 83 AM. J. INT'L L. 586 (1989).

risk of psychological harm exception does not apply where a party claiming the exception created that risk by wrongfully retaining the child. Here, the only psychological risk stems from separating Laurentia's children from their temporary residences in Oriente.

B. Caledon cannot use its internal law to avoid undoing the adoptions and returning Laurentia's children under the Vienna Convention and customary international law.

Both Caledon and Laurentia are parties to the Vienna Convention on the Law of Treaties²² (Vienna Convention), which governs the interpretation of agreements between states. The Vienna Convention states that every treaty in force is binding upon the parties to it,²³ and that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.²⁴ These provisions of the Vienna Convention are customary international law as applied by this Court, even in cases involving conflicting obligations between treaties and domestic constitutions.²⁵ To allow otherwise would facilitate evasion of international obligations.²⁶ Arising from the nature

²²Vienna Convention on the Law of Treaties, 23 May 1969, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 699 (1969).

²³*Id.* Article 26.

²⁴*Id.* Article 27.

²⁵Greco-Bulgarian "Communities," Advisory Opinion, 1930, P.C.I.J., Series B, No. 17, p. 32; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44, p. 24; Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46, p. 167; Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Case of the PLO Mission) 1988 I.C.J. 12, at 31-2, ¶47.

²⁶IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 35 (4th ed. 1990).

of treaty obligations and from customary international law, there is a duty to bring internal law into conformity with obligations under international law.²⁷ This principle applies to both unitary and federal states.²⁸

Here, the Court should invalidate the adoptions of Laurentia's children in Oriente and order Caledon to returned the children to Laurentia. As a federal state, Caledon has a duty to bring the laws of Oriente into compliance with obligations under international law. Any violations created by the adoptions are attributed to Caledon, regardless of the fact that the adoptions were effected under Oriente law. Municipal courts have refused to ignore Article 12 of the Abduction Convention when it conflicts with domestic law.²⁹ As a party to the Abduction Convention, Caledon must return the children to Laurentia for a final custody determination.

Caledon claims that "all legal and constitutional responsibility for such domestic matters as the care, rearing, and adoption of children [is] left to the exclusive jurisdiction of the Provinces."³⁰ Regardless of whether this is an accurate description of Caledon's internal law, Caledon must comply with Article 12 of the Abduction Convention and return Laurentia's children.

Caledon had a large role in the adoptions in Oriente. The CMC, a branch of the

²⁷*Id.* at 36 n.22.

²⁸*Id.*

²⁹ *See, e.g.,* Constitutional Court Decision in Case Concerning the Hague Convention on the Civil Aspects of International Child Abduction, 10 Oct. 1995, 35 I.L.M. 529.

³⁰Compromis, ¶ 15.

Caledon Defense Ministry, took the children from Laurentia into Caledon. It was the federal government that placed the Laurentian children in foster homes in Oriente, provided psychological assistance, medical care, and maintained a list of information about the children in the capital. Caledon's federal government decreed that it would reimburse the foster parents in full for all of their expenses, and that it would make sure that the children would remain in Caledon until the federal government determined that "safe conditions" existed in Laurentia. Caledon neither defined "safe conditions," nor specified how it would determine when or whether they existed. All of these actions contradict Caledon's assertion that the provinces have exclusive jurisdiction over the children.

C. Caledon violated its obligations under the Convention on the Rights of the Child.

As a party to the Child Convention, Caledon has a reciprocal duty to other parties. Laurentia was an initial signatory to the Child Convention, bound to the treaty's object and purpose.³¹ Laurentia ratified the Child Convention on 1 July 1996. Laurentia's status as a signatory at least created a reciprocal duty for Caledon to honor the object and purpose of the Child Convention. After 1 July 1996, Caledon's Child Convention duty *vis-a-vis* Laurentia is complete.

Further, obligations embodied in the Child Convention are customary international law, which binds nations regardless of whether they are parties to the treaty. The Court may apply customary international law as evidence of a general

³¹Vienna Convention, *supra* note 22, Article 18.

practice accepted as law.³² United Nations General Assembly Resolutions, recitals in treaties, and widespread acceptance of a treat, are all evidence of customary international law.³³ The Child Convention was unanimously adopted by the UN General Assembly on 20 November 1989.³⁴ As of 15 August 1996, 187 of 193 nations had signed, ratified or acceded to the Child Convention.³⁵ Many publicists believed that the Child Convention was not necessary because that children's rights were adequately protected under existing international human rights law.³⁶ This demonstrates that provisions in the Child Convention are obligations under customary international law, or alternatively, obligations under the Universal Declaration of Human Rights,³⁷ which clarifies the obligations in the UN Charter.³⁸

Caledon violated its treaty and customary international law obligations embodied the Child Convention. Under the Child Convention, a child deprived of his or her family environment, or in whose best interests cannot remain in that environment, shall be

³²Statute of the International Court of Justice, 26 June 1945, Stat. 1055, T.S. No. 993, at Article 38(1).

³³BROWNLIE, *supra* note 26, at 5.

³⁴U.N. Doc. A/44/736 (1989).

³⁵Status of the Convention on the Rights of the Child, UN Doc. A/51/424 (1996).

³⁶THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 29 (Sharon Detrick ed. 1992).

