

General List No. 111

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

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**Case Concerning  
Trade Violations, Coral Reefs, and Climate Change**

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KINGDOM OF ACROPORA

Applicant

v.

REPUBLIC OF DELAND

Respondent

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Fall Term 2006

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Memorial for Respondent

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## **QUESTIONS PRESENTED**

1. WHETHER DELAND IS RESPONSIBLE UNDER INTERNATIONAL LAW FOR DAMAGES, INCLUDING ENVIRONMENTAL AND CULTURAL, ASSOCIATED WITH CORAL BLEACHING IN ACROPORA.
2. WHETHER ACROPORA VIOLATED THE TADR BY BANNING THE IMPORTATION OF GOODS PRODUCED OR MANUFACTURED IN DELAND

## STATEMENT OF JURISTITION

The International Court of Justice (“ICJ” or “Court”) is competent to resolve the dispute between Acropora (“Acropora”) and DeLand (“DeLand”) because each state is a party to the Statute of the International Court of Justice.<sup>1</sup> Pursuant to Article 40 of the Statute of the International Court of Justice, DeLand and Acropora submit the following dispute to the ICJ.<sup>2</sup> On May 11, 2006, the parties notified the Court of their intention to submit their dispute to the Court through the issuance of a special agreement that they signed on that date.<sup>3</sup> The Registrar of the ICJ issued acknowledgment of the receipt of the joint notification on May 22, 2006.

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<sup>1</sup> See Statute of the International Court of Justice, Art. 36, T.S. No. 993 (1945); Record at 6 [“R”].

<sup>2</sup> See Statute of the International Court of Justice, Art. 40, T.S. No. 993 (1945).

<sup>3</sup> See Special Agreement Between Acropora and the Republic of DeLand for Submission to the International Court of Justice of Differences Between Them Concerning Coral Reefs and Climate Change

## STATEMENT OF FACTS

The facts in this case are not in dispute. In 2001, DeLand and Acropora became parties to the Trade Agreement for the Disston Region (“TADR”).<sup>4</sup> This agreement established a free trade area in the Disston Sea region and prohibits all trade restrictions except those “(b) necessary to protect human, animal or plant life or health; (f) imposed for the protection of national treasures of artistic, historic or archaeological value; [or] (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”<sup>5</sup> On September 28, 2005, Acropora announced its intention to embargo goods produced or manufactured in DeLand.<sup>6</sup> This action was taken in response to DeLand’s refusal to comply with Acropora’s demand that the DeLand reduce its greenhouse gas emissions.<sup>7</sup>

Acropora initiated its request for DeLand to reduce its emissions based on the continued degradation of Acroporan coral reefs. The coral reefs are located on the northern coast of Hebrides, Acropora’s largest island, and began to bleach (which can be fatal to the reefs) in 1998.<sup>8</sup> At this time, the Maroons, a quasi-indigenous group that depends on fish from the coral reefs for 90% of their protein needs, reported that their fish harvest declined 30%.<sup>9</sup> This trend continued, and in 2005 it was reported that more than two-thirds of the coral reefs in the area had died as a result of the bleaching, and the

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<sup>4</sup> R7.

<sup>5</sup> Id. at 8.

<sup>6</sup> Id. at 12.

<sup>7</sup> Id. at 10-12.

<sup>8</sup> Id. at 9.

<sup>9</sup> Id.

Maroon's fish harvest had declined by 60%.<sup>10</sup> The cause of this damage remains unknown. DeLand relies on industries to adopt voluntary emission reduction programs as part of the country's emission reduction and control policy.<sup>11</sup> However, despite these efforts, emissions in DeLand have risen by more than 20% since 1990.<sup>12</sup>

Acropora believes that DeLand, the largest and most populous state bordering the Disston Sea, located approximately 250 kilometers north of Acropora, should be held responsible for damages in Acropora.<sup>13</sup> Specifically, Acropora believes DeLand is in violation of the Kyoto Protocol.

DeLand has not ratified the Kyoto Protocol.<sup>14</sup> As such, DeLand owes no duty to Acropora concerning any obligations that may be created under either of these treaties.<sup>15</sup>

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<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Id. at 6.

<sup>14</sup> Id.

<sup>15</sup> Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, Art. 35 ("A treaty does not create either obligations or rights for a third State without its consent").

## **SUMMARY OF ARGUMENT**

The complaint before the ICJ against DeLand fails to join necessary and indispensable parties, and must therefore be dismissed. In the alternative, this Court should dismiss the current action against DeLand because it has been filed in an improper forum.

This Court should find that Acropora has violated international law by embargoing Delandian goods because the current embargo is a violation of the TADR, standards of customary international law, and jurisprudence of the General Agreement on Tariffs and Trade and the World Trade Organization.

The Acroporan actions are inconsistent with the purposes of Article 15 of the TADR. The embargo is not permissible under Articles 15(b), (g), or (f) of the TADR.

