

General List No.111

IN THE INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE, THE HAGUE, NETHERLANDS

**Case Concerning
Coral Reefs and Climate Change**

The Kingdom of Acropora,
Applicant,

v.

The Republic of DeLand,
Respondent.

Memorial for the Respondent

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Statement of Jurisdiction

The Republic of DeLand and the Kingdom of Acropora submit the following dispute to the International Court of Justice (ICJ) under Article 40(1) of the Statute of the ICJ, by special agreement. This special agreement was entered into force upon signature at Buenos Aires, Argentina, on May 11, 2006.

Questions Presented

- I. Whether DeLand is responsible at international law for environmental, cultural or other damage associated with the coral bleaching in the Kingdom of Acropora by failing to regulate Greenhouse Gas Emissions.
- II. Whether the Kingdom of Acropora has violated international law by banning the importation of goods produced or manufactured in the Republic of DeLand.

Statement of Facts

The Republic of DeLand (DeLand) is a heavily industrialised developed State. The Kingdom of Acropora (Acropora) is a developing nation and has two main ethnic groups; Maroons and Acroporans. Hebrides is the main island of Acropora. The northern coast of Hebrides is ringed with coral reefs and has been on the World Heritage Convention list since 1981.

Both DeLand and Acropora are party to international legal instruments relating to international environmental and trade law.

In 2001 all six States in the Disston Sea region signed the Trade Agreement for the Disston Region (TADR). In 2006 DeLand issued a report that established that they produced approximately 25% of the world's net GGE's. DeLand relies on industry to regulate emissions and adopt voluntary limits.

In 1998, average sea temperatures in the Disston region rose, coral reefs began to bleach and the Maroons reported a decline in their fish harvest by 30%.

In 2005 scientists reported two thirds of the coral reef of Hebrides had died and the Maroons reported a fish harvest decline of 60%.

On September 28 2005 the Minister of Trade for Acropora, in a nationally broadcast speech placed an embargo on any goods produced or manufactured in DeLand.

Summary of Argument

- I. DeLand is not responsible under international law for any damage be it environmental, cultural or other as a result of coral bleaching. There is insufficient evidence to determine the cause of the coral bleaching and consequently the causation of said harm can not be conclusively attributable to an individual State. DeLand is fulfilling its international legal obligations with respect to environmental protection and human rights.

- II. Counsel for DeLand submits that the Acropora has violated Article 5 of the TADR insofar as it has invoked an arbitrary, unilateral embargo on all goods produced or manufactured in DeLand by relying on Article 15 of the Agreement. When interpreting such agreements, this court should construe the exceptions narrowly, and in light of the objects and purpose of the treaty. There is an insufficient link between the policy justification behind the embargo and promoting conservation of the environment. Furthermore there is insufficient evidence to attribute responsibility for coral bleaching as a result of increased sea temperatures, resulting from GGEs to one particular state.

ARGUMENTS

I. DeLand is not responsible under international law for any damage be it environmental, cultural or other as a result of coral bleaching.

A) DeLand is fulfilling its international legal obligations with respect to environmental protection in accordance with:

i. United Nations Convention on the Law of Sea 1982 (UNCLOS)

Article 197 and 212(3) of UNCLOS requires States to cooperate through international organisations. This obligation can be expressed in two ways, either *pactum de negotiando* or *pactum de contrahendo*. A *pactum de negotiando* is merely an agreement to negotiate while a *pactum de contrahendo* requires negotiation and subsequent outcome in the form of a mutually accepted solution.¹ No customary right to negotiate has been established. The ICJ has been unwilling to require a legal obligation to enter into negotiations in the absence of an express duty.² There has only been willingness by international tribunals to find a duty to cooperate and reach an agreement in specific circumstances. For example the delimitation of the Continental Shelf.³ Suggesting that there may be a duty specific to certain regimes rather than a general international law obligation.⁴ Thus, DeLand's obligation has been fulfilled through its participation in the UNFCCC. This multilateral forum facilitates the negotiation envisaged by UNCLOS.

¹ S. B. Kaye, *International Fisheries Management*, 2001, pp 115-6.

² *International Status of South-West Africa* I.C.J. Reports (1950) 128 at 139

³ *North Sea Continental Shelf Cases* I.C.J. Reports (1969) see also *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* I.C.J. Reports (1996)

If, however, the Court views the obligation that exists under the UNCLOS to consist of negotiation and outcome such a duty has been discharged by DeLand. DeLand has set a target in Annex B to Kyoto, in addition, DeLand has sent top ranking officials to international conferences notably the 1997 meeting in Maastricht and fully participated in the 1972 United Nations Conference on the Human Environment in Stockholm, the 1992 United Nations Conference on Environment and Development at Rio de Janeiro and the 2002 World Summit on Sustainable Development at Johannesburg.⁵ This reflects DeLand's good faith commitment as required by the VCLT Article 26.

ii. Convention on Biological Diversity 1992 (CBD)

The CBD requires cooperation through competent international organisations for the conservation and sustainable use of biological diversity.⁶ As with UNCLOS this duty is not a general rule of customary law and has been discharged through DeLand's participation in international conferences.

