

**THE 2007 PHILIP C. JESSUP INTERNATIONAL LAW  
MOOT COURT COMPETITION**

**INTERNATIONAL COURT OF JUSTICE**

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**CASE CONCERNING THE ROTIAN UNION**

**BETWEEN:**

**THE REPUBLIC OF ADARIA**

**(Applicant)**

**and**

**THE REPUBLIC OF BOBBIA, THE KINGDOM OF CAZALIA, THE  
COMMONWEALTH OF DINGOTH, THE STATE OF EPHRAIM, AND THE  
KINGDOM OF FINBAR**

**(Respondents)**

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Memorial for Applicant

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## STATEMENT OF JURISDICTION

The Republic of Adaria (“the Applicant” or “Adaria”), the Republic of Bobbia, the Kingdom of Cazalia, the Commonwealth of Dingo, the State of Ephraim, and the Kingdom of Finbar (“the Respondents” or “the Member States”), have submitted their differences concerning the Rotian Union by Special Agreement dated 15 September 2006 to the International Court of Justice in accordance with Article 40(1) of the *Statute of the International Court of Justice*. The parties have agreed to the contents of the *Compromis* and each Respondent has declared that the claims against them are identical in fact and in law. In accordance with Article 36(1) of the *Statute of the International Court of Justice*, each party will accept the judgment of this Court as final and binding.

## QUESTIONS PRESENTED

Applicant requests that the Court adjudge and declare that:

- a) The Respondents violated international legal obligations owed to Adaria by denying it membership in the Rotian Union;
- b) The Respondents do not have standing before this Court to make any claims concerning Adaria's actions with respect to the Rotian Union Representative Office, its property or its personnel;
- c) The Applicant did not violate international law concerning the immunity of diplomatic missions by seizing the premises, property, or personnel of the Rotian Union Representative Office; and
- d) The National Industry Act (NIA) does not constitute an illegal expropriation of Adarmoire and the other privatized concerns at international law.

## STATEMENT OF FACTS

This dispute arises out of a) the Adarian Accession Agreement (“AAA”), the aim of which was to “facilitate the successful integration of Adaria” into the Rotian Union (“RU”); b) the treatment of RU representatives and premises in Adaria; and c) the Adarian National Industry Act (“NIA”).

The RU is an organization created by the Treaty Establishing the Rotian Union and the Convention Amending the Rotian Union Treaty (together hereinafter “TRU”). The Respondents, all contiguous, economically developed states in the region of Rotia, are its only Member States, although Adaria and the Democratic Republic of Gerasimov have concluded Accession Agreements with the RU. Adaria, a developing country with a democratic form of government, is contiguous with Bobbia.

The RU was created to encourage economic cooperation and political unity amongst its members. The preamble to the TRU expresses the determination of the Member States to “lay the foundations of an ever closer union among their people” and their resolve to engage in “common action” to ensure economic and social progress. It further calls for a “common commercial policy”, and declares the intention of the Member States to develop their prosperity in accordance with the principles of the Charter of the United Nations and a respect for human rights.

The RU has four institutions: the Council, the Commission, the High Court and the Parliament. The Commission is the executive and civil service branch of the RU. The High Court has authority to interpret the TRU and other Union legislation, although its competence is not explicitly exclusive. The Council is composed of the Heads of

Government of the Member States or their representatives, and has a number of functions. It may authorize the Commission to negotiate international agreements with one or more states, which it must then ratify by unanimous vote. Together with Parliament, it may enact legislation, by majority vote, in furtherance of certain specifically enumerated goals. Parliament is comprised of 100 directly elected representatives. Its approval is not required for international agreements.

In December 1995, Adaria applied for membership in the RU, pursuant to Article 11 of the TRU. Over the next four years, the Commission conducted the requisite investigation of Adaria's suitability. It concluded that Adaria was suitable for membership, provided that it meet three conditions:

- (a) reduce public debt owed to non-Member States;
- (b) privatize state-owned monopolies; and
- (c) eliminate government support payments to small, privately owned businesses.

In February 2000, the Council unanimously ratified the Commission's recommendation and directed it to negotiate an Accession Agreement, leading to the conclusion of the AAA. The agreement mirrored the Commission's recommendation, including a requirement that Adaria eliminate support payments to all small domestic businesses.

Adaria's economy has traditionally been dependent on small, privately-owned farms, but in recent years a fast-growing manufacturing sector has emerged, led by a number of major state-owned enterprises, such as Adarmoire. However, approximately two million Adarians are ethnic Sophians distinct from other Adarians. They are an insular people governed by a tradition of literal adherence to religious texts. They hold

themselves apart from mainstream economic life and resist technological and social change, engaging in village-level farming and household crafts. In 1975, Adaria passed the Sophian Protection Acts (“SPA”) to allow Sophians to maintain their traditional way of life, which would otherwise be impossible. The Acts provided subsidies and benefits, including indirect support payments to small businesses and substantial price reductions from state-owned utilities.

Under the AAA, these mechanisms had to be eliminated. Parliament urged that the AAA include a requirement of social and economic protection for the Sophians, but this was unanimously rejected by Council.

While initially popular in Adaria, the AAA caused an increasing degree of dissatisfaction among the population, leading many to oppose membership. Despite this, the pro-RU party retained its majority in two elections. The measures adopted to implement the AAA were especially hard on the Sophians. For example, the cancellation of state subsidies caused over 500 handicraft collectives to cease operations. Furthermore, when Adaria privatized Adarmoire, a state-owned furniture company, as required by the AAA, it was purchased by Bobboman, Inc., a corporation based in Bobbia. Bobboman’s intent was to integrate Adarmoire into its global supply chain. It shed 20,000 jobs and cancelled dozens of supply contracts, resulting in a 15% decrease in total sales for Sophian handicraft manufacturers. In July 2003, Adaria attempted to provide jobs and income for Sophians through a massive public works program, but this was unsuccessful.

In November 2005, having satisfied all conditions in the AAA, Adaria was recommended for admission by the Commission. However, on 24 November 2005 the

Council voted unanimously against admission, stating in a resolution that Adaria's approach to implementing the AAA was disadvantageous to the Sophians and "inconsistent with membership in the Union." Before this resolution, there had been no indication that this caused the Council concern.

On 16 December 2005, suspecting that RU staff had violated election laws by financing pro-membership political parties, Adarian officials, acting on a duly-issued subpoena, requested that Mr. Heep, head of the RU Office in Adaria, deliver all of the Office's bank records. Mr. Heep refused and was arrested in accordance with Adarian law. The Commission President claimed that RU staff and premises were protected by diplomatic privilege. However, because the RU is not a state, the Adarian Prime Minister denied that the RU Office was a diplomatic mission. The RU Office was never formally identified as a tax-exempt entity.

On 19 December 2005, Adaria passed the National Industry Act ("NIA"), forbidding "the exportation of the proceeds of the sale of goods or services produced by certain recently-privatized business concerns" and the direct or indirect repatriation of assets belonging to formerly state-owned enterprises, including Adarmoire. The Adarian Prime Minister stated that the law was aimed at preventing "capital flight" and reducing the damage caused by being denied membership in the RU. The CEO of Bobboman denounced the law as "tantamount to expropriation" because the value of Adarmoire would be greatly reduced if it could not be fully integrated into Bobboman's corporate structure. Bobboman has exhausted all local remedies against the NIA.

On 20 April 2006, Adaria filed its complaint against the five Member States with this Court. On 1 September 2006, the Member States declared to this Court that they

intended to present “written and oral arguments through common counsel in the name of the Rotian Union” as the claim and counterclaims were based on identical facts and law. Adaria accepted the terms of the declaration but specified that this did not entail recognition of the RU as an international legal person or as a party to this case, nor did it entail recognition of the Member States’ standing to bring a claim on behalf of the RU. On 15 September 2006 Adaria and the Member States jointly submitted the Compromis, agreeing to the stipulated facts of the dispute.