DeLand has complied with the duty to prevent actions with its borders from causing injury in the territory of Acropora. DeLand has exercised due diligence in encouraging industries to adopt voluntary emissions reduction standards/practices. Furthermore, Acropora cannot demonstrate by clear and convincing evidence that emissions from DeLand have produced damages in Acropora.

Finally, this Court should find that Acropora, in failing to take affirmative steps to prevent or alleviate damage to the coral reefs, is in breach of its international and domestic obligations.

## ARGUMENT

### **I. THE COURT SHOULD DISMISS THE CLAIM AGAINST DELAND BECAUSE THIS ACTION FAILS TO JOIN NECESSARY AND INDISPENSIBLE PARTIES**

The ramifications of the requested relief in this action have broad effects across the globe because in assessing responsibility for climate change, this Court will determine the legal interests of several states not before this court. Allowing such an action to go forward is the equivalent of this Court exercising its jurisdiction over parties not properly before it, which it cannot do.<sup>16</sup> International law recognizes the equitable theory behind many states' municipal laws for joinder of necessary parties,<sup>17</sup> namely, that a dispute involving the legitimate interests of parties not before the Court cannot, in fairness, properly proceed without the inclusion of those parties.<sup>18</sup> Since no mechanism for joinder exists in international law<sup>19</sup> and intervention does not adequately safeguard the interests of all concerned parties,<sup>20</sup> this Court has in the past used its powers to decline the exercise of jurisdiction over disputes between parties properly before the Court when the implications of the decision have significant effects on the legal interests of other parties not properly before the court.<sup>21</sup> Accordingly, DeLand respectfully requests this Court to exercise such discretion by dismissing the current complaint by Acropora against DeLand.

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<sup>16</sup> *Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K., U.S.)*, 1954 I.C.J. 19, 32 (June 15).

<sup>17</sup> *East Timor (Port. v. Austl.)* 1995 I.C.J. 90, 119 (June 30).

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> See *Monetary Gold Removed from Rome in 1943*, 1954 I.C.J. at 32.

The relief requested by Acropora will set a legal standard in international law allowing individual states to hold a neighboring state solely liable for damage to their ecosystem from a change in climate without any showing of causation beyond a mere assumption. Although Acropora can cite specific changes in their climate, their situation is not unique. Climate change is a global, not localized, issue.<sup>22</sup> The international community recognizes that global climate changes are the culmination of worldwide activity and cannot be traced to one source in particular.<sup>23</sup> For these reasons, an individual state cannot be held entirely liable for localized damages resulting due to a change in climate. To do so decides the issue for any similar dispute in the future. If a country emits greenhouse gases, then it is individually liable to any state adversely affected by the change in climate. Hence, a finding for Acropora will directly decide the legal rights of any other greenhouse gas emitting country.

This court must recognize the overreaching implications that will naturally flow from hearing this case. Furthermore, this court must acknowledge that the present case will decide the legal rights of several states not before this court. Accordingly, this court must properly exercise its power and decline to exercise jurisdiction over the present action pertaining to the issues of liability for damages to Acropora's environment.

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<sup>22</sup> United Nations Framework Convention on Climate Change, Mar. 28 – Apr. 6, 1995, 34 I.L.M. 1671 [hereinafter UNFCCC].

<sup>23</sup> Id.

## II. THIS SUIT HAS BEEN BROUGHT IN AN IMPROPER FORUM, WARRANTING DISMISSAL

DeLand and Acropora have agreed that issues concerning pollution and climate change must be addressed within a multinational framework.<sup>24</sup>

The effects from the combined transboundary emissions of greenhouse gases from all of the states on this planet produce climate change.<sup>25</sup> Furthermore, customary international law, as evidenced by the numerous treaties and conventions on climate change, demands a multilateral and multinational response to climate change.<sup>26</sup> Therefore, one individual state therefore cannot seek to hold any one other state responsible for damages caused by greenhouse gas emissions. International environmental law standards and solutions for harm caused by global warming and climate change from greenhouse gases must be established in a multilateral forum, as climate change presents a problem that is best addressed multilaterally. Accordingly, DeLand respectfully requests this court to dismiss the current action based on insufficiency of forum.

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<sup>24</sup> See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, arts. 197, 207 § 4 (“States, acting especially through competent international organizations or diplomatic procedures shall establish” regimes and frameworks for the reduction “and control of pollution of the marine environment from land-based sources”); see also UNCLOS art. 212 [hereinafter UNCLOS].

<sup>25</sup> UNFCCC, *supra* note 23, preamble (“Concerned that human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth’s surface and atmosphere and may adversely affect natural ecosystems and humankind”)

<sup>26</sup> See e.g. UNCLOS, *supra* note 25; UNFCCC, *supra* note 26; International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360; United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, S. Treaty Doc. 103-20, 31 I.L.M. 818 [hereinafter “Rio”]; United Nations Conference on the Human Environment at Stockholm, June 16, 1972, 11 I.L.M. 1416 [hereinafter “Stockholm”]; See also, Gregory Wetstone & Armin Rosencranz, *Transboundary Air Pollution: The Search for an International Response*, 8 HARV. ENV. L. REV 89, 120-123 (1984) (describing air pollution and climate change as a transboundary, international issue).

