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

CASE CONCERNING
CORAL REEFS AND CLIMATE CHANGE

THE KINGDOM OF ACROPORA,

Applicant

v.

THE REPUBLIC OF DELAND,

Respondent

Fall Term 2006

Memorial for the Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF JURISDICTION vi

QUESTIONS PRESENTED vii

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE REPUBLIC OF DELAND IS IN COMPLIANCE WITH ALL OBLIGATIONS UNDER INTERNATIONAL LAW AND TREATIES TO WHICH IT IS A PARTY, AND IS NOT RESPONSIBLE FOR DAMAGES ASSOCIATED WITH CORAL BLEACHING IN ACROPORA. 4

A. DeLand is in compliance with obligations under the United Nations Convention on the Law of the Sea and did not violate international law regarding greenhouse gas emissions. 4

B. DeLand is in compliance with obligations under the United Nations Framework Convention on Climate Change and did not violate international law regarding greenhouse gas emissions. 6

C. DeLand is in compliance with obligations under the United Nations Framework Convention on Biological Diversity and did not violate international law concerning indigenous peoples. 7

D. DeLand is in compliance with obligations under the International Covenant on Economic, Social and Cultural Rights and did not violate international law concerning human rights. 11

E. DeLand is not required to be in compliance with treaties to which it is not a party. 12

1. DeLand is not a Party to the Kyoto Protocol and is not bound by it. 13

2. DeLand is not a Party to the Convention Concerning the Protection of the World Cultural and Natural Heritage and is not bound by it. 14

II. THE KINGDOM OF ACROPORA VIOLATED INTERNATIONAL LAW, INCLUDING A SPECIFIC TRADE AGREEMENT WITH OTHER ISLAND STATES, BY BANNING THE IMPORTATION OF GOOD PRODUCED OR MANUFACTURED IN THE REPUBLIC OF DELAND. 15

A. Acropora violated express terms of the Trade Agreement for the Disston Region by banning importation of goods from DeLand. 15

B. Acropora violated the TADR because no exceptions to under the TADR, that would allow a party state to disregard the treaty, apply. 16

1. Acropora's violation of TADR by banning importation of goods from DeLand is not necessary to protect human, animal or plant life or health. 17

2. Acropora's violation of TADR by banning importation of goods from DeLand is not justifiable to protect national treasures because the exception does not apply to bans on imports. 19

3. Acropora's violation of the TADR by banning importation of goods From DeLand is not justifiable for conservation of natural resources because the violation is discriminatory. 20

CONCLUSION..22

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STATEMENT OF JURISDICTION

The Republic of DeLand and the Kingdom of Acropora have agreed by Special Agreement to submit the present controversy concerning the Coral Reefs and Climate Change for final resolution to the International Court of Justice, pursuant to Article 40, paragraph 1 of the Statute of this Court. *See* Special Agreement Between the Kingdom of Acropora and the Republic of DeLand For Submission to the International Court of Justice of Differences Between Them Concerning Coral Reefs and Climate Change, signed at Buenos Aires, Argentina, May 11, 2006. (R. at 2-5.) In accordance with Article 36, the jurisdiction of the Court comprises all cases that the parties refer to it.

QUESTIONS PRESENTED

I. UNDER THE U.N. CONVENTION ON THE LAW OF THE SEA, THE U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, AND THE U.N. CONVENTION ON BIOLOGICAL DIVERSITY, DOES THE REPUBLIC OF DELAND SATISFY ITS OBLIGATIONS TO REGULATE GREENHOUSE GAS EMISSIONS, WHEN DELAND IS NOT A CONTRACTING PARTY TO THE KYOTO PROTOCOL AND THE MAROONS ARE NOT AN INDIGENOUS PEOPLE?

II. UNDER THE TRADE AGREEMENT FOR THE DISSTON REGION, DOES THE KINGDOM OF ACROPORA VIOLATE INTERNATIONAL LAW, WHEN IT BANS IMPORTATION OF ALL GOODS PRODUCED OR MANUFACTURED IN THE REPUBLIC OF DELAND?

STATEMENT OF FACTS

The Republic of DeLand ("DeLand") is a developed nation with a population of approximately 350 million people. (R. at 6.) DeLand considers climate change and the protection of the marine environment serious issues best dealt with through the organizations of the United Nations Framework Convention on Climate Change ("UNFCCC"). (R. at 11.) DeLand is a party to both the UNFCCC and the United Nations Framework on Climate Change ("UNCLOS"). (R. at 7.)

The Kingdom of Acropora ("Acropora") is a small island state with a population around 75,000 located approximately 250 kilometers south of DeLand. (R. at 2, 4.) The coral reefs off of the coast of Acropora are dying.