The CBD states in its preamble that 'lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise' the threat of significant loss of biological diversity. Article 3 of the CBD embodies the principle that the sovereign right to exploit resources has been interpreted by the ICJ to mean that every State is under an obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of

⁴ S. B. Kaye, International Fisheries Management (2001) at 114

⁵ Record, paras 9 and 11

⁶ Convention on Biological Diversity, June 5 1992, 1760 U.N.T.S. 79, Article 5 reproduced at: <http://www.biodiv.org/convention/convention.shtml>

other States.’⁷ Given the lack of scientific certainty as to the connection between GGEs and rising seas levels it cannot be reasonably presumed that DeLand has knowingly caused such harm.

The CBD adopts the precautionary principle. By ratifying and implementing the CBD DeLand is contributing to the state practice required to turn principles into rules of customary international law. Therefore DeLand is not in breach of its obligations under this international instrument.

iii. United Nations Framework Convention on Climate Change 1992 (UNFCCC)

The UNFCCC was established in June 1992 at the Rio Earth Summit. Its primary objective is the “stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure the food production is not threatened, and to enable economic development to proceed in a sustainable manner.”⁸

While the legal status of the atmosphere is uncertain, UN General Assembly Resolution 43/53 (1988) on protection of the global climate for present and future generations declares that global climate is ‘the common concern of mankind’. This was endorsed by

⁷ *Corfu Channel*, Merits, Judgment of 9 April 1949, I.C.J. Reports 1949, at 22

⁸ United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 108 (*entered into force* March 21, 1994) Article 2

the UNFCCC, the governing body for international negotiations, which treats the atmosphere as a ‘common resource of vital interest to mankind’.⁹

This international instrument provides States with the opportunity to negotiate agreements to manage climate change. As such it does not create any international obligations to be followed.

iv. Kyoto Protocol

DeLand is an Annex B signatory to the Kyoto Protocol in the company of 39 other emissions-capped industrialised countries and economies in transition. Legally binding emission reduction obligations for Annex B countries range from an 8% decrease (such as DeLand’s commitment to reduce its GGEs to 92% of its 1990 levels) to a 10% increase (Iceland) in relation to 1990 levels during the first commitment period from 2008 to 2012.

There is no requirement that DeLand achieve the commitment levels projected by the Kyoto Protocol before 2008. Although DeLand is a signatory to the Kyoto Protocol it has not ratified the Protocol and as such is not bound to reduce its GGEs.¹⁰ The Kyoto commitment period is the period in which Annex B countries have committed to reduce their collective GGEs by an average of 5.2%. There are currently no emissions targets after the commitment period specified in the Kyoto Protocol from 2008 to 2012.

⁹ S. Blay, et al, *Public International Law: An Australian Perspective* (2nd Edition: 2005) p.364

There is a discrete difference between the obligations of Annex B and Annex I signatories. Annex I States may invest in Joint Implementation (JI)/Clean Development Mechanism (CDM) projects as well as host JI projects. Non-Annex I countries which can host CDM projects.

DeLand is an Annex I signatory to the Kyoto Protocol in the company of 36 other industrialised countries and economies listed in the UNFCCC. The responsibilities of DeLand as an Annex I signatory include a non-binding commitment to reducing GGEs to 1990 levels by the year 2000.

**v. Protection of the World Cultural and Natural Heritage Convention
1972 (WHC)**

WHC protects biodiversity in a minimal but important way by aiming to preserve the scientific, artistic, cultural, and natural heritage of mankind.¹¹ Parties to the WHC are required to identify, protect and conserve the cultural and natural heritage that lies within their territory, and to hand it on to future generations. They accept the obligation to do so, whether by using their own resources or, when appropriate and obtainable, international financial, scientific, and technical; aid and cooperation.¹²

**B) DeLand is fulfilling its international legal obligations with respect to
human rights in accordance with:**

¹⁰ Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature*, December 10, 1997; I.L.M. 22 (1998) Article 24

¹¹ See Blay, *supra* note 9, at 375

¹² *Id.*

i. Universal Declaration of Human Rights

The Declaration cannot be properly be invoked as a source of legal obligation. Its provisions cannot form the subject matter of legal interpretation, as it is not a legal instrument.¹³ Thus DeLand cannot be found to be in breach of international human rights obligations on the basis of this instrument alone.

ii. International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR contains no provisions on its scope of application. The Covenant guarantees rights which are essentially territorial thus implying that a State which has neither sovereignty nor exercises territorial jurisdiction over another State does *not* owe an obligation to ensure the rights contained in a territory other than its own.¹⁴ Thus, DeLand does not owe an obligation to the nationals of Acropora, specifically the Maroons pursuant to the ICESCR.

