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General List No. 111

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

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CASE CONCERNING  
CORAL REEFS AND CLIMATE CHANGE

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THE KINGDOM OF ACROPORA,

Applicant

v.

THE REPUBLIC OF DELAND,

Respondent

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Fall Term 2006

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MEMORIAL FOR THE RESPONDENT

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## **STATEMENT OF JURISDICTION**

Pursuant to Article 40 of the Statute of the International Court of Justice (“ICJ”), the Kingdom of Acropora and the Republic DeLand, hereinafter referred to as the Parties, notified the ICJ of the Special Agreement signed between the Parties on 11 May 2006. The Parties submit the question contained in Annex A of the Special Agreement for final resolution by the ICJ.

## **QUESTIONS PRESENTED**

- I. Whether or not the International Court of Justice has jurisdiction to adjudicate the greenhouse gas regulation dispute between the Kingdom of Acropora (“Acropora”) and the Republic of DeLand (“DeLand”).
  
- II. Whether or not DeLand violated its obligations under the relevant treaties and customary international law and consequently, to be held liable for damages.
  
- III. Whether or not the Maroons are indigenous peoples and that the injuries suffered by them are to be borne by DeLand.
  
- IV. Whether or not Acropora violated the TADR and other international law when it banned and boycotted goods produced by DeLand and called upon all States to do the same.

## **STATEMENT OF FACTS**

Acropora, Applicant in this case, is a developing, small island State and is at the same time the smallest State in the Disston Region.

The Respondent, DeLand is a developed State with a diversified, heavily industrialized economy and the largest in the Disston Region both in terms of size and population. In April 2006, the Republic of DeLand issued a report on its inventory of greenhouse gas emissions and sinks for the years 1990 to 2004.

Acropora and DeLand are only 250 kilometers apart. Acropora claims that the bleaching of the corals in its northern coast is caused by greenhouse gases emitted by DeLand and demanded bilateral discussions. Acropora further alleged that DeLand failed to fulfill its obligations under the Kyoto Protocol (“Protocol”), U.N. Convention on the Law of the Sea (“UNCLOS”), U.N. Framework Convention on Climate Change (“UNFCCC”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). DeLand responded that climate change is a serious issue that deserves to be discussed through the organizations of the UNFCCC rather than through bilateral discussions.

Subsequently, Acropora imposed an import ban of all goods produced or manufactured in DeLand as a response to the refusal of DeLand to enter into bilateral talks.

Believing that the trade ban is a direct violation of the Trade Agreement for the Disston Region (“TADR”), DeLand’s Trade Representative entered into discussions with Acropora. Unfortunately, consultations and negotiations, and mediation failed to resolve the dispute. Thereafter, Acropora and DeLand signed an agreement submitting the matter to the ICJ.

## **SUMMARY OF ARGUMENTS**

- I. The ICJ lacks jurisdiction over the greenhouse gas regulation dispute but is vested with jurisdiction to determine the liability of Acropora for violation of the TADR. DeLand's consent is limited to the trade dispute only and excluded the greenhouse gas regulation dispute. The latter dispute that involves climate change should be settled in accordance with the mechanism under the UNFCCC.
- II. DeLand cannot be held liable for the damage to the marine environment of Acropora as there is no evident causal connection between the damage and DeLand's greenhouse gas emissions. DeLand has faithfully complied with its obligations under UNFCCC, UNCLOS, CBD and customary law thereby negating liability.
- III. The Maroons are not indigenous peoples. In any event, DeLand is not liable to them and it is Acropora which owes them obligations under international law.
- IV. Acropora violated international law and the provisions of the TADR when it banned goods produced by DeLand and called upon other States to do the same. Assuming *arguendo* that DeLand violated its obligations, the import ban is still illegal since it is manifestly disproportionate to DeLand's alleged breach.

## ARGUMENTS

### **I. THE ICJ LACKS JURISDICTION OVER THE GREENHOUSE GAS REGULATION DISPUTE.**

#### **A. THE SPECIAL AGREEMENT BETWEEN DeLAND AND ACROPORA IS LIMITED TO THE TRADE DISPUTE.**

The ICJ determines the scope of the dispute submitted to it based on diplomatic exchanges and other pertinent evidence.<sup>1</sup> The evidence in this case reveals that the special agreement between DeLand and Acropora refers exclusively to the trade dispute arising from the import ban and does not extend to the greenhouse gas regulation dispute.

On 2 October 2005, the *Trade* Representative of DeLand declared that Acropora breached the *TADR*, that DeLand will not permit Acropora's *trade* violation to stand, and that it will enter into discussions with Acropora regarding "this matter".<sup>2</sup> The discussions pertained to the trade dispute, and not the greenhouse gas issue which, as DeLand asserted from the onset, should be considered in a multilateral context among UNFCCC organizations.<sup>3</sup> Since the discussions failed to resolve the trade dispute, DeLand and Acropora signed an agreement submitting said dispute to the ICJ.<sup>4</sup> By no means does this imply that DeLand likewise consented to the ICJ's jurisdiction over the greenhouse gas issue. Clearly, the ICJ has no jurisdiction over the greenhouse gas dispute.<sup>5</sup>

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<sup>1</sup> Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 432, 448.

<sup>2</sup> R.28.

<sup>3</sup> R.24

<sup>4</sup> R.30.

<sup>5</sup> See e.g. Case Concerning Phosphate Lands in Nauru (Nauru v. Austl.) (Preliminary Objection), 1992 I.C.J. 240, 260.