## SUMMARY OF PLEADINGS

First, the Respondents violated international legal obligations owed to Adaria by denying it membership in the Rotian Union (“RU”). The Respondents are responsible for violations have the capacity to conclude treaties on its own behalf and therefore the AAA is a treaty between the Applicants and the Respondents. If, in the alternative, the AAA is a treaty between the Applicant and the RU, the Respondents are responsible for the RU’s conduct under international law. At the very least, the Respondents and the RU share responsibility for violations of the AAA. The Respondents’ violated their obligations under the AAA because that treaty requires that Adaria be admitted to the RU once the three conditions it sets out are met. The conditions were met and Adaria was not admitted. The Respondents may not deny Adaria membership on the basis of its treatment of the Sophians.

The Respondents do not have standing before this Court to make any claims concerning Adaria’s actions with respect to the Rotian Union Representative Office (“the Office”), its property or its personnel. Such standing requires that one have a legal interest in the claim being made. The RU has a distinct legal personality independent, with its own rights and obligations. As the RU Office is an organ of the RU, the Member States do not have a legal interest in its dispute with Adaria. The Respondents are not vested with a legal interest by any other rule or instrument of international law. The Applicant did not violate international law concerning the immunity of

diplomatic missions by seizing the premises, property of personnel of the RU Office. First, the Office does not benefit from diplomatic immunity because it does not represent a state. Any other immunities of international organizations are determined by a functional approach to their constituent documents. Based on such an approach, the Office was not intended to have immunity. Furthermore, any immunities that flow from the Treaty Establishing the Rotian Union (“TRU”) do not apply with regard to Adaria because Adaria is not a party to the TRU and has not expressly consented to grant the Office immunity. Customary law does not require states to grant immunity to international organizations.

Finally, the National Industry Act (“NIA”) does not constitute an illegal expropriation of Adarmoire and the other privatized concerns under international law. Customary law does not prohibit indirect or regulatory expropriation without compensation, but in any case the NIA does not constitute an indirect expropriation as it is a legitimate exercise of regulatory powers in a time of economic unrest. Its effects do not amount to a ‘taking’ of Bobboman’s property, and it did not frustrate legitimate investment expectations of the Adarian Accession Agreement (“AAA”) because the RU does not.

## PLEADINGS

### **I. THE RESPONDENTS VIOLATED INTERNATIONAL LEGAL OBLIGATIONS OWED TO ADARIA BY DENYING IT MEMBERSHIP IN THE RU.**

#### **A. The Respondents are responsible for violations of the AAA.**

1. The AAA is a treaty between Adaria and the Respondents because the RU does not have the capacity to conclude treaties.

Unlike states, international organizations are created by a constituent instrument.<sup>1</sup>

Whereas all states bear the full complement of powers, international organizations only have such capacities as are granted by their constituent instruments.<sup>2</sup> Furthermore, unlike states, international organizations are inherently unequal.<sup>3</sup> For instance, some do not possess international legal personality.<sup>4</sup> To possess legal personality, an international organization must have a legitimate object and permanent organs with distinct powers which are exercisable on the international plane.<sup>5</sup> Thus, the British Commonwealth, which has no institutional structure, is deprived of such personality.<sup>6</sup> Each international

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<sup>1</sup> Ian Brownlie, *Principles of Public International Law*, 6th ed. (New York : Oxford University Press, 2003) at 680 [Brownlie].

<sup>2</sup> *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, Advisory Opinion, 1948 I.C.J. Rep. at 57at 24, [Admissions]

<sup>3</sup> Special Rapporteur Paul Reuter, *Third Report on Treaties concluded between States and International Organisations or between two or more International Organisations*, UN GAOR, 26th Sess. U.N. Doc. A/CN.4/279 and Corr.1 at 182. [Reuter].

<sup>4</sup> *Ibid.*

<sup>5</sup> Brownlie, *supra* note 1 at 679-80.

<sup>6</sup> *Ibid.*

organization is shaped by the will of its founders (and later its members), and serves specific functions which vary from one organization to the next.<sup>7</sup> Consequently, the capacity of an international organization to conclude treaties depends on the rules of that organization and does not result from any general rule of international law.<sup>8</sup> This Court has held that practice constitutes an important part of the rules of the organization when considering whether conduct is imputable to it.<sup>9</sup>

Careful examination of the TRU reveals that it does not grant the RU the capacity to conclude treaties, and this reading is supported by RU practice. First, unlike similar organizations,<sup>10</sup> the TRU does not explicitly grant to the RU the power to enter into agreements with non-member states as a distinct legal person. In fact, concluding that it does would be at odds with the overall scheme of the TRU. Unlike Union legislation, the approval of Parliament is not required to ratify such agreements.<sup>11</sup> Since Parliament is an elected body entirely independent of the Member States, a requirement that it approve Union legislation would suggest the independence of the RU, but this is not the case.

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<sup>7</sup> Reuter, *supra* note X at 182.

<sup>8</sup> *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, 21 March 1986, 25 I.L.M. 543(1986) at Article 6 [VCLTIO].

<sup>9</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, [1996] I.C.J. Rep. 66 at 75; *Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* [1970] I.C.J. Reports, 12 at ¶22; Special Rapporteur Giorgio Gaja, Second Report on Responsibility of International Organizations, UN GAOR, 55th Sess., UN Doc. A/CN.4/541 at 12 [*Gaja Second*].

<sup>10</sup> “Consolidated Version of the Treaty Establishing the European Union” (2002) C 325 O.J.L. 33 at Article 300 [*EU Treaty*].

<sup>11</sup> *Ibid.*

This, combined with the fact that all agreements must meet with the unanimous approval of the Heads of Government of the Member States,<sup>12</sup> who have full powers to bind their states,<sup>13</sup> indicates that, when concluding agreements with other states, the RU is not independent from the Member States. This is particularly the case with regard to admitting new members, which calls for not one but two unanimous votes by Council, at different stages.

Such a reading is reinforced by the distribution of the RU's internal legislative competencies. Despite the fact that the RU's primary purpose is economic integration, the only reference to legislation on external economic relations is Article 8(2)(f), which states that legislation may only be passed for the “*coordination* of the external trade relations of the *Member States* [emphasis added].” The use of ‘coordinate’ is noteworthy, as in relation to internal matters Article 8 refers to ‘common’ policies. It follows that external trade relations are conducted by the Member States in a parallel but legally distinct manner. The RU's functions are directed inward, at ensuring coordination between Member States, not outward, at the conclusion of agreements as an autonomous legal person.

This interpretation is consistent with RU practice. The RU “negotiated” agreements for the mutual recognition of domestic civil money judgments with a number of countries, but in each case the agreement had to be “codified into RU law”.<sup>14</sup> If, in addition to being negotiated by the RU (via the Commission), these agreements had also

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<sup>12</sup> *Ibid.*

<sup>13</sup> *Brownlie, supra* note 1 at 610

<sup>14</sup> *Compromis ¶12.*

been concluded by it, they would have been immediately binding and not required implementation into internal RU law.

It follows that the High Contracting Parties intended to keep the internal and external spheres of RU activity separate. Within the RU, they ceded substantial sovereignty,<sup>15</sup> giving Parliament and Council the power to enact binding legislation by simple majority vote. But outside the RU, each Member State has retained full control over its affairs, with a veto over every agreement and without any interference by the democratic organ of the RU. By comparison, the Council of the European Community is empowered conclude agreements with non-member states by qualified majority in those areas where it has the power to enact internal rules by qualified majority.<sup>16</sup> This reading is reinforced by the AAA, which was concluded by the “Council of the Rotian Union”, and not by the Rotian Union.

2. In the alternative, the Respondents are responsible for the RU’s conduct under international law

International Law Commission (“ILC”) draft Article 26 on the responsibility of international organizations provides that “[a] State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act....”<sup>17</sup> The Commentary states that one must distinguish between directing or controlling an international organization and

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<sup>15</sup> *Compromis*, ¶6,7.

<sup>16</sup> *EU Treaty*, *supra* note 10 at Article 133(5).

<sup>17</sup> “*Report of International Organizations*” in *Official Records of the General Assembly*, UN GAOR, 61st Sess., Supp. No. 10. UN Doc. A/61/10 (2006) at 280.

participating in its decision-making process.<sup>18</sup> However, it notes that in “borderline” cases this may be difficult, and that “the size of membership and the nature of the involvement will probably be decisive.”<sup>19</sup> Several scholars hold the view that the decisive question in relation to the attribution of conduct is who had effective control over the conduct in question.<sup>20</sup>

Two arbitral tribunals have found that the member states of an international organization may be held responsible for its internationally wrongful acts, provided that they did not intend to exclude their liability.<sup>21</sup> Although the first of these awards was set aside,<sup>22</sup> the second tribunal, sitting subsequently and in relation to the same organization, nonetheless ruled in a similar manner to the first.