**III. ACROPORA HAS VIOLATED INTERNATIONAL LAW BY BANNING THE IMPORT OF GOODS PRODUCED OR MANUFACTURED IN DELAND**

**A. The TADR permits the use of General Agreement on Tariffs and Trade (“GATT”)/World Trade Organization (“WTO”) Panel Decisions in Interpreting the Terms of the TADR**

The parties have agreed by Article 25 of the TADR that decisions by GATT/WTO dispute resolution panels shall be considered subsidiary sources of law when interpreting the terms of the TADR.<sup>27</sup> While these decisions are not binding upon either the parties present or to GATT/WTO members, they shall be used as persuasive authority.<sup>28</sup> Therefore, DeLand requests that this Court agree that applying the legal reasoning, as applied in the GATT/WTO panel discussions, as appropriate in the current dispute.

**B. Acropora Has Violated the TADR by Banning the Importation of Goods Produced or Manufactured in DeLand**

On 28 September 2005, Acropora initiated an embargo against goods produced or manufactured in DeLand. Acropora expressed that the embargo was a symbolic gesture, essential to protect the northern reefs.<sup>29</sup> This trade restriction, however, is not within the scope of the permitted exceptions outlined in Article 15 of the TADR, exceptions that are nearly identical to those of Article XX of the GATT.<sup>30</sup> Likewise, the text of Article 5 of

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<sup>27</sup> R8 (*citing* TADR Article 25(2)).

<sup>28</sup> Compare Statute of the International Court of Justice, supra note 1, art. 38 with Id. art. 59.

<sup>29</sup> R12

<sup>30</sup> General Agreement on Tariffs and Trade, April 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1153., Art. XX [hereinafter “GATT”].

the TADR is identical to that of Article XI:1 of the General Agreement.<sup>31</sup> Article 5 of the TADR (“Article 5”) prevents any Party from imposing “prohibitions or restrictions...whether made effective through quotas, import or export licenses, or other measures...regarding the importation of any product from the territory of any other Party.”

Because Article 5 could impose an unfair burden on a State in times of crisis, the TADR contains a set of exceptions that permit a State to adopt protective measures.<sup>32</sup> Of relevance to this case are the measures (b) necessary to protect human, animal or plant life;<sup>33</sup> (f) imposed for the protection of national treasures of artistic, historic or archaeological value;<sup>34</sup> and (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.<sup>35</sup>

The GATT/WTO dispute panels narrowly interpret the general exceptions in Article XX of the General Agreement.<sup>36</sup> The panel decisions have restricted the use of measures under Article XX to cases of national emergency and crisis.<sup>37</sup> As will be discussed below, Acropora has not sufficiently demonstrated that it is acting to protect its people, its exhaustible resources, or any significant national treasure.

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<sup>31</sup> See TADR, art. 5; GATT, supra note 31, art. XI:1.

<sup>32</sup> R8 (citing TADR Art. 15).

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Id.

<sup>36</sup> See the discussion of Tuna/Dolphin, Shrimp/Turtle, infra.

<sup>37</sup> See Ryan L. Winter, *Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?*, 11 COLO. J. INT’L ENVTL. L. & POL’Y 223 (2000).

### **C. Acropora's Actions are not Justified by Article 15 of the TADR**

Acropora claims that even if it has breached its obligation imposed upon it by the TADR, Article 15 of the TADR permits such a violation as an emergency measure. However, this assertion is not an accurate representation of the law. The exceptions outlined in Article XX have been narrowly interpreted by GATT/WTO panels as a remedy of limited scope. To broaden these exceptions would require a diversion from the principles of trade liberalization.<sup>38</sup>

#### **i. The Actions by Acropora are not Consistent with the Purposes of Article 15 of the TADR**

Article 15 of the TADR, like Article XX of the General Agreement, serves to protect the autonomy of the contracting parties by exempting them from the general liberal trading scheme in order to protect the lives of a contracting State's citizens as well as property of national importance.<sup>39</sup> The *chapeau* of Article XX of the General Agreement serves to define the scope of the exceptions. An introductory statement, the *chapeau*, governs all the enumerated exceptions in Article XX. The *chapeau* notes that these restrictions are not to be used in an arbitrary manner or as a disguise for discriminatory trade restrictions.<sup>40</sup>

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<sup>38</sup> See also GATT, *supra* note 31, at Preamble.

<sup>39</sup> Most legal scholars begrudgingly agree that Article XX is not an effective means for protecting the environmental or enforcing environmental regulations. See, e.g., *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation* 7 *Minn. J. Global Trade* 75 (1998). But see T. Alana Deere, *Balancing Free Trade and the Environment: A Proposed Interpretation of GATT Article XX's Preamble*, 10 *INT'L LEGAL PERSP.* 1 (1998)

<sup>40</sup> See discussion of Tuna/Dolphin, and Shrimp/Turtle, *infra*.