**B. THE GREENHOUSE GAS DISPUTE INVOLVES CLIMATE CHANGE AND SHOULD THUS BE SETTLED PURSUANT TO THE UNFCCC.**

**1. The UNFCCC obliges DeLand and Acropora to resolve the greenhouse gas dispute through a conciliation commission.**

The UNFCCC provides, “if after twelve months following notification by one party to another that a dispute exists between them, the Parties concerned have not been able to settle their dispute through [negotiation or any other peaceful means of their own choice], the dispute *shall* be submitted, at the request of any of the parties to the dispute, to conciliation.”<sup>6</sup> For this purpose, a conciliation commission “*shall* be created upon the request of one of the parties”.<sup>7</sup>

Therefore, under the customary principle<sup>8</sup> of *pacta sunt servanda*,<sup>9</sup> DeLand and Acropora are obligated under the UNFCCC to submit the greenhouse gas dispute to a conciliation commission, failing in which the ICJ has no jurisdiction to adjudicate the dispute.

**2. The UNFCCC, being *lex specialis*, prevails over the UNCLOS and CBD in determining the procedure for resolving the greenhouse gas dispute.**

The UNFCCC, UNCLOS and CBD provide different mechanisms in resolving disputes. Nonetheless, the apparent conflict in these treaties should be resolved on the basis of the principle of *generalia specialibus non derogant*, which means that the general law shall not derogate from the specific law.<sup>10</sup>

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<sup>6</sup> United Nations Framework Convention on Climate Change, 1994, arts. 14(1) & 14(5), 1771 U.N.T.S. 108 [UNFCCC].

<sup>7</sup> UNFCCC, art.14(6).

<sup>8</sup> BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 592 (6th ed. 2003).

<sup>9</sup> Vienna Convention on the Law of Treaties, 1969, art. 26, 1155 U.N.T.S.331 [VCLT].

<sup>10</sup> Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT’L L. REV. 573, 589 (2005).

Acropora's claim involves greenhouse gas regulation.<sup>11</sup> This is specifically addressed by the UNFCCC which explicitly states that its ultimate objective is the stabilization of greenhouse gas concentrations.<sup>12</sup> On the contrary, the UNCLOS states the responsibility of States to protect the marine environment in general terms only,<sup>13</sup> while the CBD deals with the conservation of biological diversity.<sup>14</sup> Consequently, the UNFCCC which requires conciliation, being *lex specialis*, prevails over the UNCLOS and the CBD, which are only *lex generalis*.<sup>15</sup>

## **II. DELAND IS NOT LIABLE FOR DAMAGES ASSOCIATED WITH THE CORAL BLEACHING IN ACROPORA.**

### **A. IT IS SCIENTIFICALLY IMPOSSIBLE TO ESTABLISH A CAUSAL LINK BETWEEN THE CORAL BLEACHING AND THE SPECIFIC GREENHOUSE GASES EMITTED PARTICULARLY BY DELAND.**

Liability is a feasible mechanism only when the damage is identifiable and traceable to a State of origin.<sup>16</sup> When it comes to environmental damage, highly qualified publicists admit that engaging State responsibility is deficient<sup>17</sup> since it is impossible to apply liability to the vast number of environmental harms resulting from varied economic and social activities.<sup>18</sup>

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<sup>11</sup> R.23.

<sup>12</sup> UNFCCC, art. 2.

<sup>13</sup> United Nations Convention on the Law of the Sea, 1994, art. 235, 1833 U.N.T.S. 3 [UNCLOS].

<sup>14</sup> Convention on Biological Diversity, 1992, art. 1, 1760 U.N.T.S. 79, [CBD].

<sup>15</sup> Southern Bluefin Tuna (Austl. & N.Z. v. Jap.), 39 I.L.M. 1359, ¶ 52, 123 (2002).

<sup>16</sup> SHAW, *INTERNATIONAL LAW* 754 (5th ed. 2003).

<sup>17</sup> *Id.*; BROWNLIE, *supra* note 8 at 274.

<sup>18</sup> Schachter, *International Environmental Law*, 44 J. INT'L AFF. 457, 462 (1991).

Climate change, in particular, is caused by cumulative greenhouse gas emissions by *all* countries that combine in the atmosphere.<sup>19</sup> These emissions may have occurred a long time ago since greenhouse gases have long residency periods.<sup>20</sup> It is also uncertain whether any damage would occur and if any, where such damage would occur.<sup>21</sup> Hence, despite DeLand's proximity to Acropora and the April 2006 report,<sup>22</sup> there is no evidence to conclude with reasonable certainty that the coral bleaching was caused by DeLand's emissions from 1990 to 2004. Consequently, DeLand is not liable for damages.

In response to the foregoing considerations, it was suggested that instead of holding a State liable for environmental damage that is not at all traceable to that State, an international trust fund should be established.<sup>23</sup> An example of such fund is the Global Environment Facility ("GEF") which was established to assist developing countries like Acropora in eliminating the effects of climate change.<sup>24</sup> While this is not liability in the strict sense, it still serves the aim of reparation<sup>25</sup> without violating the basic precepts of State liability. DeLand commiserates with Acropora and actually implied its willingness to "render compensation" through the GEF, to which DeLand has financial commitments as a developed country.<sup>26</sup> Thus, DeLand called for a

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<sup>19</sup> Churchill, *Controlling Emissions of Greenhouse Gases*, in INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE 152 (Churchill and Freestone eds. 1991).

<sup>20</sup> Allen, *Liability for Climate Change*, 421 NATURE 891, 892 (2003).

<sup>21</sup> Churchill, *supra* note 19 at 152.

<sup>22</sup> R.17.

<sup>23</sup> Schachter, *supra* note 18 at 461.

<sup>24</sup> Anderson, Reforming International Institutions to Improve Global Environmental Relations, Agreement, and Treaty Enforcement, 18 HASTINGS INT'L & COMP. L. REV. 771, 783-84 (1995).

<sup>25</sup> Schachter, *supra* note 18 at 462.

