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

BRIEF FOR RESPONDENT

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 request a determination by the International Court of Justice of all legal consequences, including the rights and obligations for the parties, arising from its judgment on the questions presented, in conformity with paragraph 1 of Article 36 of the Statute of this Court.

STATEMENT OF THE FACTS

In February of 1994 over 150,000 people were killed in a devastating volcanic eruption on Mount Zolo in Laurentia. The International Committee of the Red Cross rated the disaster one of the most significant of the century. Almost every member of the United Nations participated in a relief effort in Laurentia. Caledon, Laurentia's eastern neighbor, voluntarily provided assistance through the Caledon Medical Corps (CMC), in the spirit of the friendly diplomatic relations Caledon has maintained with Laurentia since the 1920's. The CMC established a network of field hospitals, and performed triage on 122,000 patients in March of 1994. Approximately 15,000 of the most seriously injured were taken to Caledon for treatment, 3,000 of whom were children under the age of 16, most of whom were separated from their parents during the eruption and its chaotic aftermath. Because of the exigencies of the children's medical condition, the lack of communications infrastructure on the ground, and the likelihood that most, if not all, of the parents were dead, the CMC did not attempt to obtain consent of the children's parents or the Laurentian government before ordering their evacuation to Caledon.

Over the next year, Caledon returned all of the able-bodied children over the age of 14 to Laurentia. About 600 others were released into the care of parents and relatives who presented themselves to the Caledonian authorities. The 400 children remaining in Caledon were placed with foster families in Oriente province, and were provided with medical care and emotional assistance to deal with the traumas they had experienced. All available information about the children was compiled into a list and maintained as public records in the capital of Caledon, and sent to Laurentia through diplomatic channels.

In May 1995, Caledon's Interior Minister decreed that foster parents would receive reimbursement for all foster child-care expenses, and that the remaining children would be kept in Caledon, out of harm's way, until safe conditions were restored in Laurentia, or until the natural parents came forward to claim the children. To date, none of the parents have come forward to claim the children.

On 28 June 1995 the people of Oriente elected a new governor, Theophilus Jones, one of whose top objectives was to preserve family unity in Oriente--whether the family was established by birth, adoption, or foster care. Laurentia's Minister of State delivered a diplomatic note to Caledon's Embassy on 1 July 1995 asking for the immediate return all children evacuated after the eruption. In response, Caledon demanded that Oriente take no unilateral action with respect to the children.

To accomplish his objective of family unity, Governor Jones decreed on 9 July 1995 that all children evacuated from Laurentia after the eruption were wards of Oriente. He further instructed the courts of Oriente that he consented to the adoption of these children by Oriente residents who sought to become their parents. Under Oriente law, the effect of this Decree was to permit the courts to accept petitions to adopt the children without the consent of natural parents. Petitions for the adoption of virtually all of the 400 children in foster care were recorded in the courts of Oriente. The courts received reports attesting to the adequacy of the proposed adoptive home in 320 of the cases. In the remaining cases, the courts required only minor modifications to the petitions. No reports of abuse were received on any of the prospective adoptive families. At no time during any of the adoption proceedings did anyone claiming to be the natural parent of any prospective adoptee come forward to oppose an

adoption petition.

On 15 July 1995, Laurentia protested the presence of the children in Caledon in a note delivered to the Caledonian Ambassador. In the note, Laurentia accused Caledon of kidnapping the children and requested their return. A week later, Caledon's Foreign Affairs Minister responded, protesting the use of terms such as "organized kidnapping" to describe its ongoing humanitarian effort that has saved the lives of thousands of people. The Minister pointed out that in the Federal Republic of Caledon, all legal and constitutional responsibility for matters such as the care, rearing, and adoption of children is in the exclusive jurisdiction of its provinces. The Minister further responded that the adoptions are formal, final, and legally binding acts of the Provincial Courts of Oriente, and Caledon is therefore powerless to return the children to Laurentia.

On 29 October 1995, Laurentia announced that it was immediately imposing an import embargo on all cigarettes from Caledon. This unilateral action by Laurentia was not part of any organized effort by the United Nations. Until the embargo, cigarette sales contributed U.S.$800 million to the bilateral trading relationship between the countries.

Immediately upon receipt of official notice that the import embargo had been imposed, Caledon requested consultations under Article XXIII of the General Agreement on Tariffs and Trade. Consultations were duly convened in Geneva on 25 April 1996 and Caledon submitted a memorandum contending that the Laurentian embargo violated Article XI of the GATT. At the completion of the WTO consultations, the Laurentian Trade Minister stated that his Government would not attempt to defend the embargo before the WTO and, accordingly, abrogated the import ban.

On 9 June 1996, the Laurentian Parliament enacted the "Save the Children Act of 1996," which provided a private cause of action against any social worker who may have contributed to the adoption of a Laurentian child without the consent of the natural parent(s) or next of kin. This Act was used to find liability in a suit filed by the relatives of Moses Doe against the Children's Foundation, a private non-profit organization incorporated under the laws of Caledon. The social workers whose activities were challenged in the suit were properly licensed, and were required to participate in the adoption proceedings by the laws of all Caledonian provinces. The Foundation consulted the list of names maintained in the capital of Caledon, and, where an address was provided, sent a letter to the parents by certified mail containing information about the adoption proceedings.

The Foundation did not appear in the action and the court entered a default judgment against the Foundation, awarding the Does actual damages equivalent to U.S. $100,000 and exemplary damages equivalent to U.S. $5 million. A writ of execution was issued, and property owned by the Foundation in Laurentia was seized and sold for $500,000, which was paid over to the Does.

Having obtained their judgment in Laurentia, the Does brought an action in Caledon to enforce it. The Oriente Provincial court of first instance rejected the Does' claiming it was against public policy. The Caledon Court of Appeals and Federal Supreme Court upheld this decision. After inconclusive exchangmes of diplomatic notes, and responding to pressures from members of the United Nations, Laurentia and Caledon agreed to submit their disputes to the International Court of Justice pursuant to Article 36(1) of the Court's Statute. They have agreed to the terms and language of the present Compromis.

QUESTIONS PRESENTED

I. DOES ORIENTE HAVE THE RIGHT TO AUTHORIZE ADOPTION OF EVACUATED CHILDREN UNDER INTERNATIONAL LAW?

II. IS LAURENTIA ENTITLED TO DAMAGES FROM CALEDON IF THE ADOPTIONS ARE INVALID UNDER INTERNATIONAL LAW?

III. WAS LAURENTIA'S EMBARGO ILLEGAL ENTITLING CALEDON TO AN AWARD OF COMPENSATION FROM THE COURT TO RECOVER LOST PROFITS?