³⁷Universal Declaration of Human Rights, U.N. G.A. Res. 217A (III) (1948).

³⁸U.N. CHARTER.

entitled to special protection and assistance by the State.³⁹ Contracting States must, in accordance with their national laws, ensure alternative care which could include, *inter alia*, foster placement or adoption. Any decision to provide alternative care must give due regard to the child's ethnic, religious, cultural and linguistic background.⁴⁰

Caledon violated its obligations when it placed Laurentian children in foster homes in Oriente. Caledon not only ignored the cultural, religious, and linguistic differences between Caledon and Laurentia, it placed the children in the most antagonistic environment in Caledon. Oriente's foster parents live in a society that derides Laurentia's culture and observes the strictest and most literal interpretation of Caledon's religious and cultural heritage.

Caledon also violated its obligation to ensure that the backgrounds of the Laurentian children were given due regard during the adoption proceedings in Oriente. Under §3.058 of the Code of Oriente Province, the District Courts of Oriente, in considering the "best interests" of any potential adoptee, were not required to give any regard to a child's ethnic, religious, cultural and linguistic background.⁴¹ Instead, the adoptions were intended to ensure that Laurentian children would be "governed by the laws of our people and of our God as if they had been born among us."⁴² This attempt

³⁹Child Convention, *supra* note 2, Article 20.

⁴⁰*Id.* Article 21.

⁴¹Appendix I to the Compromis.

⁴²Compromis, ¶12 .

to prevent “ the loss of the children who are growing up with our values to pagan cultures”⁴³ is in direct violation of the Child Convention.

The adoptions in Oriente also violated the international law requirement that a nation consider as paramount the best interests of the child.⁴⁴ To that end, Caledon should not have allowed inter-country adoptions unless the children could not be placed in a Laurentian family or could not be suitably cared for in Laurentia.⁴⁵ Caledon had an affirmative duty to find suitable care in Laurentia before allowing adoption of a Laurentian child.⁴⁶

Caledon failed to determine whether suitable care could be obtained in Laurentia before authorizing the adoptions. Under §3.053(b) of the Code of Oriente Province, when the parents or guardian of a potential adoptee have not consented to adoption, the District Courts must direct a duly-licensed child placement agency to take all necessary measures to obtain such a statement.⁴⁷ Otherwise, the placement agency must file with the court an affidavit attesting to its unsuccessful efforts to contact the natural parents.⁴⁸ Caledon officials merely consulted an incomplete list of names maintained in the capital of Caledon, and, where an address was provided, sent a certified letter containing

⁴³Compromis, ¶10.

⁴⁴Child Convention, *supra* note 2, Article 3.

⁴⁵*Id.* Article 21.

⁴⁶*Id.* Article 20.

⁴⁷Appendix I to the Compromis.

⁴⁸*Id.*

information regarding the adoption hearing. Even if the Court finds those efforts sufficient to meet the standard required by Oriente's District Courts, the Court should not find that it meets the efforts required under international law.

Finally, Oriente's government seeks to impose conservative changes. Implementing these changes would violate the Laurentian children's rights under international law. These rights include the right to freedom of thought, conscience, and religion.⁴⁹ Further, children have a right to education, and in particular access to higher education,⁵⁰ and development of the child's personality, talents and mental and physical abilities,⁵¹ free from discrimination based upon sex.⁵² Under international law, children are entitled to special care and assistance,⁵³ and the Court should consider the threats to the rights of these Laurentian children and return them to their habitual residence for a custodial determination consistent with international law.

II. LAURENTIA IS ENTITLED TO DAMAGES FROM CALEDON TO COMPENSATE EACH LAURENTIAN CHILD AND THE FAMILY OF EACH SUCH CHILD FOR EACH CHILD'S WRONGFUL DETENTION IN CALEDON.

This Court may award damages to compensate Laurentia for Caledon's breach of international law because the parties have expressly accepted the Court's jurisdiction. In

⁴⁹Child Convention, *supra* note 2, Article 14.

⁵⁰*Id.* Article 28.

⁵¹*Id.* Article 29.

⁵²*Id.* Article 2.

⁵³*Id.* Preamble; Universal Declaration, *supra* note 37 at Article 25.

Article 2 of the Compromis, the Court is requested to determine the rights and obligations for the parties. Therefore, under Article 36(1) of the Statute, the Court has jurisdiction to hear the case and determine damages since the parties have expressly agreed to the jurisdiction to determine all obligations of the parties. As the Court stated in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, "[i]n general, jurisdiction to determine the merits of a dispute entails jurisdiction to determine reparation."⁵⁴

In determining reparations, there are three questions for the Court to decide: whether an obligation to make reparation exists, whether there are any damages to be repaired, and the extent of such damage.⁵⁵ First, Caledon's wrongful retention of Laurentian children created an obligation for the Caledon to make reparation. Second, Laurentia has shown that there has been an actual loss to the children and their families. The Abduction Convention presumes that a child's wrongful removal or retention will have harmful effects on the child unless he or she is promptly returned.⁵⁶ Many courts consider the wrongful withholding of custody to be a tort.⁵⁷ However, Laurentia need not show any actual loss. Many publicists acknowledge that states may claim damages for any breach of international law regardless of whether the breach caused actual loss.⁵⁸

⁵⁴Nicaragua Case, 1986 I.C.J. at 142.

