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**THE 2006 STETSON INTERNATIONAL ENVIRONMENT LAW  
MOOT COURT COMPETITION**

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

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*The Case Concerning the Coral Reefs and Climate Change*

**THE KINGDOM OF ACROPORA  
APPLICANT**

**v.**

**THE REPUBLIC OF DELAND  
RESPONDENT**

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**2006**

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**MEMORIAL FOR THE RESPONDENT**

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**ABBREVIATIONS.**

1. &: And.
2. ¶: Paragraph.
3. Am.J.Int'l.L.: American Journal of International Law.
4. Am.U.Int'l.L.Rev.: American University International Law Review.
5. Am.U.J.Int'l.L. & Pol'y: American University Journal of International Law and Policy.
6. ASIL PROC.: Proceedings of American Society of International Law.
7. ATS: Australian Treaty Series.
8. B.U.Int'l.L.J.: Boston University International Law Journal.
9. B.Y.I.L.: British Yearbook of International Law.
10. C.O.P.: Conference of Parties.
11. C.B.D.: Convention on Biological Diversity.
12. Dal.J.Leg.Stud.: Dalhousie Journal of Legal Studies.
13. Doc.: Document.
14. Duke L.J.: Duke Law Journal.
15. Eds.: Editors.
16. Eur.J.Int'l.L.: European Journal of International Law.
17. G.A.: General Assembly.
18. Geo.Int'l.Env'tl.L.Rev.: Georgetown International Environmental Law Review.
19. Geo. J. Int'l. L.: Georgetown Journal of International Law.
20. GESAMP: Group of Experts on Scientific Aspects of Marine Pollution.
21. Harv.Env'tl.L.J.: Harvard Environmental Law Journal.
22. Hum.Rts.Q.: Human Rights Quarterly.
23. Inter-Am.Ct.H.R.: Inter American Court of Human Rights.
24. Int'l. J. Mar. & Coast. L.: International Journal of Marine and Coastal Law.
25. IAEA: International Atomic Energy Agency.
26. I.C.J.: International Court of Justice.

27. ICCPR: International Covenant on Civil and Political Rights
28. ICESCR: International Covenant on Economic, Social and Cultural Rights.
29. I.J.I.L.: Indian Journal of International Law.
30. IPCC: Intergovernmental Panel on Climate Change.
31. ILC: International Law Commission.
32. I.L.M.: International Legal Materials.
33. IMO: International Maritime Organization.
34. Int'l: International.
35. J.: Journal.
36. J.Env't'l.L.: Journal of Environmental Law.
37. J.Int'l.Econ.L.: Journal of International and Economic Law.
38. J.W.T.: Journal of World Trade.
39. Law & Pol'y Intl.Bus.: Law and Policy in International Business.
40. McGill Int'l. J. Sustainable Dev. L. & Pol'y.: McGill International Journal of Sustainable Development Law and Policy.
41. p.: Page.
42. Pac.Rim.L. & Pol'y.J.: Pacific Rim Law and Policy Journal.
43. P.C.I.J: Permanent Court of International Justice.
44. R.I.A.A.: Report of International Arbitral Awards.
45. Res.: Resolution.
46. Rev.: Review.
47. Sess.: Session.
48. Soc'y: Society.
49. TADR: Trade Agreement for the Disston Region.
50. UDHR: Universal Declaration on Human Rights.
51. U.N.: United Nations.
52. U.N.C.E.D: United Nations Conference on Environment and Development.
53. UNCLOS: United Nations Convention on the Law of Sea.
54. UNESCO: United Nations Educational, Scientific and Cultural Organization.

55. UNEP: United Nations Environmental Program.
56. UNFCCC: United Nations Framework Convention on Climate Change.
57. UNHRC: United Nations Human Rights Commission.
58. U.Pa.J.Int'l.Econ.L.: University of Pennsylvania Journal of International Economic Law.
59. U.N.T.S.: United Nations Treaty Series.
60. VCLT: Vienna Convention on Law of Treaties.
61. WMO: World Meteorological Organization.
62. WTO: World Trade Organization.
63. Yale J. Int'l. L.: Yale Journal of International Law.
64. Yb.Int'l.Env't'l.L: Yearbook of International Environmental Law.

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**STATEMENT OF JURISDICTION**

The Kingdom of Acropora and the Republic of DeLand submit the following dispute to the International Court of Justice (ICJ). Pursuant to Art. 40, para.1 of the ICJ Statute. Accordingly this court has jurisdiction to adjudicate any question presented by the parties.

**STATEMENT OF FACTS.**

The Kingdom of Acropora (“Acropora”) and the Republic of De Land (“De Land”) are states in the Disston Sea region. De Land is a developed country, with a diversified, industrial economy. Record (“R”) at ¶ 4. Acropora a small island state, has a main island state, Hebrides, inhabited by the Acroporans and the Maroons, both citizens of Acropora. Acroporans are the descendants of the native indigenous people of Acropora. R. at ¶ 3. The Maroons are descendants of slaves, not the original inhabitants of Acropora, live in the northern coast of Hebrides, which is ringed with the Hebrides Coral Reef. The Maroons engage in reef fishing. R. at ¶ 3.

Acropora and Maroons have enjoyed a normal diplomatic and trading relationship with each other, being parties to the Trade Agreement for the Disston Region (“TADR”). R. at pg. 7, 8. In 1998, the Maroons became concerned with increase in sea temperatures and decline in fish harvest, a fact not established by a single scientific report. R. at ¶ 20. De Land has a voluntary standard setting program for regulation of GHG emissions of its industries, in conformity with obligations under UNFCCC.

Despite the above facts, in 2000, concerned with declining fish harvests, Maroons brought a law suit against De Land in its domestic court system, primarily alleging violations of its international obligations to regulate GHG emissions apart from alleging violation of other international obligations. Domestic courts laid down that the proper forum for the dispute was the executive and the legislative branches of De Land, and did not entertain the lawsuit. R. at ¶ 21.

In 2005, on measurement, Disston Sea recorded the highest temperatures since systematic measurements had been made, which had only been a couple of years. Subsequent to the report, the Maroons reported a decline in their fish harvest. R. at ¶ 22.

In a diplomatic note, R. at ¶ 23, Acropora raised concern over the aforementioned facts, and alleged the violation of international obligations by De Land, in regulating GHG emissions.

De Land in a diplomatic note, R. at ¶ 24, stated, as a party to UNFCCC and a non-party to Kyoto Protocol, it has satisfied all its obligations under UNFCCC. De Land expressing concern over the global issue of climate change, deemed appropriate to consider it at a multilateral context of UNFCCC.

In response Acropora, in a diplomatic note, R. at ¶ 25, alleged failure of fulfillment of legal obligations under UNFCCC and Kyoto Protocol, despite the fact that there are no binding legal obligations under UNFCCC and De Land not ratifying Kyoto Protocol. Acropora also alleged violations by De Land, of international obligations imposed on it by UNCLOS and obligation towards Maroons imposed by Rio Declarations, CBD and ICESCR.