The obligations contained in the ICESCR are those of progressive realisation. This is a necessity of the fact that the obligations under the ICESCR are so onerous that virtually no government will be able to comply. Due to the lack of programmatic obligations the determination of when an obligation has been fulfilled or ought to have been fulfilled is

¹³ H J Steiner, P Alston, *International Human Rights in Context: Law, Politics, Morals, Text and Materials*, (2nd edition 2000) at 151.

¹⁴ *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Advisory Opinion, 9 July 2004, at 112.

virtually impossible to determine.¹⁵ The rights are therefore characterised as negative, not positive.

DeLand, therefore, has a negative obligation to follow the Covenant requirements. Thus, in the event the court finds that DeLand does owe a responsibility to the Maroons under the Convention, particularly Article 11, that responsibility does not extend to a positive right to provide food for the Maroons. The right is negative and involves a State not denying a right to food. The fact that the Maroons no longer have access to fish means that an alternative food source is necessary.

iii. Draft Declaration on the Rights of Indigenous Peoples

DeLand submits that the Maroons are not an indigenous peoples and that DeLand is not bound by the Draft Declaration on the Rights of Indigenous Peoples.

At the 9th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands in November 2005, Suriname requested recognition that the descendants of escaped African slaves that make up a portion of their population are not indigenous and thus alternative terminology should be adopted to include the Maroon people.¹⁶ Similarly the Maroons, who inhabit the north of Acastus, are not indigenous and do not therefore, fall within the parameters of the Draft Declaration.

¹⁵ H J Steiner *et al*, *supra* note 13, at 246.

¹⁶ 9th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar, Iran, 1971) Kampala, Uganda, 8-15 November 2005, 310-312.

In the event the Court finds the Maroon do comprise an indigenous population the Draft Declaration is not a binding instrument as it has not been subject to a General Assembly resolution. Therefore DeLand is not in breach of its international law obligations as a result of the actions alleged by Acropora.

C. Insufficient evidence to attribute liability to DeLand for coral bleaching in the Disston Region and associated damage

DeLand is not responsible under international law for any damage be it environmental, cultural or other as a result of coral bleaching. There is insufficient evidence to determine the cause of the coral bleaching and consequently the causation of said harm can not be conclusively attributable to an individual State.

The obligation not to cause environmental harm develops through various legal instruments. The case law of *Trail Smelter* (1941), *Corfu Channel* (1949) and *Lac Lanoux Arbitration* (1957) establish the general principle that States are not to harm others and are not to allow their territory to be used in such a way as to do harm.¹⁷

The standard of care in the duty to prevent environmental harm at international law is one of due diligence.¹⁸ ‘Due diligence’ is often expressed as conduct that is expected of ‘good government’.¹⁹ However, the standard is flexible as it demands consideration of the nature of the activity and the different conditions and capabilities of each State.²⁰ This is

¹⁷ See Blay, *supra* note 9, 354

¹⁸ *Id.* 359

¹⁹ *Id.*

²⁰ *Id.*

evidenced by Article 194 of UNCLOS which obliges States to take measures to prevent, reduce, and control pollution, using the ‘best practicable means available to them and in accordance with their capabilities’. Similarly Article 6 of the CBD requires States to develop strategies and integrated programs and policies for implementation of the convention ‘in accordance with [their] particular conditions’. Given the deadline for reaching the GGE reduction obligations governed by Kyoto and the lack of scientific certainty surrounding this area of environmental protection whilst noting DeLand’s consistent attendance at UN environmental conferences on environmental sustainability DeLand has acted within the doctrine of ‘due diligence’.

Foreseeability of harm is relevant to a State’s obligation to prevent environmental damage. Where a State knows or ought to know that a practice being performed on its territory is causing or may cause environmental damage, it is obliged to take measures within its power to prevent that harm. This requirement of foreseeability of harm is set out in the *Corfu Channel*²¹ case, as well as the ILC Draft Articles on International Liability for the Injurious Consequences of Acts Not Prohibited by International Law 1998, and can be inferred from the requirement found in many treaties for an environmental impact assessment of activities likely to have adverse environmental effects.²² DeLand submits that its current State practice regarding GGEs, noting especially DeLand’s commitment to participating in international conferences in ‘good faith’ and the inclusion of DeLand within Annex B of Kyoto demonstrates measures taken by DeLand to mitigate the foreseeability of harm.