The organization dealt with in both those cases had a restricted membership (four states), and a “Higher Committee” made up of state ministers which, according to the constituent agreement, was the organization’s “dominating authority”. Similarly, the RU has only five Member States, giving each of them significant control over the organization’s decisions. In the admission of new members, they have not one but two

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<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, p. 279.

<sup>20</sup> J.-P. Ritter, “La protection diplomatique à l’égard d’une organisation internationale” in *Annuaire français de Droit international*, vol. 8 (Paris: Centre national de la recherche scientifique, 1962) 427 at 442; R. Simmonds, *Legal problems Arising from the United Nations Military Operation in the Congos* (The Hague: Martinus Nijhoff, 1968) at 229; see Gaja, 2<sup>nd</sup> report at ¶40.

<sup>21</sup> R. Higgins, “The Legal Consequences for Member States of Non-Fulfillment by International Organizations of their Obligations towards Third Parties: Provisional Report”, (1995) 66 *Ann. Inst. Dr. Int.* 373 at 393.

<sup>22</sup> *Ibid.*

chances to veto. Moreover, unlike ministers, Heads of Government are even more closely associated with state action as they control virtually its entire apparatus. Although the acts of officials “seconded” by a state are attributable to the receiving organization,<sup>23</sup> it is difficult to imagine a Head of Government being “seconded” in the same way as an appointed functionary. And while the conduct of a person “not acting on behalf of the State” is not attributable to that state,<sup>24</sup> it is difficult to imagine any circumstances under which Heads of Government, when performing functions arising from their position in government, are not acting on behalf of their state, *a fortiori* when concluding treaties which are binding on their states through internal RU law.<sup>25</sup> Thus, obligations undertaken by the Council also bind the Member States.

**B. The Respondents and the RU share responsibility for violations of the AAA.**

The RU and its Member States are jointly responsible for the AAA because it is a ‘mixed agreement’ to which both are party. A treaty is a mixed agreement if it touches on the competencies of both the organization and its member states.<sup>26</sup> Admission of new members is an area of joint competency: the Commission receives applications and

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<sup>23</sup> *Ibid.*

<sup>24</sup> International Law Commission, Report of the International Law Commission on the work of its Thirty-Second Session, UN GAOR, 35th Sess., Supp. No. 10, UN Doc. A/35/10 at 31.

<sup>25</sup> *Treaty Establishing the Rotian Union as Amended by the Convention Amending the Rotian Union Treaty* at Article 10

<sup>26</sup> Henry G. Schermers & Niels M. Blokker, *International Institutional Law: Unity Within Diversity*, 4th ed. (Boston: Martinus Nijhoff, 2003) at 1121[Schermers].

makes recommendations, and the Member States, through the Council, vote on Accession Agreements and admission. The European Court of Justice has held that “in the absence of derogations expressly laid down in [a treaty], the Community and its Member States as partners of the [contracting] States are jointly liable to those latter States for the fulfillment of every obligation arising from the commitments undertaken.”<sup>27</sup>

Although conclusion of the AAA resulted from a single vote in Council, conduct may be attributed to more than one subject of international law, and dual attribution normally leads to joint, or joint and several, responsibility.<sup>28</sup> Moreover, joint, or joint and several international responsibility does not necessarily depend on dual attribution.<sup>29</sup> Thus, both the RU and the Member States may be hold obligations under the AAA even if its conclusion is attributable only to one of them.

**C. The AAA creates an obligation to admit Adaria once three conditions are met.**

It is well established customary law that a treaty must be interpreted in good faith, in accordance with the ordinary meaning of its terms considered in their context, and in light of the treaty’s object and purpose.<sup>30</sup> The textual interpretation is the most important

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<sup>27</sup> *Parliament v. Council*, C-316/91, [1994], E.C.R. I-625 at I-660-661; Special Rapporteur Giorgio Gaja, *Third Report on Responsibility of International Organizations*, UN GAOR, 57<sup>th</sup> Sess., UN Doc. A/CN.4/553 at footnote 16.

<sup>28</sup> *Gaja Second*,, *supra* note 9 at 3,4.

<sup>29</sup> *Ibid.* at 3.

<sup>30</sup> *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S 331 at Article 31 [VCLT]; *Kasikili/Sedud Island (Botswana/Namibia)* (1999), I.C.J. Rep. at 1045.

in determining the intention of the parties.<sup>31</sup> Treaties must be read as a whole, and their meaning must not be determined upon particular phrases which, in absence of context, may be ambiguous.<sup>32</sup> Context includes any instrument made by one or more parties and accepted by all parties as relevant to the treaty.<sup>33</sup> As the AAA incorporates Article 11(6) of the TRU, the latter is relevant to give meaning and context to the AAA.

Three features of the AAA indicate that it was intended to set out exhaustive conditions, the fulfilment of which gives Adaria a right under international law to acquire RU membership: its title, the inclusion of a deadline, and the overall scheme of the agreement viewed in light of its object and purpose.

The AAA is labelled an “accession” agreement. Use of this term of art implies that the AAA gives Adaria certain rights. The title is no accident; Article 11(4) of the TRU provides for the conclusion of an “Accession Agreement” with applicant states, describing “conditions and timelines for accession.” In international law, “accession” is a frequently used mechanism through which States may unilaterally become party to a treaty.<sup>34</sup> Accession may only occur when a treaty provides for it or the negotiating states have otherwise indicated their intention to allow it.<sup>35</sup> It is thus an exception to the

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<sup>31</sup> *Territorial Dispute (Libyan Arab Jamahiririya/Chad)*, Judgment, [1994] ICJ Rep. 6, ¶41; Malgosia Fitzmaurice, “The Practical Working of the Law of Treaties” in Malcolm D. Evans ed., *International Law*, 2nd ed., (New York: Oxford University Press, 2006) at 199.

<sup>32</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, Advisory Opinion, [1950] I.C.J. Rep. 221 at 250.

<sup>33</sup> *VCLT*, *supra* note 31 at Article 31.

<sup>34</sup> *Ibid.* at Article 2 & 11.

<sup>35</sup> *Ibid.* at Article 15.

general rule of *res inter alios acta*, and creates a right for third states.<sup>36</sup> In the case of an international organization, this would normally result in the automatic acquisition of membership.<sup>37</sup> While the TRU requires a final vote in Council before membership in the RU can be formally acquired, use of this term in both the TRU and the AAA indicates that the parties intend that Adaria, by fulfilling the conditions in the AAA, would acquire, if not membership itself, then the *right* to be admitted to the RU.

This reading is buttressed by the inclusion of a deadline for meeting the three conditions.<sup>38</sup> If the AAA were not intended to create binding obligations, there would be no reason for a deadline, the purpose of which is to extinguish obligations and entitlements.

Finally, the overall scheme of the AAA indicates that it was intended to set binding and exhaustive terms for admission. The conditions in the AAA are onerous to implement, calling for a massive upheaval in the Adarian economy and a substantial overhaul of public finances. It is unreasonable to think that Adaria would undertake such profound alterations in exchange for nothing. Logically and practically, there must be some counterpart to Adaria's agreement to effect these changes. In the context of negotiated legal instruments, the very notion of conditions supposes contingent obligations.

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<sup>36</sup> *Ibid.* at Article 36.

<sup>37</sup> *Admissions, supra* note 2 at 24.

<sup>38</sup> *Adarian Accession Agreement to the Rotian Union Treaty*, The Republic of Adaria and the Council of the Rotian Union, 1 October 2001 at Article 2.

Furthermore, Article 11(4) of the TRU states that an Accession Agreement must “describe the conditions and timeline for accession.” Using the definite article ‘the’ before “conditions” indicates that, under the TRU, an Accession Agreement, once concluded, shall contain all relevant conditions for membership. If the organization were not bound to admit a state having met those conditions, they would not be exhaustive and the phrase would have no meaning.