IV. IS LAURENTIA'S SAVE CHILDREN ACT IMPERMISSIBLY EXTRATERRITORIAL UNDER INTERNATIONAL LAW?

SUMMARY OF THE PLEADINGS

I.

Caledon complied with all aspects of international law when it allowed the children evacuated from Laurentia to be placed in foster and adoptive families in Oriente. Because of Caledon's tremendous humanitarian efforts to save Laurentian lives after the eruption of Mount Zolo, Caledon's obligations *vis-a-vis* Laurentia under the Hague Convention on the Civil Aspects of International Abduction (Hague Convention) were suspended. Even without a suspension of obligations, however, Caledon complied with all Hague Convention requirements. Addittionally,, Laurentia's failure to ratify the Convention on the Rights of the Child (CRC) eliminates Laurentia's claim that Caledon had any specific treaty obligations to Laurentia. Further, Caledon considered the best interests of the children when placing the children in foster and adoptive families in Oriente. Finally, Caledon, as a federal republic, is not bound by international law to undo the Oriente adoptions.

II.

Laurentia is not entitled to receive any damages from Caledon regardless of the validity of the adoptions under international law. Despite the fact that this Court has jurisdiction to award damages in a case where both parties have accepted the Court's jurisdiction, no damages should be awarded to Laurentia. Laurentia has failed to put forward any evidence of an actual loss, and any claim for punitive or exemplary damages should be dismissed because these forms of reparation are unacceptable under international law.

III.

Laurentia's illegal cigarette embargo entitles Caledon to an award of compensation from the Court to recover lost profits. This Court should accept jurisdiction over this compensation claim. The World Trade Organization (WTO) regime contains no provisions making it the exclusive means to recover profits lost during a dispute that the WTO process settled. Further, customary international law allows the Court to award compensation to Caledon for losses due to a coercive, economic sanction.

IV.

Laurentia's Save the Children Act is impermissibly extraterritorial under international law and the seizure of the Children's Foundation property was therefore invalid. The Act purports to make social workers liable for participation in foreign adoption proceedings, if such participation materially contributes to the adoption of a Laurentian child without the consent of the natural parent(s) or next of kin. International law places limits on a nations's exercise of its jurisdiction to prescribe. The extraterritorial reach of the Save the Children Act exceeds these limitations. Finally, the Court should not enforce the judgment under the Act, but should require Laurentia to return the seized property.

PLEADINGS

I. THE ADOPTIONS ARE CONSISTENT WITH INTERNATIONAL LAW.

Caledon complied with all aspects of international law when it allowed the children evacuated from Laurentia to be placed in foster and adoptive families in Oriente. Because of Caledon's humanitarian efforts in helping to save Laurentian lives after the eruption of Mount Zolo, Caledon's obligations *vis-a-vis* Laurentia under the Hague Convention on the Civil Aspects of International Abduction[1] (Hague Convention) were suspended. Even if the obligations were not suspended, Caledon fully complied with the Hague Convention. In addition, because Laurentia failed to ratify the Convention on the Rights of the Child[2] (CRC), Laurentia cannot claim that Caledon had any obligations to comply with specific clauses under the treaty. The best interests of the children were considered when the decisions were made to place the children in foster and adoptive families within Oriente. Finally, Caledon, as a federal republic, is not bound by international law to undo the adoptions which took place in Oriente.

A. Caledon's obligations under the Hague Convention were suspended *vis-a-vis* Laurentia because the eruption of Mount Zolo was a fundamental change of circumstances.

The eruption of Mount Zolo has fundamentally changed the circumstances of Caledon's obligations under the Hague Convention. ***Rebus sic stantibus***, the customary international law doctrine codified in the Vienna Convention,[3] allows a treaty party to suspend the operation of a

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

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

[3]Vienna Convention on the Law of Treaties, 23 May 1969, Article 62, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 699 (1969).

treaty[4] after an unforeseen and fundamental change in circumstances.[5] The original circumstances must have been an essential factor behind the formation of the treaty[6] and the changed circumstances must radically transform the treaty obligations beyond their original scope.[7] This Court has accepted *rebus sic stantibus* as international law.[8] Caledon's voluntary relief efforts in Laurentia have taxed the medical and foster care resources throughout Caledon. The scope of the disaster, Caledon's extensive efforts to aid its neighbor, and the large number of young victims were unforeseen, and fundamental changes in the circumstances affecting Caledon's obligations under the Hague Convention. Therefore, the disaster warrants Hague Convention's suspension.

B. Caledon met its obligations under the Hague Convention.

Even if the Court were to find that Caledon's obligations under the Hague Convention were not suspended, Caledon has complied with its terms. Caledon's removal and retention of the children was not wrongful under the Hague Convention. Under the treaty, removal or retention of a child is only wrongful if it is in breach of custody rights attributed to a person, an institution or any other body, under the law of the state in which the child was habitually resident immediately before the retention.[9] The party who claims a breach must have actually exercised

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[4]*Id.* Article 62(3).

[5]*Id.* Article 62(1).

[6]*Id.* Article 62(1)(a).

[7]*Id.* Article 62(1)(b).

[8]Fisheries Jurisdiction Case (United Kingdom & Northern Ireland v. Iceland) 1973 I.C.J. 3, 17, ¶¶ 35-36.

[9]Hague Convention, *supra* note 1, Article 3.

those rights of custody at the time of removal or retention, or must show that the rights would have been exercised but for the removal or retention.[10]

1. Caledon is the children's state of habitual residence.

The relevant rights of custody are those recognized by the state of habitual residence, where the final merits of a custody dispute are decided.[11] Although habitual residence is not defined in the Hague Convention, it should be given its meaning under international law.[12] A child's nationality is not determinative of habitual residence.[13] Rather, the current residence of the child, if permanent, is his or her habitual residence.[14] Here, the children are permanently residing with families in Oriente. The children have been in Caledon for more than two years when they arrived for medical treatment since March 1994. The children have been legally adopted under the laws of Oriente. These adoptions are final, binding, custody decisions. Therefore, the habitual residence of the children is Oriente and all decisions under the Hague Convention should refer to Oriente as the habitual residence.

2. No rights of custody have been breached.

Further, the removal and retention of the children is not wrongful because Caledon's actions did not breach any rights of custody. In determining who may claim a breach, the Hague

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[10]*Id.*

[11]Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9 (1994).

[12]Hague 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 235.

[13]*See, e.g.*, Friedrich v. Friedrich, 983 F.2d 1396, 1402 (6th Cir. 1993).

[14]*See* In re F, [1992] 1 F.L.R. 548 (C.A.) (Australia).