In a diplomatic note submitted to DeLand on August 19, 2005, Acropora expressed its belief that DeLand had failed its international obligations to reduce greenhouse gas emissions. (R. at 10.) Specifically, Acropora claimed that DeLand was not in compliance with the Kyoto Protocol and requested that the two countries discuss the issue as contemplated by the UNCLOS, UNFCCC and the United Nations Convention on Biological Diversity ("CBD"). *Id.* DeLand declined Acropora's invitation to engage in bilateral consultations, affirming its belief that a multilateral context under the UNFCCC is the most effective manner to address climate change issues. (R. at 11.) In its response, DeLand also noted that it was not a party to the Kyoto Protocol, thus satisfying all of its international legal obligations. (R. at 10-11.)

Acropora responded by asserting that DeLand was not in compliance with the Kyoto Protocol, as well as, the UNFCCC and the UNCLOS. (R. at 11.) In addition, Acropora claimed that DeLand had harmed the Maroons, a group of Acroporan citizens, and that this violated international protections of indigenous peoples and local communities, including the Rio

Declaration, the CBD, and the International Covenant on Economic, Social, and Cultural Rights. (R. at 11.)

DeLand disputed Acropora's claims, insisting that it was in compliance with all of its international obligations. (R. at 12.) DeLand further noted that the Maroons were not an indigenous people protected under the agreements specified by Acropora. (R. at 12.)

Acropora responded by prohibiting the importation of goods produced or manufactured in DeLand and encouraged other states to do the same. (R. at 12.) Although deploring this action as a violation of international law, DeLand agreed to discuss the matter with Acropora in accordance with the provisions of the Trade Agreement for the Disston Region ("TADR")—a treaty, signed by both parties, which governs free trade in the Disston Region. (R. at 13, 8.)

After negotiation and mediation failed to resolve the matter, DeLand and Acropora agreed to submit the matter to the International Court of Justice.

SUMMARY OF ARGUMENT

I. DeLand is in compliance with its obligations under international law. The UNCLOS and UNFCCC are framework conventions that do not require specific minimum standards. In addition, though the Kyoto Protocol sets a target for reducing greenhouse emissions, the Protocol is not binding because DeLand is not a contracting party to the agreement.

II. Acropora violated express terms of the Trade Agreement of the Disston Sea because none of the exceptions under the treaty provide for the implementation of a sanction in this situation. The ban on the importation of goods was not necessary to protect human, animal, or plant life or health; to protect national treasures; or for the conservation of natural resources.

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ARGUMENT

I. THE REPUBLIC OF DELAND IS IN COMPLIANCE WITH ALL OBLIGATIONS UNDER INTERNATIONAL LAW AND TREATIES TO WHICH IT IS A PARTY, AND IS NOT RESPONSIBLE FOR DAMAGES ASSOCIATED WITH CORAL BLEACHING IN ACROPORA.

A. DeLand is in compliance with obligations under the United Nations Convention on the Law of the Sea and did not violate international law regarding greenhouse gas emissions.

DeLand, as a sovereign state, has particular rights regarding use of its own resources. According to Article 193 of the United Nations Convention on the Law of the Sea ("UNCLOS"), DeLand has the sovereign right to exploit its natural resources.[1] However, this right is bound closely to a sovereign state's duty to ensure it does not damage the environment of another state,[2] as well as the duty to "protect and preserve the marine environment."[3] The UNCLOS does not, however, require adherence to specific minimum standards in fulfilling these duties.[4] The Convention allows flexibility for states to balance "environmental protection measures against the needs of their own economies . . . ."[5] The UNCLOS, therefore, neither mandates nor defines precisely what duties DeLand must perform to protect and preserve the marine environment.

Article 207 of UNCLOS, for example, provides that states should "take other measures as

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[1] United Nations Convention on the Law of the Sea art. 193, Dec. 10, 1982, 1833 U.N.T.S. 397, 21 I.L.M. 1261 [hereinafter UNCLOS]; United Nations Conference on Environment and Development: Convention on Biological Diversity art. 3, *opened for signature* June 5, 1992, 31 I.L.M. 818 [hereinafter CBD].

[2] UNCLOS, *supra* note 1, art. 193; CBD, *supra* note 1, art. 3; *See generally* 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).

[3] UNCLOS, *supra* note 1, art. 193.

[4] PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 408 (2d ed. 2002).

[5] *Id.* at 409.

may be necessary,"[6] "endeavour to harmonize as may be necessary,"[7] and "endeavour to establish global and regional rules"[8] with regards to pollution from land-based sources. Article 207 sets out a long list of measures to guide contracting parties, but fails to provide any specific requirements under which those parties are bound. Although this article "provides the Convention's only significant legal basis for protecting the marine environment from land-based pollution,"[9] it does not provide substantial explanation for due diligence obligations found in customary law.[10]

The UNCLOS references extraneous sources of law throughout the convention including, "internationally agreed rules," "international rules and standards," and "generally accepted rules."[11] However, with regard to pollution through the atmosphere, the obligation to adopt international standards is extremely weak. Under Article 212 of UNCLOS, states are obligated to adopt laws to prevent pollution of the marine environment "taking into account internationally agreed rules, standards and recommended practices . . . ."[12] The UNCLOS does not, however,

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[6] UNCLOS, *supra* note 1, art. 207(2).