De Land in a diplomatic note, R. at ¶ 26, stated that obligations imposed by UNCLOS “to co-operate through international organizations” has been fulfilled. R. at ¶ 26. Regarding human rights violations against Maroons, they being citizens of Acropora, at first instance, duty is upon Acropora to safeguard their rights.

Despite the diplomatic responses by De Land, in a nationally broadcasted speech, R. at ¶ 27, Acropora prohibited the importation of all goods from De Land, and asked other states to do the same. In response, R. at ¶ 28, De Land characterized the act as a direct breach of TADR and called upon Acropora to discuss the matter. After negotiations and meditations failed, Acropora and De Land, signed an agreement, (R. at pg. 3, 4, 5), dated 11 May 2006, and submitted the matter to the ICJ. (R. at ¶ 30).

STATUS OF THE PARTIES IN RESPECT TO VARIOUS INTERNATIONAL TREATIES  
AND MEMBERSHIP OF ORGANIZATIONS.

	Acropora	De Land
ORGANIZATIONS.		
United Nations.	Yes.	Yes.
Statute of ICJ.	Yes.	Yes.
TREATIES.		
VCLT.	Yes.	Yes.
UNFCCC.	Yes.	Yes.
Kyoto Protocol.	Yes.	*
UNCLOS.	Yes.	Yes.
CBD.	Yes.	Yes.
ICESCR	Yes.	Yes.
WHC	Yes.	No.

SYMBOLS:

Yes: State Party to the Treaty/ Member of the Organization.

No: Not a State Party to the Treaty/Not a Member of the Organization.

\*: Signed the Treaty but Not Ratified.

QUESTIONS RAISED.

I. Whether the Republic of Deland is respecting its international obligations and is responsible under international law for damages in relation to the coral bleaching in the Kingdom of Acropora.

II. Whether the Kingdom of Acropora is violating international law by banning the importation of goods produced or manufactured by the Republic of Deland.

## SUMMARY OF ARGUMENTS

1. The UNFCCC does not impose any legally binding obligation. It uses “hortatory” rather than “mandatory” language and imposes no binding obligation on the states. The UNFCCC does not envisage state responsibility as it is a *common concern of humankind*. The UNFCCC is vaguely worded and gives no set standards and timetables. The appropriate forum to discuss the issue is under Article 13 of the UNFCCC, which envisages a Multilateral Consultative process. The conference of parties (COP) is to review the report of inventories and then, give suggestions on policies to be undertaken.

2. DeLand is also not responsible under the United Nations Law of Sea Convention. The definition of pollution under Article 1 of UNCLOS does not include pollution through GHG’s. Scholars have criticized Article 194 and 207 as being vaguely worded imposing clearly laid out duties. There can be no causation, which can be proved either in fact or in law. This is because damage to coral reefs can occur due to a number of reasons, like disease, overfishing etc. Historical emissions would make the establishing of a causal link impossible hence specific causation cannot be proved.

3. DeLand has no obligation towards the Maroons. This is because the ICCPR and the IESCR do not indicate an intention to have inter state claims. Moreover, in the light of no concrete definition of indigenous people yet defined under international law,

Maroons cannot be considered as indigenous people. The obligation to protect Maroons is on the Acropara and not DeLand, as both ICCPR and ISESCR only imposes an obligation on a state to protect the rights of its own citizens. This does not extend to another state.

4. The trade embargo imposed by Acropara is in violation of Article 5 of the TADR. The trade measure is not justified under Article 15, clause (b), as it does not satisfy the necessity clause as has been ruled in the WTO panel decisions in US Shrimp-turtle case, EC Asbestos case. The ban is merely symbolic and does not satisfy the necessity requirement in clause b.

The trade import ban cannot be justified under clause (g), as it is applied in a disguised or an arbitrary manner. The need for the ban to satisfy the non-arbitrariness test has been enunciated in the US-Gasoline case. The actions of Acropora clearly indicate an arbitrary action, which cannot be justified under clause (g).

**PLEADINGS**

**I. DELAND IS NOT RESPONSIBLE UNDER INTERNATIONAL LAW FOR THE DAMAGE TO ACPROPARA'S CORAL REEFS**

**A. The UNFCCC imposes no legally binding obligations on states and sets no targets or timetables to take effective measures to reduce GHG emissions.**

The UNFCCC is a framework convention which, lays down broad principles or rules. Because of its “hortatory” rather than “mandatory” language it imposes no binding obligation on the states.<sup>1</sup> The UNFCCC specifically uses the word “aim”, which renders the whole set of obligations as legally non binding in meaning and nature.<sup>2</sup> The *travaux preparatoires* of the shows that it was negotiated in less than eighteen months and walks a tight rope in seeking to balance the interests of the developed as well as the developing states.<sup>3</sup> The intention of the negotiators was to make a framework

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<sup>1</sup> Rebecca Elizabeth Jacobs, *Treading Deep Water: Substantive Law Issues In Tuvalu's Threat To Sue The United States In The International Court Of Justice* *Treading Deep Water*, 14 Pac. Rim L & Pol'y J. 103.; 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 21 (2005).

<sup>2</sup> Article 4.2(a) (b) UNFCCC, see *Ibid*.

<sup>3</sup> Daniel Bodansky, *The United Nations Framework Convention On Climate Change: A Commentary*, 18 Yale J. Int'l. L. 483 (1993).

convention modelled on the Vienna Convention for the protection of the Ozone layer<sup>4</sup>. The UNFCCC is a framework convention setting only broad principles and rules, whereas, the Kyoto protocol imposes specific targets and timetables. DeLand is only a party to the UNFCCC and not to the Kyoto Protocol and hence, it is not bound by legally binding obligations including those setting targets and time tables to reduce GHG emissions.

**1. The Climate change regime does not envisage state responsibility in the case of non-compliance**

The preamble to the UNFCCC refers to climate change as a *Common Concern of Humankind*<sup>5</sup>. By approaching the issue from a global perspective; the UN has also acknowledged the artificiality of spatial boundaries and also the inappropriateness of treating the phenomena of climate change in the same way as transboundary air pollution where a bi-lateral approach is more relevant<sup>6</sup>. With respect of global commons, like atmosphere and climate, the usual schemes of state responsibility prove

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<sup>4</sup> Vienna convention is a framework convention laying down certain basic principles and rules, on which latter substantive rules were added through the Montreal Protocol, which imposed binding obligations on parties.

<sup>5</sup> Preamble to the UNFCCC reads “*Acknowledging that change in earth’s Climate and its adverse effect are common concern of humankind.*” This was included at the request of Malta, which gained widespread support from governments and NGO’s, *supra* note 3, p. 486.

