

IN THE INTERNATIONAL COURT OF JUSTICE

Peace Palace, The Hague
Netherlands

2006 **GENERAL LIST NO. 111**

CASE CONCERNING CORAL REEFS AND CLIMATE CHANGE

THE KINGDOM OF ACROPORA

Applicant

v.

THE REPUBLIC OF DELAND

Respondent

TERM 2006

MEMORIAL FOR THE RESPONDENT

THE REPUBLIC OF DELAND

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ABBREVIATIONS

1. **A.C.** Court of Appeals
2. **AM. J. INT'L L.** American Journal of International Law
3. **ARIZ. J. INT'L & COMP. L.** Arizona Journal of International and Comparative Law
4. **B.I.S.D.** Basic Instruments and Selected Documents
5. **BRIT. Y.B. INT'L L.** British Yearbook of International Law
6. **CBD** Convention on Biological Diversity
7. **CHAP. L. REV.** Chapman Law Review
8. **DSU** Dispute Settlement Understanding
9. **EDN.** Edition
10. **ED. /EDS.** Editor(s)
11. **ENVTL L** Environmental Law
12. **Eur. Ct. H. R.** European Court of Human Rights
13. **G.A.** General Assembly
14. **G.A. Res.** General Assembly Resolution
15. **G.A.T.T.** General Agreement on Trade and Tariffs
16. **HARV. HUM. RTS. J.** Harvard Human Rights Journal
17. **HARV. INT'L L. J** Harvard International Law Journal
18. **HUM. RTS. Q.** Human Rights Quarterly
19. **ICESCR** International Covenant on Economic, Social and Cultural Rights
20. **I.C.J.** International Court of Justice

21. INT'L & COMP. L.Q.	International and Comparative Law Quarterly
22. ILC	International Law Commission
23. I.L.M.	International Legal Materials
24. ILO	International Labour Organisation
25. I.L.R.	International Law Reports
26. Inter-Am. C.H.R	Inter-American Commission on Human Rights
27. Inter-Am. Ct. H.R.	Inter-American Court of Human Rights
28. INT'L SECURITY	International Security
29. IPCC	Inter-Governmental Panel on Climate Change
30. IUCN	International Union for the Conservation of Nature
31. J. INT'L LEGAL STUD.	Journal of International Legal Studies
32. L.Q.R.	Law Quarterly Review
33. No.	Number or Numbers
34. NTB	Non-Tariff Barrier
35. OKLA. CITY U. L. REV.	Oklahoma City University Law Review
36. P.C.I.J.	Permanent Court of International Justice
37. QUEEN'S L.J.	Queens Law Journal
38. Res.	Resolution or resolutions
39. REV. EUR. COMMUNITY & INT'L ENVTL LAW	Review of European Community and International Environmental Law
40. R.I.A.A.	Recueil of International Arbitral Awards
41. Supp.	Supplement

42. SWCC	Second World Climate Conference
43. TADR	Trade Agreement for the Disston Region
44. UCLA J. ENVTL. L. & POL'Y	UCLA Journal of Environmental Law and Policy
45. U. MIAMI INTER-AM. L. REV	University of Miami Inter-American Law Review
46. UNEP	United Nations Environment Programme
47. UN	United Nations
48. UNFCCC	United Nations Framework Convention on Climate Change
49. UNCLOS	United Nations Convention on the Law of the Sea
50. U.N.T.S.	United Nations Treaty Series
51. VA. J. INT'L L.	Virginia Journal of International Law
52. VAND. J. TRANSNAT'L L.	Vanderbilt Journal of Transnational Law
53. VCLT	Vienna Convention on the Law of Treaties
54. Vol.	Volume or Volumes
55. WASH. L. REV.	Washington Law Review
56. WHC	World Heritage Convention
57. WMO	World Meteorological Organisation
58. YALE J. INT'L L	Yale Journal of International Law
59. YALE L. J.	Yale Law Journal
60. Y.B.INT'L ENVTL L.	Yearbook of International Environmental Law
61. Y.B. INT'L L. COMM.	Yearbook of the International Law Commission
62. ¶	Paragraph or paragraphs

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STATEMENT OF JURISDICTION

The Kingdom of Acropora and the Republic of DeLand have submitted the dispute to the International Court of Justice pursuant to a special agreement dated 11 May, 2006. The Court's jurisdiction is invoked under Article 36(1) read with Article 40(1) of the Statute of the International Court of Justice, 1945.

STATEMENT OF FACTS

I

The Kingdom of Acropora (Acropora) is a developing small island country in the region of the Disston Sea. The Republic of DeLand (DeLand), 250 kilometers north of Acropora is a developed country in the region, having an industrial economy. (Compromis ¶¶1, 4)

II

Both countries are parties to the United Nations Convention on the Law of the Sea [UNCLOS], Convention on Biological Diversity [CBD], International Covenant on Economic Social and Cultural Rights [ICESCR] and United Nations Framework Convention on Climate Change [UNFCCC]. The applicant is a party to the World Heritage Convention [WHC] and the Kyoto Protocol. The respondent has signed but not ratified the Kyoto Protocol. Both countries are also part of the regional Trade Agreement for the Disston Region [TADR]. (Compromis ¶¶7-10,12,13)

III

The northern coast of Acropora is ringed with coral reefs which are on the World Heritage List since 1981. Around 1/3rd of Acropora's population are Maroons living in their own communities and following subsistence fishing of reef fish. Fish provide for 90% of their protein needs. (Compromis ¶3)