<sup>26</sup> Walcoff, *The Restructured Global Environment Facility: A Practical Evaluation for Unleashing the Lending Power of GEF*, 3-FALL WIDENER L. SYMP. J. 485, 486 (1998).

discussion among the UNFCCC organizations<sup>27</sup> where it could be determined whether Acropora is qualified to be a recipient of GEF-funded projects aimed at eliminating the effects of climate change.<sup>28</sup> However, Acropora rebuffed this remedy, opting instead to unlawfully impose the import ban and to erroneously bring the dispute to the ICJ.<sup>29</sup>

**B. DeLand Complied with its International Obligations Respecting the Environment.**

**1. DeLand complied with the UNFCCC by issuing the requisite inventory report and by calling on its industries to adopt voluntary limits.**

The UNFCCC obliges State-Parties to publish national inventories of greenhouse gas emissions,<sup>30</sup> and DeLand complied with this obligation by issuing a report in April 2006 on its inventory of greenhouse gas emissions and sinks from 1990 to 2004.<sup>31</sup>

Meanwhile, any alleged commitment to reduce greenhouse gases under Article 4(2)(a) and (b) of the UNFCCC is purely hortatory.<sup>32</sup> The UNFCCC only establishes an “aim” to reduce emissions and it does not impose binding emission targets or timetables.<sup>33</sup> Thus, Article 4(2)(a) and (b) merely recognize that the return to earlier levels by the year 2000 “would contribute” to

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<sup>27</sup> R.24.

<sup>28</sup> Walcoff, *supra* note 26 at 504.

<sup>29</sup> R.27.

<sup>30</sup> UNFCCC, art. 4(1)(a).

<sup>31</sup> R.17.

<sup>32</sup> FREESTONE & STRECK, LEGAL ASPECTS OF IMPLEMENTING THE KYOTO PROTOCOL MECHANISMS: MAKING KYOTO WORK 4-5 (2005).

<sup>33</sup> DAMROSCH, HENKIN, PUGH, SCHACHTER, & SMIT, INTERNATIONAL LAW CASES AND MATERIALS 1628 (4th ed. 2001) [DAMROSCH ET AL]; Harris, *The European Union And Environmental Change: Sharing The Burdens Of Global Warming*, 17 COLO. J. INT'L ENVTL. L. & POL'Y 309, 314 (2006); Burns, *The Exigencies That Drive Potential Causes Of Action For Climate Change Damages At The International Level*, 98 AM. SOC'Y INT'L L. PROC. 223, 225 (2004).

the modification of longer-term trends in emissions,<sup>34</sup> with no express commitment after the year 2000.<sup>35</sup>

The convoluted language of the cited provision<sup>36</sup> highlights its non-binding character. To illustrate, each State-Party's contribution to the modification of trends in emissions is dependent on several factors, including equitable considerations.<sup>37</sup> This prompted environmental law expert Philippe Sands to conclude that the extent of any commitment thereunder is unclear<sup>38</sup> and, at most, only requires a limitation as opposed to stabilization at a particular level or reduction.<sup>39</sup>

Since DeLand has issued the inventory report and considering that Article 4(2)(a) and (b) is too indefinite to create any enforceable obligation,<sup>40</sup> DeLand has fully complied with the UNFCCC.

**2. Being a non-Party, DeLand is not bound by the Kyoto Protocol. In any event, as a signatory thereto, DeLand complied with the VCLT by observing the object and purpose of the Protocol.**

A treaty does not create obligations for a third State without its consent.<sup>41</sup> DeLand signed but did not ratify<sup>42</sup> the Protocol.<sup>43</sup> Accordingly, DeLand is a third party to the Protocol and is not

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<sup>34</sup> SANDS, PRINCIPLE OF INTERNATIONAL ENVIRONMENTAL LAW 365 (2003).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 364.

<sup>37</sup> *Id.* at 365.

<sup>38</sup> *Id.* at 364.

<sup>39</sup> *Id.* at 365.

<sup>40</sup> Schachter, *The Twilight Existence of Nonbonding International Agreements*, 71 A.J.I.L. 296, 304 (1977).

<sup>41</sup> VCLT, art. 34.

<sup>42</sup> R.12.

<sup>43</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1998, U.N. Doc. FCCC/CP/1997/7/Add.1 [KYOTO PROTOCOL].

bound by its provisions.<sup>44</sup> The Protocol's specific proviso that it "shall be ... subject to ratification"<sup>45</sup> underscores that its ratification is an indispensable precondition for its operation.<sup>46</sup>

Therefore, DeLand is not bound under the Protocol to reduce its greenhouse gas emissions.

DeLand's act of signing the Protocol only binds it to refrain from acts which would defeat the object and purpose of the treaty.<sup>47</sup> The Record is bereft of any indication that DeLand committed an act undermining the object and purpose of the Protocol. On the contrary, DeLand produced a faithful report of its greenhouse gas emissions and implemented voluntary limits for its industries,<sup>48</sup> a better alternative than traditional command and control regulation ("CAC"),<sup>49</sup> all in keeping with the Protocol's object and purpose.

Since DeLand has not ratified the Protocol and, as a signatory, even performed acts that promote its object and purpose, DeLand cannot be held liable for any breach thereof.

### **3. DeLand complied with the UNCLOS and the CBD.**

#### ***a. DeLand fulfilled its obligation under the UNCLOS to protect the environment under a very broad standard of care.***

The obligation under the UNCLOS to "prevent, reduce and control pollution of the marine environment"<sup>50</sup> is not an absolute prohibition against pollution but a due diligence

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<sup>44</sup> CHINKIN, *THIRD PARTIES IN INTERNATIONAL LAW* 37 (1993); VCLT, art. 34.

<sup>45</sup> KYOTO PROTOCOL, art. 24(1).

<sup>46</sup> VCLT, art. 2(1)(b).

<sup>47</sup> VCLT, art. 18.