<sup>6</sup> David Freestone, *The Precautionary Principle*, in Robin Churchill and David Freestone (eds.), *International Law and Global Climate Change*, (London, Graham and Trotman, 1991) at 21.

to be insufficient. These pose confusion as to “wrong-doers” and “victims” that is to some extent every state is contributes and every state is also affected by climate change.<sup>7</sup>

Article 31 of the Vienna Convention on the Law of Treaties,<sup>8</sup> states, that a treaty shall be interpreted “in good faith and in accordance with the ordinary meaning given to the terms of the treaty in their context and the light of its object and purpose.”<sup>9</sup> The object and purpose and be deciphered from the *Travaux preportiores* of the treaty.<sup>10</sup> Prior to the drafting of the UNFCCC, there were three Conferences, The Noordwijk conference, The Bergen Conference and The Second World Conference on Climate Change (SWCC), where all three conferences there is no concurrence on set target and timetables, rather the SWCC merely urged developed states to establish target and timetables or feasible national programmes and strategies.<sup>11</sup> Pre - Rio negotiation saw a deadlock between U.S. and U.K. over setting targets and timetables, finally a compromise was struck and the and it set forth in its very nebulous language the general “aim” of returning GHG emissions to 1990 levels by the year 2000.<sup>12</sup> Thus, the *Travaux* clearly indicates that there was an intention on the part of the negotiators as not

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<sup>7</sup> Tullio Scovazzi, *State Responsibility for Environmental Harm*, 12 Yb. Int'l. Env'tl. L. 51 (2003)

<sup>8</sup> Vienna Convention On Law Of Treaties , 27 January 1980, U.N.T.S 1155

<sup>9</sup> See Article 31(1) Vienna Convention on Law of Treaties, *Ibid.*

<sup>10</sup> Anthony Aust, *Modern Treaty Law and practice*, (Cambridge, Cambridge University Press, 2000) at 32.

<sup>11</sup> Supra note 3

<sup>12</sup> Daniel Bodansky, *International Law and The Design of a Climate change Regime*, in Urs Lutherbacher, Detlef F. Sprinz (eds.) , *International Relations and Global Climate Change*, (New York, MIT press, 2001) at 172.

to impose any legally binding obligations. The UNFCCC is the framework convention which lays down aspiration of states and broad principles, legally binding obligations are imposed through the Kyoto protocol.<sup>13</sup> Deland is a party to the UNFCCC, and has only signed, but yet not ratified, The Kyoto Protocol.<sup>14</sup> Hence, DeLand has no legally binding targets and timetables to follow.

i. **The UNFCCC sets no legally binding obligation and does not envisage state responsibility in the case of non-compliance**

The commitments of state parties to the UNFCCC are enunciated in the Article 4. The general commitments of all parties are embodied in Article 4.1, while specific commitments of Annex 1 parties are enunciated in Article 4.2. Though the specific commitments do set up a non-legally binding “aim” to return to the 1990 levels and also enlists obligations, such as mandatory reporting requirements etc.<sup>15</sup> However, the UNFCCC does not mention how these commitments have to be made concrete, this question though was addressed through the Kyoto Protocol. The KP sets flexible implementation methods through Joint Implementation, Clean Development Mechanisms and Emission Trading.<sup>16</sup> These mechanisms provide states with a lot of

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<sup>13</sup> *Ibid.*

<sup>14</sup> Compromis para 12, Record, at p.7.

<sup>15</sup> Article 4(b) UNFCCC

<sup>16</sup> Peter Ducanson Cameron, *The Kyoto Process: Past, Present and Future*, in Peter D. Cameron and Donald Zillman (eds.) , *Kyoto: From Principles to Practice*, ( Hague, Kluwer Law International, 2001)

flexibility in meeting their objectives of reduction of their targets.<sup>17</sup> The states are permitted to meet their emission reduction commitments, by exchanging tradable emissions from other states, they can also work jointly in meeting their commitments, and this is known as “bubbling”<sup>18</sup>, and states can also gain emission points by Investing in Clean Development projects in other states.<sup>19</sup> This is so because, the aim is to reduce *global* GHG emissions and hence it is of no material Significance, as to from which source state such a reduction is taking place.<sup>20</sup> Hence, it can be assumed that the UNFCCC does not envisage liability in the event of non-compliance.

Article 13 of the convention envisages a multilateral consultative process<sup>21</sup> available to parties at their request, for the resolution of questions regarding the implementation of the convention. Under, the Kyoto protocol also, after decision 24/CP.7, the issue of non-compliance is addressed by a non-compliance committee, scholars have termed it as the strongest and institutionally most sophisticated non-compliance procedure adopted by any MEA to date.<sup>22</sup> These, processes of compliance have been kept with the objective of

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<sup>17</sup> Clare Breidenich, Daniel Macgraw, Anne Rowley and James W. Rubin, *The Kyoto Protocol To The United Nations Framework Convention On Climate Change*, 92 Am. J. Intl. L., 315 (1998).

<sup>18</sup> Peter G. G. Davies, *Climate Change and the European Union*, *supra* note 16. “The European Union has jointly aimed at reducing its GHG emissions, through the process known as Bubbling”.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Supra* note 19.

<sup>21</sup> Article 13 UNFCCC reads “the conference of parties shall, at their, first session consider the establishment of multilateral consultative process, available to parties at their request, for the resolution of the question regarding the implementation of the convention.”

<sup>22</sup> Farhana Yamin and Joanna Depledge, *International climate change: A guide to Rules, Institutions and Procedure*, (Cambridge, Cambridge University Press, 2004) at 386.

“facilitating, promoting and enforcing compliance with commitments under the protocol.”<sup>23</sup> Since climate change is a global issue, it can only be addressed at a multilateral forum and not a bi-lateral context.

It is humbly submitted, that the appropriate forum for negotiation is the Conference of Party (COP) and not at the Bi-lateral level.

**ii. The Appropriate forum for negotiations is a Multilateral Consultative Process under the UNFCCC, not Bi-lateral negotiation**

In response to the letter forwarded by the government of The Kingdom of Acropora, which invited the Republic of DeLand for negotiations through Bilateral talks, the position of the latter was, that the dispute ought to be resolved at a multilateral context, through organizations of the U.N. Framework Convention on Climate Change.<sup>24</sup> The Republic of DeLand humbly submits that it still holds its position.

The issue of climate change is a global concern, and this is evident from the preamble of the UNFCCC which calls it a *common concern of humankind*<sup>25</sup> . The status of CCH, implicates that climate change is an international community concern rather than an injury to a particular state.<sup>26</sup> Though the UNFCCC contains the dispute resolution

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<sup>23</sup> Ibid.

<sup>24</sup> See, Letter forwarded to the government of Kingdom of Acropara, on the 26<sup>th</sup> August 2005, para 24, record page 10.

<sup>25</sup> *Supra* note 4

<sup>26</sup> *Supra* note 12.

provisions found in other international environmental agreement, in practice they are never invoked. Historically, states have been able to agree on liability schemes only for acute pollution incidents such as oil spills and nuclear accidents. They have generally been unwilling to undertake liability for long term problems such as Stratosphere Ozone Depletion and global warming, where the potential liability exposure is extremely high and task of establishing responsibility is not simple.<sup>27</sup> The UNFCCC calls on all parties to resolve disputes through a “Multilateral consultative Process” to address implementation questions<sup>28</sup>. This is based on the Montreal Protocol system.