IV

In April 2006, a report by DeLand established that it was the largest net emitter of greenhouse gases, both in terms of actual and per capita emissions. The report took into account data

between 1990 and 2004 and stated that DeLand's total greenhouse gas emissions have risen by more than 20% since 1990. Data of 2005 and 2006 was expected to show a similar trend. DeLand relies on its industries to adopt voluntary limits and has no program to regulate emission of greenhouse gases. (Compromis ¶¶17, 18)

V

In 1998, the average sea temperatures of Disston Sea began to rise. Acropora's coral reefs began to suffer from bleaching and the Maroons reported a 30% drop in their fish harvest. In 2000, the Maroons along with NGO Bluewatch brought a suit against DeLand in DeLand's domestic court system. The suit was dismissed on procedural grounds. (Compromis ¶¶20, 21)

VI

In 2005, Disston Sea recorded the highest temperatures since 1987. More than 2/3rd of Acropora's corals had undergone bleaching and died. The fish harvest of the Maroons declined by 60%. (Compromis ¶22)

VII

In August and September 2005 there was an exchange of diplomatic notes between Acropora and DeLand. Acropora alleged that the respondent had violated the UNCLOS, CBD and other obligations under international law. DeLand denied any legal obligations or responsibility arising from the same and refused to enter into bilateral negotiations. (Compromis ¶¶ 23 – 26)

VIII

As a response, Acropora, prohibited import of all goods manufactured or produced by the respondent. The two countries entered into consultations in October 2005 which failed in December 2005. (Compromis ¶27)

IX

After mediation between the two parties also failed, the parties submitted the dispute to the ICJ in May 2006 for its consideration by way of a special agreement. (Compromis ¶30)

QUESTIONS PRESENTED

- [1] Whether DeLand is responsible for a breach of obligations under the UNCLOS?
- [2] Whether DeLand can be held responsible under the CBD?
- [3] Whether DeLand can be held responsible under the WHC?
- [4] Whether DeLand is internationally responsible under the UNFCCC?
- [5] Whether DeLand is bound by the commitments under the Kyoto Protocol?
- [6] Whether DeLand is acting in conformity with applicable principles of international environmental law?
- [7] Whether DeLand is responsible for violating the human rights of the Maroons?
- [8] Whether DeLand is under an obligation to make reparation to Acropora?
- [9] Whether the trade restrictions imposed by Acropora violate the TADR, 2001?
- [10] Whether Acropora's conduct satisfies the requirements of a peaceful counter-measure under international law?

SUMMARY OF PLEADINGS

1. DeLand has no binding obligations under Article 194 of the UNCLOS and it has satisfied all its obligations under Article 212 pertaining to marine pollution through the atmosphere. It cannot be held responsible under the CBD which provides no basis for liability or redress. Furthermore, DeLand is not party to the WHC and is not bound by it.
2. The UNFCCC contains no provisions to invoke the responsibility of States or create an obligation to make reparation, and therefore is inappropriate in the present case. DeLand is, however, acting in conformity with its obligations under the Convention, and cooperating under the same. DeLand has also acted in conformity with the principles of international environmental law.
3. There is no applicable international definition of indigenous peoples. Even under existing definitions, the Maroons do not qualify as indigenous people. Alternatively, DeLand has no binding obligations pertaining to indigenous peoples' rights under customary or treaty law. Further, it cannot be held responsible for breach of the ICESCR.
4. Acropora has violated the TADR by the blanket prohibition of imports from DeLand, and the measure is neither justified under Articles 15(b) and (g) nor does it qualify as a legitimate counter-measure.

PLEADINGS

[1] DeLAND IS NOT RESPONSIBLE FOR A BREACH OF OBLIGATIONS UNDER THE UNCLOS.

[A] DeLAND HAS NO BINDING OBLIGATIONS UNDER ARTICLE 194 OF THE UNCLOS.

The UNCLOS is a mere umbrella convention¹ serving to act as a legal framework for more specific regional and global agreements.² The obligations contained in Articles 192 to 194 are only legal principles and do not impose specific obligations or quantifiable rights.³ Further, any rules of international law derivable from the decisions of international tribunals⁴ are at too high a level of generality and vagueness to be applied in the absence of more specific standards.⁵ Article 194 clearly cannot be said to contain any specific, detailed obligations that can be enforced. The term “damage by pollution” in Article 194(2) has not been defined anywhere in the Convention indicating that the UNCLOS did not intend to set a threshold of damage beyond

¹ S.N. NANDAN & S. ROSENNE, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982 A COMMENTARY- II 21 (1993); T.A. MENSAH, *The International Legal Regime for the Protection and Preservation of the Marine Environment from Land-based Sources of Pollution*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 301 (A. BOYLE & D. FREESTONE EDS., 1999).

² NANDAN AND ROSENNE, *supra* note 1, at 4, A. Boyle, *Marine Pollution under the Law of the Sea Convention*, 79(2) AM. J. INT’L L. 347, 350 (1985).

³ NANDAN AND ROSENNE, *supra* note 1, at 36; J.J.A. Salmon, *Marine Environment, Protection and Preservation*, in ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW VOL. XI 200 (1990).

⁴ Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1911 (1941) [Hereinafter Trail Smelter]; Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) [Hereinafter Corfu Channel]; Lac Lanoux Arbitration (Spain v. Fr.), 12 R.I.A.A. 281 (1957).

⁵ Boyle, *supra* note 2, at 357; Y. L. Tharpes, *International Environmental Law: Turning the Tide on Marine Pollution*, 20 U. MIAMI INTER-AM. L. REV. 579, 606 (1989); X. HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 275 (2003).

which a State would be held responsible. Instead, the UNCLOS looks to more specific international and regional instruments to provide those specific, enforceable standards and rules.⁶ Thus, there are no binding obligations under Article 194 of the UNCLOS.