²¹ *Corfu Channel*, Merits, Judgment of 9 April 1949, I.C.J. Reports 1949, at 22

²² See Blay, *supra* note 9, at 359

According to the *Trail Smelter Arbitration* ‘clear and convincing evidence’²³ of actual or threatened injury is necessary before the obligation to prevent harm arises. The Bergen Ministerial Declaration on Sustainable Development 1990, espoused the principle that ‘...environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation’²⁴. As there is no ‘clear and convincing evidence’ that attributes the coral bleaching in the Disston Region to the GGEs of DeLand it cannot be said that DeLand is responsible for the harm caused to the Hebrides Coral Reef and by extension any subsequent harm that befalls the Maroons.

The UN conference on the Human Environment, held in Stockholm in 1972, marked the beginning of the phase of development of international environmental law by soft law mechanisms, such as UN resolutions and declarations and resolutions of international conferences.²⁵ *The Stockholm Declaration on the Human Environment* was adopted by representatives from 113 States by acclamation together with an ‘Action Plan for the Human Environment’ comprising 109 recommendations and a resolution that ultimately led to the creation of the United Nations Environment Program (UNEP).

²³ *Trail Smelter* (U.S. v. Can.), 3 R.I.A.A.1905, 1963-65 (1941)

²⁴ Bergen Ministerial Declaration on Sustainable Development in the ECE Region, in Action for a Common Future, Report on the Regional Conference at Ministerial Level on the Follow-up to the Report of the World Commission on Environment and Development in the ECE Region (Norway Ministry of Environment, 1990) Reprinted in 20 *Environmental Policy & Law* 100 (1990) para 7

²⁵ See Blay, *supra* note 9, 355

The *Stockholm Declaration* set out a number of principles relating to the protection of the natural environment, use of renewable resources, protection of flora and fauna, restriction of the discharge of toxic substances, prevention of marine pollution, and the relationship of environmental protection to economic development.²⁶ Perhaps the most significant development to the obligation not to cause environmental harm provided by the Declaration is that it recognised not just oil and minerals, but also air, water, plants, animals, and earth as natural resources to be protected and preserved in the interest of future generations.²⁷ These emerging principles have found expression in numerous UN and other international declarations and resolutions, culminating in the *World Charter for Nature 1982*.

The *Rio Declaration*, adopted by consensus by more than 175 States, is a statement of principles or goals, some of which have already been incorporated into treaties and into domestic state practice, and may therefore constitute customary norms. This international conference adopted the non-binding, but influential, Agenda 21.²⁸ Agenda 21 is a comprehensive 800-page action plan, covering all aspects of the environment and development, which is intended as a guide for States in designing and pursuing their environmental and developmental policies and international relations into the 21st Century. The conference also produced the CBD and the UNFCCC.²⁹

²⁶ See Blay, *supra* note 9, 355

²⁷ *Id.*

²⁸ *Id.* at 357

²⁹ *Id.*

The international community reconvened in 2002 at the World Summit on Sustainable Development to review the progress of Agenda 21. The conference adopted the Johannesburg Declaration on Sustainable Development that reaffirms the international community's commitment to sustainable development.³⁰

The World Conservation Strategy, developed by the International Union for the Conservation of Nature (IUCN) and sponsored by UNEP, was incorporated into the World Charter for Nature 1982 that was adopted by the UN General Assembly by solemn proclamation. Notably the USA dissented to this incorporation. The analogous positions of DeLand and the USA with respect to their international environmental law policies and practices gives rise to the conjecture that DeLand holds similar reservations to such an incorporation into the World Charter for Nature.

Many of the principles advocated in the Charter have been incorporated into the Biodiversity Convention. It is these principles, as enunciated by the CBD that bind DeLand at international law.

³⁰ *Id.*

II) The embargo placed by Acropora on goods from DeLand amounts to a breach of Article 5 of the TADR

The Vienna Convention on the Law of Treaties (“VCLT”)³¹ provides the framework for treaty interpretation at international law. Article 26 of the VCLT espouses the doctrine of *Pacta sunt servanda*. According to the International Law Commission’s Commentary treaties are binding on the parties and must be performed in good faith which represents “the fundamental principle of the Law of Treaties”.³²

The VCLT directs treaty interpretation in accordance with the ordinary meaning of the terms in context, in light of the objects and purpose of the treaty.³³ A corollary of this principle of interpretation is that, ‘interpretation must give meaning and effect to *all* the terms of a treaty’.³⁴ Article 31 (3) requires that in addition to context, this Court shall apply, “any rules of international law applicable in its relations between the parties.”³⁵ In the present case, the TADR stipulates at Article 25 (2) that the World Trade Organisation (“WTO”) and General Agreements on Tariffs and Trade (“GATT”) decisions ‘shall be considered subsidiary sources of law with respect to the interpretation of this Agreement.’³⁶