⁵⁵Chorzów Factory Case (Germany v. Poland) P.C.I.J. Ser. A, No. 13, p.46 (1927).

⁵⁶Memorandum, *supra* note 2, at 537.

⁵⁷Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961).

⁵⁸See, e.g., G.G. Fitzmaurice *BYBIL* 82 (1936), at 109; IAN BROWNLIE,

The final inquiry surrounds the quantum of damages to be awarded by the Court. The Court may decide to award damages based on the suggestion provided by Laurentia or it may decide to call upon experts to aid it in its decision in accordance with Article 50 of the Statute. The Court should consider the value suggested by Laurentia, even if experts render an independent figure, in accordance with the Court's decision in the *Corfu Channel* case.⁵⁹

III. CALEDON IS OBLIGATED UNDER CUSTOMARY INTERNATIONAL LAW TO ENFORCE THE LAURENTIAN COURT'S JUDGMENT IN *DOE V. CHILDREN'S FOUNDATION*.

In *Doe v. Children's Foundation*, a Laurentian court awarded damages under the Save the Children Act to the next of kin of a Laurentian child purportedly adopted in Caledon. The Save the Children Act regulates participation by social workers in the Caledonian adoption proceedings, but it is within international law limits on prescriptive jurisdiction. Customary international law requires Caledon to enforce the Laurentian judgment. The Court may not compel return of property seized under the Save the Children Act because Laurentia has proper enforcement jurisdiction and Caledon may not rely on the "foreign sovereign compulsion doctrine" to avoid seizure of the property.

- A. The Save the Children Act is a valid exercise of state power under the permissive regime of prescriptive jurisdiction established in international law under the *S.S. Lotus Case*.

Prescriptive jurisdiction is the authority of a state to make its laws applicable to

INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 369 (1963).

⁵⁹*Corfu Channel Case (United Kingdom v. Albania)*, 1949 I.C.J. Rep. 4.

persons or activities.⁶⁰ The seminal case concerning the international law limits on prescriptive jurisdiction is the *Case of the S.S. Lotus*.⁶¹ In the case, the court determined that there was no "general prohibition to the effect that States may not extend application of their laws . . . to persons, property, and acts outside their territory."⁶² Under the *Lotus* case, prescriptive jurisdiction is permissive, giving states "a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases every state remains free to adopt the principles which it regards as best and most suitable."⁶³ Therefore, the question is not whether extraterritorial prescriptive jurisdiction is supported under international law, but how much is supported.

B. The Save the Children Act is an exercise of prescriptive jurisdiction by four separate bases recognized in international law.

Even under a restrictive regime of prescriptive jurisdiction advocated by some publicists,⁶⁴ the Save the Children Act is a valid exercise of state power on four separate bases: territoriality via the effects doctrine, passive personality, the protective principle, and universal jurisdiction.

1. The Save the Children Act is a valid exercise of state power under the effects doctrine.

⁶⁰See, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §401 (1987).

⁶¹The Case of the S.S. Lotus, P.C.I.J. Ser. A, No. 9 (1927).

⁶²*Id.* at 19.

⁶³*Id.*

⁶⁴See, e.g., E. LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS, I, 488-89 (1970).

Territoriality is the basic principle under which states exercise their prescriptive jurisdiction under international law. The territorial principle extends to conduct which, though it took place abroad, has effects in the regulating state. It is "settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory."⁶⁵ Ms. Montaigne and other Foundation workers' participation in the adoption proceedings produced and continue to produce harmful effects in Laurentia. Ms. Montaigne and the Foundation materially contributed to the adoption proceedings, causing the loss of the society, companionship, and support of the children by Laurentia and the children's next of kin.

The effects doctrine was established as an acceptable grounds for jurisdiction by this court's predecessor in the *Case of the S.S. Lotus*.⁶⁶ In the *Lotus Case*, the French steamer *Lotus* collided with a Turkish ship, killing eight Turkish nationals. The watch officer on the *Lotus* was arrested, tried, and convicted for involuntary manslaughter in Turkey. The Court found Turkey's exercise of jurisdiction valid, stating that "once it is admitted that the effects of the offense were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting [the officer]."⁶⁷ Likewise, once it is admitted that Laurentia and Laurentian families suffered the loss of society, companionship, and support as a result of the forced

⁶⁵*Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F. 2d 909 (D.C. Cir. 1984).

⁶⁶*Lotus Case*, P.C.I.J. Ser. A, No. 9.

⁶⁷*Id.* at 40.

expatriation of their children through the adoption proceedings, it is impossible to find a rule of international law which prohibits Laurentia from adjudicating claims against those who materially contributed to the adoptions.

Although the *Lotus Case* took place in a criminal context, there is no real reason to distinguish between the limits of jurisdiction for criminal versus civil matters. “[A]s civil jurisdiction is ultimately reinforced by procedures of enforcement involving criminal sanctions, there is no great difference between problems created by assertion of civil and criminal jurisdiction over aliens.”⁶⁸ In fact, at least one court has held that criminal actions are more constrained by territorial restrictions.⁶⁹

2. The Save the Children Act is a valid exercise of state power under the passive personality principle of prescriptive jurisdiction.