In a similar case, this Court found that Article 4 of the UN Charter sets out exhaustive conditions for membership in that organization.<sup>39</sup> Like the instant case, such membership is subject to approval by a political body. However, this Court held that the member states were not juridically entitled to subject their votes to conditions not found in Article 4, which set a legal standard for admission.<sup>40</sup> The conditions set out in the AAA, a negotiated legal instrument,<sup>41</sup> are far more specific and detailed than those found in Article 4 of the UN Charter, and thus even more susceptible to objective evaluation. As the Court said: “[t]he political character of an organ cannot release it from the observance of the treaty provisions ... when they constitute limitations on its powers or criteria for its judgment.”<sup>42</sup> While the vote itself cannot be invalidated, the fact that an

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<sup>39</sup> *Admissions*, *supra* note 2 at 6.

<sup>40</sup> *Ibid.* at 5.

<sup>41</sup> *Compromis*, ¶15-16

<sup>42</sup> *Admissions*, *supra* note 2 at 6.

act is legal internally has no bearing on the responsibility of the organization to non-member states.<sup>43</sup>

**D. Adaria may not be denied membership on the basis of its treatment of the Sophians.**

Treaties must be performed in good faith.<sup>44</sup> This principle led this court to recognize the doctrine of estoppel at international law, according to which a state is precluded from asserting a state of affairs if it: a) previously asserted or acted otherwise; b) if that conduct was relied upon by the other party; c) to that party's prejudice.<sup>45</sup> The doctrine was reaffirmed in the *Nuclear Tests* case when this Court ruled that: "interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligations thus created be respected."<sup>46</sup>

The Council explicitly denied Adaria's application for membership because its implementation of the AAA had disadvantaged the Sophians.<sup>47</sup> This was a complete about-face. The AAA required the elimination of *all* support payments to small domestic businesses.<sup>48</sup> This could not possibly be implemented without upsetting the Sophians' traditional means of subsistence. Although the RU Parliament had officially

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<sup>43</sup> Special Rapporteur Giorgio Gaja, *First report on responsibility of international organizations*, UN GAOR 55<sup>th</sup> Sess. UN Doc. A/CN.4/532 at 19.

<sup>44</sup> *VCLT*, supra note 31 at Article 26.

<sup>45</sup> *Cambodia v. Thailand*, Judgment [1962] I.C.J. Rep. 149 at 6.

<sup>46</sup> *Nuclear Tests (Australia v. France)*, [1974] I.C.J. Rep. 253; *Nuclear Tests Case (New Zealand v. France)*, [1974] I.C.J. Rep. 457.

<sup>47</sup> *Compromis* at ¶28.

<sup>48</sup> AAA supra note 38 at Article 1(c).

recommended that the AAA expressly protect the Sophians, the Council rejected this amendment. The adverse effects of the AAA were being felt by the Sophians as early as September 2002, yet the RU provided no indication that it considered this upsetting. Under international law, the Council is prevented from asserting a requirement it explicitly rejected.

**II. THE RESPONDENTS DO NOT HAVE STANDING BEFORE THE COURT TO MAKE ANY CLAIMS CONCERNING ADARIA’S ACTIONS WITH RESPECT TO THE ROTIAN UNION REPRESENTATIVE OFFICE, ITS PROPERTY OR ITS PERSONNEL**

**A. Standing to bring a claim requires the existence of a legal interest in that claim.**

The Applicant concedes that the Respondents meet several of this Court’s requirements for jurisdiction: they are states;<sup>49</sup> are parties to the Statute of the International Court of Justice (“the Statute”);<sup>50</sup> and have given their consent to this Court to adjudicate on this matter.<sup>51</sup> However, for the Respondents to have standing there must also be a dispute between it and Adaria.<sup>52</sup> There is no general right to take legal action at international law.<sup>53</sup> A dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”<sup>54</sup> A state has a legal interest where it

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<sup>49</sup> *Statute of the International Court of Justice*, 59 Stat. 1031 at Article 34 [*ICJ Statute*].

<sup>50</sup> *Ibid* at Article 35.

<sup>51</sup> *Ibid.* at Article 36

<sup>52</sup> *Brownlie*, *supra* note 1 at 458.

<sup>53</sup> *South West Africa Cases*, Judgment [1966] I.C.J. Rep. 6at 46-49 [South West Africa 1966]

<sup>54</sup> *Mavrommatis* (1924), Judgment, P.C.I.J. (Ser. A.) No. 2 at 11 as in *Brownlie* *supra* note 1 at 459.

has been directly prejudiced, although it “may have legal interests in matters which do not affect [its] financial, economic, or other ‘material’ ... or tangible interests.”<sup>55</sup> The Respondents have no legal interest in a dispute concerning the RU Office in Adaria.

**B. The RU has independent legal personality from its Member States.**

As a legal person independent from its Member States, the RU may bear rights and obligations under international law. Member States have no legal interest in the rights the RU bears as an autonomous entity because they are not the beneficiary of those rights. Furthermore, this court has ruled that an entity possessing international legal personality has the capacity to bring claims under international law.<sup>56</sup> Consequently, the Member States may not bring a claim on the basis of rights belonging exclusively to the RU.

As argued above, the RU lacks the capacity to conclude treaties with non-member states. However, this does not prevent the RU from possessing international legal personality. Several RU institutions are independent from the Member States. The Parliament is directly elected; the Commission President and Ministers, once named, cannot be removed except by unanimous Council vote, and they have exclusive competence to propose RU legislation; High Court judges cannot be removed. Collectively, the RU institutions may create legal obligations for Member States and individuals within Member States. In particular, each institution is empowered to bring a

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<sup>55</sup> *South West Africa 1966*, *supra* note 53 at. 32-33

<sup>56</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] I.C.J. Rep. 174 [*Reparations*].

claim before the High Court against another RU institution or a Member State if it has violated its obligations under the TRU or RU legislation. It follows that in relation to Member States, the RU collectively, and the autonomous institutions severally, have international legal personality with rights and obligations that are exercised totally independently from the Member States. This reasoning applies *a fortiori* should the Court rule that the RU has the capacity to conclude international agreements.

The rights and obligations of the RU Office in Adaria are borne exclusively by the RU as an autonomous legal person. The function of the Office is primarily to facilitate the work of the RU Commission.<sup>57</sup> The RU Delegation is to act as the official representative of the RU in Adaria.<sup>58</sup> The Office is thus an organ of the RU, not the Member States, and has been assigned no responsibilities by the Member States. Consequently, the Respondents do not have a legal interest in any dispute between the RU and Adaria in relation to that office.

**C. The Respondents are not vested with a legal interest by any instrument or rule of international law.**

A legal interest may result from a text, instrument, or rule of international law.<sup>59</sup> However, no instrument or rule of law vests the Respondents with a legal interest in this dispute. Adaria and the Respondents have concluded no agreements apart from the AAA.<sup>60</sup> The AAA does not provide the Respondents with a right of action. In the *South*

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<sup>57</sup>AAA, *supra* note 38 at Article 3

<sup>58</sup> *Ibid.*

<sup>59</sup> *South West Africa 1966*, *supra* note 53 at 32-33.

<sup>60</sup> Clarification at Article 12.

*West Africa* case, this court ruled that Ethiopia and Liberia did not have a legal interest in a dispute concerning the mandate for South West Africa, despite the fact that the mandate agreement expressly provided members of the League of Nations (of which the applicants in that case were deemed members) with access to a mechanism to settle disputes concerning the mandate's interpretation. The Court so held because the claim brought by Ethiopia and Liberia, even if successful, would not affect any legal interest or right possessed by them. In this case, the AAA provides no such mechanism, let alone any legal rights for the Respondent.

In addition, no customary law or general principles of law exist that vest a member state legal interest in the affairs of an international organization if that organization has a distinct legal personality. Similarly, in *Barcelona Traction* (Preliminary Objections),<sup>61</sup> this Court held that Belgium did not have jurisdiction to bring a claim because it did not possess a legal interest in the dispute. Although the shareholders were Belgian, the company was incorporated in Canada. Since international law recognized a legal right to assert diplomatic protection only to Canada, Belgium was barred from bringing a claim, even though its citizens indirectly suffered a prejudice.