Convention states that rights of custody, which are defined to include rights relating to the care of the child and the right to determine the child's residence, may arise by operation of law or by reason of a judicial or administrative decision.[15] Under operation of Laurentian law, in the absence of natural parents, there is no automatic award of custody over children to their next of kin. Rather, close family members have historically been permitted to petition for custody. Here, no judicial or administrative decision has been made in Laurentia regarding rights of custody. No further information is available regarding operation of law in Laurentia, but no one outside of Caledon has stepped forward to care for the children.

The Hague Conference on Private International Law (Conference) instructs that an institution to whom custody has actually been awarded could claim a breach under the Hague Convention, but it has been found to be "quite different if a court is involved (as in the case of the English concept of a "ward of the court")."[16] This implies that the Hague Convention does not confer rights of custody to a government who has made children wards of the court. A child becomes a ward of the court when his or her parents die or do not assert custody rights,[17] as in this case.

3. Laurentia acquiesced to Caledon's retention of the children.

Any party claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central

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[15]*Id.*

[16]Hague Conference on Private International Law: Report on 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.

[17]*See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 648 (1972).

Authority of any other Contracting State to secure the child's return.[18] The Hague Convention provides no other remedies. Caledon's Central Authority is its provincial district courts. The Oriente court authorized the adoptions of the children because no family member or member of the Laurentian government came forward to request assistance in securing the children's return or to oppose the adoptions. Therefore, Laurentia failed to follow the necessary steps of the Hague Convention to secure the return of the children.[19]

In any case, Laurentia has acquiesced in Caledon's retention of the children, so the Court should not order a return of the children.[20] Fifteen months passed before Laurentia made any statement regarding the children, and Laurentia has yet to make a claim under the treaty procedures. During these fifteen months, Caledon provided medical treatment and psychological assistance to the children, and made arrangements to place the children in foster and adoptive families. Laurentia's silence during this period evidences acquiescence to Caledon's continued retention of the children.

5. The children face a grave risk of harm if they are returned to Laurentia.

Caledon can refuse to return the children to Laurentia if there is a grave risk that the children would be exposed to physical or psychological harm or if the children would otherwise be placed in an intolerable situation.[21] The children would be exposed to psychological harm if returned to Laurentia. The children have become members of families in Oriente, and removing

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[18]Hague Convention, *supra* note 1 at Article 8.

[19]*Id.* Article 8.

[20]*Id.* Article 13.

[21]Hague Convention, *supra* note 1, Article 13(b).

them from those families would cause instability and distress. Further, the loss of familiar surroundings and family members would cause psychological harm to the children.

6. The Hague Convention does not require the Court to undo the adoptions.

Upon conflict between international law and the operation of a municipal law, the Court considers whether the intent of the treaty was to prohibit operation of the municipal law,[22] particularly in cases involving *ordre public*.[23] *Ordre public* matters concern the public welfare, and include the guardianship and welfare of infants.[24] The purposes of a treaty are limited to its stated purposes.[25] Interpreting a treaty to prohibit any legislative enactment on a different subject-matter that would restrict, but not abolish, application of the treaty would exceed the purpose of the treaty.[26]

In *Guardianship of Infants,* this Court held that a Swedish court's award of custody over a child, who was a national of the Netherlands, did not violate a guardianship treaty between the states.[27] The Court found that although the custody award prohibited the return of the child to the Netherlands, the treaty was not intended to prohibit the application of municipal law to a foreign infant. Therefore, in *ordre public* matters governed both by international law and

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[22]*See*, Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), 1958 I.C.J. 55; Fisheries Case (United Kingdom v. Norway), 1951 I.C.J. 116; Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4.

[23]Guardianship of Infants, 1958 I.C.J. 55.

[24]*Id.*

[25]Vienna Convention, *supra* note 3, Article 31(1).

[26]Guardianship of Infants, 1958 I.C.J. 55.

[27]*Id.*

municipal law, the international law does not always prevail over the application of the municipal law.[28] In the case, the Court stated that municipal laws concerning *ordre public* apply to a foreign infant, and "a guardian's right to custody under the national law of the infant cannot override the application of such laws to a foreign infant."[29]

Here, the Court should not order Caledon to undo the adoptions. The adoption proceedings were conducted under the Family Law Title of the Oriente Code. The adoption law is intended to provide for the welfare of any children in Oriente, and is therefore *ordre public*. The Hague Convention does not intend to regulate adoptions, but only to determine jurisdiction over custody disputes

C. Caledon has no obligations to Laurentia under the Convention on the Rights of the Child.

Caledon has been a party to the CRC throughout the pertinent events. Therefore, it is bound by CRC terms with regard to all other treaty parties. However, Laurentia did not become a party to the treaty until 1 July 1996, after all the pertinent events took place. Consequently, Laurentia may not claim Caledon violated the CRC. Even if the Court finds that Laurentia may bring a claim under the CRC, Caledon cannot be compelled to undo the adoptions because to do so would be a violation of its internal law. Additionally, the CRC is not customary international law, so Caledon is not bound on that basis.

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[28] *Id.* at 68.

[29] *Id.*

1. Laurentia was not a party to the CRC at any time during the events covered by the Compromis.

Although Laurentia was an original signatory to the CRC, it failed to deposit its instrument of ratification until 1 July 1996. Consequently, Laurentia was not a party to the treaty during the events which gave rise to this dispute. Therefore, Laurentia cannot enforce any CRC obligation against Caledon.

2. Undoing the adoptions would be a violation of a rule of Caledon's internal law which is manifest and of fundamental importance.

Caledon cannot undo the adoptions because doing so would violate a fundamental rule of Caledonian law that was manifest both at the time that Caledon ratified the treaty and when Laurentia ratified it. Article 27 of the Vienna Convention prohibits a party from invoking the provisions of its internal law as justification for its failure to perform a treaty, but is without prejudice to Article 46 of the Vienna Convention. Article 46 says that a state may not claim that its consent to be bound by a treaty is in violation of a provision of its internal law unless that violation concerns a rule of its internal law of fundamental importance and is manifest.

Caledon's consent to be bound by the CRC violates a rule of its internal law of fundamental importance — specifically the rule that the Provincial governments within Caledon have exclusive jurisdiction over domestic matters. This rule is of fundamental importance because the exclusive jurisdiction over domestic matters is fundamental to Caledon's federal democracy. Additionally, international law considers domestic or family matters themselves fundamental. The Universal Declaration[30] proclaims that childhood is entitled to special care and

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[30]Universal Declaration on Human Rights, U.N. G.A.Res. 217A (III) (1948), Article 22.

assistance. The document further states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.[31] As stated in the Preamble to the CRC, "the family, as the fundamental group of society . . . should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community," particularly those regarding the well-being of children.[32] Therefore, Oriente's treatment of family matters is a fundamental matter regulated at the provincial level.