<sup>48</sup> R.17.

<sup>49</sup> See *infra* notes 73-79.

<sup>50</sup> UNCLOS, art. 194.

obligation to *minimize* pollution and to act with appropriate care.<sup>51</sup> Further, the UNCLOS allows DeLand a “wide discretion” in fulfilling its obligations through “the best practicable means at [its] disposal” and “in accordance with [its] capabilities.”<sup>52</sup>

DeLand complied with the foregoing obligations by implementing a self-regulation policy, which is more effective than the traditional means of CAC environmental regulation.<sup>53</sup> Notably, a State has the sovereign capacity to decide whether to adopt voluntary regulation as an environmental policy.<sup>54</sup>

***b. By cooperating through UNFCCC organizations, DeLand fulfilled its duty under the UNCLOS and CBD to act through international organizations in addressing environmental issues.***

The UNCLOS obliges States-Parties to: (i) cooperate on a global basis directly or through competent international organizations in formulating international rules for the protection of the marine environment;<sup>55</sup> (ii) control pollution by considering internationally agreed rules;<sup>56</sup> and (iii) act through competent international organizations to establish measures to prevent, reduce and control such pollution.<sup>57</sup>

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<sup>51</sup> *Law of the Sea: Protection and Preservation of the Marine Environment*, U.N. Secretary General, at 30, U.N. Doc. A/44/461 (1989).

<sup>52</sup> Hassan, *International Conventions Relating to Land-Based Sources of Marine Pollution Control: Applications and Shortcomings*, 16 GEO. INT'L ENVTL. L. REV. 657, 669 (2004).

<sup>53</sup> See *infra* notes 73-79.

<sup>54</sup> See *Stockholm Declaration on the Human Environment*, U.N. Conference on the Human Environment, at Principle 21, U.N. Doc. A/CONF.48/14/Rev.1 (1973) [Stockholm Declaration]; *Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, at Principle 2, U.N. Doc. A/CONF.151/5/Rev.1 (1992) [Rio Declaration]; CBD, art. 3; UNFCCC, preamble.

<sup>55</sup> UNCLOS, art. 197.

<sup>56</sup> UNCLOS, art. 212(1).

<sup>57</sup> UNCLOS, art. 212(3).

The CBD similarly obliges States-Parties to cooperate through competent international organizations in matters of mutual interest for the conservation and sustainable use of biological diversity.<sup>58</sup>

DeLand exhibits a cooperative conduct, as required by the UNCLOS and CBD, in dealing with global warming. Thus, DeLand is a member of the United Nations (“U.N.”)<sup>59</sup> and has fully participated in U.N.-led activities that aim to establish environmental policies, such as the 1972 U.N. Conference on the Human Environment, the 1992 U.N. Conference on Environment and Development, and the 2002 World Summit on Sustainable Development.<sup>60</sup>

Deland also cooperates through the organizations of the UNFCCC,<sup>61</sup> which should be construed as the competent international organization referred to in Article 197 of the UNCLOS and Article 5 of the CBD, given that the UNFCCC addresses climate change and has been ratified by one hundred eighty nine (189) States.<sup>62</sup> Further, the obligations under the UNFCCC should be recognized as the international mechanism to control pollution referred to in Article 212(1) of the UNCLOS since its overarching purpose is to control greenhouse gas emissions so as to “prevent dangerous anthropogenic interference with the climate system.”<sup>63</sup> Finally, the UNFCCC bodies are international organizations which establish measures to prevent, reduce and control pollution, as referred to in Article 212(3) of the UNCLOS.<sup>64</sup>

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<sup>58</sup> CBD, preamble & art. 5.

<sup>59</sup> R.5.

<sup>60</sup> R.11.

<sup>61</sup> R.26.

<sup>62</sup> Burns, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, 2 MCGILL INT’L J. SUSTAINABLE DEV. L. & POL’Y 27, 47 (2005).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

DeLand has, therefore, complied with the UNCLOS and CBD, as shown by its active cooperation with the UN and through the organizations of the UNFCCC.

**4. DeLand did not breach customary international law by implementing a voluntary regulation policy.**

***a. DeLand has no customary duty to reduce greenhouse gases to specific levels since greenhouse gas regulation has not attained customary status.***

DeLand recognizes that States must act responsibly in relation to the environment, as evidenced by DeLand's compliance with many environmental treaties. Nonetheless, the fact remains that greenhouse gas regulation finds no basis in customary international law.<sup>65</sup>

States have not agreed on implementing steps to take regarding greenhouse gas regulation,<sup>66</sup> and the North-South divide continues to figure prominently in negotiations on specific standards regarding climate change.<sup>67</sup> This disagreement has barred the formation of custom on greenhouse gas regulation, which requires detailed ecostandards.<sup>68</sup>

In any event, Acropora cannot bring a claim based on customary law because greenhouse gas regulation is specifically addressed by the UNFCCC. When a treaty provides means for the settlement of a claim, it is inappropriate for States to bring said claim based on a customary law rule.<sup>69</sup> *Lex specialis derogat legi generali.*<sup>70</sup> Since the UNFCCC already defines the rights and

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<sup>65</sup> Boyle, *International Law and the Protection of the Global Atmosphere: Concepts, Categories and Principles*, in *INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE* 14 (Churchill and Freestone eds. 1991).

<sup>66</sup> DAMROSCH ET AL, *supra* note 33 at 1529.

<sup>67</sup> Hagen, *The Green Diplomacy Gap*, SF56 ALI-ABA 257, 264 (2001).

<sup>68</sup> Contini and Sand, *Methods to Expedite Environment Protection: International Standards*, 66 AM. J. INT'L L. 37 (1972). An example of a detailed standard is the 1973/78 MARPOL Convention. See generally, Boyle, *Marine Pollution under the Law of the Sea Convention*, 79 AM. J. INT'L L. 347 (1985).