[7] *Id.* at art. 207(3).

[8] *Id.* at art. 207(4).

[9] BIRNIE & BOYLE, *supra* note 4, at 409.

[10] *Id.*

[11] UNCLOS, *supra* note 1, art. 207(1), art. 213, art. 211(2). See generally Duncan French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 INT'L & COMP. L.Q. 281 (2006), for a discussion of methods of interpretation that go beyond the text of the treaty, including an analysis of the UNCLOS.

[12] *Compare* UNCLOS, *supra* note 1, art. 212(1) (requiring states to "take account of" internationally agreed rules and standards with regards to pollution through the atmosphere), *with* UNCLOS, *supra* note 1, art. 211(2) (requiring a more stringent standard that rules "shall at least have the same effect" as generally accepted international rules with regards to pollution from vessels).

impose an absolute prohibition against pollution.[13] DeLand is only obligated under UNCLOS to take "into account" internationally agreed rules and standards, but not necessarily bound to adopt these rules or standards.[14] Accordingly, DeLand has wide discretion in adopting its own laws.[15] To satisfy the UNCLOS obligation to take into account internationally agreed rules, standards, or practices, DeLand relies on industries to adopt voluntary limits.[16] DeLand also cooperates on a global basis, pursuant to Article 197 of the UNCLOS, as a contracting party to the United Nations Framework Convention on Climate Change ("UNFCCC").[17]

B. <u>DeLand is in compliance with obligations under the United Nations Framework Convention on Climate Change and did not violate international law regarding greenhouse gas emissions.</u>

DeLand believes climate change is a serious issue that requires international attention.[18] As a party to the United Nations Framework Convention on Climate Change ("UNFCCC"), DeLand agrees with the long-term goal of the UNFCCC: "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[19] The convention is, however, exactly what its title

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[13] Burns, *supra* note 2, at 46 (noting the UNCLOS establishes a due diligence obligation to use "the best practicable means"); *See* UNCLOS, *supra* note 1, art. 194 ("States shall . . . [use] the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection.")

[14] Alan E. Boyle, *Marine Pollution Under the Law of the Sea Convention*, 79 AM. J. INT'L. L. 347, 350 (1985), *reprinted in* HUGO CAMINOS, LAW OF THE SEA 373 (2001).

[15] Boyle, *supra* note 14, at 353.

[16] Record, *Annex A*, ¶ 18 (May 11, 2006).

[17] UNCLOS, *supra* note 1, art. 197; Record, ¶ 12.

[18] Record,.¶ 24.

[19] United Nations Framework Convention on Climate Change art. 2, *opened for signature* May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

suggests—a "framework" of basic principles from which obligations may be set at a later time.[20] The UNFCCC does not require states to meet specific levels of greenhouse gas emissions,[21] but it does suggest that states work towards reducing emissions.[22] Adhering to the obligation of satisfying treaty requirements in good faith—*pacta sunt servanda*—as set forth in the Vienna Convention,[23] DeLand issued a report in April 2006 on its inventory of emissions and sinks between 1990 and 2004.[24] Although the State has no formal program to regulate emissions yet, DeLand's industries can adopt voluntary limits on emissions.[25]

C. DeLand is in compliance with obligations under the United Nations Framework Convention on Biological Diversity and did not violate international law concerning indigenous peoples.

DeLand is a Party to the United Nations Framework Convention on Biological Diversity ("CBD"). This convention is focused on balancing the interests of developing and developed

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[20] *See* ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 39 (2000).

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[21] Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 453 (1993). *See also* KISS & SHELTON, *supra* note 22, at 515 (stating "the instrument deserves its title: it constitutes a framework for which concrete and specific obligations must be elaborated."); SEBASTIAN OBERTHÜR & HERMANN E. OTT, THE KYOTO PROTOCOL: INTERNATIONAL CLIMATE POLICY FOR THE 21ST CENTURY 34 (1999) ("The negotiators in 1992 did not translate these principles into any legally binding targets for industrialized countries.")

[22] UNFCCC, *supra* note 19, art. 2; Burns, *supra* note 2, at 47.

[23] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331[hereinafter Vienna Convention].

[24] Record, ¶ 17; *See also* Edith Brown Weiss, "Introductory Note" to the United Nations Conference on Environment and Development, June 3-14, 1992, 31 I.L.M. 814, 816 ("Under the [UNFCCC], parties will provide national inventories of sources and sinks of greenhouse gases, and regular national reports on policies and measures that limit emissions of these gases and enhance the sinks for them. . . . Countries did not agree in the Convention to control greenhouse gas emission at any given level at a specific date in the future, although articles 2(a) and (b) when taken together might be read as implying a tacit goal of returning to 1990 levels of greenhouse gas emissions by the end of the decade.").