“The passive personality principle asserts that a state may apply law . . . to an act committed outside its territory by a person not its national where the victim of the act was its national.”⁷⁰ The Save the Children Act is an attempt to protect its nationals, in the persons of the children purportedly adopted in Laurentia. While some commentators have advocated only limited application of the passive personality doctrine,⁷¹ it has been applied under circumstances of far less grievous harm to the regulating state’s nationals than the unlawful abduction and detention of their children.

⁶⁸BROWNLIE, PRINCIPLES, *supra* note 26, at 299.

⁶⁹*See, e.g., United States v. Bowman*, 260 U.S. 94, 97-98 (1922).

⁷⁰RESTATEMENT (THIRD), *supra* note 60, § 402, cmt. g.

⁷¹BROWNLIE, PRINCIPLES, *supra* note 26, at 303.

In the *Cutting Case*,⁷² for example, a Mexican court found against a US citizen for libelous statements made entirely in a US publication which did not find its way into Mexico. As its title indicates, the Save the Children Act is an attempt by Laurentia to protect its children abroad, and is therefore within the scope of the passive personality principle.

3. The Save the Children Act is a valid exercise of state power under the protective principle of prescriptive jurisdiction.

The protective principle permits "jurisdiction over aliens for acts done abroad which affect the security of the state . . ."⁷³ A leading publicist on international law and the International Court of Justice, has concluded that the *Lotus* court "declared the exercise of such protective jurisdiction to be consistent with international law."⁷⁴ The provision of the Turkish penal code which the French officer was convicted under was based on this principle, as it criminalized "acts abroad by foreigners against Turkish nationals."⁷⁵ Likewise, the Save the Children Act is intended to protect Laurentian nationals from unlawful detention and adoption in Caledon. Though often invoked for political offenses such as espionage, the protective principle "is not necessarily confined to political acts."⁷⁶ Its scope extends to violation of immigration laws,⁷⁷ as in the forced

⁷²The *Cutting Case*, Bravos District Court, Chihuahua, 1886 (Mexico).

⁷³BROWNLIE, PRINCIPLES, *supra* note 26, at 304.

⁷⁴Lauterpacht, 9 CAMB. L.J. 343 (1947).

⁷⁵BROWNLIE, PRINCIPLES, *supra* note 26, at 302.

⁷⁶*Id.* at 304; see also, *Nusselein v. Belgian State*, I.L.R. 17 (1950), no. 35; *Public Prosecutor v. L.*, I.L.R. 18 (1951), no. 48; *RE van dem Plas*, I.L.R. 22 (1955), no. 205;

expatriation of the children in this case.

4. The Save the Children Act is a valid exercise of state power under the universality principle of prescriptive jurisdiction.

The universality principle permits jurisdiction over acts of foreigners abroad “where the circumstances, including the nature of the crime, justify [the prohibition] . . . as a matter of international public policy.”⁷⁸ The forced expatriation of children into a foreign culture is an act of sufficient offense to international norms of acceptable conduct to justify application of universal jurisdiction. Universal jurisdiction is not limited to criminal law.⁷⁹

C. International law does not bar *ex post facto* legislation like the Save the Children Act.

Although the Save the Children Act was enacted after many of the adoption proceedings took place, Laurentia had made its objection to the retention and forced expatriation of the children prior to commencement of the proceedings. Ms Montaigne and the Children's Foundation were therefore on notice that Laurentia considered the retention of the children in Caledon, the adoptions, and the proceedings unlawful. They were therefore on notice that their participation in the proceedings might give rise to liability in Laurentia. Although the United States Constitution prohibits retroactive

Rocha v. U.S., 228 F. 2d 545 (1961).

⁷⁷Rocha v. United States, 288 F.2d 545 (9th Cir. 1961), *cert. den.* 366 U.S. 948 (1961); RESTATEMENT (THIRD), *supra* note 60, § 402, cmt. f.

⁷⁸BROWNLIE, PRINCIPLES, *supra* note 26, at 304.

⁷⁹RESTATEMENT (THIRD), *supra* note 60, §404, cmt. b.

legislation,⁸⁰ other countries, including the commonwealth countries, do not have such a prohibition.⁸¹ There is no established international law rule prohibiting such.

D. Customary international law requires Caledon to enforce the Laurentian judgment.

Numerous bilateral and multilateral treaties, especially among the European states (the Brussels and Lugano Conventions), provide for the recognition and enforcement of foreign judgments.⁸² There is also an effort underway to achieve an international convention for recognition and enforcement of foreign judgments in civil and commercial matters through the Hague Conference on International Private Law.⁸³ The existence of the New York Convention on the recognition and enforcement of arbitral awards, a treaty ratified by over 70 nations, further evinces a global move toward recognition of foreign judgments.⁸⁴ This trend toward mandatory recognition and enforcement of foreign judgments, coupled with the permissive recognition and enforcement in such legal systems as the United States,⁸⁵ suggests sufficient state practice and *opinio juris* to

⁸⁰US CONST. art. I, §10, cl. 1.

⁸¹*Polyukhovich v. The Commonwealth of Australia*, F.C. 91/026, High Court of Australia, 172 CLR 501 (1991).

⁸²RESTATEMENT (THIRD), *supra* note 60, Ch. 8, Introductory Note.

⁸³von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 289 (1994).