Before Laurentia's ratification, Caledon notified Laurentia that Caledon "is a Federal Republic, with all legal and constitutional responsibility for such domestic matters as the care, rearing, and adoption of children left to the exclusive jurisdiction of the Provinces."[33] Specifically, the Minister stated that "[t]he adoptions . . . are formal, final, and legally binding acts of the Provincial courts of Oriente."[34] It was clear to Laurentia *before* it ratified the CRC that any obligations assumed by the Federal Government of Caledon with regard to the care, rearing, and adoption of children were subject to internal law. Therefore, it was manifest to Laurentia, as Caledon's neighbor, that domestic matters such as adoption law were within the exclusive jurisdiction of the Provinces.

3. The CRC is not customary international law.

Because the terms of the CRC are not customary international law, Caledon has no obligations to Laurentia under the CRC. The elements of customary international law are state

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[31] *Id.* Article 16.

[32] *Id.*

[33] Compromis, ¶ 5.

[34] Compromis, ¶ 5.

practice and *opinio juris*.[35] The substantive terms of the CRC do not meet either of the necessary elements.

State practice requires a passage of time to establish general custom.[36] Although it took years for nations to implement the CRC, this passage of time was not because international customs were developing, but because there was a lengthy disagreement about the necessity for the CRC. In the seven years since its implementation on 20 November 1989,[37] many nations have signed, ratified and acceded to the CRC, without a concurrent change in state practice.[38] If the provisions have not been implemented by the states, the CRC is not international custom.

There must also be substantial uniformity and a consistency of practice to establish customary international law.[39] The CRC contains an explanation of the rights of children that many nations have not accepted into their state practice. For example, the United States initially signed the CRC, but has refused to ratify it because it will not adopt its provisions into U.S. practice.[40] These variations among state practice undermine any argument that the CRC is international custom.

The second element of customary international law is *opinio juris*, which is an acceptance

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[35]IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4-8 (4th ed. 1990).

[36]*Id.*

[37]CRC, *supra* note 2.

[38]Status of the Convention on the Rights of the Child, U.N. G.A.Res. A/51/424, 27 Sept. 1996.

[39]BROWNLIE, *supra* note 35, at 5.

[40]*Id.*; Status, *supra* note 38.

of practice as law.[41] The CRC has not been generally accepted into the practice of states. Nations are still grappling with children's rights, whether those rights exist, and whether they can be enforced. Because there is no evidence that states feel obligated to follow the CRC, there is no *opinio juris* and it is not customary international law. Therefore, Caledon is not legally obligated to comply with the CRC with respect to Laurentia.

D. Caledon complied with its obligations under the Convention on the Rights of the Child.

Even if this Court finds that Caledon is bound by the CRC with respect to Laurentia, the adoptions were conducted in compliance with the terms of the CRC. Under the CRC, the best interests of the child is a nation's primary consideration.[42] In practice, this means that parties to the CRC must ensure that children deprived of their family environment receive special assistance and protection and are provided with alternative care.[43] In addition, parties to the CRC must ensure that inter-country adoptions are authorized by competent authorities and conducted in accordance with applicable law.[44] Caledon has made every effort to consider the best interests of the children and to guarantee that the adoptions were conducted in accordance with applicable law.

1. Caledon acted in the best interests of the children.

Caledon has continually considered the best interests of the children. Caledon voluntarily assisted Laurentia after the volcanic eruption, evacuating 3,000 children who desperately needed

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[41]BROWNLIE, *supra* note 35, at 5.

[42]CRC, *supra* note 2, Article 3.

[43]*Id.* Article 20.

[44]*Id.* Article 21.

medical treatment. These children were taken to Caledon, provided with full medical treatment, and cared for by Oriente families. Caledon has continually focused on the best interests of the children.

2. Caledon has provided the children with special assistance and alternative care.

The CRC requires that states to provide alternative care for children who are temporarily or permanently deprived of a family environment.[45] Caledon evacuated the children from Laurentia, at a time when the children were deprived of a family environment due to the volcanic eruption. Caledon guaranteed that the children would receive full medical treatment; and once treated, that the children would be cared for by foster families. Caledon attempted to obtain information about the children, including any last known address. This information was difficult to obtain, however, due to the ages of the children and the tragic circumstances. During an emergency, Oriente took every step possible to comply with the spirit of Article 20, by ensuring that the children were placed in alternative care and that the placements were in the best interests of the children.

3. The adoptions were conducted by competent Caledonian authorities under municipal laws consistent with the terms of the CRC.

The CRC requires states to ensure that adoptions are authorized by competent authorities, and that informed consent is given if required by law.[46] The Oriente adoptions complied with all relevant laws. The Oriente Code at § 3.052(a) allows a petition for adoption to be granted only if parental consent is given, or alternatively at § 3.052(c) if the child is a ward of Oriente

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[45] *Id.* Article 20.

[46] *Id.* Article 21(a).

and the Governor has consented to the adoption.[47] The Governor decreed that the children were wards of the state and subsequently gave his consent to the adoptions of the children. Additionally, Oriente courts received reports in the majority of the adoptions attesting to the adequacy of the adoptive home. These measures demonstrate that Oriente's adoption procedures were proper.

The CRC further requires that intercountry adoption be considered as an alternative only if the child cannot be placed in his or her country or origin.[48] At no time during the adoption proceedings did any parent or relative from Laurentia come forward to claim any child who was adopted. The Oriente authorities attempted to locate Laurentian parents in compliance with Article 21, using the information they obtained, but these attempts were unsuccessful. By promoting the safety and security of the children, Caledon has complied with its obligations under the CRC.

II. LAURENTIA IS NOT ENTITLED TO DAMAGES FROM CALEDON IN ANY AMOUNT REGARDLESS OF THE VALIDITY OF THE ADOPTIONS UNDER INTERNATIONAL LAW.

Despite the fact that this Court may award damages where the parties have accepted the jurisdiction of the Court, in this case such damages should not be awarded. There are three fundamental questions for this Court to decide in determining what damages should be awarded: whether there existed an obligation to make reparation, whether there was any damage to be repaired, and the extent of the damage.[49] Assuming, *arguendo,* that the Court has the competence

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[47]Appendix I to the Compromis.

[48]CRC, *supra* note 2, Article 21(b).

[49]Chorzów Factory (Germany v. Poland) P.C.I.J. Ser. A, No. 13, p. 46.

to decide damages, Laurentia has not shown an actual loss to the children and their families.