<sup>69</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) (Merits)*, 1986 I.C.J. 4, 274.

<sup>70</sup> *Gabcikovo-Nagymoros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, 132 [Gabcikovo-Nagymoros].

obligations of DeLand and Acropora as regards greenhouse gas regulation, Acropora can no longer base its claim on customary international law.

***b. DeLand's implementation of voluntary measures, which are more effective than CAC regulation, was an exercise of its sovereign right to select its own environmental policies.***

According to the Stockholm Declaration<sup>71</sup> and several ICJ cases,<sup>72</sup> States have the sovereign right to exploit their own resources pursuant to their own environmental policies. Therefore, DeLand was merely exercising its sovereign right when it implemented a voluntary regulation policy.

It bears stressing that traditional CAC regulation is limited, inefficient,<sup>73</sup> costly and intrusive<sup>74</sup> since it relies on the State to formulate detailed specifications,<sup>75</sup> supplanting the judgment of people who know their business with that of regulators who may not.<sup>76</sup> Thus, there is a trend towards self-regulation systems that are more flexible and performance-based<sup>77</sup> considering that the private sector is in a better position to determine the technologies that will attain the goal of regulation.<sup>78</sup> The USA and China are inclined to self-regulation systems.<sup>79</sup>

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<sup>71</sup> Stockholm Declaration, Principle 21; Rio Declaration, Principle 2; CBD, art. 3; UNFCCC, preamble; UNCLOS, art. 193; *see* International Covenant on Civil and Political Rights, 1976, art. 1 (2), 999 U.N.T.S. 171.

<sup>72</sup> Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 432, 478; *Gabcikovo-Nagymoros*, 1997 I.C.J. 7, 89.

<sup>73</sup> Stavins, [*Resources for the Future, Lessons from the American Experiment with Market-Based Environmental Policies, Discussion Paper 01-53*] (visited October 11, 2006) <<http://www.rff.org/rff/Documents/RFF-DP-01-53.pdf>>.

<sup>74</sup> Fiorino, *Toward A New System Of Environmental Regulation: The Case For An Industry Sector Approach*, *Environmental Law*, 26 ENVTL. L. 457, 463 (1996).

<sup>75</sup> *Id.* at 464.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 457.

<sup>78</sup> *Id.* at 464.

<sup>79</sup> *Id.* at 467.

Therefore, DeLand did not violate international law by implementing voluntary environmental regulation measures.

### **III. DELAND IS NOT LIABLE FOR THE INJURIES ALLEGEDLY SUFFERED BY THE MAROONS.**

#### **A. THE MAROONS ARE NOT AN INDIGENOUS PEOPLE AND, THEREFORE, DO NOT POSSESS RIGHTS RESERVED FOR INDIGENOUS PEOPLES BY INTERNATIONAL LAW.**

The rights of indigenous peoples are protected under several instruments.<sup>80</sup> However, Acropora cannot invoke these rights on behalf of the Maroons because they do not qualify as an indigenous people.

##### **1. The Maroons are not an indigenous people since Acropora was neither conquered nor colonized, and they arrived in Acropora only after the establishment of its State boundaries.**

Under Article 2(2)(a) of ILO Convention No.169,<sup>81</sup> an indigenous group must have descended from peoples who have been conquered and oppressed by a foreign colonizer.<sup>82</sup> Since Acropora was never conquered nor colonized, the Maroons undoubtedly do not qualify as an indigenous people.

Alternatively, an indigenous group must have descended from the population which inhabited the country at the time of the establishment of its present State boundaries.<sup>83</sup> The Record shows that the Kingdom of Acropora came into existence in the early 1400s,<sup>84</sup> which

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<sup>80</sup> CBD, art. 8(j).

<sup>81</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1991, 72 ILO Official Bull. 59 [ILO Convention 169].

<sup>82</sup> Holley, *Recognizing the Rights of Indigenous People to their Traditional Lands: A Case Study of an Internally-Displaced Community in Guatemala*, 15 BERKELEY J. INT'L L. 119, 144 (1997); see Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957, art. 13(2), 328 U.N.T.S. 57.

<sup>83</sup> ILO Convention 169, art. 2(2)(a).

<sup>84</sup> R.3

means that its present boundaries were established at that time. Meanwhile, the Maroons arrived in Acropora from nearby countries only in the 1700s.<sup>85</sup> Thus, the population from which the Maroons descended could not have inhabited Acropora at the time of the establishment of its present boundaries. As a result, the Maroons may not be considered an indigenous people. This conclusion is bolstered by the Record itself which deliberately refers to the Acroporans as descendants of a native *indigenous* people, without any suggestion at all that the Maroons also descended from an indigenous group.<sup>86</sup>

**2. The Maroons have no territorial basis, which is an essential element of an indigenous people.**

Territorial basis is the relationship of indigenous peoples with the land they live on<sup>87</sup> and it encompasses emotional, cultural, spiritual and religious dependence indispensable for the indigenous people's existence.<sup>88</sup>

The Maroons' relationship with the northern coast of Hebrides where they live does not meet this element. The Maroons depend upon their land only for their subsistence.<sup>89</sup> There is no showing in the Record that their culture, spirituality or religion also depend upon the land they live on. For instance, the Record does not show that the northern coast of Hebrides houses the Maroons' sacred sites or legendary landmarks that symbolize their identity. Thus, that particular bond which indigenous peoples have with the territory they occupy is conspicuously absent in the case of the Maroons.

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<sup>85</sup> R.3

<sup>86</sup> R.3

<sup>87</sup> U.N.Doc.E/CN.4/Sub.2/1983/Add.4, at 28.

<sup>88</sup> BROLMANN, ET AL, PEOPLES AND MINORITIES IN INTERNATIONAL LAW 196 (1993).