⁸⁴United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 38.

⁸⁵*See* RESTATEMENT (THIRD), *supra* note 60, §481.

support a that the practice is customary international law.⁸⁶ Therefore, under customary international law the Court should compel Caledon to enforce the judgment.

Additionally, Caledon's assertion of the public policy exception to enforcement of foreign judgments is improper in this case. Usually the public policy exception applies when: (1) the foreign judicial proceedings were unfair or biased, (2) the defendant did not receive notice of the proceedings in sufficient time to enable a defense, (3) the foreign court lacked personal jurisdiction over the defendant, (4) the foreign court lacked subject matter jurisdiction over the dispute, (5) there was fraud or other irregularity in the foreign proceedings or (6) the judgment is contrary to the public policy of the enforcing state.⁸⁷ Laurentia's judgment is not subject to any of the above exceptions. The public policy exception is not a catch-all exception. Courts narrowly construe it to apply only if the recognition and enforcement is "repugnant to fundamental notions of what is fair and just."⁸⁸ Caledon presented no evidence suggesting the Laurentian judgment runs counter to such fundamental notions of fairness and justice. Therefore, the Court should compel Caledon to enforce the judgment, or in the alternative, award the uncollected damages in *Doe* to Laurentia on behalf of the Does.

Even if the Court decides not to compel Caledon to enforce the *Doe* judgment, in the alternative the Court should award damages to Laurentia on behalf of the Does in an amount equivalent to the uncollected damages from the *Doe* judgment. The Court

⁸⁶See generally BROWNIE, PRINCIPLES, *supra* note 26, at 4-11.

⁸⁷Hilton v. Guyot, 159 U.S. 113 (1895).

⁸⁸Tahan v. Hodgson, 662 F.2d 862, 866 (D.C. Cir. 1981).

may decide issues solely on the basis of the municipal law of a particular state.⁸⁹ In *Serbian Loans*, the Court considered whether it had jurisdiction under the Statute of the Court where the point at issue was a question which must be decided by application of a particular municipal law.⁹⁰ The Court found jurisdiction in that case under the broad terms of Article 36(1) of the Statute of the Court. Therefore, since the parties agreed in the Compromis to allow the Court to broadly decide all rights and obligations, under Article 36(1) of the Statute of the Court, the Court may apply the Act and award damages in accordance with the Act.

The Court should find that Ms. Montaigne and the Foundation violated the Act and therefore award the damages Laurentia on behalf of the Does. Ms. Montaigne and the Foundation substantially contributed to the adoption of the Laurentian children through their provision of social workers who supported the adoption petitions in approximately fifty Caledonian adoption proceedings, including Moses Doe's. These adoption proceedings concluded without the consent of the parents or the next of kin in violation of the Act, therefore they are liable for damages under the Act.⁹¹ As a result, the Court should look at the *Doe* case and the nature of the obligations therein and award damages in an amount equal to the uncollected damages determined by the Laurentian court.

E. The Court may not compel return of property seized under the Save the

⁸⁹BROWNLIE, PRINCIPLES, *supra* note 26, at 39.

⁹⁰Serbian Loans Case, P.C.I.J. Ser. A, No. 7, p.19 (1929).

⁹¹*Save the Children Act* §301(a).

Children Act because Laurentia has proper enforcement jurisdiction and Caledon may not rely on the “foreign sovereign compulsion doctrine” to avoid seizure of the property.

The Act’s valid prescriptive and enforcement jurisdiction should prevent the Court from compelling Laurentia to return the property seized in *Doe*. The “foreign sovereign compulsion” defense is not available to Ms. Montaigne and the Foundation because the doctrine is not a rule of international law and the conduct prohibited by the Save the Children Act was not compelled by Caledonian law.

1. Laurentia has enforcement jurisdiction to seize the property of the Foundation under the Save the Children Act.

The Act’s valid prescriptive and enforcement jurisdiction should prevent the Court from compelling Laurentia to return the property seized in *Doe*. A state may compel compliance with its laws through judicial or nonjudicial measures as long as it has jurisdiction to prescribe.⁹²

First, the Court should find proper enforcement jurisdiction because the Foundation had reasonable notice to prepare and present its defense.⁹³ Ms. Montaigne, who is Chief Administrator of the Foundation, was served in person while she was in Laurentia. This service gave her and the Foundation sufficient notice. Although neither the Foundation nor Ms. Montaigne appeared in the action, Laurentia had enforcement jurisdiction to satisfy the money judgment through seizure of the Foundation’s. Therefore, Laurentia need not return the seized property.

⁹²RESTATEMENT (THIRD), *supra* note 60, §431(1).

⁹³*Id.* §431(3).

Additionally, Laurentia may decline to return the Foundation's property because seizure under the Act was a permissible countermeasure to Caledon's violations of its international obligations to Laurentia. A state injured by another state's violation of an international obligation is entitled to take otherwise illegal measures against the offending state.⁹⁴ Despite numerous requests, Caledon refused to return the children to Laurentia in violation of international law. In response, Laurentia's passage of the Act was permissible and the seizure is a measure designed to execute the provisions of the Act. Countermeasures taken by the injured state must be proportional to the gravity of the offending state's international offense.⁹⁵ Laurentia's actions in promulgating the Act and in allowing seizure of property is indeed proportionate, if not less harmful, than the harm propagated by Caledon's illegal retention of the Laurentian children. As a result, the seizure of the Foundation's property is proper in the context of a countermeasure to Caledon's illegal acts.