³¹ Vienna Convention on the Law of Treaties, Art 26, opened for signature May 23, 1969, 1155 U.N.T.S 331 “VCLT”

³² International Law Commission’s Commentary (1910) Reports of International Arbitral Awards, Vol.XI, p.188

³³ Article 31(1) VCLT

³⁴ Appellate Body Report, *United States-Standards for Reformulated and conventional Gasoline*, WT/DS2/AB/R, Adopted 20 May 1996, DSR 1996: I, 3 p23 (“*US Gasoline*”)

³⁵ VCLT, Art 31

³⁶ Article 25(2) TADR

DeLand submits that Acropora has violated Article 5 of the TADR through banning importation of goods manufactured or produced in DeLand and inciting a worldwide ban. In order for Acropora to justify an embargo against DeLand, it must satisfy one of the exceptions provided by Article 15.

A) Exceptions under Section 15 TADR

Article 15 of the TADR must be read in conjunction with Article 5 of the TADR.³⁷ The use of the term “any *product*” in Article 5 indicates that any restrictive trade measure, purportedly justified by virtue of falling within an exception contained in Article 15 of the TADR should only apply in relation to a specific product and not a general embargo on all products from a state party.

The Article 15 exceptions within the TADR are identical in wording to Article XX (GATT).³⁸ The exceptions contained within Article 15 of the TADR should be construed narrowly. The Appellate Body in *EC Asbestos* held that there must be a ‘sufficient basis’ of evidence which outlines the risk [in that case, the risk posed to human health through the use of asbestos products] to justify a departure from the treaty obligations.³⁹

³⁷ Article 31(1) VCLT

³⁸ General Agreement on Tariffs and Trade, opened for signature on May, 1947 (“GATT”).

³⁹ Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Product*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII,3243. para.115, (“*EC-Asbestos*”)

According to the *Appellate Body Report on US- Wool Shirts and Blouses*⁴⁰, the nature of exceptions in Article XX of the GATT (interchangeable with Article 15 TADR) “...are affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it.”⁴¹ According to the decision in *EC Hormones*⁴², Acropora must establish a “prima facie case showing that the *measure* is justified.”⁴³ The measure *itself* must justify the invocation of the exception, rather than a broader policy consideration.

i) The embargo is not Necessary under Article 15 (b) of the TADR as there were Less Restrictive to Trade Alternatives

DeLand submits that Article 15 (b) of the TADR is not available to Acropora as an exception to Article 5 as it does not satisfy the high threshold test of being necessary.

In *EC Asbestos* two limbs were outlined. Firstly there must be “sufficient scientific evidence to conclude that there exists a risk for...life or health *and* [emphasis added] sufficient evidence that the measure in question is necessary in relation to the objectives pursued.”⁴⁴

⁴⁰ Appellate Body Report, *United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323. (“*US- Wool Shirts and Blouses*”)

⁴¹ *US- Wool Shirts and Blouses* p16

⁴² Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:1,135 (“*EC Hormones*”)

⁴³ *EC Hormones* para.104

⁴⁴ Panel Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and ADD.1, Adopted 5 April 2001, as modified by EC Asbestos Appellate Body, para 8.182.

In the present case, Acropora must satisfy this Court that (1) there is sufficient scientific evidence to prove that as a result of the Green House Gas Emissions (GGE) emitted by DeLand, the sea temperatures within the Disston sea have increased, and this has led to the death of the coral reefs as a result of coral bleaching. In addition, Acropora must establish that (2) the embargo imposed upon products from DeLand is necessary in order to achieve the objective of preserving the remaining coral and reversing the decline in fish stocks, thus preserving the health of the Maroons.

In *US Gasoline*,⁴⁵ it was held that the invoking state must satisfy three elements. The ‘policy’ must be ‘within the range of policies’ designed to protect human, animal, plant life or health. The ‘inconsistent measures for which the exception was being invoked were *necessary* to fulfil the policy objective’. The final requirement relates to compliance with the chapeau, which is not relevant to the present case.⁴⁶

In *Thailand Cigarettes*,⁴⁷ import restrictions could be considered necessary ‘*only if*’ there were no alternative measures consistent with the free trade treaty in question. The measure taken must be that which is **least inconsistent** with the free trade agreement and that could reasonably be expected to employ to achieve its health policy objectives.

⁴⁵ *US Gasoline* at 6.20

⁴⁶ *Ibid.*

⁴⁷ GATT Panel Report, *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, Adopted 7 November 1990, BISD 37S/200 at para 170

Applying this ‘least restrictive trade’ test to the present case, it is submitted that Acropora’s measure is not necessary to protect the health of the Maroons, the coral reefs or the fish. DeLand submits plausible alternatives existed for Acropora, which could have satisfied the ‘least restrictive trade test’.