[25] Record, ¶ 18. See generally Cinnamon Carlame, *Climate Change Policies an Ocean Apart: EU & US Climate Change Policies Compared*, 14 PENN. ST. ENVTL. L. REV. 435 (2006), for a discussion on the United States' use of voluntary environmental programs to meet its obligations under international law, including the UNFCCC.

states, and providing general goals, as opposed to specific obligations,[26] regarding protection and utilization of biodiversity.[27] The CBD specifically affirms national sovereign rights over biological resources.[28] Article 22 of the CBD states: "[t]he provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity."[29] The CBD calls for development of national strategies for conservation, for national monitoring of biological diversity,[30] and for *in situ* conservation by a state.[31]

Despite the CBD's specification that states should develop *national* strategies for preservation of "indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity . . .,"[32] Acropora references the CBD as a convention that imposes on DeLand a duty to protect indigenous peoples living in Acropora.[33] Acropora claims DeLand has harmed an indigenous group of people comprising one-third of the population of Acropora: the Maroons—descendants of slaves who escaped

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[26] BIRNIE & BOYLE, *supra* note 4, at 571.

[27] Alexander Gillespie, *Biodiversity, Indigenous Peoples and Equity in International Law*, 4 N.Z. J. ENVTL. L. 1, 1 (2000) (noting the CBD has defined biodiversity as "the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of species." (citing Convention on Biological Diversity art. 2 (UNEP/BioDiv/Conf 12) 31 I.L.M. 954 (1992))).

[28] CBD, *supra* note 1, art. 3; Gillespie, *Biodiversity, supra* note 27, at 21.

[29] CBD, *supra* note 1, art. 22.

[30] *Id.* art. 8(j).

[31] Gillespie, *Biodiversity*, *supra* note 27, at 21.

[32] CBD, *supra* note 1, art. 8(j).

[33] Record, ¶ 25.

servitude in nearby countries in the eighteenth century.[34] The Maroons initiated the original lawsuit against DeLand, based on their declining fish harvests.[35] Acropora brought the accompanying lawsuit based on coral death that interferes specifically with the rights of Maroons.[36]

First, DeLand has not violated international law because the CBD indicates it is a state's responsibility to use national legislation and strategies to protect its own indigenous peoples and biodiversity.[37] Furthermore, the CBD prioritizes the sovereign rights of states over biological diversity, and over any rights indigenous peoples have to biological resources.[38] While the CBD recognizes the dependence of indigenous peoples on biological resources, it does not directly support indigenous rights.[39] Acropora is responsible for protecting its own citizens, including those it identifies as indigenous.

Second, DeLand has not violated international law regarding indigenous peoples because the Maroons do not qualify as indigenous. Definitions of indigenous peoples include: "descendants of preinvasion inhabitants of lands now dominated by others,"[40] "First Peoples,"[41]

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[34] *Id.* ¶¶ 25, 3.

[35] *Id.* ¶¶ 21, 22.

[36] *Id.* ¶¶ 23, 25.

[37] CBD, *supra* note 1, art. 8(j).

[38] Jeremy Firestone, Jonathan Lilley & Isabel Torres de Noronha, *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, 20 AM. U. INT'L L. REV. 219, 250-51 (2005). *See also* CBD, *supra* note 1, art. 8(j).

[39] Firestone et. al, *supra* note 38, at 249-50.

[40] S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 3 (2d ed. 2004). *See also* PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 335-36 (2001) (discussing the International Labour Organization's guide to identification, or definition, or indigenous groups); S. James Anaya, *Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 237, 238 (discussing advancements in arguments using international law to protect the rights of indigenous peoples, and noting there is disagreement as to whether international law establishes sovereign rights of indigenous people over ancestral lands and resources); Maria

and people who "have a historical relationship with their lands and are generally descendants of the original inhabitants of such lands."[42] The Maroons are descendants of slaves and did not settle in Acropora until the 1700s; they are not descendants of the original inhabitants of Acropora.[43] International law contains no specific definition of "indigenous" and no express protections for indigenous peoples' rights to natural resources.[44] Acropora brought this lawsuit specifically based on the rights of Maroons, not other peoples who live in Acropora.[45] Because the Maroons are not indigenous, and because Acropora did not bring the lawsuit to support the rights of Acroporans who are indigenous,[46] assertions that DeLand harmed an indigenous group

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Stavroupoulou, *Indigenous Peoples Displaced from their Environment: Is There Adequate Protection?*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 105 (1994) (discussing how the rights of indigenous peoples are established in or protected by international law).

[41] Firestone et. al, *supra* note 38, at 224.

[42] David H. Getches, *Indigenous Peoples' Rights to Water Under International Norms*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 259, 279 (2005). *See also* Firestone et. al, *supra* note 38, at 229 (explaining that weighing four factors helps determine whether a people is indigenous: (1) priority in time, with respect to the occupation and use of a specific territory; (2) voluntary perpetuation of cultural distinctiveness; (3) self-identification or recognition by State authorities; (4) an experience of subjugation, marginalization, dispossession, exclusion or discrimination).

[43] Record, ¶ 3.

[44] Getches, *supra* note 42, at 262 (discussing how customary international law may be used in the future to protect indigenous peoples' rights to water); *See also* Stavroupoulou, *supra* note 40, at 111 (discussing instruments in international environmental law that are not binding law as well as principles that may be considered customary law).