Similarly, in the *Nicaragua* case, this Court rejected an argument advanced by the United States of America ("U.S."), that it was entitled to intervene as a member of the Organization of American States ("OAS").<sup>62</sup> The U.S. argued that Nicaragua had undertaken certain legal obligations to the OAS in its constituent treaty which it later

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<sup>61</sup> *Barcelona Traction* 1964 I.C.J. Rep. 5

<sup>62</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, 1986 ICJ Reports, at paras. 258-262.

violated, and that, as a member state, the U.S. was entitled to act in defence of the rights of the OAS. The Court ruled that no such right existed, as the obligations, should they have been found to exist, were to the OAS only, not its member states or the U.S. directly, thus precluding the latter from having a legal right in respect of those obligations. No customary law or general principle of law vested in Belgium a legal interest despite a logical connection between the harm and Belgium.

**III. THE APPLICANT DID NOT VIOLATE INTERNATIONAL LAW CONCERNING THE IMMUNITY OF DIPLOMATIC MISSIONS BY SEIZING THE PREMISES, PROPERTY, OR PERSONNEL OF THE ROTIAN UNION REPRESENTATIVE OFFICE.**

**A. The RU Office does not benefit from diplomatic immunity because it does not represent a state.**

The RU Office in Adaria was created by the AAA to facilitate the work of Commission experts and to serve as the official representative of the RU in Adaria.<sup>63</sup> The Vienna Convention on Diplomatic Relations applies only to states<sup>64</sup> and does not protect representatives of international organizations.<sup>65</sup> It cannot be argued that Mr. Heep represented the Respondents, as he was not accredited to do so,<sup>66</sup> and the establishment of diplomatic relations between states takes place by mutual consent.<sup>67</sup>

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<sup>63</sup> AAA, *supra* note 53 at Article 333.

<sup>64</sup> *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 U.N.T.S. 95. Article 2.

<sup>65</sup> Chanaka Wickremasinghe, “Immunities Enjoyed by Officials of States and International Organizations” in Malcolm D. Evans, *ed.*, *International Law*, 2<sup>nd</sup> ed., (New York: Oxford University Press, 2006) at 411.

<sup>66</sup> *Compromis* at ¶18

<sup>67</sup> *VCDR*, *supra* note 63 at Article 2.

Mr. Heep was not admitted to Adaria as a representative of any state. Moreover, the Respondents maintain separate diplomatic missions in Adaria.

The AAA does not indicate that the RU Office is to perform any diplomatic functions. It exists to facilitate the work Commission experts in monitoring implementation of the AAA conditions.<sup>68</sup> While paragraph 3 states that the Office may “aid in the diplomatic and economic aspects of Adarian integration”, this is too vague to constitute the formal establishment of a diplomatic relationship. A distinction must be drawn between ‘aiding’ in certain aspects of integration and actually performing them. The Office has no economic functions of any kind, save perhaps to advise Adaria in its attempt to satisfy the AAA.

**B. The immunities and privileges of international organizations are determined by their constituent instruments.**

As previously noted, international organizations are inherently unequal and must be distinguished from states in the rights or capacities they possess.<sup>69</sup> These are determined by their constituent instruments.<sup>70</sup> Immunity from state jurisdiction (hereinafter sometimes “international immunities”) does not automatically attach by reason of a general rule which benefits all international organizations identically.<sup>71</sup> The source of immunity must be the organization’s founding treaty or some other agreement

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<sup>68</sup> AAA *supra* note 38 at Article 2.

<sup>69</sup> Reuter, *supra* note 3, at 182.

<sup>70</sup> Reparations, *supra* note 56 at 174.

<sup>71</sup> Panayotis Glavinis, *Les litiges relatifs aux contrats passés entre organisations internationales et personnes privées*, (Paris: L.G.D.J., 1990) at 122.

between the organization and the state receiving its representatives.<sup>72</sup> Thus, for example, the European Communities do not enjoy general immunity from jurisdiction in its member states.<sup>73</sup>

**C. The Office was not intended to have immunity.**

Adaria is not bound to grant the Office immunity because it was not the intent of the Member States that the Office be immune. Immunities, be they diplomatic<sup>74</sup> or international,<sup>75</sup> are accorded on a functional basis. The functions attributed to the Office do not require that it be immune from jurisdiction.

There exist important distinctions between the immunities of state diplomats and those of the functionaries of international organizations. Diplomatic law balances the interests of the sending and receiving states, and is based on a reciprocal relationship.<sup>76</sup> The benefit accruing to each state in granting immunity consists of the equivalent protection afforded its own representatives. However, no such reciprocity exists between states and international organizations. Immunity exists solely to permit the organization to function effectively, and the benefits of granting such immunity accrue primarily by

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<sup>72</sup> Carol Crosswell, *Protection of International Personnel Abroad*, (New York: Oceana Publications, 1952) at v-vi; David B. Michaels, *International Privileges and Immunities: A Case for Universal Statute* (The Hague: Martinus Nijhoff, 1971) [Michaels] at 21.

<sup>73</sup> *Schermers*, *supra* note 26 at 1024.

<sup>74</sup> VCDR, *supra* note 64 Preamble.

<sup>75</sup> Rina Goldenberg, "Abuse of Diplomatic Immunity: Is the Government Doing Enough?" (1995) 1 ILSA J. Int'l & Comp. L. 200; Lori Shapiro, "Foreign Relations Law: Modern Developments in Diplomatic Immunity" (1989) Ann. Surv. Am. L. 281.

<sup>76</sup> Rosalyn Higgins, "The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience", 79 AMJIL 641, p. 642.

virtue of membership in the organization.<sup>77</sup> Thus, the existence and scope of immunities are determined in light of the nature of a state's relationship to an international organization.

The RU Office was set up by virtue of Article 11 of the TRU, which governs the accession of new members. Under Article 11(2), the Commission is required to conduct an investigation into the suitability of a state for membership. Under Article 11(6), the Commission is required to monitor the implementation of the conditions of the accession agreement and to recommend a state for membership. Neither of these functions requires the representatives of the Commission to perform acts on behalf of the RU in the territory of the applicant state. Unlike other articles of the TRU which authorize the Commission to negotiate an accession agreement<sup>78</sup> or a commercial accord<sup>79</sup> or otherwise conduct relations on behalf of the Member States,<sup>80</sup> the role of the Commission under an Accession Agreement is merely one of fact gathering. Exercising these other powers requires specific authorization by the Council, which did not exist at the time the AAA was concluded, nor was it granted afterwards. The Respondents maintain their own diplomatic missions through which they may conduct diplomatic affairs in the absence of an express mandate to the Commission via a Council resolution.<sup>81</sup>

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<sup>77</sup> Michaels, *supra* note 72 at 21.

<sup>78</sup> Article 11(4)

<sup>79</sup> Article 4(f)

<sup>80</sup> Article 4(g)

<sup>81</sup> Clarification at ¶6.

This Court should refrain from reading in powers to the RU Office that are not expressly provided. Article 3 of the TRU provides that the treaty should be interpreted restrictively, stating that “each institution shall act within the limits of the powers conferred upon it by this Treaty.” As a rule, treaties should be interpreted according to the intent of the parties as expressed in the text.<sup>82</sup> In their practice, the European Communities have avoided disturbing the institutional structures by too readily implying powers.<sup>83</sup> Adaria consented to receive the RU Office in the context of a detailed distribution of functions, which by the Respondents’ own admission operates within “strictly defined conditions”.<sup>84</sup> Thus, any modification to the RU Office’s powers would vitiate Adaria’s consent.

**D. Adaria is not bound to respect immunities granted by the TRU.**

Adaria is not a party to the TRU and did not expressly consent in writing to be bound by its terms. Therefore, any immunities that flow from functions attributed to the Office under the TRU do not apply to Adaria.

1. Adaria is not a party to the TRU.

Whatever immunities may or may not flow from the functions attributed to the RU Office under the TRU do not apply to Adaria. It is well settled that, as a general rule,

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<sup>82</sup> *Brownlie, supra* note 1 at 632.

<sup>83</sup> *Ibid.* at 292.