However, unlike in Article XX of the General Agreement, the *chapeau* of Article 15 of the TADR does not contain the phrase “[s]ubject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>41</sup> While not superfluous, the phrase is a restatement of the general principle of liberalized trading systems,<sup>42</sup> and a reading of Article 15 of the TADR would be contrary to the purposes of a free trade system. Note the Vienna Convention provides<sup>43</sup> that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>44</sup> The TADR was enacted in 2001<sup>45</sup> to “establish a free trade area within the Disston Sea region.”<sup>46</sup> Therefore, the obligation imposed on the contracting parties is not to protect the environmental, but to uphold the principles of free trade. Frustration of this purpose by Acropora is a violation of their treaty obligations.

Three exceptions outlined in Article XX are relevant to the case at hand: Article XX(b) allows for measures necessary to protect human, animal or plant life or health; Article XX(f) allows for measures necessary to protect national treasures of artistic, historic or archaeological value; Article XX(g) allows measures to conserve exhaustible

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<sup>41</sup> GATT, *supra* note 31, art. XX.

<sup>42</sup> *C.f.* Axel Bree, *Article XX GATT - QUO VADIS? The Environmental Exception After The Shrimp/Turtle Appellate Body Report*, 17 Dick J. Int’l L. 99 (1998) (suggesting that interpretations of the chapeau of Article XX are, at present, too harsh)

<sup>43</sup> *See also* Shrimp/Turtle, ¶ 7.27.

<sup>44</sup> Vienna Convention on the Law of Treaties, *supra* note 16, art. 31(1).

<sup>45</sup> R8.

<sup>46</sup> R7 (*quoting* TADR Art. 1).

natural resources. The text of these exceptions is identical in both Article XX of the General Agreement and Article 15 of the TADR.<sup>47</sup> As discussed below, the GATT/WTO dispute resolution panels narrowly have narrowly interpreted Article XX exceptions, and unless the party can demonstrate that no less restrictive system can be imposed, the restriction will not permit a quantitative trade restriction.

To date, every panel interpreting Article XX has noted that the exceptions are to be interpreted extremely narrowly, and no panel has yet found a reason to interpret these provisions otherwise.<sup>48</sup> Therefore, this Court should follow precedents established in the GATT//WTO dispute resolution panels and find that Acropora has violated the TADR.

**ii. The Actions Taken by Acropora are Permissible Under Article 15(b) of the TADR**

In the GATT panel decision United States – Restrictions on Imports of Tuna<sup>49</sup> (Tuna/Dolphin), the United States enacted the US Marine Mammal Protection Act of 1972<sup>50</sup> to protect certain species of dolphin. The Act prohibited the taking of marine mammals, even incidentally, unless the fishing boat operator first obtained a permit. Without a permit,<sup>51</sup> direct<sup>52</sup> and intermediate<sup>53</sup> imports of tuna were not permitted.

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<sup>47</sup> Compare GATT, *supra* note 31, art. 15, with R8.

<sup>48</sup> See Winter, *supra* note 11 (comparing GATT/WTO panel decisions with multilateral environmental agreements).

<sup>49</sup> DS29/R, 1994 GATTPD LEXIS 11 (1994) (unpublished).

<sup>50</sup> P.L. 92-522, 86 Stat. 1027.

<sup>51</sup> Only one permit was issued by the United States – to the American Tunaboat Association. Tuna/Dolphin, ¶ 2.8

<sup>52</sup> Tuna/Dolphin., ¶ 2.9

<sup>53</sup> *Id.*, ¶ 2.12

As applied to the present case, DeLand asserts that the trade policy enacted by Acropora is not within the provisions of Article 15(b). As noted in Tuna/Dolphin, trade policies that otherwise would be in violation of the General Agreement must be sufficiently narrow. “[M]easures taken so as to force other countries to change their policies, and that [are] effective only if such change [occurs], [can] not be considered ‘necessary’ for the protection of animal life or health in the sense of Article XX(b).”

The panel in Tuna/Dolphin suggests a three-step analysis.<sup>54</sup> First, the trade policy has to be one that is “to protect human, animal or plant life.”<sup>55</sup> Second, the policy must be consistent with the General Agreement and therefore “‘necessary’ to protect human, plant or animal life.”<sup>56</sup> Third, the policy must be consistent with the *chapeau* of Article XX and thus cannot be arbitrary or unjustifiably discriminatory.<sup>57</sup>

Applying the analysis set forth in Tuna/Dolphin, the panel found that the United States tuna import licensing was not necessary within the meaning of Article XX. Moreover, the panel found that Article XX(b) was not intended to be a mechanism for forcing another State to alter its domestic policy.<sup>58</sup> The panel made no determination as to whether the policy of the United States violated the *chapeau* of Article XX.