2. The "foreign sovereign compulsion" defense is not available to Ms. Montaigne and the Foundation because the doctrine is not a rule of international law and the conduct prohibited by the Save the Children Act was not compelled by Caledonian law.

The foreign sovereign compulsion doctrine provides that a state may not prohibit conduct in another state that is legally compelled in that other state. The U.S. Restatement appears to suggest that the doctrine is a principle of international law, but

⁹⁴International Law Commission's Draft Articles on State Responsibility (Part Two), Article 11, I.L.C. Rep. 55-61 (1992).

⁹⁵*Id.* Article 13.

cites only U.S. authority.⁹⁶ Even if the doctrine were international law, however, it is inapplicable here. While participation in adoption proceedings is required by provincial law in Caledon, mere participation in the proceeding is not the basis of liability under the Save the Children Act. The Save the Children Act creates liability for those who materially contribute to the adoption of a child without the “written voluntary, and informed consent of his or her natural parent(s) or next of kin”⁹⁷ Ms. Montaigne and the Foundation did not take all necessary measures to contact the parents or next of kin, but merely sent letters, and then only in cases where an address was provided to them.⁹⁸ Ms. Montaigne and the foundation filed affidavits under the Oriente law that required them to “take all necessary measures” to acquire parental or next of kin consent⁹⁹ and attest to unsuccessful efforts. The Save the Children Act created liability only for participation in adoption proceedings where parental or next of kin consent was not acquired. It was the responsibility of Montaigne and the Foundation to obtain such consent under Oriente law. Only by failing to comply with Oriente law did Montaigne and the Foundation become liable under the Save the Children Act. Consequently, the Save the Children Act did not create liability for conduct required under Caledon’s domestic law. The “foreign state compulsion” doctrine is therefore inapplicable.

⁹⁶RESTATEMENT (THIRD), *supra* note 60, at 340.

⁹⁷*Save the Children Act* §301(a).

⁹⁸Compromis, ¶122.

⁹⁹Appendix to the Compromis, Oriente Family Law Title §3.053(b)(1).

IV. CALEDON CANNOT COLLECT DAMAGES OFFSETTING LAURENTIA'S TRADE SANCTIONS BECAUSE WTO EXCLUSIVITY PREVENTS ADJUDICATION, LAURENTIA MEETS THE WTO'S SECURITY EXCEPTION, AND COUNTERMEASURES JUSTIFY LAURENTIA'S SANCTIONS.

Caledon requests compensation for profits lost during Laurentia's cigarette trade sanction initiated to recover the Laurentian children. Caledon has no means to recover those profits under international law. World Trade Organization¹⁰⁰ (WTO) exclusivity precludes adjudication in the Court. Moreover, Laurentia prevails on the merits under WTO code. Finally, customary international law allows an otherwise illegal trade sanction as a countermeasure directed at settling an international dispute.

A. The Court has no jurisdiction over the trade sanction issue because the WTO regime is the exclusive means to resolve a trade dispute between members.

1. The WTO is exclusive.

The WTO regime, which includes the 1994 General Agreement on Tariffs and Trade¹⁰¹ (GATT 1994) and its related agreements, by its language, is exclusive.

Historically this was true absent specific, exclusive language.¹⁰² The Understanding on Rules and Procedures Governing the Settlement of Disputes¹⁰³ (DSU) codifies the

¹⁰⁰Agreement Establishing the World Trade Organization, 33 I.L.M. 1144 (1994).

¹⁰¹GENERAL AGREEMENT ON TARIFFS AND TRADE (1994).

¹⁰²J. Kolas, *Law-Making and Law-Enforcing for International Trade*, at 19 n.42 (World Order Studies Program Occasional Paper # 3, 1976); *citing* GATT Analytical Index, Article 25, ¶ 3 (Contracting Parties to the GATT 3rd ed. 1970).

¹⁰³Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 1226 (1994).

WTO's exclusive nature for the first time. It requires members to "seek a redress of a violation" under WTO "covered agreements" only through the rules and procedures in the DSU.¹⁰⁴ Members may only determine WTO violations through the DSU.¹⁰⁵

2. The WTO applies in this case.

The WTO applies to the dispute between Laurentia and Caledon. Both countries are members. The WTO regime prohibits quantitative restrictions on imports¹⁰⁶ of products such as cigarettes.¹⁰⁷ Indeed, Caledon initially sought WTO resolution of the sanction issue. The Court should deny jurisdiction over the sanction issue because the WTO is the primary and exclusive recourse for trade disputes among its members.¹⁰⁸

3. The Compromis supersedes WTO exclusivity or establishes the Court's jurisdiction over the trade sanction claim.

The Compromis does not require the Court's jurisdiction over the trade sanction claim. Although Article 36(1) of the Statute of the Court gives the Court jurisdiction over any dispute submitted by compromis,¹⁰⁹ Article 36(6) says that the Court will decide whether it has jurisdiction in cases of disputed jurisdiction.¹¹⁰ Article 36(6) applies to

¹⁰⁴*Id.* Article 23.1.

¹⁰⁵*Id.* Article 23.2.