The Climate Change regime is based on Japans proposal of “pledge” and “review”, and though the proposal so not accepted in its strongest terms, it is reflected in reporting requirements which the Convention imposes on its parties. The Conference of Parties (COP), as the supreme body of this convention, shall keep under regular review the Implementation of the convention and any related instrument that the Conference of Party may adopt.<sup>29</sup> The, report of inventories , which each Annex 1 party needs to publish pursuant to its obligation under the Article 4.2(b)-(c), will be reviewed by the COP and then it will , after reviewing, suggest parties what policies or steps to take to effectively its policies under the convention. DeLand has already given a report

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<sup>27</sup> *Ibid.*

<sup>28</sup> Article 13 UNFCCC.

<sup>29</sup> Article 7.2 UNFCCC.

of its inventories and now awaits suggestions from the COP, on policies which it could use to effectively implement its policies and obligations under the UNFCCC.

Moreover, the convention provides for adaptation<sup>30</sup> i.e. providing states especially those most vulnerable to climate change the tools for adapting to rising sea levels, etc. by building walls to avoid coastal flooding, switching to more heat resistant agricultural crops etc. <sup>31</sup>. The suggestion to provide a financial mechanism for meeting the costs of adaptation was a suggestion made by the Association of Small Island States (AOSIS), which after much deliberation got adopted through Article 4.4. The proposal for inclusion of a financial mechanism for adaptation from AOSIS clearly shows that states are well aware of the inevitability of adverse effects caused due to climate change.

UNFCCC envisages a framework of cooperation rather than legal sanctions<sup>32</sup> . DeLand is willing to negotiate, however, for negotiations to be meaningful; it must be conducted at a multilateral level, as climate change is a global problem. Hence, it is submitted that the Multilateral Consultation provided by the UNFCCC is the most appropriate forum to discuss the issue and not the bilateral talks proposed by Kingdom of Acropora.

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<sup>30</sup> Article 4.4 & Article 12.3 , UNFCCC.

<sup>31</sup> *Supra* note 3.

<sup>32</sup> *Ibid*

**B. DeLand is not responsible for any breach of obligation occurring under UN Law of Sea Convention**

The UNCLOS lays down certain obligations on states for not polluting, the marine environment, however, such an obligation is not as expansive as to include GHG emissions. Also, imputing state responsibility for global commons is not possible, as it is very difficult to identify the wrong-doer in this case. Proving state responsibility would require i.) Presence of an obligation ii.) Breach of that obligation and iii.) Imputability to the respondent state (causation).

**i. The definition of pollution under UNCLOS does not include GHG emissions emanating from land based sources.**

Article 1 of the UNCLOS defines pollution as “pollution of the marine environment” means the introduction by man, directly or indirectly, of substances or energy into the marine environment”. This is an expansive definition of pollution which the UNCLOS encompasses. However it is evident from the negotiations that the negotiators had no intention to include within its purview the issue of climate change.<sup>33</sup> Even under the UNFCCC and Kyoto protocol, GHG emissions are not considered as pollution *per se*, as a matter of fact UNFCCC never provides a threshold for Emitting

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<sup>33</sup> Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. IV (Hague, Martinus Nijhoff Publishers, 1993) at 47.

GHG gases.<sup>34</sup> It is only a party to the UNFCCC which sets the “aim” of “returning” back to the 1990 levels. The world “aim” does not specify any legally binding obligation and hence does not set a threshold, and it uses the word “return” and not “stabilize”, which again is a legally non binding language.<sup>35</sup>

Under the UNCLOS, Article 207 refers to Land-based source of pollution. It imposes an obligation on states to prevent, reduce and control pollution of the marine environment from land-based sources<sup>36</sup> however; states have to keep into account internationally agreed rules, standards and recommended practices and procedures. Scholars have criticized this provision by affirming that the vaguely worded language does not, indicate what internationally agreed upon rules and standards are, and what "other measures" states must take into account. Further, it fails to give any indication as to the criteria to determine the suitability of the above standards and Measures.<sup>37</sup> In Article 207, vague or imprecise language is used in relation to the obligation of states to "endeavour" to “harmonize their policies at the appropriate regional level" and "to

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<sup>34</sup> *Supra* note 30, “The country by country targets are listed in annex B of the protocol. Though the Kyoto protocol does provide a threshold, it is based on common and differentiated responsibility approach and is different for all states; it ranges from 8% reduction in members of the European Union and 7% for United States.”

<sup>35</sup> *Supra* note 35

<sup>36</sup> See Article 207 U.N. Convention on the Law of Sea, 10 December 1982, U.N. Doc. A/Conf.62/121,21 I.L.M 1261.

<sup>37</sup> Dr. Daud Hassan, *International Conventions Relating to Land Based Source of Marine Pollution Control: Applications and Shortcomings*, 16 Geo. Int'l Env'tl. L. Rev. 657

establish global and regional rules, standards and recommended practices" on LBSMP<sup>38</sup>. Because it fails to give any indication as to the criteria to be used to determine the suitability of the international standards and adequate measures, it has been said that the obligation is so imprecisely and broadly formulated as to not have much of a practical effect.<sup>39</sup> However, even if it is assumed, without necessarily conceding, that the international standard be taken as provided by the UNFCCC, even then there would be no legally binding obligation as UNFCCC itself does not provide a definitive obligation or a standard.

Hence, the GHG emissions cannot be taken within the definition or ambit of pollution as provided under the UNCLOS.

**ii. There is no causal link between the increase in DeLand's GHG emissions and rise in sea water temperatures in Disston Sea.**

In establishing responsibility for climate change through increase in GHG emissions, as in most other cases concerning Global Commons, it requires proving causation or a causal link between the harm caused and the activity, which involves uncertainty, both in science and in law.<sup>40</sup> Causation theories are differentiated between causation in fact and causation in law.<sup>41</sup>

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<sup>38</sup> *Supra* Note 35 at 209.

<sup>39</sup> Lucas Bergkamp, *Liability and Environment*, (Hague, Kluwer Law International, 2001) at 281.

<sup>40</sup> Richard S.J. Tol and Roda Verheyen, *State Responsibility and Compensation for Climate Change Damages- A Legal and Economic assessment*, Energy Policy 32 (2004) 1109-1130; Rebecca Elizabeth Jacobs, *Treading Deep Water: Substantive Law Issues In Tuvalu's Threat To Sue The United States In The International Court Of Justice*, 14 Pac. Rim L & Pol'y J. 103 ; Tullio Scovazzi, *State Responsibility for Environmental Harm*, 12 Yb. Intl.

**There is no causation in Fact**

To establish causation in fact, one needs to prove a causal link between the activity and the damage caused.<sup>42</sup> It is submitted, that no such causal link can be established with certainty.