<sup>89</sup> R.3.

Hence, the totality of circumstances leads to the conclusion that the Maroons are not indigenous peoples.

**B. EVEN ASSUMING THAT THE MAROONS ARE AN INDIGENOUS PEOPLE, ANY OBLIGATION TOWARDS THEM FALLS UPON ACROPORA, AS THEIR STATE OF NATIONALITY, AND NOT DELAND.**

Acropora, as the State of nationality, is bound<sup>90</sup> under the ICESCR to recognize the rights of the Maroons to adequate food<sup>91</sup> and to take part in cultural life.<sup>92</sup> By virtue of the Limburg Principles,<sup>93</sup> Acropora is also obliged to protect the Maroons from the adverse effects of greenhouse gas emissions and to adopt measures to improve their standard of living.<sup>94</sup> Further, Principle 22 of the Rio Declaration obliges States to recognize and duly support the indigenous peoples' identity, culture and interests. The CBD also obliges States-Parties to respect, preserve and maintain practices of indigenous communities relevant to the conservation and sustainable use of biological diversity.<sup>95</sup> These obligations owed to the Maroons belong to Acropora because it has the responsibility over activities within its territorial jurisdiction.<sup>96</sup>

Thus, while Acropora arbitrarily imputes liability to DeLand,<sup>97</sup> it is actually Acropora which owes obligations towards the Maroons. In fact, if damages are due, the liability attaches

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<sup>90</sup> Rome Statute of the International Criminal Court, 2002, art. 29, 2187 U.N.T.S. 90.

<sup>91</sup> International Covenant on Economic, Social and Cultural Rights, 1976, art. 11, G.A. Res. 2200A (XXI) [ICESCR].

<sup>92</sup> ICESCR, art.15.

<sup>93</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights at 6, U.N.Doc.E/CN.4/17 (1987) [Limburg Principles]; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights at guideline 6, 1998 HUMAN RIGHTS Q. 20, 692 (1998).

<sup>94</sup> Limburg Principles, annex.

<sup>95</sup> CBD, art. 8(j).

<sup>96</sup> CBD, preamble & art. 4; Rio Declaration, Principle 2.

<sup>97</sup> R.23.

to Acropora which failed to perform its obligations considering that it did not take steps to conserve the coral reefs and to protect the Maroons' cultural identity.

#### **IV. ACROPORA VIOLATED INTERNATIONAL LAW WHEN IT BANNED DELAND'S GOODS AND CALLED ON ALL OTHER STATES TO ALSO BAN AND BOYCOTT THE SAME.**

Principle 24 of the Stockholm Declaration provides that environmental issues should be handled in a cooperative spirit by all States concerned<sup>98</sup> and the CBD promotes access to competent international organizations with respect to areas beyond the national jurisdiction of a State.<sup>99</sup> Further, the UNFCCC provides that measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.<sup>100</sup> Since there is no finding that DeLand's goods caused the rising temperature in the Disston Sea, much less that DeLand is the only State allegedly in breach of its duties, the import ban constitutes an arbitrary and unjustifiable discrimination and a disguised trade restriction against DeLand.

##### **A. THE IMPORT BAN DOES NOT FALL UNDER THE EXCEPTIONS TO THE PROSCRIPTION AGAINST UNILATERAL TRADE MEASURES.**

Article 5 of the TADR prohibits quantitative prohibitions or restrictions on the importation of products from a particular country, except in instances enumerated under Article 15.<sup>101</sup> As discussed below, the import ban does not fall under any of these exceptions. As Acropora itself admits, the import ban is *solely symbolic*,<sup>102</sup> indicating that the import ban does

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<sup>98</sup> Rio Declaration, Principle 10.

<sup>99</sup> CBD, art. 5.

<sup>100</sup> UNFCCC, art. 3(5).

<sup>101</sup> R.16.

<sup>102</sup> R.27.

not aim to achieve any of the practical purposes underlying the TADR exceptions. In reality, the import ban is but an aggressive political statement seeking to pressure DeLand into conforming with Acropora's baseless demands. Hence, the import ban infringes the TADR.

**1. The import ban is not justified under Article 15(b) of the TADR.**

Under the TADR, a State-Party may adopt a unilateral trade-restriction measure necessary to protect human, animal or plant life or health<sup>103</sup> when two requisites are met:<sup>104</sup> (i) the measure satisfies the policy of the exception; and (ii) the measure is necessary to attain the objective.<sup>105</sup>

*a. The import ban does not address any risk to life or health and, therefore, falls outside the policy underlying Article 15(b).*

In the EC-Asbestos case, the panel determined the policy by examining two factors: (i) whether a risk exists;<sup>106</sup> and (ii) what is the level of risk to life or health posed by the product.<sup>107</sup> The panel concluded that the import ban satisfied the policy designed to protect human life or health<sup>108</sup> because an identifiable risk resulted from the product, asbestos fibers, which caused illness and death.<sup>109</sup>

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<sup>103</sup> R.16.

<sup>104</sup> WTO Panel Report, European Communities--Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R, ¶¶ 8.170, 8.174 (2000) [Asbestos 2000].

<sup>105</sup> Eres, *The Limits of GATT Article XX: A Back Door for Human Rights?*, 35 GEO. J. INT'L L. 597, 616 (2004).

<sup>106</sup> WTO Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, ¶¶ 8.184-189 (2001) [Asbestos 2001].

<sup>107</sup> *Id.* at 8.190-193.

<sup>108</sup> Asbestos 2000, *supra* note 104 at 8.194.

<sup>109</sup> Asbestos 2000, *supra* note 104 at 8.188, 8.194, 8.200.