In *EC Asbestos*, the Court acknowledged a ‘well known, and life threatening, health risk posed by asbestos fibres’ but added an additional requirement, that there was no alternative measure.⁴⁸

In contrast to the well known and potentially fatal consequences of asbestos that lead the panel to permit an embargo on asbestos *products*,⁴⁹ a restriction or “controlled use” on GGE products by those States in the Disston Sea region at the very least could better achieve both the purported end and be less restrictive on trade. In relation to taking a measure that related specifically to GGE, Acropora could not rely on an inability to identify such products on the basis that it would be an excessive administrative difficulty.⁵⁰

ii. The embargo is not Imposed for the Protection of the Hebrides Reef

In order for Acropora to rely on the exception stipulated in Article 15(f) of the TADR, they must satisfy a two-limb test. Firstly, the subject in question must amount

⁴⁸ *EC Asbestos* para 172 (emphasis added)

⁴⁹ *Ibid.* para 175

to a national treasure, and secondly the measure must be imposed for the protection of this national treasure.⁵¹

DeLand submits that regardless of the status of the coral reef as a national treasure⁵², the blanket embargo does not satisfy a purpose imposed for conservation objectives.

In relation to the Courts interpretation of Article 15 (f), it is the submission of DeLand that the Court should apply a narrow reading of the term, ‘imposed for the protection of’, in light of the trade liberalisation purpose and the reasoning of the WTO Panel, whereby, “the practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation”.⁵³

Acropora relies on the assertion that GGE contributes to rising sea temperatures, which cause death to the coral. Acropora has taken this unilateral, discriminatory stance against DeLand only. As a small island-state trading partner, the practical effect of the embargo has been described as merely ‘symbolic’ by Acropora’s Minister of Trade.⁵⁴

Since the reef is World Heritage protected, an appropriate alternative to aggressive trade restrictions is envisioned by the Convention, whereby Acropora could request

⁵⁰ *US Gasoline* at para 6.26 and 6.28

⁵¹ TADR Article 15(f)

⁵² see definition of Great Barrier Reef, Australia as a ‘national treasure’; accessed at <http://www.aims.gov.au/pages/research/research-groups/rg-conservation-biodiversity-01-teams-d.html>

⁵³ *Tuna-Dolphin I*, Report of the Panel, GATT Doc.DS21/R, 3rd September 1991 (30 ILM 1594 (1991)) at para 5.22

⁵⁴ Record, para 27.

international assistance to secure ‘the protection [or] conservation’ of the reef.⁵⁵ Further undermining the claim that the purpose of the embargo is to protect the national treasure is the tenuous link between means and ends. This is due in part since the Acroporan government has taken no action to monitor the harvesting by the Maroons of the fish in the reef. Scientists proclaim that over-harvesting of fish is a significant contributor to the worldwide decline of coral reefs.⁵⁶ Consequently, the unilateral action, rather than being imposed for ‘the protection of’ coral, amounts to naked discrimination.⁵⁷ The importance of a multilateral approach as a *requirement* for any trade restriction for environmental purposes has been emphasized both in WTO cases and reiterated by the eminent publicist Sands.⁵⁸

B) The Embargo is neither Primarily Aimed at Conservation Nor Accompanied by Even-Handed Measures

Addressing the exception under Article 15 (g) of the TADR, it is submitted that Acropora cannot rely on this provision as it is neither primarily aimed at conservation nor accompanied with even-handed domestic restrictions.

⁵⁵ WHC Art. 13, 19.

⁵⁶ Bellwood, Hughes, Folke and Nystrom, ‘Confronting the coral reef crisis’ (2004) 429 *Nature*, 827 at 827, Toby A. Gardner, Isabelle M. Cote, Jennifer A. Gill, Alastair Grant, Andrew R Watkinson, “Long-Term Region-Wide Declines in Caribbean Corals”, 15 August 2003, Vol 301, *Science* p 960 (“Gardner”)

⁵⁷ *US Gasoline*, Appellate Body Report, p21.