¹⁰⁶GATT 1994, *supra* note 101 at Article XI.

¹⁰⁷*See, e.g.,* Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, DS10/R, adopted 7 November 1990, 37S/200.

¹⁰⁸ASIF H. QURESHI, *THE WORLD TRADE ORGANIZATION: IMPLEMENTING INTERNATIONAL TRADE NORMS* 96 (1996).

¹⁰⁹ICJ Statute, *supra* note 32, Article 36(1).

¹¹⁰*Id.*

cases submitted under Article 36(1).¹¹¹ Further, the Compromis asks the Court to decide these claims "on the basis of the rules and principles of general international law, as well as any applicable treaties."¹¹² For the trade sanction claim, the WTO is the applicable treaty. The Compromis only compels Article 36(6) jurisdiction. The Court should reject jurisdiction because of the WTO's exclusive nature.

4. The Court has rejected jurisdiction over WTO disputes in the past.

The Court has never made a ruling on a dispute covered by WTO's predecessor, the 1947 General Agreement on Tariffs and Trade¹¹³ (GATT 1947) or the WTO regime.¹¹⁴ In the *Nicaragua case*,¹¹⁵ for example, the Court indirectly dealt with the issue of which international body, GATT 1947 or the Court, had primary jurisdiction over a trade sanction dispute. The Court failed to adjudicate the GATT 1947 issue.¹¹⁶ The Court's inaction was more than just a refusal to exercise jurisdiction. The Court said any breach of GATT 1947 appeared "to fall outside the Court's jurisdiction."¹¹⁷ The Court's continued inaction on GATT 1947 disputes, and now WTO disputes, cements the

¹¹¹Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4, 119.

¹¹²Compromis at Article 2(1).

¹¹³GENERAL AGREEMENT ON TARIFFS AND TRADE (1947).

¹¹⁴Richard Sutherland Whitt, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua*, 19 LAW & POL'Y INT'L BUS. 603, 612 (1987); citing J. JACKSON, *WORLD TRADE AND THE LAW OF THE GATT* 136-37 (1969).

¹¹⁵Nicaragua Case 1986 I.C.J. 14 ; Nicaragua Case 1984 I.C.J. 395.

¹¹⁶Nicaragua Case, 1986 I.C.J. at ¶245.

¹¹⁷*Id.* at 141-142.

precedent of the Court's lack of jurisdiction over GATT and WTO disputes.

5. Policy reasons support rejecting this Court exercising jurisdiction over WTO disputes.

The Court's inaction makes sense for practical reasons. First, changes in WTO procedure versus its predecessor suggests the WTO regime is more conducive to exclusivity than GATT 1947. These changes, which include an automatic right of appeal,¹¹⁸ non-unanimous voting,¹¹⁹ and the creation of an international organization,¹²⁰ represent efforts to make the WTO regime a more legitimate and effective dispute resolution body than GATT 1947. Second, as a court of general jurisdiction, the Court lacks comparative expertise in international commercial issues.¹²¹ Third, the WTO regime has a stronger international enforcement mechanism than the Court.¹²² Fourth, the WTO regime has broader support among its members and a history of building consensus.¹²³ Fifth, WTO procedures make allowances for the unique circumstances of less developed countries.¹²⁴ Sixth, the WTO regime is not one of the international

¹¹⁸DSU, *supra* at note 103, Article 16.4.

¹¹⁹GATT 1994, *supra* note 101, Article XXV:4.

¹²⁰WTO, *supra* note 100, Article I.

¹²¹Whitt, *supra* note 114 at 612; *citing* J. JACKSON, *supra* note 114 at 137.

¹²²Rosalind M. Parker, *Protecting American Television Programming in Russia, China, Taiwan, and Japan*, 17 HASTINGS COMM. & ENT. L.J. 445, 471 n. 10.

¹²³*Id.*

¹²⁴*Id.*

organizations authorized by the U.N. to seek advisory opinions from the Court.¹²⁵ Finally, most nations recognize some form of *res judicata*,¹²⁶ a final settlement in one forum precludes new litigation in a second forum. The Court decides cases in accordance with general principles of law recognized by civilized nations.¹²⁷ *Res judicata* promotes judicial efficiency, prevents inconsistent judicial opinions, and supports the enforcement jurisdiction of the primary forum.

B. The WTO regime and the customary law of countermeasure denies Caledon compensation if the accepts jurisdiction over the trade sanction issue.

1. Laurentia meets the WTO's security exception.

The Court cannot award compensation if it adjudicates the sanction issue on the merits because Laurentia prevails under the WTO code. Laurentia's trade sanction, although prohibited by GATT 1994's Article XI, meets the security exception in Article XXI:(b)(iii). Article XXI:(b)(iii) suspends the operation of GATT 1994's Article XI prohibitions when a member takes an action which "it considers necessary for the protection of its essential security interests"¹²⁸ during an "emergency in international relations."¹²⁹

¹²⁵Whitt, *supra* note 114 at 612; citing J. JACKSON, *supra* note 114 at 137.

¹²⁶Case Concerning the Arbitral Award of 31 July 1989 (Bineau-Bissau v. Senegal), 1991 I.C.J. 53, 121.

¹²⁷ICJ Statute, *supra* note 32, Article 38:1(c).