Caledon is not obligated to pay reparation to Laurentia, because the adoptions were valid. However, even if the adoptions are invalid, Laurentia has not demonstrated any actual loss. Therefore, Laurentia has not suffered any damage for Caledon to repair. Although some publicists contend that states may claim damages for a breach of international law whether or not the breach causes actual material damage or loss,[50] there are no examples of damages being awarded for a mere breach of treaty not leading to actual loss.[51] In the *Mavrommatis (Jerusalem) Concessions* case,[52] Greece made a claim against Great Britain for the breach of a concession in violation of its international obligations under the Mandate for Palestine. The Court accepted that Great Britain had violated its obligations, but said that the Greek government's claim for indemnity must be dismissed because it failed to prove a loss resulted from the breach.[53] Although Laurentia has made a claim for damages, it has failed to forward any assertion of actual loss. Any claims for indirect losses based on emotional distress or other like causes of action are untenable and should be avoided by the Court because they would result in claims for punitive or exemplary damages. Punitive damages are unacceptable as a form of reparations under international law.[54]

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[50]*See, e.g.*, G.G. Fitzmaurice *BYBIL* 82 (1936), at 109; BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 369 (1963).

[51]CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 86 (1987).

[52]Mavrommatis (Jerusalem) Concessions Case (Greece v. United Kingdom) P.C.I.J. Ser. A., No. 5.

[53]*Id.*

[54]*See* Lusitania Cases, 7 U.N.Rep. Int'l Arb. Awards 201 (1923); Jimenez de Aréchaga, *International Law in the Past Third of a Century* 159 REC. DES COURS 285-87 (1978-I).

III. LAURENTIA'S ILLEGAL CIGARETTE EMBARGO REQUIRES COMPENSATION BECAUSE THE TRADE ISSUE IS UNDER THE COURT'S JURISDICTION.

The Court should award Caledon compensation for Laurentia's illegal and coercive cigarette embargo. This Court has jurisdiction over this compensation claim. Not only does the World Trade Organization[55] (WTO) regime make the embargo illegal, the WTO contains no provisions suggesting it is the exclusive means to recover compensation for profits lost during a dispute. Further, customary international law allows the Court to award compensation to Caledon for losses due to a coercive, economic sanction.

A. Neither the WTO regime nor the Statute of the Court prevent this Court's jurisdiction over compensatory claims arising out of a WTO-settled dispute.

1. The WTO is not the exclusive means to recover compensation after a trade dispute between its members has been through the WTO process.

The WTO regime, which includes the 1994 General Agreement on Tariffs and Trade[56] (GATT 1994) and its related agreements, does not preclude recovery of lost profits in a trade dispute through the Court once the dispute has been settled through the WTO process. The WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes[57] (DSU) states that its exclusivity applies for the sole purpose of making a "determination to the effect that a violation has occurred."[58] That determination has already occurred through WTO consultations. The exclusive language prevents the Court's jurisdiction before a dispute is

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

[56]GENERAL AGREEMENT ON TARIFFS AND TRADE (1994).

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

[58]*Id.* Article 23.2.

resolved through the WTO process. At the conclusion of consultations, the sides settled the dispute and Laurentia lifted the embargo.

2. WTO focuses on dispute settlement which takes claims for past damages out of its realm and places them in the Court's jurisdiction.

The WTO regime settles disputes.[59] Its remedies, such as retaliation and compensation, are only available after the DSU process has concluded that a member has violated a GATT 1994 provision, and that member has failed to correct the violation promptly.[60] The WTO regime does not compensate past violations.[61] It's dispute settlement nature does not preclude the Court from compensating Caledon for injuries which the WTO regime does not address: profits lost prior to Laurentia's lifting of the illegal embargo.

3. The Court's Statute requires jurisdiction over the embargo.

No express Court provision bars the Court's adjudication of WTO disputes. On the contrary, Article 36(1)[62] of the Court's Statute, gives the Court jurisdiction over "all cases which the parties refer to it."[63] The Compromis expressly refers the case of the Laurentian cigarette embargo to the Court.[64] As the Court's jurisdiction is stipulated to in the Compromis, the Court has jurisdiction to decide compensation for the embargo issue.[65]

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[59]Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 417 (1996).

[60]DSU, *supra* note 57, Article 22.

[61]*Id.*

[62]Statute of the International Court of Justice, June 26, 1946, 59 Stat. 1055, T.S. No. 933.

[63]*Id.*

[64]Compromis at Article 2(2).

[65]ICJ Statute, *supra* note 62, Article 36(1).

4. The Court's history of inaction should not continue with the new WTO regime.

Any Court inaction on disputes occurring while the 1947 General Agreement on Tariffs and Trade[66] ("GATT 1947") was in force should not prevent action under the new WTO regime. The Agreement Establishing the WTO expressly says GATT 1994 is a new and legally distinct entity from GATT 1947.[67] This Court's precedent of inaction, therefore, is not automatically applicable to the new entity. This Court has several policy reasons to discontinue its precedent of inaction. First, the WTO regime has adopted a voting system which replaces its consensus system.[68] Under GATT 1947's consensus system, each member had veto power over the adoption of panel reports.[69] Veto power insulated the member states from WTO decision-making based on politics instead of GATT 1947's provisions.[70] Lacking veto power, members of the new WTO regime have no recourse in the event of a majority decision based on politics, coercion, or illegal interpretation of WTO provisions. Therefore, this Court has a vital role in protecting minority interests.

Second, the WTO regime is not comprehensive.[71] Absent a treaty provision that regulates

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[66]GENERAL AGREEMENT ON TARIFFS AND TRADE, (1947).

[67]WTO, *supra* note 55, Article II:4.

[68]GATT 1994, *supra* note 56, Article XXV:4.

[69]GATT 1947, *supra* note 66, Article XXV:4.

[70]James R. Arnold, *The Oilseeds Dispute and the Validity of Unilateralism in a Multilateral Context*, 30 STAN. J. INT'L L. 187, 204, 220, fn. 116 (1994); William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 95-96 (1987).

[71]Arnold, *supra* note 70 at 200.

conduct, customary international law applies.[72] WTO language only precludes customary international law which is contrary to the provisions of the WTO regime.[73] The Court has a role in determining the customary international law obligations that are not precluded, or only partially precluded, by the WTO regime. WTO provisions, for example, preclude the Court's adjudication of disputes, but permit adjudication of claims for compensation unaddressed in the WTO regime.

B. Laurentia's embargo on cigarettes is illegal under GATT 1994's prohibition against quantitative restrictions.

1. The consensus system under GATT 1947 precluded the application of the security exception.

The merits dictate a finding that Laurentia's embargo was illegal under the WTO regime. GATT 1994's Article XI prohibits members from creating quantitative restrictions on imports or exports.[74] GATT 1994's Article XXI, the security exception, precludes Article XI's prohibition. Under GATT 1947's consensus-based system, members did examine behind another member's invocation of the security exception.[75] It was impossible to adopt a panel report without the agreement of the invoking member.[76] Even with a 1982 Ministerial Declaration by the WTO members agreeing that they should "abstain from taking restrictive trade measures, for reasons

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[72]Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 47.