⁵⁸ Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6th November 1998, DSR 1998:VII, 2755 at para 168 (*US Shrimp*), Philippe Sands, *Principles of International Environmental Law*, Second Edition, 2003 p945 (Cambridge University Press, UK)

i. The embargo is not Primarily aimed at Conservation

In relation to the first limb, the measure must be ‘relating to’ the conservation of natural resources. In *US Gasoline* the Appellate body applied the *Herring and Salmon Report* which held, that in order for a measure to satisfy Article XX(g) of the identically worded GATT, it must be ‘primarily aimed at’ the conservation of exhaustible natural resources.⁵⁹ ‘Relating to’ must be interpreted narrowly to avoid an interpretation that would ‘subvert the purpose and object’ of Article 1 and 5 of the TADR.⁶⁰ In the present case, the TADR is a treaty for trade liberalization to establish ‘a free trade area’ within the region.⁶¹

In *US Shrimp* the Appellate Body held that the protection measures taken were ‘primarily aimed at’ the conservation of sea turtles as it did not represent a ‘simple, blanket prohibition on shrimp imposed without regard to the consequences...of the mode of harvesting employed’ and that, taken as a whole, the s 609 guidelines were not ‘disproportionately wide in its scope and reach in relation to the policy objective.’⁶² In terms of proportionality, the issue is “whether all the trade restricting features of the scheme have some reasonable connection to turtle conservation.”⁶³

⁵⁹ Report of the Panel in *Canada-Measures Affecting the Exports of Unprocessed Herring and Salmon*, Adopted 22nd March 1998, BISD/35S/9, 114, Para 4.6 cited with approval in *US Gasoline*, Appellate Body Report, p18.

⁶⁰ *US Gasoline*, Appellate Body Report, p18.

⁶¹ TADR, Art. 1

⁶² *US Shrimp*, Appellate Body Report, para. 1.141-142

It was held in *US Gasoline* that the baseline establishment rules in question had a ‘substantial relationship’ with the conservation of clean air.⁶⁴ The *measure* itself must be ‘primarily aimed at’ conservation.⁶⁵ In the present case the Acroporan government has imposed a blanket prohibition on *all* products, which is clearly disproportionately wide in scope, thus the embargo is not ‘primarily aimed at’ conservation, but rather is an arbitrary and unilateral prohibition on trade with DeLand, contrary to Article 1 and 5 of the TADR.

In *US Shrimp* the exemptions from the import ban were held by the Appellate Body to relate ‘clearly and directly to the policy goal of conserving sea turtles.’⁶⁶ In that case s609 of the guidelines excluded from the import ban, shrimp harvested under conditions that do not adversely affect sea turtles. In the present case, there is no exception for imports from De Land that do not result in GGE, thus not satisfying the ‘close and genuine relationship’ requirement.⁶⁷

ii. The embargo does not Satisfy the Even-Handedness Requirement

It is submitted that even if this Court were to find that the embargo does relate to the conservation of exhaustible natural resources, it nevertheless fails the conjunctive requirement; to be ‘made effective in conjunction with restrictions on domestic production or consumption.’⁶⁸

⁶³ Robert Howse, “The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate”, 27 *Colum.J.Envntl. L.* 491, 2002 p503

⁶⁴ *US Gasoline*, Appellate Body Report, p19.

⁶⁵ *US Gasoline*, Appellate Body Report, p16.

⁶⁶ *US Shrimp*, Appellate Body Report, para 138.

⁶⁷ *US Shrimp*, Appellate Body Report, para 138.

⁶⁸ TADR, Art. 15 (g)

In *US Gasoline* and *US Shrimp* this limb of the identically framed Article XX(g) of the GATT was held to represent the “requirement of *even-handedness* in the impositions of restrictions”.⁶⁹ In *US Shrimp* the fact that ‘essentially the same’ restrictions applied domestically and abroad satisfied the even-handedness requirement.⁷⁰ While Acropora as a developing small island State is not required under international law generally to limit its own greenhouse emissions, Article 15 (g) of the TADR does require equivalent measures domestically and internationally.

The Panel in *US Shrimp* held that regardless of whether an action is taken in good faith, if such action is unilateral and not met with even handedness, it will not satisfy the second limb.⁷¹ Protection of animal and plant life which affects an entire region, such as the Disston sea therefore requires ‘concerted and cooperative efforts on the part of the [six] countries’ of the Disston Sea.⁷² DeLand correctly sought to consider the climate change issues within a multilateral framework.⁷³

It is worth noting the remarks of the Appellate Body in *US Gasoline* where it is stated that if there were,

no restrictions on domestically-produced like products...imposed at all, and all limitations are placed upon imported products *alone*, the measure cannot be accepted as primarily or even substantially designed for

⁶⁹ *US Gasoline*, Appellate Body Report, para 143.

⁷⁰ *US Shrimp*, Appellate Body Report, para 163.

⁷¹ *US Shrimp*, Panel Report, para 166.

⁷² *US Shrimp*, Panel Report, para 168.

⁷³ Record, para 24.

implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods.⁷⁴

C) Empirical Evidence of GGE Emissions

DeLand presents the following evidence in relation to attributability for GGE. There is an insufficient link between the policy justification behind the embargo and promoting conservation of the environment. Furthermore, there is insufficient evidence to attribute responsibility, to one particular state, for coral bleaching due to increased sea temperatures, resulting from GGE's.