¹²⁸GATT 1994, *supra* note 101, Article XXI(b).

¹²⁹*Id.* Article XXI(b)(iii).

2. The security exception applies if Laurentia says it applies.

Several GATT 1947 members have applied this exception in political crises to prevent the application of Article XI. Ghana invoked Article XXI:(b)(iii), the security exception, to justify its 1961 boycott of Portuguese goods to protest the Angolan war. Although the consensus system in GATT 1947 prevented any binding decision on the matter, Ghana noted that each member country "was the sole judge of what was necessary in its essential security interest."¹³⁰ Likewise, during the 1982 Falkland/Malvinas dispute, the European Union member states, as well as Canada and Australia, asserted that invoking Article XXI required no notice or justification,¹³¹ was a political issue beyond the scope of GATT 1947¹³², and could not be overruled to support a GATT violation.¹³³ A draft report written after the U.S. embargo of Nicaragua in stated that the terms of Article XXI prevented an examination of the validity of the U.S. invocation of Article XXI.¹³⁴

Article XI does not apply to the trade sanction because Laurentia initiated the trade sanctions for security, rather than economic, reasons. Laurentia determined that the international emergency over the wrongful retention and adoption of Laurentian children, an essential security interest, warranted the responsive sanction. Laurentia's

¹³⁰GATT Doc., SR. 19/12, p. 196 (1961).

¹³¹GATT Doc., C/M/157, p. 11 (1982).

¹³²*Id.* at 10.

¹³³*Id.*

¹³⁴United States - Trade Measures Affecting Nicaragua, draft GATT panel report L/6053, 13 October 1986 (unadopted).

application of the security exception in Article XXI:(b)(iii), as in the Angolan, Falkland, and Nicaraguan cases, is not subject to examination by WTO or this Court's adjudication.

3. WTO code does not compensate for damages that occur before dispute settlement begins.

If the Court were to reject the security exception, Caledon could not receive compensation for profits lost before or after the conclusion of WTO consultations. Compensation for lost profits after consultations conclude are available only if a member does not promptly bring its measures into WTO compliance.¹³⁵ Laurentia withdrew the trade sanction unilaterally after the conclusion of WTO consultations. Caledon has no claim for post-dispute-settlement compensation because Laurentia promptly complied with WTO provisions. Additionally, the WTO regime offers no other avenue for compensation for damages arising before dispute settlement. The DSU's Article 22 contains no means to collect for pre-dispute-settlement losses. The lack of provisions for pre-dispute-resolution compensation, as well as the WTO's preclusion of any customary international law remedy, prevent an award to Caledon.

4. Customary international law does not give Caledon a means to recover.

Customary international law does not allow Caledon to recover any damages. First, the WTO precludes the application of customary international law. Second, the norm of non-intervention does not apply to this case. Non-intervention prevents states

¹³⁵DSU, *supra* note 103, Article 22.1.

from using force to interfere in the internal or external governance of another state.¹³⁶

The Court rejected the application of non-intervention to economic measures in the Nicaragua case.¹³⁷ In response to Nicaragua's contention that the U.S. embargo and withdrawal of aid amounted to intervention, this Court said, "the Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention."¹³⁸

5. The doctrine of countermeasure legalizes the sanctions if they are illegal under the WTO.

The doctrine of countermeasure legalizes otherwise illegal acts one state takes in response to an illegal act of another state.¹³⁹ Like retorsion and reprisal, countermeasure is a well accepted doctrine of international law.¹⁴⁰ Laurentia's sanction, which responds to Caledon's wrongful retention and adoption of Laurentia's children, is legal as a countermeasure. It is a proportionate response, given after a Caledon's breach of international law, and taken with the requisite demand for Caledon to comply with international law.¹⁴¹

¹³⁶Daniel J. Fitzpatrick, *Of Ropes, Buttons, and Four-By-Fours: Import Sanctions for Violations of the COCOM Agreement*, 29 VA. J. INT'L L. 249, 266 (1988).

¹³⁷Nicaragua Case, 1986 I.C.J. at 107.

¹³⁸*Id.* at 126.

¹³⁹Joyner, *Transnational Boycotts as Economic Coercion in International Law*, 17 VAND. J. TRANSNAT'L L. 205, 253 (1984).

¹⁴⁰Case Concerning Air Services Agreement (France v. United States), 18 U.N.R.I.A.A. 417, 443-46 (Dec. 9, 1978).

¹⁴¹International Law Commission, *supra* note 94, Article 11.

CONCLUSION

For the foregoing reasons, the Applicant, The State of Laurentia, respectfully requests this Court to:

1. DECLARE that the continued detention in Caledon of Laurentian children who were evacuated after the volcanic eruption, irrespective of whether they have been “adopted” according to the laws of Caledon or any political subdivision thereof, is illegal in international law; and ORDER the immediate return of those children;

2. AWARD damages to Laurentia, in an amount calculated to compensate each Laurentian child who was unlawfully and involuntarily detained in Caledon, as well as to the family of each such child; and

3. ORDER Caledon to enforce the judgment of the Laurentian court in *Doe v. Children's Foundation*, or, in the alternative, AWARD to Laurentia, on behalf of Mr. and Mrs. Doe, an amount equivalent to the uncollected portion of the judgment in that case.