Acropora has failed to enact a quantitative measure in a method that is sufficiently narrow, they have failed to meet the exceptions of Article 15(b) of the TADR. The

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<sup>54</sup> *Id.*, ¶ 5.29.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Tuna/Dolphin, ¶ 5.38 (stating “If however Article XX(b) were interpreted to permit contracting parties to impose trade embargoes so as to force other countries to change there policies within their jurisdiction...the objectives of the General Agreement would be seriously impaired.”)

measure taken by Acropora was openly hostile to DeLand with the express aim of forcing DeLand to change its domestic policy on greenhouse gas emissions.<sup>59</sup> Since the embargo has no other purpose, it is wholly inconsistent with the general aims of the TADR and therefore an illegal trade restriction.

### **iii. The Actions Taken by Acropora are Permissible Under Article 15(g) of the TADR**

The text of Article 15(g) of the TADR is identical to that of Article XX(g) of the General Agreement.<sup>60</sup> Therefore, as noted in section (x), *supra*, decisions made by GATT/WTO in regards to Article XX(g) dispute panels will be used to interpret Article 15(g) of the TADR.

In *United States – Import Prohibition of Certain Shrimp and Shrimp Products*<sup>61</sup> (Shrimp/Turtle), the WTO again was asked to interpret the meaning of Article XX(g). Central to the issue was the idea that any trade restrictions must be consistent with the *chapeau* of Article XX<sup>62</sup>, requiring that any trade restriction made under the authority of Article XX be narrowly tailored.<sup>63</sup> The WTO Dispute Settlement Body (DSB) found that an import-licensing requirement imposed by the United States upon countries that exported shrimp into the United States was not consistent with Article XI of the General Agreement and did not fall into the exception provided for in Article XX(g). The DSB found that the imposition of a restrictive trade embargo unless the standards imposed by

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<sup>59</sup> R11 (Acropora refers to a “failure to regulate”).

<sup>60</sup> Compare GATT, *supra* note 31, art. XX(g), with R8 (TADR, Art. 15(g)).

<sup>61</sup> Panel Report, WT/DS58/RW (15 June 2001)

<sup>62</sup> Shrimp/Turtle, ¶¶ 3.44—3.63.

<sup>63</sup> *See* Shrimp/Turtle, ¶¶ 5.43—5.50.

the United States “constituted arbitrary or unjustified discrimination between Members and was a disguised restriction on trade.”<sup>64</sup>

Similar to the action by the United States in Shrimp/Turtle, Acropora has imposed an arbitrary trade embargo. GHG emissions are created by nearly all states, yet DeLand is the only state that faces trade restrictions from Acropora. Other states, parties and nonparties, have failed to live up to the obligations of the Kyoto Protocol, but DeLand is the only one facing a trade embargo. There is no indication from Acropora what would satisfy them such that DeLand could resume its rightful trading practice.

Because Acropora has shown neither that it has imposed restrictions on domestic production or consumption in conjunction with the restriction nor that the import restriction is not arbitrary, the trade restriction does not meet the exception in Article 15(g).

#### **iv. The Actions Taken by Acropora are not Permissible Under Article 15(f) of the TADR**

The argument advanced by Acropora regarding the use of Articles 15(b) and (g) have been examined and rejected by the international legal community; the novel and untested question is whether or not the provisions of Article. 15(f) allows for the “adoption or enforcement by any party of measures...imposed for the protection of national treasures of artistic, historic or archaeological value.”<sup>65</sup>

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<sup>64</sup> Shrimp/Turtle, ¶ 3.269.

<sup>65</sup> R8 (restating TADR Art. 15(f)).

While there is no legal precedent for the use of Article 15(f)<sup>66</sup>, the same logic should apply as does to Articles 15(b) and (g). Using the same framework created in *Tuna/Dolphin*, this Court should be able to create a similar framework to evaluate the legality of a trade restriction designed to protect national treasures.

First, this Court needs to determine if the trade restriction serves the purpose of protecting a “national treasure”. Aside from the World Heritage List, to which DeLand is not a party<sup>67</sup>, there is no definitive source for determining whether anything is a “national treasure” and as such cannot dictate, beyond its domestic borders, what is and is not a national treasure.

Second, assuming that the coral reef is a national treasure, this Court needs to determine if the trade restriction was made in conjunction with restrictions on domestic production or consumption. As noted above, the burden of proof lies with the party exerting the exception. Acropora asserts that their coral reefs are dying because the average sea temperature in the Disston Sea. As will be further discussed below, there is not direct relationship between the greenhouse gas emissions and the rise in the temperature of the Disston Sea.<sup>68</sup>

The intent of Acropora is to force DeLand into changing its domestic policies in relation to greenhouse gas emissions by banning the importation of manufactured goods in DeLand. This action is contrary to the entire purpose of the TADR. Using the same logic as the panel in *Tuna/Dolphin*, allowing countries to impose trade embargos contrary

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<sup>66</sup> See Patty Gerstenblith, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: The Public Interest in the Restitution of Cultural Objects*, 16 Conn. J. Int'l L. 197 (2001), n. 135.