[73]*See,* Arnold, *supra* note 70 at 220 n.116.

[74]GATT 1994, *supra* note 56, Article XI:1.

[75]*See, e.g.,* United States - Trade Measures Affecting Nicaragua, draft GATT panel report L/6053, 13 October 1986 (unadopted).

[76]GATT 1947, *supra* note 66, Article XXV:4.

of a non-economic character, not consistent with [GATT 1947],"[77] the system was unable to prevent arbitrary use of the security exception.[78]

2. The Court should look into the merits of Laurentia's invocation of the security exception under the WTO's new voting system.

The WTO regime's voting system will give effect to this Declaration where the consensus system was unable to do so. Laurentia used trade measures for political, rather than economic, ends. Consequently, the embargo cannot meet the security exception as stated in the 1982 Declaration. To abstain from looking into the invocation of the security exception would only encourage members to avoid substantive GATT 1994 provisions like Article XI. Arbitrary use of Article XXI subverts the purposes of the WTO regime. The Court should prevent Laurentia's arbitrary invocation of Article XXI by enforcing the limits set in the 1982 Declaration.

C. The customary international law doctrine of non-intervention entitles Caledon to an award of compensation for Laurentia's illegal embargo.

1. The norm of non-intervention is customary international law.

Even if this Court decides that the embargo was not illegal under the WTO regime, the Court should find that the embargo violated customary international law. The norm of non-intervention prevents a country from attempting to cause a change in another country's behavior through economic coercion.[79] This Court recognized this norm as customary international law.[80]

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[77]Ministerial Declaration of Contracting Parties, L/5424, adopted 29 November 1982, 29S/9, 11.

[78]Nicaragua Case, *supra* note 75, at fn. 23.

[79]Daniel 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).

[80]*See, e.g.*, Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14, at ¶¶ 202-209.

The customary international law doctrine of non-intervention allows Caledon to recover lost profits.

2. Laurentia's embargo violated the norm of non-intervention.

Laurentia violated customary international law when it used illegal economic measures to coerce Caledon's compliance with its demands. Laurentia's violation is not excused by the customary international law doctrines of retorsion or countermeasure. Retorsion is the use of a legal, but unfriendly, act to respond to a similarly unfriendly act.[81] The embargo is illegal under GATT 1994 and non-intervention, precluding the application of retorsion.

3. Nothing excuses the embargo's illegality under non-intervention.

No customary exception to the norm of non-intervention excuses Laurentia's conduct. Countermeasure, which makes otherwise illegal acts legal when they are adopted as a response to another state's illegal acts,[82] cannot apply in this case. First, Caledon's acts were legal under international law so Laurentia was not responding to an illegal act. Second, the countermeasure must be proportionate[83] and equivalent to the illegal act.[84] Proportionate means the countermeasure cannot be subjectively excessive when compared with the alleged offense.[85]

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[81]ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 36-38 (1988).

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

[83]*See* Case Concerning the Air Services Agreement (U.S. v. France), 54 I.L.R. 304, 338 (1978).

[84]ZOLLER, *supra* note 81, at 128.

[85]*See* Naulilaa Case (Portugal v. Germany), 8 Trib. Arb. Mixtes 409 (1928), *reprinted in* 2 R. Int'l Arb. Awards 1011, 1026, 1028 (1949).

Equivalence requires an objective analysis of whether the countermeasure is of equal value or of the same kind.[86] Laurentia's interference with a $800 million market is not a proportional response to the dispute about the children. Customary international law necessitates an award for Caledon's lost profits.

IV. LAURENTIA'S SAVE THE CHILDREN ACT IS IMPERMISSIBLY EXTRATERRITORIAL AND THE SEIZURE OF THE CHILDREN'S FOUNDATION PROPERTY WAS INVALID.

On its face the Save the Children Act (Act) purports to regulate conduct which takes place outside Laurentian territory by creating liability for "participation in any proceeding before a court of any foreign nation"[87] if such participation "materially contributed to the purported adoption of a child of Laurentian citizenship without the written, voluntary, and informed consent of his or her natural parent(s) or next of kin."[88] International law places limits on the scope of a state's power to regulate conduct. "[T]he law of nations, or customary international law, includes limitations on a nations' exercise of its jurisdiction to prescribe."[89] The extraterritorial reach of the Act exceeds these limitations.

A. International law requires an affirmative jurisdictional basis to support extraterritorial exercise of legislative power.

The primary limitation on a state's jurisdiction to prescribe law is its territorial borders. In the *Case of the S.S. Lotus*,[90] the predecessor of this Court stated that a state "may not exercise

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[86]ZOLLER, *supra* note 81, at 128, 132.

[87]Save the Children Act §301(a).

[88]*Id.*

[89]Hartford Fire Insurance Co. v. California, 509 U.S. 765, 814 (1993).

[90]Case of the S.S. "Lotus" (France v. Turkey), P.C.I.J., Series A, No. 9 (1927).

its power in any form in the territory of another state."[91] The court stated that jurisdiction was "certainly territorial" and "cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention."[92]

Some language in the *Lotus Case* indicated a more permissive approach, but many prominent publicists on international law have attacked this language.[93] Adoption of such a permissive approach would have had far-reaching ramifications, creating an international law regime under which "everything which is not prohibited is permitted . . . ."[94] This permissive approach is "at variance with the spirit of international law."[95] Moreover, subsequent cases before this Court have taken more restrictive approaches to the limits on a state's jurisdictional competence.[96]

The restrictive approach implicates an additional duty to "act in good faith and with due regard to [t]he positions of other States . . . ."[97] This duty requires states to avoid exercises of legislative jurisdiction which are "discriminatory, xenophobic, [or] interventionist . . . ."[98] The Act is all of these things. It is a deliberate effort to intervene in the domestic legal proceedings

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[91]*Id.* at 18.

[92]*Id.* at 18.

[93]BROWNLIE, *supra* note 35, at 302.

[94]Lotus Case, at 47 (Loder, *dissenting*).

[95]*Id.*

[96]Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4; Fisheries Case (United Kingdom v. Norway), 1951 I.C.J. 116.

[97]Fitzmaurice, 92 Hague *Recueil* (1957, II), 58.

[98]*Id.*

of Caledon and is based on xenophobic and discriminatory views of the cultural and religious traditions of Caledon and Oriente. The weight of authority, therefore, requires an affirmative basis for extraterritorial assertions of prescriptive jurisdiction under international law, which was not provided in this case.

B. Laurentia may not regulate the participation of Caledonian citizens in a Caledonian legal proceeding under any accepted theory of prescriptive jurisdiction.