[B] DELAND HAS NOT VIOLATED ARTICLE 212 R/W ARTICLE 222 OF THE UNCLOS.

Article 212(1) merely requires States to adopt national laws and regulations taking into account internationally agreed rules, standards and recommended practices. The term “taking into account”, being general and imprecise,⁷ constitutes the weakest possible formula that States chose to use under the UNCLOS as a device for incorporation by reference.⁸ Given the hesitation of States in fixing specific standards for air pollution,⁹ Article 212 sets no minimum standard.¹⁰ Further, Article 212 is an exception to the predominance of international rules over national legislation. In the case of atmospheric pollution, the latter prevails over the former.¹¹ Thus, the standard that governs atmospheric pollution is national with a negligible amount of

⁶ NANDAN AND ROSENNE, *supra* note 1, at 4; Boyle, *supra* note 2.

⁷ K.R. Simmonds, *European Economic Community and New Law of the Sea*, 218 RECUEIL DES COURS 9, 96 (1989-VI); A. Yankov, *The Law of the Sea Convention and Agenda 21: Marine Environmental Implications*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 281 (A. BOYLE & D. FREESTONE EDS., 1999).

⁸ NANDAN AND ROSENNE, *supra* note 1, at 211; Final Report of the Committee on Coastal State Jurisdiction Relating to Marine Pollution, International Law Association London Conference (2000) available at <http://www.ila-hq.org/pdf/Coastal.pdf>. (visited on August 27 2006); Boyle, *supra* note 2, at 354.

⁹ Boyle, *supra* note 2, at 354.

¹⁰ Boyle, *supra* note 2, at 354.

¹¹ Yankov, *supra* note 7 at 280; R.P.M. Lotilla, The Efficacy of the Anti-Pollution Legislation Provisions of the 1982 Law of the Sea Convention: A View from South-Asia, 41 INT’L & COMP. L.Q. 137, 138 (1992).

international control.¹² Each State is given a large amount of discretion in the coordination of these national standards with international rules.¹³

Thus, DeLand need not meet any international minimum standards in using its discretion to choose a national policy. Therefore, it has not violated any obligations under Article 212 of the UNCLOS by allowing industries to adopt voluntary limits of emission.¹⁴

[2] DeLAND CANNOT BE HELD RESPONSIBLE UNDER THE CBD.

The CBD does not contain any binding obligations but is a framework convention that provides for the possibility of more detailed instruments containing binding legal obligations.¹⁵ Article 14(2) expressly leaves it to the Conference of the Parties established under the CBD to examine, on the basis of studies conducted, issues of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.¹⁶

Thus DeLand cannot be held responsible under the provisions of the Convention on Biological Diversity which provides no basis for such responsibility.

¹² P. BIRNIE & A. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 404 (2ND EDN., 2002); Boyle, *supra* note 2, at 354.; Lotilla, *id.*

¹³ Yankov, *supra* note 7, at 280; Lotilla, *supra* note 11.

¹⁴ Compromis ¶18.

¹⁵ F. Burhenne-Guilmin & S. Casey-Lefkowitz, *The Convention on Biological Diversity: A Hard Won Global Achievement*, 3 Y.B. INT'L ENVTL. L. 43, 57 (1992).

¹⁶ Convention on Biological Diversity, June 5, 1992, Article 14(2), 31 ILM 8182 [Hereinafter CBD].

[3] DeLand CANNOT BE HELD RESPONSIBLE UNDER THE WHC.

DeLand is not a party to the WHC.¹⁷ To hold it responsible under the same would, therefore, constitute a violation of the principle *pacta tertiis nec nocent nec prosunt*¹⁸ contained in Article 34 of the Vienna Convention on the Law of Treaties¹⁹ which states that a treaty does not create obligations or rights for a third State without its consent. Thus, DeLand cannot be held responsible under the provisions of the WHC.

[4] DeLand IS NOT INTERNATIONALLY RESPONSIBLE UNDER THE UNFCCC.

[A] THE UNFCCC DOES NOT CONTAIN PROVISIONS FOR HOLDING STATES RESPONSIBLE.

The UNFCCC is meant to serve as a legal and institutional framework for monitoring and assessing climate change and facilitating the reaching of further agreement on policies and specific measures to deal with the same.²⁰ The UNFCCC only contains a provision for determining how, in the facts and circumstances of a particular case, the Convention is to be interpreted and applied. It does not contain any provision to determine the responsibility of States under it, or provide for the creation of an obligation to pay compensation for damage

¹⁷ Compromis ¶10.

¹⁸ OPPENHEIM'S INTERNATIONAL LAW VOL. I 1260 (9TH EDN., R. JENNINGS & A. WATTS ED., 1996).

¹⁹ Vienna Convention on the Law of Treaties, May 23 1969, Article 34, 1155 U.N.T.S. 331 [Hereinafter VCLT].

²⁰ Report of the IPCC Working Group III/Response Strategies Working Group, WMO & UNEP, 2nd Sess. (1989) See P. SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 364-365 (2ND EDN., 2003); BIRNIE & BOYLE, *supra* note 12, at 96.

suffered.²¹ The International Court of Justice (ICJ) has held that the *first duty* of a tribunal is to endeavour to give effect to the natural and ordinary meaning of the terms of the treaty,²² and the intention of the framers must be presumed to be contained in the text of the agreement.²³

Thus, the UNFCCC cannot be applied in the present case to decide issues of responsibility under international law for damages.²⁴

[B] ARGUENDO, DELAND CAN BE HELD RESPONSIBLE UNDER THE UNFCCC, IT IS ACTING IN CONFORMITY WITH THE SAME.