Acropora argues that the import ban is necessary if it does not want to be complicit in the death of its population,<sup>110</sup> implying that the import ban is allegedly intended to protect life. However, the ban indiscriminately covers all products from DeLand regardless of whether their production causes greenhouse gases. This is in stark contrast with the EC-Asbestos case where the import ban covered a *specific* product bearing *demonstrable* risk to human life and health and was therefore justified. Thus, the import ban is but a symbolic act which falls outside the policy of Article 15(b).

***b. Even if DeLand's products pose a risk, the import ban is still illegal because it is unnecessary to achieve the objective of the exception.***

A measure is deemed necessary if: (i) the protected interests are important; (ii) there is no alternative measure reasonably available, or which contributes to the protection of life or health;<sup>111</sup> and (iii) the measure adopted is the least TADR-inconsistent measure that a State-Party could employ to achieve the objective.<sup>112</sup> The import ban may satisfy the first condition, given the importance of life,<sup>113</sup> but it fails the second and third factors.

Acropora definitely has alternative measures that are both reasonably available and much less inconsistent with the TADR, such as (i) banning only those products which threaten life and health in Acropora; (ii) engaging in multilateral discussions with UNFCCC organizations to address the environmental problem; and (iii) product labeling and disclosure requirements.<sup>114</sup>

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<sup>110</sup> R.27.

<sup>111</sup> Asbestos 2001, *supra* note 106 at 8.172.

<sup>112</sup> See WTO Panel Report, United States--Restrictions on Imports of Tuna, DS21/R, ¶ 5.28 (1991).

<sup>113</sup> Asbestos 2001, *supra* note 106 at 8.172.

<sup>114</sup> Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L. L. 700, 712 (1992).

Acropora ignored these remedies. Thus, even if a risk exists, the import ban is still illegal since it is unnecessary for the protection of life and health in Acropora.

**2. Neither is the import ban justified under Article 15(f) since it was not imposed for the protection of national treasures.**

WTO jurisprudence evinces that national treasures of artistic, historic or archaeological value, collectively referred to as cultural goods,<sup>115</sup> include goods that enjoy copyright protection, tangible articles of trade like books, and cultural services like contracts for live artistic performances.<sup>116</sup> Acropora may argue that this definition includes coral and reef fish under some environmental treaties.<sup>117</sup> However, in relation to trade, cultural goods are limited to the cultural component of the good or service.<sup>118</sup>

Thus, the corals and fish in Hebrides do not qualify as national treasures, and corollarily, the import ban may not be justified under Article 15(f). Even assuming that they are national treasures, the import ban is still illegal because it was not imposed for their protection but only for symbolic purposes allegedly for the protection of life in Acropora.<sup>119</sup>

**3. Article 15(g) is likewise inapplicable because the import ban is not aimed at the conservation of exhaustible natural resources.**

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<sup>115</sup> Hagen, *Cultural Resistance to Global Governance*, 22 MICH. J. INT'L L. 1, 31 (2000).

<sup>116</sup> *Id.*; WTO Dispute Panel Report on Canada-Certain Measures Concerning Periodicals, WT/DS31/R (1997); WTO Appellate Body Report, Canada--Certain Measures Concerning Periodicals, WT/DS31/AB/R (1997); GATT Dispute Panel Report, Japan--Measures on Imports of Leather, May 15/16, 1984, GATT B.I.S.D. (31st Supp.) 94 (1985).

<sup>117</sup> See e.g., UNCLOS, CBD, Convention concerning the Protection of the World Cultural and Natural Heritage, 1975, 1037 UNTS 151.

<sup>118</sup> Carmody, *When "Cultural Identity was Not at Issue": Thinking About Canada – Certain Measures Concerning Periodicals*, 30 LAW & POL'Y INT'L BUS. 231, 250 (1999).

<sup>119</sup> R.27.

A quantitative prohibition may be justified if such measure (i) is concerned with *exhaustible natural resources*,<sup>120</sup> and (ii) is related to their *conservation*.<sup>121</sup> Neither of these two conditions are present here.

As stated, the import ban is solely symbolic. Even assuming that it was imposed to prevent the death of Acropora's citizens,<sup>122</sup> it remains unjustifiable because Article 15(g) refers specifically to exhaustible natural resources which, as defined in several environmental treaties, does not refer to human life.<sup>123</sup>

Assuming *arguendo* that human life constitutes an exhaustible natural resource or that the ban ultimately aims to protect corals and fish, which admittedly are natural resources, the import ban remains illegal because it is not a conservation measure.<sup>124</sup> Acropora imposed the ban against *all* DeLand products without proof that their importation will threaten life in Acropora or ultimately result in coral bleaching. Clearly, the import ban does not serve any purpose of conservation and, therefore, it may not be justified under the TADR.

#### **B. THE IMPORT BAN IS NOT A VALID COUNTERMEASURE.**

A countermeasure is a non-forcible measure taken by an injured State in response to a breach of international law to stop the breach by the responsible State.<sup>125</sup> It is intrinsically

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<sup>120</sup> United States-Restrictions on Imports of Tuna, 33 I.L.M. 839, 819 (1994) at 193.

<sup>121</sup> WTO Appellate Body Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, (November 6, 1998) [Shrimp I]; Green, *Climate Change, Regulatory Policy and the WTO*, 8 J. INT'L ECON. L. 143, 175 (2005).

<sup>122</sup> R.27.

<sup>123</sup> See *e.g.* UNCLOS; Stockholm Declaration.

<sup>124</sup> See Shrimp I, *supra* note 121 at 135-42.

<sup>125</sup> White & Abass, *Countermeasures and Sanctions*, in INTERNATIONAL LAW 512 (Evans ed. 2006); see *Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83, art. 49(1), U.N. GAOR, 56th Sess., Annex, Agenda Item 162 at 3, U.N. Doc. A/RES/56/83 (2001) [Articles on State Responsibility]; *Gabcikovo-Nagymaros*, 1997 I.C.J. 7, 83-85.

unlawful but is justified if it satisfies three conditions, *viz*: (1) a prior breach by the responsible State; (2) notification by the injured State; and (3) proportionality between the prior breach and the countermeasure.<sup>126</sup> Acropora's import ban does not satisfy these conditions, thus rendering the ban wrongful.