<sup>67</sup> R7.

<sup>68</sup> See the discussion of the factors relating to the cause action, Section IV B, supra.

to multinational trade agreements would “seriously impair” the objectives of the Trade Agreement.<sup>69</sup>

The lack of causality makes it far more difficult, if not impossible, for Acropora to argue that their policy is imposed sufficiently “related to” what they seek to protect.<sup>70</sup> Therefore, this Court must find that the trade restriction imposed by Acropora is not sufficiently narrow to justify existence under Article 15(f) and find Acropora in violation of international law.

Third, this Court needs to determine if the trade restriction is arbitrary or otherwise unjustifiably discriminatory. The trade measure will clearly not satisfy this requirement, since Acropora has not stated what, if any, action by DeLand will end the embargo. The declaration by the Minister of Trade for Acropora on 28 September shows that the purpose is to restrict trade; instead of imposing trade restrictions on all of the nations, Acropora is asking other parties to the TADR to violate their international agreements. Outside of an international or multilateral agreement, this action cannot be viewed as consistent with the aims and purposes of the TADR.

#### **D. The Embargo Initiated by Acropora Forbidden Under International Law**

As justification for their action, Acropora suggests that a number of international treaties impose an affirmative duty on DeLand and that Acropora can enforce these duties

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<sup>69</sup> Tuna/Dolphin, ¶ 5.39.

<sup>70</sup> See Section IV.B, supra.

by imposing quantitative restrictions on DeLand. Assuming that the duties exist, Acropora cannot enforce the duties outside of the mechanisms outlined in the treaty.<sup>71</sup>

As shown below, none of the sources of law cited by Acropora create an affirmative duty for DeLand. While a treaty may represent the codification of customary international law, the Vienna Convention states that a treaty must be viewed for the purpose for which it was drafted.<sup>72</sup>

The action taken by Acropora can only serve to alter the internal policy of DeLand in violation of customary international law. A state has a right to its own sovereignty, and an attempt to coerce another state into altering its internal policy, especially without an obligation imposed by an international duty or obligation, is inconsistent with traditional notions of sovereignty.<sup>73</sup>

Acropora's attempt at economic coercion is not valid under international law. While UNCLOS does impose an obligation for states "to protect and serve the marine environment,"<sup>74</sup> the Convention does not extend to economic sanctions or other coercive measures that impede on the sovereign rights of nations.<sup>75</sup> Even if such actions were permitted under UNCLOS, DeLand has not engaged in any activity that would violate the Convention. Article 194(3) of the UNCLOS enumerates the types of activity that is considered harmful or destructive to the marine environment, and all of the pollution sources contemplated by the convention relate directly to marine activities, such as

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<sup>71</sup> Vienna Convention, *supra* note 16, art. 30.

<sup>72</sup> Vienna Convention, *supra* note 16..

<sup>73</sup> See, e.g., Justin Stalls, *Economic Sanctions*, 11 U. Miami Int'l & Comp. L. Rev. 115 (2003).

<sup>74</sup> UNCLOS, *supra* note 25, Art. 192.

<sup>75</sup> See id. at art. 194(4).

dumping of pollutants from the land directly into the sea, from vessels, and from marine-operating equipment. Accordingly, Acropora can find no justification in the UNCLOS.

#### **IV. DELAND HAS COMPLIED WITH THE DUTY TO PREVENTION ACTIONS WITHIN DELAND FROM CAUSING INJURY IN THE TERRITORY OF ACROPORA**

It is uncontested that the coral reefs surrounding Acropora have suffered bleaching and died, leading to consequences which significantly affect an Acroporan minority, the Maroons.<sup>76</sup> The existence of damages, however grave, alone will not lead to the imposition of liability under customary international law.<sup>77</sup>

In finding that Canada was responsible for injuries to private businesses and individuals in the United States caused by the fumigations by a private corporate actor within Canada, the Trail Smelter Arbitration Tribunal held that “under principles of international law... no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”<sup>78</sup> DeLand accepts that this Trail Smelter principle is binding rule of customary international law and that the Trail Smelter principle subsequently recognized (albeit as non-binding "soft law) in Principle 21 of the

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<sup>76</sup> See R6; R9.

<sup>77</sup> See Trail Smelter Arbitration (United States v. Canada), 3 UN Rep. Int'l Arb. Awards 1905, 1959 (1938/1941); see also Justitia et Pace Institut de Droit International, *Responsibility and Liability under International Law for Environmental Damages*, Art. 4 (Sept. 4, 1997) (“strict responsibility ... is most appropriate in case of ultra-hazardous activities, and activities entailing risk or having other similar characteristics” this demonstrates the international community’s willingness to assign strict responsibility for damages only when the damages result from a states use of ultra hazardous activities or similar activities, resulting in harm in another state. Such a situation has not been presented by Acropora, as the complaint alleges not ultra hazardous activities, but rather activities involving the production of twenty five percent of the world’s anthropocentric emissions).

<sup>78</sup> Trail at 1963-5.

Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992, as binding upon the matter at hand.<sup>79</sup> As stated by the International Court of Justice in *Legality of the Threat of Use of Nuclear Weapons*,<sup>80</sup> “the Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”

The elements thus presented, and subsequently codified in customary international law, are discussed in the following. The fact that DeLand is a producer of greenhouse gases has already been established.<sup>81</sup> At this time, DeLand declines to comment as to whether the damages sustained by the Acroporans are “of consequence” as required in the holding of *Trail*. DeLand however, reserves the right to make this argument in the future. For the foregoing reasons, this Court should find that under customary international law established in the *Trail Smelter*’s arbitration decision, DeLand is not responsible for any of the injuries alleged by Acropora.

**A. DeLand has Exercised Due Diligence, as Required by Trail Smelters, By Encouraging Industries to Voluntarily Adopt Emission Reduction Standards and/or Practices**

Most interpretations of *Trail Smelters* find that a state can be responsible for injuries to private businesses and individuals in another state caused by transboundary

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<sup>79</sup> Stockholm, *supra* note 27; Rio, *supra* note 27.

<sup>80</sup> *Legality of the Threat of Use of Nuclear Weapons* (United Nations), 1996 I.C.J. 226, 241-242 (July 8).

<sup>81</sup> R9.

pollution emitted by a private corporation within the state's territory, but only if the state has failed to exercise due diligence (reasonableness) in regulating the emissions of pollutants by the private corporation.<sup>82</sup>

The United Nations Convention on the Law of the Sea (“UNCLOS”)<sup>83</sup> and the United Nations Framework Convention on Climate Change (“UNFCCC”)<sup>84</sup> provide guidelines that are directly applicable to the current dispute because both Acropora and DeLand are states parties to each.<sup>85</sup> Under the UNCLOS and the UNFCCC, every state has the sovereign right to design and or implement environmental protection measures within its borders.<sup>86</sup> DeLand has acted in accordance with these provisions by diligently encouraging industries within DeLand’s territory to voluntarily comply with emissions limits.<sup>87</sup> Requests for voluntary emission reduction are sufficient to comply with Trail Smelters requirement for duly diligent regulation because it passes the due diligence guidelines as expressed by the Institute of International Law.<sup>88</sup> In the alternative, the use of voluntary emissions reduction programs constitutes due diligence under customary international law through the practices of states.

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<sup>82</sup> See e.g. Gregory Wetstone & Armin Rosencranz, *Transboundary Air Pollution: The Search for an International Response*, 8 HARV. ENV. L. REV. 89, 120-123 (1984).

<sup>83</sup> UNCLOS, supra note 25.

<sup>84</sup> UNFCCC, supra note 23.

<sup>85</sup> R6-7.

<sup>86</sup> See UNCLOS, supra note 25, art. 194 § 1; UNFCCC, supra note 23, Preamble (“Recalling also that States have ... the sovereign right to exploit their own resources pursuant to their own environmental ... policies...”).

<sup>87</sup> See R9.

<sup>88</sup> Justitia et Pace Institut de Droit International, *Responsibility and Liability under International Law for Environmental Damages*, Art. 3 (Sept. 4, 1997).

“When due diligence is utilized as a test for engaging responsibility it is appropriate that it be measured in accordance with objective standards relating to the conduct to be expected from a good government and detached from subjectivity. Generally accepted international rules and standards further provide an objective measurement for due diligence.”<sup>89</sup> Whether DeLand has acted with due diligence requires examination of the objective due diligence test, as well as evaluating DeLand’s conduct in light of the practices of other states.

Among the industrialized countries, there are twenty-five voluntary emission reduction programs, practiced by Austria, Belgium, Canada, Denmark, Finland, France, Ireland, Japan, South Korea, Netherlands, New Zealand, Switzerland, Sweden, Taiwan, United Kingdom, and United States.<sup>90</sup> Indeed, the encouragement of compliance with voluntary limits is “consistent with the Convention” because such encouragement is a reasonable and diligent measure taken to control pollution in the marine environment.<sup>91</sup> Therefore, DeLand respectfully requests this Court to find that it is not in breach of its obligations under the United Nations Convention of the Law of the Sea Convention.

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<sup>89</sup> Id.

<sup>90</sup> See Lynn Price *Voluntary Agreements for Energy Efficiency or GHG Emissions Reduction in Industry: An assessment of Programs Around the World* Ernesto Orlando Lawrence Berkeley National Laboratory (April 2005) (retrieved from <http://ies.lbl.gov/iespubs/58138.pdf>. last accessed Oct. 14, 2006).

<sup>91</sup> See UNCLOS, supra note 25, art. 194 § 1, art. 207 §§ 1, 2, art. 212.