It is clear that the intent of the UNFCCC is not to impose common obligations on parties, but to enable parties to use nation-specific programs and to prevent any hindrance to their economic development.²⁵ Article 3, which contains principles that guide the parties in the implementation of the Convention, specifically provides that the measures to address climate change and enable

²¹ United Nation Framework Convention on Climate Change, *opened for signature* May 9, 1992, Article 14(1), 31 ILM 849 [hereinafter UNFCCC].

²² Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4 (March 3).

²³ Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 221; Advisory Opinion No. 13, Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employer, 1925 P.C.I.J. (ser. B) No. 13 at 182.

²⁴ Compromis ¶31.

²⁵ Report of the Governing Council, UNEP, 42nd Sess., U.N. Doc. A/42/25 (1987) where it was specifically stated that the objective of the proposed response was to promote internationally co-ordinated assessments of the magnitude, timing and potential environmental and socio-economic impacts of climate change and promote *realistic response strategies*. See SWCC Conference Statement, para. A(1), in CLIMATE CHANGE: SCIENCE, IMPACTS AND POLICY – PROCEEDINGS OF THE 2ND WORLD CLIMATE CONFERENCE 497 (JILL JÄGER & HOWARD L. FERGUSON EDS. 1991) The SWCC Ministerial Declaration which urged states to adopt feasible national programs and strategies.

the achievement of sustainable development must be *cost-effective*,²⁶ take into account the different socio-economic contexts prevailing in different countries, and comprise all economic sectors.²⁷

Given the specific conditions prevailing in DeLand, including the fact that it possesses a diversified, heavily industrialized economy,²⁸ the enactment of a *cost-effective* policy in such an economy would necessitate provision for flexibility and variance, and DeLand's action in relying on voluntary limits would not be a violation of the UNFCCC.

[C] DELAND IS CO-OPERATING WITHIN THE FRAMEWORK OF THE CONVENTION.

Parties are given discretion under Article 14 of the UNFCCC to decide the method of dispute settlement with regard to the interpretation and application of the agreement by *any peaceful means of their own choice*²⁹ and are thus entitled to choose the appropriate forum for dispute resolution. The inadequacy of bilateral engagements in environmental disputes affecting common concerns has been recognised by the International Court.³⁰ The object of negotiation is to provide an opportunity to reconcile the conflicting interests and rights which may exist, and

²⁶ UNFCCC, *supra* note 21, Article 3(3); J.K. Sebenius, *Designing Negotiations Towards a New Regime: The Case of Global Warming*, 15 INT'L SECURITY 110,132 (1991). It has been estimated that a worldwide reduction in the emission levels by 20% will cost as much as \$3600 billion, and therefore a voluntary reduction by a single nation will cost \$1000 billion.

²⁷ UNFCCC, *supra* note 21, Article 3(3).

²⁸ Compromis ¶4.

²⁹ UNFCCC, *supra* note 21, Article 14(1); Stockholm Declaration on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1 (1973), Principle 24 [Hereinafter Stockholm Declaration]. This Principle also allows for multilateral, bilateral or *other appropriate means to enable the settlement of disputes*.

³⁰ Appeal Relating to the Jurisdiction of the ICAO Council, 1972 I.C.J. 46, 67 (Aug. 18).

not to stifle activity in a particular State without any consideration for the rights being affected and the nature of those rights.³¹

The stance adopted by DeLand, in requiring consideration of the issue in a multilateral context³² was within the limits of discretion provided by the agreement and in furtherance of its sovereign interests. Hence, DeLand is co-operating within the framework of the Convention.

[5] DELAND IS NOT BOUND BY THE COMMITMENTS UNDER THE KYOTO PROTOCOL.

DeLand is not a party to the Kyoto Protocol,³³ and, therefore, is not bound by the terms of the Protocol. Ratification is an important legal act which establishes consent on the part of the State depositing the instrument of ratification to be bound by the terms of the international agreement.³⁴ When a treaty is signed by a party, prior to its coming into force, the conduct of the party and the actions taken are solely at its discretion and the imputation of fault would be inadmissible.³⁵ The only obligation on States which are signatories to the Protocol is to refrain

³¹ Stockholm Declaration, *supra* note 29. This was also endorsed in GA Res. 2995, UN GAOR, 27th Sess. at 19, U.N.Doc. A/2995 (1972).

³² Compromis ¶24.

³³ Protocol to the United Nations Framework Convention on Climate Change (Kyoto) 11 December 1997, 37 ILM 22 (1998), Article 24 [Hereinafter Kyoto Protocol]. The article states that the Protocol shall be subject to ratification.

³⁴ I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 583 (6TH EDN., 2003).

³⁵ LORD MC NAIR, LAW OF TREATIES 202 (1961); *Ambatielos (Greece v. United Kingdom)*, 1952 I.C.J. 28, 40 (July 1). **See also** *Mavrommatis Palestine Concession (Greece v. Great Britain)*, 1924 P.C.I.J. (ser. A) No. 2 at 34.

from acts which are *intended* to substantially impair the value of the undertaking signed by the parties.³⁶

As mentioned earlier, the nature of the measures taken by DeLand was dictated by specific national objectives and certainly not *intended* to substantially impair the value of the undertaking entered into. Therefore, DeLand has committed no infraction of international law.

[6] DeLAND IS ACTING IN CONFORMITY WITH APPLICABLE PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW.

[A] DeLAND HAS NOT VIOLATED THE PRINCIPLE OF SUSTAINABLE DEVELOPMENT.