It is a well know scientific fact that damage to coral reefs can occur due to various reasons, rise in temperatures being only one of them. The majority of coral reef destruction is a result of human action. The causes of coral reef degradation attributable to human activity fall into four major categories: over fishing; pollution; sedimentation; and climate change.<sup>43</sup> Human activity, such as development, over fishing, or irresponsible tourism, is the common denominator of the many threats to the health and existence of coral reefs. Even agricultural fertilizer and herbicides applied to fields far from the reefs are creating total "dead zones" in the oceans and harming life on the reefs, which require clean, nutrient-free waters to thrive.<sup>44</sup> Hence, climate change remains but one possibility for the damage to the coral reefs.

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Envtl. L. 46 (2003) ; 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 21 (2005).

<sup>41</sup> *Supra* note 39.

<sup>42</sup> *Ibid.*

<sup>43</sup> Mary Gray Davidson, *Protecting Coral Reefs: The principal National and International Instruments*, 26 Harv. Env'tl. L. Rev. 499, 2002: The United Nations Food and Agriculture Organization ("FAO") has been tracking the supply of fish in the ocean and has found that the stocks of over seventy percent of the 200 major fish species are either fully or over-exploited if not actually being depleted.

<sup>44</sup> Colin Woodard, *OCEAN'S END*, 42 (2000): "diseases have been observed on 106 species of coral (including some soft corals) on reefs in 54 countries around the world] The Caribbean has been particularly hard hit by diseases such as aspergillosis, white plague type II, black band disease, and white band disease."

The Kingdom of Acropora sent the first letter, on 29 August 2005, which alleged that Deland was not meeting its commitments under the UNFCCC.<sup>45</sup> However, Deland only came out with a report in April 2006<sup>46</sup>. Hence, it is evident that Acropora's assertion was based on speculation rather than scientific basis. It was possible that since roughly 25,000 of population is dependent on reef fish for 90% of their protein needs, reduction in the number of reef fish could be due to over fishing or the reason could be fertilizers used in agricultural activities, another reason could be the introduction of any disease. These could be other possible reasons, which are backed by scientific information. Hence, the causal probability by Climate change is not *res ipsa loquitor* and hence, for reasons such mentioned, it is submitted that no causation in fact can be established. There is no causal link in increase of DeLands GHG gases and damage to coral reefs.

**There is no specific causation in law**

To establish responsibility a state has to establish harm caused to a “victim” by the “wrong-doer”, however, in the case of global commons, it is the opinion of most distinguished scholars, that every state may be a potential “victim” and every state a

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<sup>45</sup> Compromis, para 23, record page 10

<sup>46</sup> Compromis, para 17, record page 9

potential “wrongdoer”. Under, law of state responsibility, damage needs to be imputed to one state, which is not possible in the case of pollution to global commons.<sup>47</sup>

Climate change as a phenomenon has occurred due to the historical emissions of many states. This can be analyzed from the fact that from 1900-1990, U.S.A has contributed 30%, Europe 28%, Japan 4%, and former Soviet Union 14%, carbon di-oxide from fuel combustion.<sup>48</sup> If for the sake of argument, one assumes that responsibility is to be imposed, then it ought to be imposed jointly. This is different from joint and several liability, as it refers to cases of *indivisible harm*, where the harm caused by either the defendants cannot be established.<sup>49</sup>

Hence, it is submitted that state responsibility in this case cannot be attributed to the Republic of DeLand, for the reasons stated above.

**iii. UNCLOS lays an obligation of cooperation through competent international organizations.**

It has been the position of DeLand throughout the exchange of letters, amongst itself and Acropara that it would like to pursue negotiations under the organizations of the UNFCCC, i.e. negotiations in a multilateral context.

Article 194 of LOSC obliges states to take necessary measures to prevent marine pollution from any source including LBS. This provision contains a presumption of

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<sup>47</sup> *Supra* note 7.

<sup>48</sup> WRI, Contributions to Global Warming, July 2001. See FCCC/SB/2002/INF.2 *loc. cit* Richard S.J. Tol and Roda Verheyen *supra* note 44.

<sup>49</sup> *Supra* note 45.

control in relation to LBSMP. However, it also allows states wide discretion in performing their duties by including reference to the use of "the best practicable means" and "in accordance with their capabilities."<sup>50</sup> Since, the obligation under Article 194 is so vaguely worded, it is not possible for a state to seek relief under Article 235 of UNCLOS, which imposes state responsibility for not meeting the obligations under Article 194. This, for example, has been demonstrated in the MOX plant case (Ireland v. United Kingdom.), where the Irish government could not prevent United Kingdom from Opening a mixed oxide fuel, or a MOX facility, in Sellafield nuclear power station in Cumbria, United Kingdom. Ireland emphasized on United Kingdoms obligation under Article 207(1) and 194 to prevent marine pollution from land based sources, however, the tribunal rejected Ireland's claim. It did however, emphasize on both parties to cooperate which was a fundamental duty under the UNCLOS.<sup>51</sup>

This duty to cooperate has been emphasized also, under Article 197 and Article 212, which imposes an obligation on states to cooperate through the competent international organizations.

It is submitted, that because the matter of Climate change is a global concern, it is best addressed in a multilateral context, through the organizations of the UNFCCC. Moreover, Article 13 of UNFCCC itself envisages a "multilateral consultative system" for resolving disputes. Hence, negotiations ought to be carried out in a multilateral

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<sup>50</sup> *Supra* note 41

<sup>51</sup> *Ibid.*

context and not at a bilateral level. DeLand cannot be held responsible, as it has not breached any obligation under UNFCCC or the UNCLOS.

## II. DELAND IS NOT CONTRAVENING THE HUMAN RIGHTS OF THE CITIZENS OF ACROPORA.

### A. The ICESCR does not impose an obligation.

1. *The travaux prepertoire does not indicate an intention that ICESCR could establish basis of inter state claims.*

The Commission on Human Rights in terms of implementation had decided upon the establishment of a permanent human rights committee with provision for inter State claims. This procedure appears to be in respect of civil and political rights as the Commission had to deal with economic, social and cultural rights separately<sup>52</sup>. Unlike the ICCPR it does not provide for the receipt of individual or state claims<sup>53</sup>. States are required to submit periodic reports to the UN on the measures adopted and the progress made in achieving the observance of rights in the Covenant with no body having the ability to interpret the Covenant in a manner which binds State parties<sup>54</sup>. Unlike the ICCPR which requires steps to respect and ensure the ICESCR

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<sup>52</sup> Mathew C.R. Cravern, *The International Covenant on Economic, Social and Cultural Right: A perspective on its Development*, (Oxford, Clarendon Press, 1995), at 18.

<sup>53</sup> Ibid, 23; Alan Boyle, *The Role of international Human Rights Law in the Protection of the Environment* in Alan Boyle & Michael R Anderson(eds) *Human Rights Approaches to Environmental Protection*, 102.