**1. Absent any prior breach of an obligation owed by DeLand towards Acropora, the countermeasure is patently illegal.**

A breach occurs when a State commits an internationally wrongful act.<sup>127</sup> As previously discussed, DeLand fulfilled its treaty and customary obligations, and did not commit any internationally wrongful act. Parenthetically, Acropora's mere belief, *bona fide* or otherwise, that an internationally wrongful act has been committed is insufficient to justify a countermeasure,<sup>128</sup> since the task to determine the existence of the breach is vested with international organizations such as the UN.<sup>129</sup> The import ban, therefore, cannot be a valid countermeasure.

**2. Even assuming that DeLand breached its obligation, the import ban is illegal because Acropora did not notify DeLand of its *intention* to impose the ban.**

State practice<sup>130</sup> shows that a countermeasure must be preceded by an unsatisfied demand by the injured State for the responsible State to remedy the breach and a notice that the injured State intends to adopt countermeasures.<sup>131</sup> Although Acropora required DeLand to fulfill its

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<sup>126</sup> *Gabcikovo-Nagymoros*, 1997 I.C.J. 7, 83-85.

<sup>127</sup> MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 254 (1997); BROWNLIE, *supra* note 8 at 439.

<sup>128</sup> See *Fourth Report on State Responsibility*, U.N. GAOR, 44th Sess., at 2, U.N. Doc. A/CN.4/444 (1992) [Fourth Report on State Responsibility]; *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 44th Sess., at 25, U.N. Doc. A/47/10 (1992).

<sup>129</sup> Ago, *Eighth Report on State Responsibility*, 1979 Y.B.ILC 2, 43-44.

<sup>130</sup> Fourth Report on State Responsibility, *supra* note 128 at 6-16.

<sup>131</sup> *Naulilaa Case* (Port. v. F.R.G.), 4 Ann. Dig. at 527 (1928) [*Naulilaa*]; *Gabcikovo-Nagymoros*, 1997 I.C.J. 7, 61.

alleged obligations, Acropora nonetheless failed to inform DeLand of its intention to impose the import ban before adopting said countermeasure. Hence, the import ban is illegal.

**3. Finally, the import ban is illegal since it is manifestly disproportionate to DeLand's alleged breach.**

Proportionality requires that countermeasures must not be disproportionate to the gravity of the internationally wrongful act and its effects on the injured State.<sup>132</sup> Even assuming an alleged breach by DeLand, the import ban fails the proportionality test.

First, banning *all* of DeLand's products, regardless of any nexus between the product and the alleged breach, is disproportionate to the breach.<sup>133</sup> The ban should have been limited to products that are directly connected to the alleged breach. Second, calling on all other States to ban and boycott DeLand's goods<sup>134</sup> is manifestly disproportionate because the alleged breach only affects Acropora and not other States.

Finally, to be proportional, a countermeasure must be taken respecting that wrongful act alone.<sup>135</sup> Hence, if DeLand's alleged breach refers to its obligations under environmental treaties, a countermeasure under a trade agreement, such as the TADR, is disproportionate.

Some experts posit a fourth condition that the countermeasure must be necessary to remedy or prevent further violation.<sup>136</sup> The import ban is certainly unnecessary because there is no showing that it will resolve the alleged greenhouse gas emission problem. This is confirmed

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<sup>132</sup> Articles on State Responsibility, art. 49; Air Services Agreement of 27 March 1946 (U.S. v. Fr.), 54 I.L.R. 304, 337 (1978); Restatement (Third) of the Foreign Relations Law of the United States § 905 Reporters' Note 1 (1987) [Restatement]; Fourth Report on State Responsibility, *supra* note 128 at 3; *Naulilaa*, 4 Ann. Dig. at 527.

<sup>133</sup> R.28.

<sup>134</sup> R.27.

<sup>135</sup> Trahmel, *Helms-Burton Invites a Closer Look at Counter-measures*, 30 GEO. WASH. J. INT'L L. & ECON. 317, 344 (1996).

<sup>136</sup> Fourth Report on State Responsibility, *supra* note 128 at 4; Restatement, *supra* note 132 at § 905(1)(a).

by a WTO study indicating that trade is rarely the root cause of environmental degradation, which is attributable to various market and policy failures, and that environmental problems are best addressed at source.<sup>137</sup> DeLand's position that the dispute must be considered in a multilateral context among the UNFCCC organizations<sup>138</sup> is a manifestation of DeLand's intention to address the problem at its source. Acropora rejected this proposal and opted for an unlawful import ban.

Acropora may claim that the ban was necessary to exert pressure on DeLand to submit to negotiations. Nonetheless, the import ban remains invalid because it went beyond this pretended aim<sup>139</sup> and became a form of punishment.<sup>140</sup> Hence, being disproportionate, the countermeasure is illegal.

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<sup>137</sup> MACMILLAN, WTO AND THE ENVIRONMENT 2 (2001).

<sup>138</sup> R.24.

<sup>139</sup> SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 186 (1992).

<sup>140</sup> White & Abass, *supra* note 125 at 512.

## CONCLUSION

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

1. Declare that the International Court of Justice does not have jurisdiction to adjudicate the greenhouse gas regulation dispute.
2. Declare that DeLand is not responsible under international law for damages, including environmental and cultural, associated with coral bleaching in Acropora.
3. Declare that Acropora violated international law by banning the importation of goods produced or manufactured in the Republic of DeLand.

Respectfully Submitted

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Agents for the Republic of DeLand