In determining whether the policies framed by a nation are sustainable, the varying facts and circumstances in every country³⁷ must be taken into account, and the determination of what is sustainable rests primarily with national governments.³⁸ DeLand's conduct of giving its enterprises freedom to assume voluntary obligations was necessitated by the need to provide them with flexibility owing to its heavily diversified industrial setup.³⁹ Hence, DeLand has not violated the principle of sustainable development.

[B] DeLAND HAS NOT VIOLATED THE OBLIGATION NOT TO CAUSE TRANSBOUNDARY HARM.

³⁶ Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland), 1926 P.C.I.J. (ser. A) No. 7 (May 25) at 30.

³⁷ G. Handl, *Environmental Security and Global Change: The Challenge to International Law*, 1 Y.B. INT'L ENVTL. L. 3, 25 (1990). See BIRNIE & BOYLE, *supra* note 12, at 95.

³⁸ BIRNIE & BOYLE, *supra* note 12, at 96.

³⁹ Compromis ¶4.

States are required to take climate change considerations into account to the *extent feasible* and, in their policies, employ *appropriate* methods to be formulated and determined nationally.⁴⁰ The obligation to take measures to prevent transboundary harm is limited to taking measures to prevent actions which have been established by *clear and convincing* evidence to cause harm to the environment.⁴¹ Even the obligation that States must take *precautionary action*, in the absence of full scientific certainty as to the occurrence of a particular contingency, only requires States to take cost-effective measures for environmental protection.⁴²

DeLand has put in place appropriate methods,⁴³ determined by national prerogatives, which would clearly fall within the scope of the principles of law mentioned above. Therefore, DeLand has not violated the obligation not to cause transboundary harm.

[7] DELAND IS NOT RESPONSIBLE FOR VIOLATING THE HUMAN RIGHTS OF THE MAROONS.

[A] THERE IS NO APPLICABLE INTERNATIONALLY ACCEPTED DEFINITION OF INDIGENOUS PEOPLES.

Indigenous peoples are found in varied and changing contexts⁴⁴ implying that any attempt at a global definition would be over or under inclusive.⁴⁵ An internationally accepted definition of indigenous peoples is, therefore, yet to be formulated.⁴⁶

⁴⁰ UNFCCC, *supra* note 21, Article 4(1)(f).

⁴¹ Trail Smelter, *supra* note 4, at 1965.

⁴² Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992), Principle 15 [hereinafter Rio Declaration], UNFCCC, *supra* note 21, Article 3(3).

⁴³ Compromis ¶18.

In the instant case, DeLand is not party to any international instrument containing a definition of indigenous people. Thus, given the absence of DeLand's explicit endorsement of any definition and the non-existence of an internationally accepted one, no definition can be imposed on DeLand and applied to the present case.

[B] ARGUENDO, EVEN UNDER EXISTING PARAMETERS, THE MAROONS DO NOT QUALIFY AS INDIGENOUS PEOPLES.

Indigenous peoples are the original inhabitants of a territory who have been overcome, often outnumbered, by *later settlers* who control the national governments, thereby making priority in time, with respect to the occupation and use of ancestral territory, a necessary factor.⁴⁷ In the instant case, the Maroons have not been displaced by any later settlers. On the contrary, the Kingdom of Acropora was originally inhabited by the Acroporans, who are the descendants of a native indigenous people dating back to the 1400s and the Maroons arrived on the island

⁴⁴ World Bank Operational Manual, *Operational Directive 4.20: Indigenous Peoples*, (1991) [Hereinafter World Bank Operational Directive].

⁴⁵ B. Kingsbury, "*Indigenous Peoples*" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414, 414 (1998).

⁴⁶ R.L. Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369 (1986); Kingsbury, *ibid* at 414; World Bank Operational Directive, *supra* note 44; Report of the UN Special Rapporteur, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986) [Hereinafter Cobo Report].

⁴⁷ Cobo Report, *id*; Kingsbury, *supra* note 45, at 454; R. Falk, *The Rights of Peoples (In Particular Indigenous People)*, in *THE RIGHTS OF PEOPLES* 18 (JAMES CRAWFORD ED., 1988); G. Alfredsson, *Indigenous Populations, Protection*, in *ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW VOL. VIII* 311 (1990).

subsequently nearly three hundred years later in the 1700s.⁴⁸ Thus, the Maroons do not qualify as indigenous peoples.

[C] ARGUENDO, THE MAROONS ARE AN INDIGENOUS PEOPLE, DELAND HAS NO OBLIGATIONS TOWARD THEM.

DeLand has not ratified ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries Peoples. Further, the Convention is not part of customary international law.⁴⁹ It simply comprises progressive guidelines for governments to review their policies toward indigenous people. The Convention is merely promotional, containing goals toward which governments should work and its terms are not always capable of immediate application.⁵⁰

The Draft UN Declaration on the Rights of Indigenous People, 1994 also does not create any binding obligations under treaty or customary international law⁵¹ since sufficient consensus on

⁴⁸ Compromis ¶3.

⁴⁹ S.J. ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 70 (2004). **See also** C. Oguamanam, *Indigenous Peoples and International Law: The Making of a Regime*, 30 *QUEEN'S L.J.* 348, 388 (2004); S. Wiessner, *Rights and Status of Indigenous People: A Global Comparative and International Legal Analysis*, 12 *HARV. HUM. RTS. J.* 57, 127 (1999).

⁵⁰ L. Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 *OKLA. CITY U. L. REV.* 677, 690 (1990).