<sup>54</sup> Supra Note 52, pp 27.

imposes an obligation to take steps with a view to achieving the full realization of right<sup>55</sup> . These suggest that the ICESCR did not at any level seek to impose State Responsibility for violations.

2. *The territorial application of the ICESCR must be presumed unless a specific provision says otherwise.*

The Covenant does not in its provisions establish that the Covenant may be the basis of an interstate claim. The VCLT in Article 29 presumes the “territorial application of a treaty” that is unless specified the treaty is applicable in respect of a State’s own territory and that alone<sup>56</sup> It is unlikely that States admit such an obligation<sup>57</sup>

**B. The Maroons do not satisfy the definition of indigenous**

While there is no clear universal definition for the term indigenous, guidelines determines the group which would be effectively covered by its definition has existed. A Preliminary Report submitted by the Special Rapporteur, UN Commission on Human Rights, Sub Commission on Prevention of Discrimination and Protection of Minorities<sup>58</sup> lays down the requirement that the term indigenous extends to those people *who were in the territory of the country at the time when other groups of different*

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<sup>55</sup> ICESCR, Article 2(1); Supra Note 52, 26.

<sup>56</sup> Supra Note 52.

<sup>57</sup> *Ibid.*

<sup>58</sup> Preliminary Report submitted by the Special Rapporteur, UN Commission on Human Rights ,Sub Commission on Prevention of Discrimination and Protection of Minorities ,26<sup>th</sup> Session ,Provisional Agenda Item 10 P 379 ,UN Doc.E/CN.4/Sub2/L.566

*cultures or ethnic groups arrived*. Jurists have also emphasized on such a requirement<sup>59</sup> Chairperson Rapporteur of the UN Working Group on indigenous populations Erica Irene Dias emphasizes that a priority in time with respect to occupation and use of a specific ancestral territory ,even if the group has been displaced in recent times<sup>60</sup>. The Maroons are migratory population which migrated to Acropora and cannot be said to meet the requirement. The issue is further reflected in State Practice. The Government of Thailand in 1992 indicated to the United Nations that hill tribes who had migrated to the region they presently occupied from other countries like Laos Burma and China were not indigenous people<sup>61</sup>. It emphasized those hill tribes who were able to enjoy fundamental rights like any other Thai citizen<sup>62</sup>. The statement of Suriname at the Conference of the Parties distinguishing between the traditional inhabitants and Maroons<sup>63</sup> is further reflected of such practice. The Maroons are citizens of Acropora<sup>64</sup> with specific rights they enjoy under the laws of Acropora along with the traditional inhabitants of Acropora. Acropora does not explicitly recognize these people as indigenous.

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<sup>59</sup> Siegfried Wiessner, *Rights and Status of Indigenous People: A Global Comparative and International Legal Analysis*, 12 Harv. Hum. Rts J. 115.

<sup>60</sup> Benedict Kingsbury, *Indigenous People in International Law: A constructivist Approach to the Asian Controversy*, 92 Am. J. Intl. L. 454 (1998).

<sup>61</sup> Thailand Government Statement, Hill Tribe Welfare and Development, UN Doc.E/CN.4/AC.2/1992/4 loc sit supra Note 9, 431.

<sup>62</sup> *Ibid.*

<sup>63</sup> [www.ramsar.org/cop9/cop9\\_conf\\_rpt\\_e.htm](http://www.ramsar.org/cop9/cop9_conf_rpt_e.htm)

<sup>64</sup> Compromis, Annex A, Record page 6, para 3.

**III. THE IMPORT BAN ON GOODS PRODUCED AND MANUFACTURED IN DELAND IS IN CONTRAVENTION TO THE OBLIGATIONS OF ACROPORA UNDER INTERNATIONAL LAW.**

The import ban on goods produced and manufactured in Deland vitiates the prohibition on quantitative restriction addressed in Article 5 of the TADR and cannot be justified under the General Exceptions , Article 15 of the Agreement.

**A. The import ban constitutes a violation of Article 5 of the TADR which prohibits quantitative restrictions imposed on imported products.**

The TADR forbids a prohibition or restriction whether made effective through quotas, import or export licenses, or other measures instituted or maintained by any Party regarding the importation of any product from the territory of another country<sup>65</sup>. An embargo on goods from Deland would constitute a restriction addressed by the said clause. Economic embargoes imposed by GATT and WTO members have been determined to be a violation of the quantitative restriction imposed by Article XI of GATT <sup>66</sup>. The boycott would constitute a trade restriction in violation to prohibition on quantitative restriction laid down in the TADR.

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<sup>65</sup> Compromis, Annex A, TADR, Article 5, and Record Pg 7.

<sup>66</sup> See Panel and Appellate Body Report in *United States –Import Prohibition of certain Shrimp and Shrimp Products*, WT/DS556/AB/R.

**B. The measure cannot be justified by the General Exceptions to TADR obligations.**

The economic embargo put in place by the Government of Acropora cannot be justified by clause b, f or g of Article 15 of the TADR. Alternatively, the requirement that trade measures should not constitute means of arbitrary and unjustifiable discrimination or a disguised restriction on trade as required under the UNFCCC<sup>67</sup> and the Rio Declaration<sup>68</sup> is not being adhered to.

**i. The economic measure cannot be justified under clause (b) of Article 15.**

Clause (b) provides an exception from TADR obligations to measures which are necessary to protect human, animal or plant health. In accordance with the jurisprudence of the WTO which forms a subsidiary source of law for interpretation of the provisions of the TADR<sup>69</sup>, two broad requirements are imposed. *First*, the measure in question must be a policy within the range of policies designed to protect human, animal or plant life or health. *Second*, the measure is necessary<sup>70</sup>. The necessity of the policy goal cannot determine whether the measure is necessary to achieve the policy

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<sup>67</sup> UNFCCC, Article 3.5.

<sup>68</sup> Rio Declaration, Article 12.

<sup>69</sup> Compromis, TADR, Article 25.

<sup>70</sup> Appellate Body Report in *United States – Standards for Reformulated and Conventional gasoline*, WT/DS2, 25.

objective<sup>71</sup>. Nor, can the measure be an excessive or overreaching means to achieve a legitimate claim.<sup>72</sup>

The trade ban imposed by Acropora is not in consonance with the above mentioned prerequisites to justify a trade ban under the said exception.

*The measure is not a policy within the range of policies designed to protect human, animal or plant life or health.*

The *EC Asbestos* jurisprudence<sup>73</sup> in a view affirmed by subsequent Panels<sup>74</sup> establishes the need for establishing a connection between a targeted product and the risk posed by that product. The trade ban imposed by Acropora represents a ban on goods originating from Deland<sup>75</sup> irrespective of its contribution to greenhouse emissions. The product originating from Deland does not present a health risk to the citizens of Acropora<sup>76</sup>. Assuming, arguendo that Acropora seeks to justify the import ban on the ground of the process of manufacture, the required nexus is again defeated. A good manufactured or produced in Deland would not be permitted access to Acropora's markets even if produced in a fashion or in a sector which does not

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<sup>71</sup> Ibid, 16.