There is dispute among the scientific community, as to whether temperatures are consistently increasing.⁷⁵ There are doubts as to the accuracy of predictions based on computer climate modeling.⁷⁶ Whilst the greenhouse effect is a widely accepted phenomenon, what happens once a rise in CO₂ increases the radiative input into the atmosphere is the subject of dispute.⁷⁷ The trend predicted by the International Panel on Climate Change (IPCC) has been compared to the actual observed data for the past nineteen years-those being the years in which the highest atmospheric concentrations of CO₂ and other GGE's have occurred. The result of this comparison shows a substantially higher level of predicted global warming by the IPCC.⁷⁸

⁷⁴ *US Gasoline*, Appellate Body Report, p21.

⁷⁵ Arthur Robinson, Sallie Baliunas, Willie Soon and Zachary Robinson, "Environmental Affects of Increased Atmospheric Carbon Dioxide", *Energy & Environment*, Volume 10, Number 5, 1 September 1999, pp. 439-468(30),

⁷⁶ *Ibid.*

⁷⁷ *ibid* p 441

⁷⁸ *Ibid* p 442, Figure 11

D) Other Causes of Coral Bleaching

In addition to climate change, Scientists have attributed the decline of coral reefs to various other causes including over harvesting⁷⁹, pollution⁸⁰ and disease.⁸¹

In relations to scientific research of the decline of coral reefs in the Caribbean region, scientists conclude;

There is no convincing evidence yet that global stressors (e.g. temperature induced bleaching and reduced rates of carbonation via enhanced levels of atmospheric CO₂) are responsible for the overall pattern of these recent coral declines. More likely, local factors, originating both naturally, (e.g. disease, storms, temperatures stress, predation) and anthropogenically [e.g., over fishing, sedimentation, eutrophication, habitat destruction] are occurring at Caribbean-wide scales.⁸²

DeLand draws attention to the other causes of coral decline to illustrate that there is significant doubt as to whether the coral bleaching can be entirely attributed to GGE's notwithstanding specifically attributed to DeLand.

⁷⁹ Jackson, J. B. C. *et al.* Historical overfishing and the recent collapse of coastal ecosystems. *Science* 293, 629–638 (2001) and Pandolfi, J. M. *et al.* Global trajectories of the long-term decline of coral reef ecosystems. *Science* 301, 955–958 (2003).

⁸⁰ Williams, D., McB. *et al.* The Current Level of Scientific Understanding on Impacts of Terrestrial Run-Off on the Great Barrier Reef World Heritage Area. {
http://www.reef.crc.org.au/aboutreef/coastal/waterquality_consensus.html} (2002). McCulloch, M. *et al.* Coral record of increased sediment flux to the inner Great Barrier Reef since European settlement. *Nature* 421, 727–730 (2003)

⁸¹ Harvell, C. D. *et al.* Climate warming and disease risks for terrestrial and marine biota. *Science* **296**, 2158–2162 (2002)

⁸² Gardner p960

E) Adverse Trade and Environmental Affects of the Embargo

DeLand submits that Acropora has not satisfied the requirements under Article 15 of the TADR to justify the embargo. Furthermore, there are real and necessary trade and environmental implications to which this court should have regard.

Unilateral trade measures may lead to strategic behaviour and reduce the likelihood of cooperative solutions enabling international environmental law to achieve its objectives. Multilateral negotiation and cooperation is a vital linchpin of the international legal system. Trade measures seeking to change DeLand's environmental policies could result in DeLand just accepting the reduction in exports to Acropora given that it is a very small proportion of DeLand's export base. Thus Acropora would only be hurting her own economic development and welfare which is typically associated with trade restrictions.⁸³

Acropora's purported justification for the embargo under Article 15 (b), (g) or (f) of the TADR will result in negligible improvement of the conservation of the reef. Furthermore it will undermine Acropora's net economic welfare and seriously undermine the capacity of states within the Disston sea region, and indeed throughout the world to take a multilateral, cooperative approach both to environmental protection, and inter-state relationships generally. DeLand would urge the Court to

⁸³ Robert Howse & Michael J Trebilcock, "The Fair Trade-Free Trade Debate: Trade, Labour, and the Environment," in Economic Analysis of International Law, (Allen O Sykes and Jagdeep S Blandiri Eds., 1996) p 237

consider the aggressive broader implications of such an embargo were it allowed to stand, undermining the liberalised trading system.

CONCLUSION

In consideration of the foregoing reasons the Republic of DeLand respectfully requests that the Court:

1. Declare that DeLand is not responsible under international law for damages, including environmental and cultural associated with coral bleaching in Acropora, and,
2. Declare that Acropora has violated international law by banning the importation of goods produced or manufactured in DeLand.

Respectfully submitted

X

Agents for the Republic of DeLand