⁵¹ M.A. Geer, *Foreigners in their Own Land: Cultural Land and Transnational Corporations-Emergent International Rights and Wrongs*, 38 *VA. J. INT'L L.* 331,376-378 (1998); Oguamanam, *supra* note 49, at 398-399. **See also** H.S. Archer, *Effect of United Nations Draft Declaration on Indigenous Rights on Current Policies of Member States*, 5 *J. INT'L LEGAL STUD.* 205, 239 (1999).

the matter has not been reached.⁵² Specifically, customary international law does not recognize the right to protection of cultural land found in the Draft Declaration.⁵³

Additionally, DeLand cannot be held responsible under the provisions of the CBD and the Rio Declaration relating to indigenous peoples, since neither instrument is binding. Under the CBD, provisions on liability and redress are yet to be formulated by the Conference of Parties.⁵⁴

Therefore, there is no basis to hold DeLand responsible under the CBD. The Rio Declaration is a soft law instrument which, by nature, is not binding on States.⁵⁵

[D] DELAND CANNOT BE HELD RESPONSIBLE UNDER THE ICESCR.

Firstly, the ICESCR does not envisage application in inter-state disputes. During negotiations on the proposed Optional Protocol to the ICESCR, States explicitly rejected the possibility of applying the ICESCR to inter-state disputes.⁵⁶

Secondly, the rights contained in the ICESCR are not justiciable since the provisions of the Covenant, including Article 11(1) which provides for an adequate standard of living and adequate food, are very general in nature.⁵⁷ Only where the steps constituting an obligation are

⁵² ANAYA, *supra* note 49, at 65.

⁵³ Geer, *supra* note 51, at 377.

⁵⁴ CBD, *supra* note 16, Article 14(2).

⁵⁵ SANDS, *supra* note 20, at 54.

⁵⁶ Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a Draft Optional Protocol for the Consideration of Communications in Relation to the International Covenant on Economic, Social and Cultural Rights, Commission on Human Rights, 53rd Sess., Provisional Agenda Item 14, Doc. E/CN.4/1997/105 (1996).

⁵⁷ D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 742 (6TH EDN., 2004).

provided for in detailed, does there arise an obligation of conduct.⁵⁸ Furthermore, the Covenant does not make national level legislative action mandatory, leaving it to the discretion of States to adopt legislation pursuant to the ICESCR. The only negative obligation placed on States is to remove existing legislation that is in violation of the ICESCR.⁵⁹

In the instant case, DeLand has enacted no legislation in violation of the ICESCR. It is under no obligation to enact legislation to give effect to the provisions of the ICESCR. Thus, it is not in breach of the ICESCR by allowing industries to adopt voluntary limits.

[8] DeLAND IS NOT UNDER AN OBLIGATION TO MAKE REPARATION TO ACROPORA.

[A] NO INTERNATIONAL RESPONSIBILITY CAN BE INVOKED AGAINST DeLAND.

State Responsibility only arises under international law if there is a breach of a specific international obligation, independent of whether the State has suffered damage, directly or indirectly, as a result of the impugned action.⁶⁰ States do not possess the right to *judge* whether a violation of international law has occurred or take counter-measures.⁶¹

The right of permanent sovereignty over natural resources extends to the enactment of any laws and the adoption of any commercial policy, unless specifically restricted by an international

⁵⁸ HARRIS, *ibid* at 748.

⁵⁹ P. Alston & G. Quinn, *The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights* 9(2) HUM. RTS. Q. 156, 167 (1987).

⁶⁰ B. Graefrath, *Responsibility and Damages Caused : Relationship between Responsibility and Damages*, 185 RECEUIL DES COURS 9, 48 (1984-II). See Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Report of the International Law Commission to the General Assembly, 53rd Session*, U.N.G.A.O.R., 56th Sess., Supp.No.10, Art.2, 3 (A/56/10), chp.IV.E.1 (2001)[Hereinafter ILC Draft Articles].

⁶¹ Graefrath, *ibid* at 53.

agreement.⁶² In determining whether or not a nation has used due diligence in preventing environmental harm, relevant social and economic factors have to be taken into account, and pollution may be significant even when the most advanced standards are applied due to the size and number of operations within the country.⁶³ In addition, it would inequitable to demand a voluntary assumption of obligations from one party when other parties have not assumed the same.⁶⁴

Further, the possibility of strict liability does not arise outside of an international agreement under which specific obligations have been assumed by the parties.⁶⁵

As elucidated earlier, DeLand has not violated any international obligation, and the due diligence standard requires that due consideration be given to the particular conditions prevailing in the concerned States. In addition, since none of the agreements contain provisions for strict liability for environmental harm, DeLand cannot be placed under an obligation to pay damages outside a legal framework.

⁶² OPPENHEIM, *supra* note 18, at 286-7.

⁶³ P.T. Stoll, *Transboundary Pollution*, in INTERNATIONAL, REGIONAL & NATIONAL ENVIRONMENTAL LAW 182 (F.L. MORRISON & R. WOLFRUM EDS., 2000).

⁶⁴ L.F.E. Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 INT'L & COMP. L.Q. 1189, 1226 (1965).

⁶⁵ Goldie, *ibid* at 1192, 1220; Graefrath, *supra* note 60, at 112, A. KISS & D. SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 352 (1991); C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 RECUEIL DES COURS 9, 301 (1999); T. Scovazzi, *State Responsibility for Environmental Harm*, 12 Y.B. INT'L ENVTL. L. 43, 55 (2001), T.A. Berwick, *Responsibility and Liability for Environmental Damage: A Roadmap for International Environmental Damage*, 10 GEO. INT'L ENVTL. L. REV. 257, 263-264 (1998); D.B. Magraw, *Transboundary Harm: The International Law Commission's Study of "International Liability"*, 80 AM. J. INT'L L. 305, 320 (1986); Corfu Channel, *supra* note 4; Trail Smelter, *supra* note 4; L.A. Teclaff, *International Law and the Protection of the Oceans from Pollution*, in INTERNATIONAL ENVIRONMENTAL LAW 121 (L.A. TECLAFF & A.E. UTTON ED., 1974); X. HANQIN, *supra* note 5, at 306.