<sup>84</sup> *Compromis* at ¶6.

states are not bound by treaties to which they are not party (*res inter alios acta*).<sup>85</sup>

Adaria is not a party to the TRU. The only portion of the TRU to be incorporated into the AAA is Article 11, Section 6, pertaining to the admission of new members.<sup>86</sup>

It cannot be argued that the RU, as international legal person, bears rights *erga omnes*. This personality, insofar as it exists, is a creature of the TRU, and five states do not have the power to bring into being an entity with objective international legal personality.<sup>87</sup> State practice distinguishes between international organizations of a universal character and other types of international organization,<sup>88</sup> and this distinction is found in the ILC draft articles on the privileges and immunities of international organizations.<sup>89</sup>

In order to have effect, the legal personality of the RU must be recognized. Adaria has not recognized the legal personality of the RU. As argued in Section I, the AAA is a treaty between Adaria and the Respondents and thus cannot constitute recognition of the RU's personality. In practice, the Adaria has not recognized the RU

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<sup>85</sup> *VCLT*, *supra* note 31 at 34; *International Status of South-West Africa*, Advisory Opinion, [1950] I.C.J. Rep. 128 at 165.

<sup>86</sup> AAA, *supra* note 38 at Article 1.

<sup>87</sup> Special Rapporteur Leonardo Diaz-Gonzalez, "Second Report on Relations between States and International Organizations (Second Part of the Topic)" (1985) 2 Y.B. of the Int'l Law Commission [*Diaz-Gonzalez 2<sup>nd</sup>*].

<sup>88</sup> *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*, 14 March 1975.

<sup>89</sup> Special Rapporteur Leonardo Diaz – Gonzalez, *Fourth Report on Relations Between State and International Organizations (Second Part of the Topic)*, UN GAOR, 1989, UN Doc. A/CN.4/424 and Corr.1 at 157.

Office as having any privileges not afforded other non-profit organizations,<sup>90</sup> and the Office performed no acts requiring or implying the possession of international legal personality.

2. Adaria has not expressly consented to grant the RU Office immunity.

In the alternative that the AAA is found to be a treaty with the RU and not the Respondents, this only implies recognition of the RU's capacity to conclude treaties and nothing further. Recognition of legal personality in one aspect does not extend to others, such as immunities and privileges.<sup>91</sup> In order for a treaty provision to create binding obligations for a third state, the parties to the treaty must intend the provision to establish such an obligation, and the third state must expressly accept it in writing.<sup>92</sup>

It cannot be argued that by ratifying the AAA and cooperating with the Commission that Adaria expressly consented to the Office having immunities. First, the TRU does not explicitly provide immunity even from the jurisdiction of Member States, which departs substantially from the widespread practice, when such immunity is intended, of specifying what immunities an organization shall have from its member states.<sup>93</sup> Second, there is no evidence on record that the High Court or the courts of Member States have recognized the immunity of any RU institutions. Given the lack of any indication, express or tacit, that immunity exists under the TRU, it would be

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<sup>90</sup> Clarification at ¶5.

<sup>91</sup> Ignaz Seidl-Hohenveldern, *Corporations in and under International Law* (Cambridge : Grotius Publications, 1987) at 90-92.

<sup>92</sup> *VCLT*, *supra* note 31 at Article 35.

<sup>93</sup> *Diaz-Gonzalez 2<sup>nd</sup>*, *supra* note 87.

unreasonable to interpret Adaria's adherence to the AAA as express consent to such immunities, were they found to exist.

Both Adaria and the RU are members of the WTO.<sup>94</sup> However, WTO membership does not require granting the RU Office immunity. While there is an obligation on Members of the WTO to grant certain immunities and privileges to the representatives of other Members, this obligation is limited to the exercise of functions in connection with the WTO.<sup>95</sup> The AAA does not empower the RU Office to exercise such functions, nor was Mr. Heep admitted to Adaria on that basis.

**E. Non-member states are not required by customary law to grant immunity to international organizations.**

International immunities, when they exist, are highly specialized and vary a great deal from one organization to the next according to the specific functions involved, making generalizations impossible.<sup>96</sup> Customary law in this area has been described as “marginal,”<sup>97</sup> and opinion as to its content exhibits “almost infinite variety”.<sup>98</sup> Consequently, treaties are the only generally accepted source of international immunities.

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<sup>94</sup> *Compromis*, ¶9.

<sup>95</sup> [Marrakesh Agreement Establishing the World Trade Organization](#), Apr. 15, 1994, 1867 U.N.T.S. 154 at Article VIII.

<sup>96</sup> D.W. Bowett, *United Nations Forces : A Legal Study of United Nations Practice* (London : Stevens, 1964) at 428-67; August Reinisch, *International Organizations Before National Courts* (Cambridge: Cambridge UP, 2000) at 140 [Reinisch].

<sup>97</sup> Felice Morgenstern, *Legal Problems of International Organizations* (Cambridge: Cambridge UP, 1986) at 5; Reinisch, *Ibid* at 145.

<sup>98</sup> Reinisch, *Ibid.* at 146.

This is reflected in state practice, which has not recognized a customary rule of immunity from the jurisdiction of non-members. In the U.S., where customary international law is treated as the “law of the land”, the predominant trend has been to deny such immunity.<sup>99</sup> In three cases, U.S. courts found that only organizations of which the U.S. was a member were immune.<sup>100</sup> In an *obiter dictum*, the English High Court observed that, at common law, international organizations such as the International Tin Council have never been recognized as having a ‘sovereign status’ and thus are entitled to no immunity save where, and to the extent, granted by legislative instrument.<sup>101</sup> Both Argentine<sup>102</sup> and French<sup>103</sup> appellate courts have denied outright any obligation of non-members to grant immunity. Others have held that customary immunity could only exist if the rights and interests of others were protected by a real possibility of recourse to an impartial and independent tribunal.<sup>104</sup> Immunity in the absence of remedies may amount

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<sup>99</sup> Reinisch, *Ibid.* note at 153.

<sup>100</sup> *International Tin Council v. Amalgamate Incorporate*, (1998), 524 N.Y.S. 2d 971; *Steinberg v. International Criminal Police Organization*, 103 F.R.D. 392 (D.D.C.1984); *International Association of Machinists v. Organization of Petroleum Exporting Countries (OPEC)*, 477 F. Supp. 553 (C.D. Cal. 1979).

<sup>101</sup> *Standard Chartered Bank v. International Tin Council and others*, [1987] 1 W.L.R. 641 (U.K.H.C.)

<sup>102</sup> *Duhalde v. Organizacion Panamericana de la Salud*, Judgment, Supreme Court of Justice of Argentina (1999), online: Organization of American States <<http://www.oas.org/legal/english/docs/BilateralAgree/Argentina/ARCSJNAgree.htm>>

<sup>103</sup> *Communauté économique des États de l’Afrique de l’Ouest and others v. Bank of Credit and Commerce international (Paris Court of Appeal)* (1993) 120 J.D.I. 353 at 357.

<sup>104</sup> *ZM v. Permanent Delegation of the League of Arab States to the United Nations*, Judgment (1993) 116 I.L.R. 643 at 646, (Labour Court of Geneva); *Pistelli v. Istituto Universitario Europeo*, Judgment (2005) R.D.I. 248 at 254 (Italian Court of Cassation).

to a denial of justice,<sup>105</sup> and neither the TRU nor the AAA provides Adaria with remedies to offset the granting of immunity.

While this Court has found that, in the case of the UN, non-member states may hold obligations towards it,<sup>106</sup> what customary law has developed around the UN system must be distinguished from that relating to other international organizations because of the UN's universal character.<sup>107</sup> Moreover, practice in this area is "manifold, complex and non-uniform."<sup>108</sup>

#### **IV. THE NATIONAL INDUSTRY ACT ("NIA") IS NOT AN ILLEGAL EXPROPRIATION OF ADARMOIRE AND THE OTHER PRIVATIZED CONCERNS UNDER INTERNATIONAL LAW.**

The Applicant and the Respondents have concluded no treaty prohibiting expropriation. Consequently, any claim that the NIA constitutes expropriation must rest on a rule of customary international law. As the NIA does not transfer ownership of any business concerns to the Adarian state, it does not constitute a direct expropriation. Therefore, to succeed in their claim the Respondents must a) demonstrate that there exists a rule of customary international law prohibiting indirect expropriation without

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<sup>105</sup> "Responsibility of International Organizations" in Official Records of the General Assembly, UN GAOR, 61st Sess., Supp. No. 10. UN Doc. A/61/10 (2006) Annex B, at p. 456.