[45] Record, ¶¶ 23, 25.

[46] *Id.* ¶ 3.

are groundless.[47] Acropora's communications with DeLand regarding coral reefs and climate change specified only effects on the Maroons.[48]

D. DeLand is in compliance with obligations under the International Covenant on Economic, Social and Cultural Rights and did not violate international law concerning human rights.

The International Covenant on Economic, Social and Cultural Rights ("CESCR") addresses civil and political rights of people within States Parties,[49] including DeLand and Acropora.[50] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, a set of guidelines accompanying the CESCR, explains that states are responsible for meeting generally accepted international minimum standards and legal obligations.[51] Additionally, the CESCR addresses the use of natural resources.[52] Applicable in this case to DeLand's use of its own resources and maintenance of its industries, the CESCR affirms:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and

[47] See Conference Report of the Ninth Meeting of the Conference of the Contracting Parties to the Ramsar Convention on Wetlands, ¶ 310 (2005), available at http://www.ramsar.org/cop9/cop9_conf_rpt_e.htm (noting the statement: "In Suriname we have two tribal groups, who are the Indigenous Peoples and the Marroons, and both rely on wetlands. Therefore the delegation of Suriname requests the Conference of Parties to mention both groups. That means that everywhere, in all Resolutions, where Indigenous Peoples are mentioned, Marroons must be added."), for an example of how easily a country could specify that two groups are to be included in a resolution or other instrument.

[48] Record, ¶ 25.

[49] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, Neth., Jan. 22-26, 1997, ¶ 5, *available at* http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html [hereinafter Maastricht Guidelines].

[50] Record, ¶ 9.

[51] Maastricht Guidelines, *supra* note 49, at ¶ 15(i)-(j).

[52] United Nations Office of the High Commissioner for Human Rights, International Covenant on Economic, Social and Cultural Rights preamble, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), 993 U.N.T.S. 3, *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm [hereinafter CESCR].

> international law. In no case may a people be deprived of its own means of subsistence.[53]

Therefore, while the rights of Acropora citizens to their own means of subsistence are valid, the rights of DeLand citizens to their means of subsistence likewise should not be limited. Although there is an obligation of good faith between states in regards to the environment,[54] there is "no treaty [that] refers explicitly to the right to a decent environment."[55] DeLand is free to use its resources and industries to support its citizens and economy and is in compliance with CESCR.

E. <u>DeLand is not required to be in compliance with treaties to which it is not a Party.</u>

All states are sovereign,[56] yet once they have agreed to be bound by an international treaty they must honor it in good faith.[57] DeLand honors its obligations to treaties to which it is a Party, but is not required to submit to treaties it has not ratified, signed, or otherwise adopted,[58] including the Kyoto Protocol and the Convention Concerning the Protection of the World Cultural and Natural Heritage.[59]

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[53] CESCR, *supra* note 52, art. 1.

[54] Alexander Gillespie, *Small Island States in the Face of Climatic Change: The End of the Line in International Environmental Responsibility*, 22 UCLA J. ENVTL. L. & POL'Y 107, 127 (2003) (citing Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 92, at 142 (Sept. 25)).

[55] *Id* at 124.

[56] U.N. Charter art. 2, para 1.

[57] Vienna Convention, *supra* note 23, art. 26.

[58] *Id.* art. 11.

[59] Record, ¶¶ 12, 24, 10.

1. DeLand is not a Party to the Kyoto Protocol and is not bound by it.

Based on the Kyoto Protocol, Acropora asserts that DeLand is violating international law by not requiring its industries to reduce emissions.[60] However, DeLand has not ratified the Kyoto Protocol and is not bound to its target: reducing greenhouse gas emissions to 92% of 1990 levels.[61]

States may show their assent to be bound by the Kyoto Protocol by "ratification, acceptance, approval or accession."[62] Although representatives of DeLand signed the Kyoto Protocol in 1998, DeLand has not ratified it and is not bound by it.[63] States may be bound by signature only if: "(a) the treaty provides that signature shall have that effect; (b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation."[64] Signatures alone are not listed in the Kyoto Protocol as a specific manner by which states may show their assent to be bound.[65] Furthermore, because DeLand has not ratified the Kyoto Protocol in the eight years since signing it, this lapse of time bolsters DeLand's intention not to be bound by it.

Similarly, the stance of the Association of Small Island States ("ASIS") does not bind DeLand because DeLand is not a party to the Kyoto Protocol. The position taken by ASIS in the

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[60] *Id.* ¶¶ 23, 25.

[61] *Id.* ¶ 12. *See also* Gillespie, *Small Island States*, *supra* note 54, at 117 n.64 (noting that not all developed countries have the same reduction target).

[62] Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 4, para. 2, *opened for signature* Mar. 16, 1998, 37 I.L.M. 22 [hereinafter Kyoto Protocol].

[63] *Id.*

[64] Vienna Convention, *supra* note 23, art. 12(1).