[B] THERE EXISTS NO CAUSAL LINK BETWEEN THE CONDUCT OF DeLAND AND THE DAMAGE TO ACROPORA.

The establishment of an obligation to make reparation requires not only the breach of an international duty and the existence of material damage, but also a causal relationship between the conduct and the damage caused to Acropora,⁶⁶ the cause being established by *clear and convincing evidence*.⁶⁷ The loss or harm, to be in the contemplation of the parties and to establish proximate causality, must be so connected with the wrongful act as to form its *consequence*.⁶⁸ Therefore, only if an action is severed from the surrounding conditions, in terms of being causally independent and *that part of the defendant's conduct which is wrongful has led to the damage*, will an act be held to be causal in the legal sense.⁶⁹ In the process of attribution, the onus is upon the claimant to establish how the damage occurred and prove the causal link between the activity and the harm,⁷⁰ and when the determination requires specialized scientific data, the rights and obligations of States cannot be extrapolated from circumstantial evidence.⁷¹ The burden is therefore on Acropora to establish that DeLand's actions were causally connected

⁶⁶ I. BROWNLIE, *STATE RESPONSIBILITY* Part I 38 (1983).

⁶⁷ G. Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AM. J. INT'L L. 50, 75 (1975).

⁶⁸ B. CHENG, *GENERAL PRINCIPLES OF LAW* 245 - 246 (1953).

⁶⁹ H.L.A. Hart, *Causation in the Law-I*, 72 L.Q.R. 56, 87 (1956) See F. James & R.F. Parry, *Legal Cause*, 60 YALE L. J. 761, 789 (1951); G.D. Grimsditch & R.V. Salm, *Coral Reef Resilience and Resistance to Bleaching*, IUCN 2005, available at www.iucn.org/themes/marine/pdf/coral_reef_resilience_gg-rs.pdf (visited on July 22 2006). Other causes of climate change, such as pollution and disease. Such stresses, though individually not lethal, may combine with other stresses, such as climate change, and the combined effect may be lethal.

⁷⁰ *Woods v. Duncan*, [1946] A.C. 401, 422; Hart, *ibid* at 67.

⁷¹ A. Tunc, *The Twentieth Century Development And Function of the Law of Torts in France*, 14 INT'L & COMP. L.Q. 1089, 1096 (1965).

to the harm caused such that the latter was the consequence of the former. The same clearly cannot be concluded merely from the fact that the damage suffered by the Hebrides Reef occurred simultaneously with the increase in DeLand's emissions, or that DeLand was a significant contributor to global emissions.⁷² Therefore, no causal link has been established and the damage suffered by Acropora cannot be causally linked to the impugned action.

[C] DELAND IS NOT LIABLE TO PAY DAMAGES TO ACROPORA.

Damages are recoverable by a State only if it is demonstrated that its rights under international law have been infringed, and this necessarily entails a breach of an international obligation, and merely an infringement of an interest will not make a State liable for damages.⁷³ Additionally, Acropora will not be able to recover damages from DeLand, unless it is shown that the losses are causally connected to the actions of the latter.⁷⁴ Clearly, DeLand is not under an obligation to make reparation to Acropora.

[9] THE TRADE RESTRICTIONS IMPOSED BY ACROPORA VIOLATE THE TADR, 2001.

[A] THE CONDUCT OF ACROPORA VIOLATES ARTICLE 5.

Article 5 of the TADR specifically bars Non-Tariff Barriers (NTBs) including restrictions on goods entering a particular State or prohibitions on the same. Hence, the measures taken by

⁷² Compromis ¶17.

⁷³ Corfu Channel, *supra* note 4.

⁷⁴ Handl, *supra* note 37, at 75.

Acropora of prohibiting the import of goods produced or manufactured in DeLand⁷⁵ violate Article 5.

[B] THE MEASURE IS NOT SAVED BY ARTICLE 15 OF THE TADR.

The burden of proving that its actions were justified in light of the exceptions under Article 15 falls on the party seeking to prove the same.⁷⁶ Additionally, a measure which has no relation to the *quality* or *characteristics* of the product⁷⁷ cannot be excused as justified under Article 15(b) or (g), and imports must be allowed as long as the product in question conforms to required qualitative standards.⁷⁸

ARTICLE 15(B):

The word *necessary* does not refer to the necessity of environmental protection, but whether the concerned measures are *required for*,⁷⁹ or *clearly designed and apt to achieve* the environmental protection desired.⁸⁰ In determining whether a measure is *necessary*, it must be determined whether the party had exhausted all the other legitimate measures more consistent with trade

⁷⁵ Compromis ¶27.

⁷⁶ Brazil – Export Financing Programme for Aircraft (Recourse by Canada to Article 21.5 of the DSU), 21 July 2000, WT/DS46 /AB/R.

⁷⁷ United States-Taxes on Automobiles, 11 October 1993, DS31/R.

⁷⁸ United States-Measures Affecting Alcoholic and Malt Beverages, 19 June 1992, GATT B.I.S.D. (39th Supp.) at 206, ¶5.19 (1993).

⁷⁹ US – Standards of Reformulated and Conventional Gasoline, Report of the Panel, 29 January 1996, WT/DS2/R, ¶6.22.