<sup>106</sup> *Reparations*, *supra* note 56..

<sup>107</sup> *Ibid.*

<sup>108</sup> *Michaels*, *supra* note 72 at 58

compensation; and b) prove that the NIA constitutes indirect expropriation. As neither of these claims is true, the Respondents' action in this regard must fail.

**A. Customary international law does not prohibit indirect or regulatory expropriation without compensation.**

In order for a customary rule to exist, there must be a general and uniform state practice in that area and *opinio juris sive necessitatis*.<sup>109</sup> Although there was once consensus on the international law of expropriation, it disappeared following the Second World War as large numbers of developing countries gained their independence and attempted to use Resolutions of the UN General Assembly to modify the state of the law, which they considered to be to their disadvantage.<sup>110</sup> Today, there is no uniformity of state practice in relation to indirect expropriation, and there is insufficient evidence to conclude that states consider themselves bound by custom to refrain from adopting measures whose indirect effects may resemble expropriation.

The dynamic between the respective needs of developing and developed economies is important in this regard, and especially germane to the instant case. While developed countries usually contend that indirect expropriation is unlawful, developing

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<sup>109</sup> *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, Judgment [1974] I.C.J. Rep. 3.

<sup>110</sup> *General Assembly Resolution on Permanent Sovereignty Over Natural Resources*, GA Res 1803, UN GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5344 (1962); *General Assembly Resolution on Permanent Sovereignty over Natural Resources*, GA Res 3171, UN GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9559 (1974); *Declaration on the Establishment of a New International Economic Order*, GA Res 3201, UN GAOR, 29th Sess., Supp. No. 1, U.N. Doc. A/9559 (1974); *Charter of Economic Rights and Duties of States*, GA Res 3281, UN GAOR, 29th Sess., Supp. No. 1, U.N. Doc. A/9631 (1974).

countries refuse to accept this imposition on their sovereignty.<sup>111</sup> This mirrors an economic reality, which is that investments generally flow from developed to developing economies. States with developing economies are in a relatively weaker positions vis-à-vis investors than are rich states, and thus guard their prerogatives more jealously. A good example of this is the present case. Adaria is a developing country whose burgeoning manufacturing sector was dominated by state-owned enterprises.<sup>112</sup> When Adaria privatized these concerns, they were all bought by corporations based in EU Member States. Its manufacturing sector, on which the future of its economy and prosperity hinges, is now entirely in the hands of foreign entities.

The OECD failed in its attempt to conclude a multilateral investment treaty because the member states, who exhibit varying levels of economic development, could not agree on whether or not regulatory acts could amount to expropriation.<sup>113</sup> In general, the content of Bilateral Investment Treaties (BITs), which have proliferated in recent years, indicates no uniformity in state practice, especially in regard to regulatory measures and indirect expropriation.<sup>114</sup> Despite similarities between certain provisions of

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<sup>111</sup> Rudolf Dolzer, “Indirect Expropriations: New Developments?” (2002) 11 N.Y.U. Envtl. L.J. 64 [*Developments*]; Bernard Kishoiyian, “The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law” (1994) 14 Nw. J. Int’l L. & Bus. 329[*Kishoiyian*]; S. K. Date-Bah, “Facilitating and Regulating Private Investment in a Developing Economy” Penn St. Int’l L.R.

<sup>112</sup> *Compromis*, ¶1.

<sup>113</sup> Rainer Geiger, "Regulatory Expropriations in International Law : Lessons from the Multilateral Agreement on Investment" 11 NYU Environmental Law Journal 94 at 96.

<sup>114</sup> Kishoiyian, *supra* note 111. Zachary Douglas, “The Hybrid Foundations of Investment Treaty Arbitration” (2003) 74 Brit. Y.B. Int’l L. 151-289.

BITs, states adopt distinct practices regarding the repatriation of profits and exchange of capital.<sup>115</sup> Where BIT provisions *do* allow for the immediate transfer of investment returns, this is generally subject to exceptions.<sup>116</sup> In times of economic upheaval or depression, “the right to repatriate cannot bind a state”.<sup>117</sup> These varying practices mean that “it is not possible to discern...any consistent and uniform usage, accepted as law”.<sup>118</sup>

In those cases where indirect expropriation without compensation *is* prohibited by a legal instrument, it is impossible to conclude that these acts were motivated by *opinio juris*. A very large number of BITs are ‘lump-sum’ agreements; that is, they are the product of a negotiated compromise between a large number of competing interests. This Court has explicitly rejected the use of lump sum agreements as evidence of *opinio juris* because the motivations behind the inclusion of specific provisions are not clear.<sup>119</sup> Moreover, BITs include numerous protections for investment that are unrelated to expropriation, so one cannot infer a belief that specific terms, such as those prohibiting expropriation, are obligatory under existing law.

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<sup>115</sup> See e.g. : Agreement for the Promotion and Protection of Investments, United Kingdom-Egypt, 11 June 1975, Gr. Brit. T.S.No. 97 at Article 6(1); Treaty Concerning the Reciprocal Encouragement and Protection of Investments, United States and Turkey, December 3, 1985, 25 I.L.M. 87 at 101; Treaty Concerning the Promotion and Reciprocal Protection of Investments, Singapore and United Kingdom, ARTXXX 1008, U.N.T.S. 221.

<sup>116</sup> *Kishoiyian*, *supra* note 111 at 353-6.

<sup>117</sup> *Ibid.*

<sup>118</sup> Asylum Case (Colombia v. Peru), [1950] I.C.J. Rep. 266 at 276-7.

<sup>119</sup> *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, Judgment, [1970] I.C.J. Rep. 3, 40 at ¶61 [*Barcelona*].

This dynamic is especially present in the case of BITs between developed and developing countries. In a frank exchange of benefits, one state cedes some of its sovereignty, in the form of treaty-imposed limits on the use regulatory controls, in exchange for specific benefits such as an increase in foreign investment or access to larger markets. Capital-exporting countries consistently seek guarantees with respect to transferring money while developing countries wish to avoid such provisions.<sup>120</sup> This exchange would not be possible if the parties believed indirect expropriation to be contrary to international law.<sup>121</sup> Thus, these treaties establish nothing more than a specific legal relationship; they are *lex specialis* rather than *lex generalis*.<sup>122</sup>

**B. The NIA does not constitute indirect expropriation.**

State measure may have a considerable negative incidence on foreign interests without amounting to expropriation.<sup>123</sup> Considerable deference must be granted to

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<sup>120</sup> Jeswald W. Salacuse & Nicholas P. Sullivan “Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain” (2005) 46 Harvard International Law Journal 67 at 77-79.

<sup>121</sup> M.E. Villiger *Customary International Law and Treaties* 2<sup>nd</sup> edn. (Boston: Kluwer law International, 1997); R.R. Baxter “Treaties and Custom” (1970-71) 129 Hague Recueil 75.

<sup>122</sup> Rudolf Dolzer, “New Foundations of the Law of Expropriation of Alien Property” (1981) 75 A.J.I.L. 553; *Kishoian supra* note 111 at 328 and 329.

<sup>123</sup> Brownlie, *supra* note 1 at 509.

domestic authorities to regulate matters within their borders.<sup>124</sup> Consequently, tribunals generally do not treat regulatory actions as expropriation.<sup>125</sup>

Three key factors are relevant in determining whether a state measure constitutes expropriation: (i) the character and purpose of the measure, (ii) the economic effect of the measure; and (iii) legitimate investment-backed expectations.<sup>126</sup>

1. The character and purpose of the NIA constitute a lawful exercise of state powers.

Where a measure is “reasonably necessary” in order for a state to perform its recognized obligations to protect the welfare of its citizens, it does not constitute unlawful expropriation.<sup>127</sup> In particular, tribunals have interpreted this to mean that a measure is lawful where a state is undergoing economic or political unrest.<sup>128</sup> Commentators and tribunals alike have indicated the importance of deference to the state in exercising such powers. Consequently, states are not responsible for loss of property

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<sup>124</sup> S.D. Myers, Inc. v. Canada, Final Award (2000) (Ch. 11 Panel), online: NAFTA Claims <<http://www.naftaclaims.com>>.