There are five commonly recognized bases for jurisdiction to prescribe:[99] (1) territoriality, (2) nationality, (3) the protective principle, (4) the passive personality principle, and (5) the universality principle. None of these doctrines support the Act.

1. Nationality, the protective principle, and the universality principle are all inapplicable jurisdictional bases for the Act.

Under the nationality principle, a state may prescribe law governing "the activities, interests, status, or relations of its nationals outside as well as within its territory."[100] The Act does not purport to regulate the status of Laurentians, but rather the conduct of Caledonians in Caledonian legal proceedings. The nationality principle, therefore, does not support the Act.

The universality principle, applies to a narrow class of cases involving piracy, hijacking, certain terrorist acts, genocide, and war crimes.[101] Universal jurisdiction over such crimes arises only when near unanimous international condemnation of such acts creates customary

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[99]BARRY CARTER AND PHILLIP TRIMBLE, INTERNATIONAL LAW 725-789 (2d ed. 1995); Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967) *cert. denied*, 384 U.S. 885 (1967).

[100]RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §402(2) (1987).

[101]*Id.* § 404; BROWNLIE, *supra* note 35, at 305.

international law.[102] Participation in adoption proceedings, is not within this narrow class of conduct.

The protective principle extends a state's jurisdiction to "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."[103] The doctrine is generally limited to political acts and such things as forgery of official state documents.[104] Participation in adoption proceedings is not an act directed against the security of Laurentia.

The passive personality principle applies a state's domestic law "to an act committed outside its territory by a person not its national where the victim of the act was its national."[105] This principle has not been generally accepted in international law.[106] The acceptance it has received is limited to a narrow range of conduct, primarily associated with terrorism, and is considered the "least justifiable, as a general principle, of the various bases of jurisdiction . . . ."[107] The Act does not purport to criminalize the conduct in question, but merely creates a civil cause of action. Moreover, participation in an adoption proceeding cannot be equated with terrorism.

2. International law limits a state's right to regulate conduct outside its

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[102]RESTATEMENT (THIRD), *supra* note 100, at §404, comment a.

[103]*Id.* §402(3).

[104]*Id.* §402, comment f.

[105]*Id.* §402, comment g.

[106]In the Matter of the Extradition of Demjanjuk, 612 F. Supp. 544, 558 n.13 (N.D. Ohio, E.D. 1985); RESTATEMENT (THIRD), *supra* note 100, § 402, comment e.

[107]BROWNLIE, *supra* note 35, at 303.

territory.

States are limited under international law to regulating conduct within the physical territory of the state. The Act attempts to regulate participation in adoption proceedings in Caledon, and is beyond Laurentia's territorial jurisdiction. An exception to the territoriality, the effects doctrine, provides that a state may regulate extraterritorial conduct which has effects within its territory. Many states have rejected the effects doctrine.[108] The European Court of Justice has declined to adopt the doctrine in the *Wood Pulp Case*.[109] The U.S.'s recently enacted the Helms-Burton Act[110] purports to take the effects doctrine as its jurisdictional basis.[111] Europe, Canada, ASEAN, and Latin America have condemned the Helms-Burton Act as an extraterritorial assertion of U.S. jurisdiction in violation of international law.[112] The hostile international response to jurisdictional assertions under the effects doctrine indicate it is not customary international law.

3. The Act is not within the scope of the effects doctrine as applied in the few countries where it is accepted.

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[108]A. NEALE AND M. STEPHENS, INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION, 66 (1988).

[109]A. Ahlström Osakeyhtiö v. Commission of European Communities, [1988] 4 Comm. Mkt. L.R. 901 (1988).

[110]Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 10 Stat. 785 (Mar. 12, 1996).

[111]Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 430-31 (1996); Helms-Burton Act, *id* at § 301(9).

[112]*See, e.g.*, David Israelson, *U.S. Extends Deadline for its Anti-Cuba Law*, TORONTO STAR, Jun. 11, 1996; *A Tough Asean Agenda*, BUSINESS TIMES (Malay.), Sep. 11, 1996; Ted Szulc, *The Pope and Castro -- A Reapproachment in the Making*, LOS ANGELES TIMES, Oct. 20, 1996.

Even if the Court accepts the effects doctrine as customary international law, it should not apply in this case. The U.S. has developed the broadest regime in the world for asserting its prescriptive jurisdiction under the effects doctrine. Even under the U.S.'s permissive prescriptive jurisdiction, however, the Act does not pass muster. The doctrine applies to criminal conduct and conduct with substantial economic effects in the United States.[113] The lone case from this Court recognizing the effects doctrine is the *Lotus Case*.[114] The case involved an actual physical intrusion and physical consequences, both of which are absent here. The effects doctrine has never reached effects of a primarily emotional nature, such as the alleged loss of society, companionship and support in this case.

Additionally, under the U.S. approach, the effects test alone "is incomplete because it fails to consider other nations' interests."[115] Consequently, courts must also balance the interests of other nations to determine if the exercise of jurisdiction is reasonable.[116] This balancing test weighs heavily against a finding that the Act is reasonable. Both Caledon's courts and the adoptive parents have expectations which would be impaired by compliance with the Act. Caledon has significant interests in regulating the participation of social workers in proceedings before its own domestic courts. Finally, the Act imposes legal obligations on social workers contrary to legal obligations created by Caledon's municipal law.

C. The Save the Children Act regulates conduct *ex post facto* in violation of

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[113]*See, e.g.*,United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[114]Case of the S.S. "Lotus" P.C.I.J. Ser. A No. 9.

[115]Timberlane Lumber Co. v. Bank of America, N.T. and S.A., 549 F.2d 597 (9th Cir. 1976).

[116]Hartford Fire, *supra* note 89, at 818-19.

international law.

Laurentia enacted the Act on 9 June 1996.[117] The adoption proceedings in Oriente took place from July 1995 to March 1996, before the Act took effect. The cause of action in *Doe* arose out of participation in these proceedings. Consequently, even if the Act were not impermissibly extraterritorial, the Foundation could not have known that its workers' conduct would violate the Act. As stated in a concurring opinion of this Court, "An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot *ex post facto* become one."[118] Moreover, it is a general principle of law that conduct may not be regulated *ex post facto*.[119] The ICJ Statute mandates that the Court apply "general principles of law recognized by civilized nations."[120] Compelling enforcement of a judgment based on *ex post facto* legislation would be contrary to international law under previous Court decisions, would violate a general principle of law common to major legal systems of the world, and would "violate fundamental notions of fairness under international law."[121]

D. Caledon is under no obligation to enforce the judgment of the Laurentian court under international law.

With the exception of certain regional and bilateral treaties, international law does not mandate the enforcement of a domestic judgment abroad. Rather, enforcement of foreign

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[117]Compromis at ¶ 19.