[65] Kyoto Protocol, *supra* note 62, art. 4, para. 2.

Kyoto Protocol includes requiring a 20% reduction of greenhouse gas emission from 1990 levels by 2005.[66] In addition, the position of these states, noted in *travaux préparatoires*, should not be used to interpret the treaty unless an interpretation is found to be ambiguous or unreasonable.[67] The fact that the parties in Kyoto adopted specific reductions that are different from the position taken by ASIS shows that the Protocol is not ambiguous and also that the parties specifically rejected the ASIS position that Acropora now advances.[68]

2. DeLand is not a Party to the Convention Concerning the Protection of the World Cultural and Natural Heritage and is not bound by it.

The Convention Concerning the Protection of the World Cultural and Natural Heritage ("World Heritage Convention") states that "the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage . . . situated on its territory, belongs primarily to the State."[69] Acropora, not DeLand, is a Party to the World Heritage Convention.[70] Acropora, therefore, is itself responsible for counteracting any dangers that threaten its natural resources.[71]

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[66] Record, ¶ 23.

[67] Vienna Convention, *supra* note 23, art 32. *See also* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (holding that the argument based on preparatory work—*travaux préparatoires*—must be rejected)
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[68] Record, ¶ 23.

[69] United Nations Educational, Scientific and Cultural Organisation, Convention Concerning the Protection of the World Cultural and Natural Heritage art. 4, *opened for signature* Nov. 23, 1972, 1037 U.N.T.S. 151, 11 I.L.M. 1358 [hereinafter World Heritage Convention].

[70] Record, ¶ 10.

[71] World Heritage Convention, *supra* note 69, art. 5(c).

II. THE KINGDOM OF ACROPORA VIOLATED INTERNATIONAL LAW, INCLUDING A SPECIFIC TRADE AGREEMENT WITH OTHER ISLAND STATES, BY BANNING THE IMPORTATION OF GOODS PRODUCED OR MANUFACTURED IN THE REPUBLIC OF DELAND.

All six states in the Disston Sea region, including DeLand and Acropora, are Parties to a treaty establishing a free trade area within their region.[72] Currently, in international law, states resort to trade sanctions as coercive mechanisms for enforcement of international obligations,[73] in lieu of prohibited military force.[74] In this instance, however, the six states of the Disston Sea region have chosen to contract around the use of trade sanctions through the signing of the Trade Agreement for the Disston Region ("TADR").[75]

A. Acropora violated express terms of the Trade Agreement for the Disston Region by banning importation of goods from DeLand.

Both DeLand and Acropora are parties to the Trade Agreement for the Disston Region ("TADR").[76] The purpose of the TADR is to establish "a free trade area within the Disston Sea region."[77] To accomplish this free trade goal, the TADR mandates that "[n]o prohibitions or restrictions . . . shall be instituted or maintained by any Party regarding the importation of any product from the territory of any other party."[78] By banning the importation of goods produced

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[72] Record, ¶ 15.

[73] Carlos Vazquez, *Trade Sanctions and Human Rights – Past, Present and Future*, 6 J. INT'L ECON. L. 797, 799 (2003).

[74] U.N. Charter art. 2, para 4. *See also* Legality of the Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 97 (July 8) (holding that the use of nuclear weapons is contrary to the rules of international law except in the extreme circumstances of self-defense).

[75] Record, ¶ 16.

[76] *Id.* ¶ 15.

[77] Trade Agreement for the Disston Region art. 1, 2001, *available at* Record, ¶ 16 [hereinafter TADR].

[78] *Id.* at art. 5.

or manufactured in DeLand and calling for other countries to do the same, Acropora has violated international law. Acropora's restriction on trade is contrary to the direct language of the TADR.[79]

B. Acropora violated the TADR because no exceptions under the TADR, that would allow a party state to disregard the treaty, apply.

Although Article 15 of the TADR provides general exceptions to the provision against restricting free trade, the three exceptions relied upon by Acropora to justify its violation of international law do not apply in this matter.[80] To justify the breaking of a treaty, there must have been a "fundamental change of circumstances."[81] Acropora has no justification in breaking the treaty because there has been no fundamental change in DeLand's environmental policies or regulation of greenhouse gases since creation of the TADR. Terms of treaties should be interpreted reasonably and according to the purposes of the treaties.[82] Because the purpose of the TADR is to establish a free trade area, the TADR should be interpreted to prevent "arbitrary or unjustifiable discrimination."[83]

Furthermore, the TADR specifically provides that "[d]ecisions by GATT [General Agreements on Tariffs and Trade] and WTO [World Trade Organization] panels or appellate bodies shall be considered subsidiary sources of law with respect to the interpretation of terms of

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[79] Record, ¶¶ 16, 27.

[80] *Id.* ¶ 16.

[81] Gabcikovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7, 104 (holding that a fundamental change must have been unforeseen).

[82] Vienna Convention, *supra* note 23, art. 31.