⁸⁰ EC- Measures Affecting Asbestos and Asbestos Containing Products, Report of the Appellate Body (AB-2000-11), 12 March 2001, WT/DS135, AB/R, ¶168.

available to it.⁸¹ Further, the measure must be the only way of achieving the desired policy goal,⁸² and must be applied consistently, especially if the damages cannot be attributed to a specific cause.⁸³ Environmental measures designed to pressurise other countries into changing their environmental policies will not be “necessary” within the meaning of Article 15(b).⁸⁴

Acropora’s conduct in banning all imports from DeLand⁸⁵ and exhorting other nations⁸⁶ to do the same is in no way related to the achievement of the objective of environmental protection, and is thus *unnecessary* under Article 15(b). Additionally, by attempting to bring DeLand into international disrepute,⁸⁷ the measures were clearly an attempt to pressurise DeLand, and hence violate international law.

ARTICLE 15(G):

Article 15(g) allows for measures relating to natural resource conservation taken in conjunction with domestically enforced restrictions on production or consumption. “Relating to” denotes that the measure is primarily aimed at conservation and will not be so if there are other measures

⁸¹ US - Section 337 of the Tariff Act of 1930, 7 November 1989, GATT B.I.S.D. (36th supp.) at 345, ¶5.26 (1990). See Thailand- Restrictions on Importation of and Internal Taxes on Cigarettes, 5 October 1990, DS10/R-37S/200, ¶75 [Hereinafter Thai Cigarettes].

⁸² US – Standards of Reformulated and Conventional Gasoline, Report of the Panel, *supra* note 79, ¶6.25.

⁸³ Thai Cigarettes, *supra* note 81, ¶76. See US - Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Panel, 15 May 1998, WT/DS58/R, ¶¶3.35-.37, 3.55-.60.

⁸⁴ US – Restriction on Import of Tuna, February 18 1992, GATT B.I.S.D. (39th Supp.) at 155. ¶5.27 (1993)

⁸⁵ Compromis ¶27

⁸⁶ Compromis ¶27.

⁸⁷ Compromis ¶27.

available to the parties.⁸⁸ A disproportionately wide measure such as a simple, blanket prohibition or any other measure which completely eliminates trade will not be saved by Article 15(g).⁸⁹ A measure will be held to be in conjunction with restrictions on domestic production if there is a parallel measure in the applying country.⁹⁰ Clearly, the measure applied was not only disproportionately wide,⁹¹ but was also applied without the application of *any parallel domestic measure*, and hence will not be saved by Article 15(g).

[10] ACROPORA’S CONDUCT ALSO DOES NOT SATISFY THE REQUIREMENTS OF A PEACEFUL COUNTER-MEASURE UNDER INTERNATIONAL LAW.

A legitimate counter-measure must be a proportionate response⁹² directed against a nation which has breached the contents of a specific rule of international law.⁹³ Additionally, a reprisal, to be legitimate, has to be equitable, implying that similar cases be treated in a similar manner, and

⁸⁸ Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, 22 March 1988, GATT B.I.S.D. (35th supp.) at 68, ¶¶4.5-4.6 (1989); US – Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, 29 April 1996, WT/DS2/AB/R, ¶¶18-19.

⁸⁹ Thai Cigarettes, *supra* note 81, ¶75.

⁹⁰ Thai Cigarettes, *supra* note 81, ¶75.

⁹¹ Compromis ¶27. The import prohibition was applied to all goods produced or manufactured in DeLand by the Proclamation dated 28th September.

⁹² O. Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178 RECUEIL DES COURS 9, 170 (1982-V). **See also** ILC Draft Articles, *supra* note 60, Article 59.

⁹³ W. Wengler, *Public International Law-Paradoxes of a Legal Order*, 158 RECUEIL DES COURS 9, 19 (1977-II), ILC Draft Articles, *supra* note 60, Article 49. **See also** Case Concerning the Gabčíkovo Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, 55 (Sept. 25).

exceptions be treated on a principled basis,⁹⁴ and must be directed towards bringing about cessation of the wrongful act and restoring *status quo ante*.⁹⁵

Acropora's action in prohibiting *all imports* of goods produced and manufactured,⁹⁶ applied only to DeLand,⁹⁷ was not only disproportionate but also inequitable in its application. Additionally, banning imports when the cause of the damage was the impact of *global emissions* was clearly inappropriate to restore status quo ante, an essential condition in determining legality. The measure thus does not qualify as a legitimate counter-measure under international law.

⁹⁴ C. JEPMA., CLIMATE CHANGE POLICY, FACTS, ISSUES AND ANALYSIS 57 (1998).

⁹⁵ Schachter, *supra* note 92, at 170. **See also** Commentary to the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N.GAOR, 56th Sess., Supp. No. 10, U.N.Doc.A/56/10 274 (2001).

⁹⁶ Compromis ¶27.

⁹⁷ Compromis ¶27.

CONCLUSION

Wherefore, may it please the Court in the light of the questions presented, arguments advanced, and authorities cited, to adjudge and declare that:

1. DeLand is not internationally responsible for violations of the UNCLOS, the UNFCCC, the CBD, the WHC as well as relevant rules and principles of international law.
2. DeLand is not internationally responsible for violating the human rights of the Maroons under customary and treaty law pertaining to indigenous peoples as well as under the ICESCR.
3. Acropora, by its banning of imports of goods produced or manufactured in DeLand has violated international law, being specifically a violation of the TADR, 2001.

All of which is respectfully affirmed and submitted

AGENTS FOR THE RESPONDENT,

REPUBLIC OF DELAND.