[118]Case Concerning the Northern Cameroons (Cameroon v. United Kingdom), 1963 I.C.J. 15, 129 (Fitzmaurice, *concurring*).

[119]*See, e.g.*, U.S. CONST. art. I, § 10, cl. 1; CONSTITUTION OF THE ARGENTINE NATION, Art. 18 (1994); CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES, Art. III, § 22 (1986).

[120]ICJ Statute, *supra* note 62, Article 38(1)(c).

[121]Handel v. Artukovik, 601 F. Supp. 1421, 1436-37 (C.D. Cal. 1985).

judgments is at the discretion of the enforcing nation.[122] Laurentia and Caledon are not parties to a bilateral treaty or to any multilateral treaty on the enforcement of judgments. In one court's words, "[a]s an act of government [a judgment's] effects are limited to the territory of the sovereign whose court rendered the judgment, unless some other state is bound by treaty to give the judgment effect in its territory, or unless some other state is willing, for reasons of its own, to give the judgment effect."[123] Thus, absent a treaty, enforcement of foreign judgments is based only the principle of international comity. *Hilton v. Guyot*[124] concluded that while no U.S. constitutional or statutory requirement and no principle of international law required the recognition of foreign judgments, the doctrine of international comity provided a basis for enforcing certain foreign judgments:

> The extent to which the law of one nation ... shall be allowed to operate within the dominion of another nation, depends on . . . [the] "comity of nations" . . . "[c]omity," in the legal sense, is [not] a matter of absolute obligation . . .[125]

This approach was also taken by the British courts.[126] Neither Laurentia nor Caledon has signed any bilateral or multilateral treaty for the recognition and enforcement of foreign judgments. As a result, Laurentia should not succeed in compelling Caledon to enforce its judgment.

There is no customary international law which mandates the recognition and enforcement of foreign judgments. Despite some bilateral and regional treaties and efforts to achieve a new

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[122]*See, e.g.*, RESTATEMENT (THIRD), *supra* note 100, Chapter 8, Introductory Note.

[123]Hilton v. Guyot, 159 U.S. 113, 163 (1895).

[124]*Id.*

[125]*Id.*

[126]*See, e.g.*, Societe Cooperative Sidmetal v. Titan International, Ltd., 1 QB 828 (1966).

multilateral convention,[127] there is little evidence to support the notion that mandatory enforcement of foreign judgments has risen to the level of customary international law. The very fact that there is an effort to complete a treaty on recognition and enforcement of judgments indicates that no custom exists. Indeed, many countries submit their disputes to arbitration because arbitration provides more certainty of recognition and enforcement of the judgment than the scant possibility of enforcement of a municipal judicial decision.

Even if Laurentia can convince the Court that there is customary international law to compel enforcement, the courts in Caledon have refused to enforce the judgment on public policy grounds. The public policy exception to recognition and enforcement of foreign judgments is available in most countries and under multilateral conventions.[128] The statutes of Japan, Germany, Italy and the common law of Great Britain, to give a few examples, support this proposition.[129]

E. Since the Act is impermissibly extraterritorial and the seizure an impermissible counter-measure, Laurentia must return the property seized in *Doe v. Children's Foundation.*

Laurentia must return the property of the Foundation seized under the Act. Laurentia's seizure of the property is not a permissible countermeasure because Caledon has not committed an impermissible international act. Even if Caledon had committed such an act, Laurentia's seizure was an improperly coercive attempt to prompt the return of the children.

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

[128]*See generally* ENFORCEMENT OF JUDGMENTS WORLDWIDE (Charles Platto & William G. Horton eds., 2d ed. 1993).

[129]*Id.*

Countermeasures, if exercised, must be proportionate to the gravity of the internationally wrongful act.[130] This seizure, and any potential seizures under the Act, are disproportionate to any harm that Laurentia or its citizens may claim. As an example, in *Doe*, the seizure of the property is $400,000 greater than the actual damages awarded by the Laurentian court to the Does. This seizure is disproportionate to any harm that Laurentia or its individual citizens may claim. Therefore, the property seized should be returned to Laurentia to deliver to the Foundation.

F. The seized property must be returned because Ms. Montaigne and the Children's Foundation are immune from liability under the foreign sovereign compulsion doctrine.

Because Ms. Montaigne's participation in the adoption proceedings was compelled by Caledonian law, the seizure of the Foundation property violates international law. Under the foreign sovereign compulsion doctrine, a state may not "require a person to refrain from doing an act in another state that is required by the law of that state."[131] The Restatement considers this a principle of international law. This assertion is supported by the statements of four states in an amicus brief to the U.S. Supreme Court that the foreign sovereign compulsion doctrine is an embodiment of the "fundamental principle of international law that a sovereign's exercise of its authority within its territory is not reviewable by the courts of another nation."[132] As "participation of social work professionals in adoption proceedings is required by the laws of all

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[130]International Law Commission's Draft Articles on State Responsibility (Part Two), Article 13, I.L.C.Rep. 55-61 (1992).

[131]RESTATEMENT (THIRD), *supra* note 100, §441(1)(b).

[132]Brief for the governments of Australia, Canada, France and the United Kingdom as Amici Curiae in Support of Petitioners at 6, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Provinces of Caledon,"[133] the conduct which the Act purports to regulate was compelled by Caledonian law. The Act was therefore an impermissible infringement on Caledon's sovereignty. Since the Act is invalid under international law, the property seized under it must be returned.

[133]Compromis, ¶ 22.

CONCLUSION

Caledon complied with all aspects of international law when it allowed the children evacuated from Laurentia to be placed in foster and adoptive families in Oriente.

PRAYER FOR RELIEF

For the foregoing reasons, the Respondent, the Federal Republic of Caledon, respectfully requests this Court to:

1. DECLARE that the adoptions of the children evacuated to Caledon were not inconsistent with international law, or in the alternative, that Caledon as a Federal Republic is not bound by international law to undo the adoptions;
2. DECLINE, to hear any claims on damages as it is in excess of the Court's authority or, if return of the children were to be compelled, to award damages in any amount whatsoever;
3. AWARD to Caledon compensation for lost profits from sales of cigarettes in Laurentia from October 29, 1995 through April 25, 1996, when the import ban was in place; and
4. DECLARE generally that the retaliatory provisions of the Laurentian Save the Children Act are impermissibly extraterritorial and therefore illegal, and, in particular, that the decision of the courts of Caledon, declining to enforce *Doe v. Children's Foundation*, is consistent with international law; and ORDER that Laurentia return to Caledon on behalf of the Foundation the property seized and sold, or its value.
5. REJECT the Applicant's requests for relief.

Respectfully submitted,

TEAM 230, AGENTS FOR CALEDON