[83] General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

this Agreement."[84] This provision is especially important because exceptions (b), (f) and (g) under Article 15 of the TADR—the three exceptions relied upon by Acropora to justify its violation—mirror the language found in the exceptions (b), (f) and (g) in Article XX of GATT.[85] GATT panels and commentators insist that the exceptions be interpreted narrowly so they do not 'swallow the rule' and lead to conclusions inconsistent with the purposes of particular trade agreements.[86] Finally, as the state relying on exceptions to the terms of the treaty, Acropora has the burden of proof in showing that violating the treaty agreement through trade restrictions is necessary.[87]

1. Acropora's violation of TADR by banning importation of goods from DeLand is not necessary to protect human, animal or plant life or health.

Article 15(b) of TADR provides an exception to the restriction on import restrictions when "necessary to protect human, animal or plant life or health."[88] Article XX(b) of the GATT, also focused on human, animal, or plant life, is used to justify import restrictions on environmentally harmful products.[89] Moreover, Article XX(b) of GATT is interpreted as meaning that "like products or services produced domestically must be similarly restricted and

[84] TADR, *supra* note 77, art. 24, para. 2; Record, ¶ 16.

[85] GATT, *supra* note 83, art. XX.

[86] *See*, *e.g.*, Report of the Panel, *Canada – Import Restrictions on Ice Cream and Yoghurt*, L/6568 (Dec. 5, 1989), GATT B.I.S.D. (36th Supp.) at 68, 84-85 (1990).

[87] BIRNIE & BOYLE, *supra* note 4, at 715. *See* Report of the Panel, *United States – Restrictions On Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1993). *See also* Padideh Ala'i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT'L L. REV. 1129, 1137 (1999) ("The burden of proof has always been on the party invoking an Article XX exception . . . ."). *See generally* PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, Chapter 19 (2d ed. 2003) (discussing unilateral environmental measures under GATT).

[88] Record, ¶ 16; TADR *supra* note 77, art. 15(b). See also Vazquez, *supra* note 73 (considering whether GATT/WTO forbids using trade sanctions in response to violations of human rights or other international law).

[89] BIRNIE & BOYLE, *supra* note 4, at 715.

discrimination among countries similarly situated would be prohibited."[90] Not only has Acropora initiated trade restrictions on all products from DeLand—not just products Acropora deems environmentally harmful—Acropora has not restricted importation of goods from any other developed states.

Additionally, in light of the purpose of the TADR to establish a "free trade area,"[91] Acropora has made no showing that its actions are "necessary" under Article 15(b). In order for a regulation to be considered "necessary" there must be no alternative measures consistent with the TADR.[92] In other words, Acropora's actions should be interpreted by using a 'least-TADR-inconsistent' test.[93] Options more consistent with the purpose of the TADR were available for Acropora; Acropora did not meet its burden of proof to show that no options were available. At a minimum, Acropora could have sought to invoke the jurisdiction of this court before it resorted to a unilateral restriction of trade in violation of the TADR. Finally, an import restriction cannot be considered "necessary" if it is intended to "[f]orce other countries to change their policies within their own jurisdictions and if it require[s] such changes in order to be effective."[94] Acropora's imposition of trade restrictions is intended to force DeLand to change its policies.

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[90] *Id.*

[91] Record, ¶ 16; TADR, *supra* note 77, art. 1.

[92] Report of the Panel, *Thailand −Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 75, Ds10/R (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) at 200 (1990). *See also* KISS & SHELTON, *supra* note 21, at 645 (noting that the necessity requirement "has been interpreted to mean application of the action least inconsistent with free trade.")

[93] *See* Ala'i, *supra* note 87, at 1144.

[94] Report of the Panel, *United States − Restrictions on Imports of Tuna* (U.S. v. Mex.), ¶ 5.38, DS29/R, 33 I.L.M. 839 (June 16, 1994).

2. Acropora's violation of TADR by banning importation of goods from DeLand is not justifiable to protect national treasures because the exception does not apply to bans on imports.

Article 15(f) of the TADR provides an exception to the restriction on import restrictions when "imposed for the protection of national treasures of artistic, historic or archaeological value."[95] No GATT/WTO panel has yet interpreted the exception under the similarly worded GATT Article XX(f).[96] However, by including the word "national" Article 15(f) is unlike other exceptions to the TADR. The inclusion of "national" suggests that the exception is inward-looking—intended to restrict the *export* of a state's own national treasures.[97] Indeed, in another case, the United States of America argued before a GATT panel that GATT Article XX(f) only applies to 'national' treasures—i.e. one's own treasures.[98] The panel noted the argument, and did not suggest that it was incorrect.[99] Even if we were to assume that the coral reefs in question are national treasures of artistic, historic or archeological value, Acropora cannot invoke TADR's Article 15(f) exception because it is restricting imports from another state, but not restricting exports of cultural objects from its own state in congruence with the purpose of this exception.[100]

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[95] Record, ¶ 16; TADR, *supra* note 77, art. 15(f).

[96] Chi Carmody, *When "Cultural Identity Was Not an Issue": Thinking About Canada – Certain Measures Concerning Periodicals*, 30 LAW & POL'Y INT'L BUS. 231, 256 (1999).