<sup>72</sup> Archana Negi, *The WTO Asbestos Case: Implications for the Trade and Environment Debate*, 1 I.J.I.L., 43, 2003.

<sup>73</sup> See Appellate Body Report in *European Communities- Measures Effecting Asbestos and Products containing Asbestos*, WT/DS135/AB/R.

<sup>74</sup> Panel Report in *European Communities - Conditions for the granting of Tariff preferences to Developing Countries*, WT/DS246/R, Para 7.200 - 7.210.

<sup>75</sup> See Compromis, Annex A, Para 27; National Broadcast Speech of the Minister of Trade for the Kingdom of Acropora on September 28, 2005.

<sup>76</sup> See Panel Report in *EC- Asbestos*, para 8.190-193.

contribute at all to greenhouse emissions. Therefore in the absence of a clear nexus between a targeted product and the risk it poses, it cannot be deemed to be a measure designed to protect human or animal health or life.

*The measure is not necessary.*

A necessity test has evolved into a weighing and balancing of three factors (1)whether and the degree to which the common interests protected by the measure are vital and important.(2)whether alternative measures are “reasonably available” to accomplish the shared objective(3)whether alternative measures are less consistent with the Member’s obligations.<sup>77</sup>

The import ban does not meet the prerequisites in the presence of other reasonably available options available to it. WTO jurisprudence like panel and Appellate Body decisions in Korea--Beef, US--Shrimp and Shrimp Products, EC--Asbestos, and EC--GSP<sup>78</sup>, indicates the effectiveness of a measure is to be given due bearing. The import ban on trade is merely symbolic<sup>79</sup> and lacks effectiveness. Acropora could have exercised the possibility of less trade restrictive modes of diplomatic protest or discussed it in a multilateral context among the organizations of the UNFCCC. Alternatively, trade restriction instead of encompassing all products originating from Deland could be restricted to goods which contribute to greenhouse emissions in its

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<sup>77</sup> Appellate Body Report in Korea Beef ,Para 162 – 166;Also see ,Deborah Osaka, *Necessity Analysis: Evolutionary Interpretation and its Impact on the autonomy of Domestic Regulation* , 29(2)Legal Issue of Economic Integration, 134,2002.

<sup>78</sup> Tatiana Eres ,*The limits of GATT Article XX: A back door for Human Rights?*,35 Geo. J. Int’l. L. 597,621

<sup>79</sup> See Compromis, Annex A, Pg 12; Nationally Broadcast Speech of the Minister of Trade for the Kingdom of Acropora.

manufacture. All these would be with due consideration to the ineffectiveness of the trade sanction put in place by Acropora, be less trade restrictive and as effective in contributing to the realization of the end pursued in accordance with the requirement laid down in EC Asbestos<sup>80</sup>. Direct trade sanctions against non parties to the Kyoto Protocol are ineffective tools to reduce greenhouse emissions<sup>81</sup>, with measures aimed at discriminating against goods or services from non Kyoto parties a violation of WTO law<sup>82</sup>. Economic sanctions to attain policy objective are discouraged considering their ineffectiveness in changing behavior of the States in question<sup>83</sup>. Even assuming Acropora seeks to justify its action on the basis of protection of human rights of its citizens, a balance needs to be maintained between the corresponding rights and obligations of the two countries with consideration to the fact that trade restrictions are only rarely efficient instruments<sup>84</sup>. The presence of reasonably available alternatives to

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<sup>80</sup> Appellate Body Report in EC – Asbestos, para 172.

<sup>81</sup> Buck & Verheyen Buck, M. and R. Verheyen (2001), *International Trade Law and Climate Change - A Positive Way Forward*, Stabsabteilung der Friedrich-Ebert-Stiftung, Bonn. Available at [www.oraefes.de:8081/fes/docs/INFOONLINE/AN-ITLCC-1.PDF](http://www.oraefes.de:8081/fes/docs/INFOONLINE/AN-ITLCC-1.PDF).

<sup>82</sup> Ibid.

<sup>83</sup> Jagdish Bhagwati, Trade Linkage and Human Rights, in THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOR OF ARTHUR DUNKEL 243-44, Andrew K. Fishman, *Between Iraq and a Hard Place: The Use of Economic Sanctions and Threats to International Peace and Security*, 13 Emory Int'l. L. Rev. 687 (1999) loc cit Tatiana Eres, *The limits of GATT Article XX: A back door for Human Rights?*, 35 Geo. J. Int'l L. 597, 631.

<sup>84</sup> Ernst – Ulrich Petersmann, *Human Rights and the law of the World Trade Organization*, JWT 37(2):241-281, 258, 2003; Also see Resolution 1999/30 of 26<sup>th</sup> August, 1999 on *Trade Liberalization and its Impact on Human Rights*, The Sub-Commission (of the UN Commission on Human Rights) on the Promotion and Protection of Human Rights declared “that trade sanctions and negative conditionality which directly or indirectly

Acropora as also the minimum effectiveness of the trade ban should bear upon the lack of necessity of the measure in question.

**ii. Alternatively, the trade import ban cannot be justified under clause (g) of Article 15 of TADR.**

The trade import ban to be an exception within the meaning of a clause (g) has to meet two prerequisites. *First*, the ban has to be relating to the conservation of exhaustible natural resources. *Second*, the measure must be made effective in conjunction with restriction on domestic production.

*The measure must be relating to the conservation of exhaustible natural resources.*

A trade restriction could be deemed to be relating to the conservation of exhaustible natural resources if it satisfies a means end test which has evolved in the Appellate Body decision in Shrimp Turtle<sup>85</sup>. Deland does not contend that coral reefs or reef fishes could in principle be exhaustible natural resources. It is the submission of Deland that the means end test is not satisfied as even if the end is legitimate excessive means have been pursued<sup>86</sup>. The Appellate Body in Shrimp Turtle observed that the

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effect trade are not appropriate ways of promoting the integration of human rights in international economic policy and practice”.

<sup>85</sup> Appellate Body Report in *Shrimp Turtle*, Para 141; Carrie Wofford, *A Greener Future at the WTO: The refinement of WTO jurisprudence on Environmental Exceptions to GATT*, 24, Harv. Envtl. L. J. , 565,2000; Gabrielle Marceau & Joel P.Trachtman ,*The Technical Barriers to Trade ,the Sanitary and Phytosanitary Measures Agreement ,and the General Agreement on Tariff and trade: A map of the World Trade Organization Law of Domestic regulation of Goods*, JWT 36(5): 811-881, 828, 2002.

<sup>86</sup> See Compromis.

general design and structure of Section 609 is not a simple blanket prohibition of importation of shrimp imposed without regard to the consequences or lack thereof the modes of harvesting employed upon the incidental capture and mortality of sea turtles<sup>87</sup> The trade ban by Acropora is however a ban on goods with absolute disregard for the mode of manufacture or its effects on the exhaustible natural resources directly, or through the production process. Even if a particular product were to be produced or manufactured in a manner, which does not contribute to emissions at all, its access to Acroporan markets would be restricted on the mere ground that it originated in Deland. The effect is that the measure imposed by Acropora is disproportionately wide in its scope and reach in relation to the policy objective of protecting its coral reefs, fisheries and the global climate.