## **B. Acropora Cannot Demonstrate by Clear and Convincing Evidence that Actions within DeLand Have Produced Damages in Acropora**

In order to have a valid claim under international law against DeLand, Acropora must “establish[] by clear and convincing evidence” that actions resulting in the discharges of transboundary pollution in DeLand have produced injury in Acropora.<sup>92</sup>

“An indemnity cannot be granted without reasonable proof of the existence of an injury, of its cause and of the damage due to it. The presentation of a claim for damages includes ... the collection in the field of the data and the preparation required for their presentation as evidence in support of the statement of facts provided for in Article V of the Convention.”<sup>93</sup>

For liability to be found, a “causal nexus between the activity undertaken and the ensuing damage” is required<sup>94</sup> However, Acropora has failed to identify any point sources or even non-point runoff sources for the pollutants that it alleges have increased ocean temperatures and consequently destroyed the coral reefs in Acropora. Furthermore, rather than increased sea temperatures, terrestrial runoff, disease, and predators for which DeLand is not responsible may have caused the degradation of coral reefs in Acropora.<sup>95</sup> Hence, Acropora has failed to demonstrate that it has suffered damages for which relief can be granted.

In Trail the United States demonstrated by clear and convincing evidence that the pollution from the particular smelter in Canada was causing crop failure and loss in

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<sup>92</sup> See Trail Smelter Arbitration (United States v. Canada), 3 UN Rep. Int'l Arb. Awards 1905, 1963-5 (1938/1941).

<sup>93</sup> *Id.* at 1959, 1958-1962 (the United States failed to prove fumigation from the October 1937 through October 1940 cause damage to trees, crops, or otherwise).

<sup>94</sup> Justitia et Pace Institut de Droit International, *Responsibility and Liability under International Law for Environmental Damages*, Art. 7 (Sept. 4, 1997).

<sup>95</sup> See William C.G. Burns, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, 2 MCGILL INT'L J. SUSTAINABLE DEV. L. & POL'Y 27 (2005), <http://policy.miiis.edu/programs/BurnsFT.pdf>. pp. 49

property value in the United States.<sup>96</sup> Individuals on both sides of the Canadian-American border could actually see the unique sulfur emissions traveling from the smelter at Trail to the property approximately forty-one miles from the boundary between the United States and Canada, to the state of Washington, as evidenced by the attempt by the Trail Smelter to acquire smoke easements over the land.<sup>97</sup> In 1930, the Smelter at Trail emitted 300-350 tons of sulfur daily.<sup>98</sup>

The dispute between Acropora and DeLand is entirely different from Trail. First, the emissions originating in DeLand are general – once dispersed into the atmosphere, there are no defining characteristics that can be presented to show where the emission originated. If emissions are causing climate change, which is leading to increased ocean temperature, then finding the source of the emissions producing that change is vital to an assignment of responsibility. Here, DeLand, if emissions do cause global climate change, only produces twenty-five percent of the possible culprits. Therefore, DeLand asks this Court to exercise its discretion by finding it unfair to hold DeLand, a twenty-five percent contributor, accountable for one hundred percent of the damages associated with climate change.

### **C. Acropora is in Breach of its International Obligations Because Acropora Made No Efforts to Protect the Coral Reef**

It is contrary to customary international law to allow Acropora, who has breached its duty to preserve the reefs, to bring suit against DeLand on the basis that DeLand has

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<sup>96</sup> Trail at 1916.

<sup>97</sup> Trail at 1913, 1917-8.

<sup>98</sup> Trail at 1917.

breached a duty to protect the same reef.<sup>99</sup> Under Article 4 of the Convention Concerning the Protection of the World Cultural and Natural Heritage<sup>100</sup> (“WHC”), Acropora has the duty to protect and conserve the Hebrides Coral Reef because that reef is included in the World Heritage List,<sup>101</sup> and Acropora is a party to the WHC.<sup>102</sup> The duty to conserve biological diversity within one’s own territory may also impose a duty to prevent damage to natural environmental treasures, such as the coral reefs in Acropora. Here, Acropora waited until August 2005, seven years after Acroporans reported that the corals were distressed, to take any action in response to that stress.<sup>103</sup> This cannot be seen as in conformity with the duty of due diligence under Trail or Acropora’s duties under the WHC. Therefore, this Court should find Acropora in breach of its duty to protect the reef.

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<sup>99</sup> Diversion of Water from Meuse (Neth. V. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70 (June 28) (where parties have assumed obligations, one party which is engaged in a continuing non-performance of that obligation may not sue based on similar non-performance of that obligation by the other party).

<sup>100</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage, November 23, 1972, 27 U.S.T. 37 [hereinafter World Heritage Convention or WHC].

<sup>101</sup>R6

<sup>102</sup> R7; WHC, supra note 108, art. 4; see also WHC, supra note 108, art. 5 (imposing on states party to the convention the affirmative duty to ensure that measures to protect treasures included on the World Heritage List are taken).

<sup>103</sup> R9-10.

**CONCLUSION**

For the foregoing reasons, DeLand respectfully requests this Court to dismiss the claims against DeLand and find that Acropora's embargo is unlawful under customary international law and the TADR.

Respectfully submitted,

October 14, 2006

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Attorney for Respondent

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