<sup>125</sup> *Developments*, *supra* note 111 at 86.

<sup>126</sup> Andrew Newcombe, “The Boundaries of Regulatory Expropriation in International Law” 20 ICSID Review F.I.L.J. at 29 [forthcoming in 2005][*Newcombe*].

<sup>127</sup> G.C. Christie, “What Constitutes a Taking of Property under International Law” (1962) 33 B.Y.I.L. 307 at 338.

<sup>128</sup> See e.g. *Sea-Land Service Inc. v. Islamic Republic of Iran* (1984) 6 Iran-U.S. C.T.R. 149.

or any other economic disadvantage resulting from a regulation that is: (i) within the police powers of states; (ii) *bona fide*; and (iii) non-discriminatory.<sup>129</sup>

Adaria has suffered political and economic uncertainty that implicates the police powers of states to regulate economic activity. Furthermore, Adaria is attempting in good faith (*bona fide*) to limit the harmful effects of its failure to gain entry to the RU. Investments by foreign corporations were made in the expectation that Adaria would be joining the RU common market. It is reasonable for Adaria to be concerned that its inability to secure access to that market might provoke a flight of capital which no longer sees as much prospect for growth and returns. Moreover, Adaria had accepted to place itself in a position of great vulnerability by allowing foreign capital to gain control of its manufacturing economy, purely in the expectation that it would gain improved access to RU markets and thus accelerate its economic growth. As this is no longer likely, it is reasonable for Adaria to seek to mitigate its exposure to risk in light of fundamentally different economic circumstances and to encourage the reinvestment of proceeds from former state-enterprises in the Adarian economy.

Under the law of expropriation, a measure is discriminatory if: a) it is directed at the complaining party for reasons unrelated to the matter's substance; and b) it results in treatment of similar persons in a different manner,<sup>130</sup> without a reasonable basis for the

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<sup>129</sup> *Third Restatement of the law: The Foreign Relations of the United States*, vol. 1 (New York: American Law Institute, 1987)[*Third Restatement*] at §712(g).

<sup>130</sup> A.F.M. Maniruzzaman, "Expropriation of Alien property and the Principle of Non-discrimination in International Law of Foreign Investment" (1998-1999) 8 J. Transnat'l L. & Pol'y 57 at 59.

difference.<sup>131</sup> In this dispute, the newly privatized companies are treated differently, but this difference is justified due to their national economic importance and the recent economic crisis. No evidence has been adduced that the NIA places them at a disadvantage relative to their competitors in the Adarian market. The character and purpose of the NIA therefore constitute a lawful exercise of state powers.

2. The economic effect of the NIA is not sufficiently significant to constitute unlawful expropriation.

Regulatory acts are rarely considered expropriation. When they are, a host state has either taken ownership of the property<sup>132</sup> or has approved an investment activity and subsequently interfered thereby defeating the investment's purpose.<sup>133</sup> Courts have ruled that a regulatory measure must present substantial interference with the investment to constitute expropriation.<sup>134</sup> However, the NIA does not give Adaria ownership of Adarmoire, and it is still able to operate freely within Adaria. Moreover, cases deciding whether interference constitutes expropriation are controversial and have produced

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<sup>131</sup> *Third Restatement, supra* note 129.

<sup>132</sup> See e.g. *Sedlmayer v. Russian Federation*, (1998) Available online: at <<http://its.law.uvic.ca>>; *Wena Hotels Ltd. v. Arab Republic of Egypt* (2002), 41 I.L.M. 933; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (2002), (ICSID Case No. ARB/99/6); Andrew Newcombe, "The Boundaries of Regulatory Expropriation in International Law" 20 ICSID Review F.I.L.J. [forthcoming in 2005] at 10.

<sup>133</sup> *Metalclad Corporation v. United Mexican States*, (2000), 40 I.L.M. 36 (International Centre for Settlement of Investment Disputes) [*Metaclad*]; *CME v. Czech Republic* (2001), UNICTRAL Final Award; *Technicas Medioambientales Tecmed S.A. v. Mexico* (2003) (ICSID Case No. ARB(AF)/00/2), (International Settle of Investment Disputes).

<sup>134</sup> *Ibid.* at 133.

inconsistent outcomes: decision-makers deciding cases in the same jurisdiction, at similar times and involving almost identical situations have reached opposite conclusions as to whether there was an expropriation.<sup>135</sup> And while the effect of a measure is relevant to its characterization as expropriation, but international decisions<sup>136</sup> focusing *solely* on effects have been criticized as lacking in methodological foundation and relying too heavily on questionable case law.<sup>137</sup>

Furthermore, most successful actions which focused on the effects of regulation involved a *total* loss of the investment's value.<sup>138</sup> Adarmoire continues to exist and to be able to conduct business, albeit chiefly within Adaria. Prior to the events leading to the present case Adaria's manufacturing sector was described as "rapidly-growing",<sup>139</sup> and thus Adarmoire remains a viable business concern. While Bobboman has claimed that Adarmoire's value is "greatly diminished",<sup>140</sup> its value in the context of a global supply

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<sup>135</sup> See e.g. *Metaclad, supra* note X; *Methanex Corporation v. United States of America*, (2005), Final Award, (2005) (Ch. 11 Panel), online: NAFTA Claims <<http://www.naftaclaims.com>>.

<sup>136</sup> *Metalclad, supra* note 135.

<sup>137</sup> *Developments, supra* note XX at 91. M.H. Mendelson, April 1985, *A Law of the Future or Law of the Past? Modern Tribunals and the Internaitonal Law of Expropriation*, Patrick M. Norton, *The American Journal of International Law*, Vol. 85, No. 3. (July 1991) (circa p. 502)

<sup>138</sup> *Tippets, Abbett, McCarthy, Straton and TAMS-AFFA Consulting Engineers of Iran et al.*, Award No. 141-7-2 (Iran – U.S. Claims Trubunal; *Starrett Housing Corporation et al. v. The Government of the Islamic Republic of Iran*, 4 Iran – U.S. CTR at 122.

<sup>139</sup> *Compromis*, ¶1.

<sup>140</sup> *Compromis*, ¶36.

chain is subject to a wide range risks and uncertainties that make any estimate highly subjective and inconclusive.

3. The NIA does not interfere with reasonable investment-backed expectations.

To prove such interference, an investor must prove that the investment was based on a state of affairs that did not include the challenged regulatory regime.<sup>141</sup> Bobboman must have known that Adaria's membership in the RU was not a *fait accompli*, and that should its application fail, it might adopt new economic policies. Bobboman accepted the risk inherent in any business activity that the political and economic climate could change so as to diminish the profitability of investments. In the present case, that risk was hardly unforeseeable, as a good portion of the anticipated benefit must have derived from Adaria's expected accession to the RU, which never occurred. As the European Court of Justice found in a similar case, one's position in the marketplace is not a property right on the basis of which one may institute an action.<sup>142</sup>

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<sup>141</sup> *Oscar Chinn* (1934), P.C.I.J. (Ser. A/B) No. 63.

<sup>142</sup> *Yedas Tarim ve Otomotiv Sanayi ve Ticaret AS v Council & Commission* (External relations) [2006] EUECJ T-367/03 (30 March 2006)

## **PRAYER FOR RELIEF**

The Republic of Adaria respectfully requests that this Honourable Court adjudge and declare that:

1. the Respondents violated international legal obligations owed to Adaria by denying it membership in the Rotian Union;
2. the Respondents do not have standing before this Court to make any claims concerning Adaria's actions with respect to the Rotian Union Representative Office, its property or its personnel;
3. the Applicant did not violate international law concerning the immunity of diplomatic missions by seizing the premises, property, or personnel of the Rotian Union Representative Office; and
4. the National Industry Act (NIA) does not constitute an illegal expropriation of Adarmoire and the other privatized concerns at international law.

All of which is respectfully submitted,

Team 305A