*The measure is made effective in conjunction with restriction on domestic production.*

The Appellate Body in United States- Gasoline defined “made effective” and “in conjunction” with as “operative” and “together with” respectively<sup>88</sup>. The requirement is one of even handedness in the imposition of restriction in the name of conservation<sup>89</sup>. The ban restricts producers and manufacturers from exporting goods in to Acropora while there is no measure imposed in Acropora to reduce emissions itself. The restriction is not made effective with any mitigation measures undertaken by Acropora.

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<sup>87</sup> Appellate Body report in *Shrimp Turtle*, Para 141.

<sup>88</sup> Abdul Haseeb Ansari, *Free Trade Law, Congruity or Conflict*, 41 IJIL,26 ,2001.

<sup>89</sup> *Ibid.*

The causes of coral reef degradation attributable to human activity fall into four major categories: over fishing; pollution; sedimentation; and climate change<sup>90</sup>. Deland submits that a trade restriction purportedly to preserve exhaustible natural resources like coral reefs and their ecosystem should also effectively regulate these other sources of coral reef depletion as also sources of greenhouse pollutions from vehicles and other agents. Agricultural fertilizer and herbicides applied to fields far from the reefs are also creating total "dead zones" in the oceans and harming life on the reefs, which require clean, nutrient-free waters to thrive<sup>91</sup>. The requirement of evenhandedness as envisaged in WTO jurisprudence would require that reasonable steps are taken by Acropora to address these causes of coral reef depletion.

**iii. The trade import ban constitutes arbitrary and unjustifiable discrimination and is a disguised restriction on trade in countries where the same conditions prevail.**

Arbitrary discrimination could arise where a targeted country is being singled out arbitrarily or in the event the selection of the target product is arbitrary.<sup>92</sup> Deland even though the highest contributor does not account for all the greenhouse emissions

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<sup>90</sup> Mark Spalding *et al.* World Atlas of Coral Reefs 15(2001), 62 in Mary Gray Davidson, *Protecting Coral Reefs: The principal National and International Legal Instruments*, 26 Harv. Env'tl. L. Rev. 499.

<sup>91</sup> Colin Woodard, *Ocean's End* 42 (2000); Reef Relief, *What is the Biggest Threat to the Health of Florida's Coral Reef?*, at [http://www.reefrelief.org/coral\\_reef\\_florida.html](http://www.reefrelief.org/coral_reef_florida.html) (last visited Apr. 28, 2002) loc. Cit. Mary Gray Davidson, *Protecting Coral Reefs: The Principal National and International Legal Instruments*, Vol 26 Harvard Environment Law Journal, 505, 2002.

<sup>92</sup> Steve Charnovitz, *Environment Trade Sanctions and the GATT: An analysis of the Pelly Amendment on Foreign Environment Practices*, 9 Am. U. J. Int'l. L. & Pol'y, 751, 752.

in the world. Discrimination on the basis that Deland is not a party to the Kyoto Protocol would not be a valid measure<sup>93</sup>. The selection of the product in addition is also arbitrary because the ban is a blanket ban on all goods originating in Deland and does not discriminate solely against those goods which contribute towards greenhouse emissions. This would have the effect that a product produced in identical fashion in two countries would be discriminated against solely on the basis where it originated. It has been suggested that sanctions if imposed to enforce compliance with the climate regime should be designed narrowly and developed and agreed multilaterally, preferably within the context of the regime's implementation "mechanisms".<sup>94</sup>

Unjustifiable discrimination exists as a result of the unilateral nature of the trade import ban which does not take into account the situation existing in other countries. Deland is a highly industrial country with a population of three fifty million. A drastic reduction in greenhouse emission from Deland may not positively impact the coral reefs but would lead to a severe impact on Deland's industries many of which would be forced to shutdown leading to mass scale unemployment. Disregarding the conditions existing in Deland and the failure to consider the burden on foreign refiners would constitute as understood by the Appellate Body in Shrimp Turtle<sup>95</sup> discrimination in violation of the chapeau requirements. This discrimination was as the Appellate Body in US - Gasoline

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<sup>93</sup> *Supra* Note 83.

<sup>94</sup> Jacob Werksman, *Compliance and the Kyoto Protocol: Building a Backbone into a "Flexible" Regime*, 9, *Yb. Intl. Env'tl. L.*, 97, (1998).

<sup>95</sup> Carrie Wofford, *A Greener Future at the WTO: The Refinement of WTO jurisprudence on Environmental Exceptions to GATT*, 24 *Harv Env'tl L.J.* 565 (2000)

emphasized clearly foreseen and not inadvertent or unavoidable.<sup>96</sup> Arbitrary discrimination would exist not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner.

The failure to explore opportunities of negotiation within the multilateral level should also be weighed to find unjustifiable discrimination in this case. Recourse to trade related measures not based on international consensus is generally not the most appropriate basis of enforcing environment measures since it leads to imposition of unwarranted constraints on the multilateral trading system and may effect sustainable development.<sup>97</sup> The Rio declaration imposes a similar requirement on environment measures directed at global issues of which climate change is one.<sup>98</sup> Trade sanctions encompassing ban on goods unrelated to the climate change in question is not found in the UNFCCC. Even Multilateral Environment Treaties which authorize trade restrictions confine it to the product in question.<sup>99</sup> The trade ban is not tailored or

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<sup>96</sup> Gabrielle Marceau and Joel Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods*, 36(5) J.WT 829 (2002)

<sup>97</sup> Preamble to the Marrakesh Decision establishing the *Committee on Trade and Environment* as noted by the Compliance Panel in *Shrimp Turtle* (21.5), Para 5.55

<sup>98</sup> *Rio Declaration*, Principle 12.

<sup>99</sup> *Convention on International Trade in Endangered Species ; Montreal Protocol on Substances that Deplete the Ozone Layer; Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal.*

developed or agreed multilaterally within the organizations of the UNFCCC<sup>100</sup>. The trade ban even if justified under the subsections of Article 15 constitutes an arbitrary and unjustifiable restriction on trade.

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<sup>100</sup> *Supra* Note 31.

**PRAYER**

Wherefore, in light of the facts of the case, issues raised, arguments advanced and authorities cited, this Court may be pleased to adjudge and declare that

1. The Republic of Deland is respecting its international obligations and is not responsible under international law for damages in relation to the coral bleaching in the Kingdom of Acropora.

2. The Kingdom of Acropora is violating international law by banning the importation of goods produced or manufactured by the Republic of Deland.

*And pass any order in favor of the respondent that it may deem fit in the ends of justice, equity and good conscience.*

*All of which is respectfully submitted*

Place: Hague

(Agents for the Respondent)

Date: September 16, 2006.