[97] Steve Charnovitz, *Critical Guide to the WTO's Report on Trade and Environment*, 14 ARIZ. J. INT'L & COMP. L 341, 355 (1997). *See also* Joel Richard Paul, *Cultural Resistance To Global Governance*, 22 MICH. J. INT'L L. 1, 34 (2000) (stating that "[t]he intended purpose [of Article XX(f)] is to protect national patrimony from foreign art collectors," by restricting what can be exported).

[98] Report of the Panel, *Japan − Taxes on Alcoholic Beverages*, WT/DS8/AB/R (1996).

[99] *Id.*

[100] Record, ¶ 27.

3. Acropora's violation of TADR by banning importation of goods from DeLand is not justifiable for conservation of natural resources because the violation is discriminatory.

Article 15(g) provides an exception to the restriction on import restrictions when "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[101] Acropora has not met its burden of proof in showing that its violation of the treaty is justifiable under this exception. In particular, Acropora's ban is arbitrary in that it singles out DeLand from all other states, and it has not been implemented in conjunction with restrictions on domestic production or consumption.

In interpreting GATT Article XX(g)—the language of which is mirrored in Article 15(g) of the TADR—GATT panels indicated that although a country's actions may fall under the exception, they may still be illegal if they do not comport with the general purpose of the trade agreement.[102] That is, the exception will not excuse a country if they are engaged in "unjustifiable discrimination."[103] The actions of Acropora are unjustifiable because Acropora has singled out DeLand from all other states that contribute to air and water pollution. Moreover, Acropora is targeting only DeLand even though there are four other states in the Disston Sea region who are also Parties to the TADR.[104]

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[101] Record, ¶ 16; TADR, *supra* note 77, art. 15(g).

[102] Appellate Body Report, *United States − Import Prohibition on Certain Shrimp and Shrimp Products*, ¶ 120, WT/DS58/AB/RW (Oct. 22, 2001). *See also* KISS & SHELTON, *supra* note 21, at 646 ("Even if justified, however, an Article XX exception cannot be applied if it constitutes arbitrary discrimination, unjustifiable discrimination, or a disguised restriction on international trade. A measures may be considered to be the last mentioned if less burdensome alternatives are available.")

[103] KISS & SHELTON, *supra* note 21, at 646.

[104] Record, ¶ 27, 15; *See also* Gillespie, *supra* note 40, at 115-16 (noting that coral bleaching over the past 20 years has been attributed to several things . . . . also that between 1998 and 2002, 16% of the world's coral reefs died from bleaching).

Not only has Acropora ignored the possibility that other states have contributed to pollution harming its coral reefs, Acropora has ignored the reality that they must establish "causal links between climate change and alleged damages to marine resources, and [a] link between [DeLand's] discrete greenhouse gas emissions and alleged damages."[105] In demonstrating a causal link between climate change and bleaching of the coral reefs, Acropora must examine other possible causes of damage to coral reefs—not only pollution from the atmosphere, but also pollution from sewage, pollution from agricultural fertilizer and herbicides, sedimentation caused by runoff from deforestation, and other human activities such as overfishing and mining of the reefs for sand and rock.[106] Damage to coral reefs, therefore, is not necessarily caused by greenhouse gas emissions from DeLand's industries. Also, in demonstrating a link between DeLand's emissions and any damages to coral reefs, Acropora must address why DeLand is singled out—in a discriminatory manner—as the sole source of pollution or damage.[107] Acropora's blanket prohibition of the import of products from DeLand masquerades as environmental or cultural protection, but it is a clear restriction on international trade in violation of the TADR.

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[105] Burns, *supra* note 2, at 49. *See also* Trail Smelter (U.S. v. Can.) 3 R.I.A.A. 1911, 1965 (1941) (holding that the case must be "of serious consequence and the injury is established by clear and convincing evidence"); Gillespie, *supra* note 40, at 110 ("The scientific evidence of global warming currently available is consistent with, but does not yet provide definitive proof of, the theories of climatic change.").

[106] Mary Gray Davidson, *Protecting Coral Reefs: The Principal National and International Legal Instruments*, 26 HARV. ENVTL. L. REV. 499, 506 (2002) (explaining that the majority of coral reef destruction is a result of human activities that fall within four categories: overfishing, pollution, sedimentation, and climate change); Burns, *supra* note 2, at 49 (noting that disease and predators are additional sources of damage to coral reefs).

[107] Burns, *supra* note 2, at 50.

CONCLUSION

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

1. **Declare** that Republic of DeLand has not violated international law with regard to the regulation of greenhouse gases, and;
2. **Declare** that the Republic of DeLand is not responsible for environmental and cultural damages associated with coral bleaching in the Kingdom of Acropora, and;
3. **Declare** that the Kingdom of Acropora is in violation of international law by banning the importation of goods produced or manufactured in the Republic of DeLand.

Respectfully Submitted,

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Agents for the Republic of DeLand