

THE INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE 2006 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

**THE CASE CONCERNING
THE ELYSIAN FIELDS**

**THE REPUBLIC OF ACASTUS
(APPLICANT)**

v.

**THE STATE OF RUBRIA
(RESPONDENT)**

MEMORIAL FOR THE RESPONDENT

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TABLE OF CONTENTS

Table of Contents	3
Index of Authorities.....	5
Statement of Jurisdiction	11
Questions Presented	12
Statement of Facts	13
Summary of Pleadings.....	18
Pleadings.....	21
PART I. THE COURT DOES NOT HAVE JURISDICTION <i>RATIONE PERSONAE</i> OVER ACASTUS	21
1) Acastus is not a Party to the Statute of the Court.....	22
a) Acastus is not a member of the United Nations.....	22
b) Acastus is not the continuation of the former Nessus	22
i) <i>Objective factors: Acastus has not retained a majority of Nessus’s territory, population, resources or armed forces, and it does not have a devolution agreement with Nessus or Rubria</i>	<i>23</i>
ii) <i>The UN’s reaction to Acastus does not support Acastus’s claim to be the continuation of the former Nessus.....</i>	<i>25</i>
2) Acastus has not deposited a declaration accepting the jurisdiction of the Court.....	27
3) The RABBIT is not a Treaty that was in force in 1945	27
4) The Court lacks jurisdiction <i>ratione materiae</i>	28
PART II. RUBRIA IS NOT IN VIOLATION OF INTERNATIONAL LAW.....	30
1) Rubria exercised its right to permanent sovereignty over natural resources by permitting construction of the pipeline	30
a. Rubria has full permanent sovereignty over natural resources in its territory	30
b. Construction of the pipeline is in the national interest of Rubria	31
2) Customary international law does not include indigenous land rights.....	31
a. The pipeline represents a state sanctioned development project	31
b. Many states with significant indigenous communities do not recognize indigenous communal land rights.....	33
3) Rubria has complied with its obligations under the ICCPR and the ICESCR	34
a. Construction of the pipeline benefits the citizens of Rubria.....	34

b.	Article 1 of the ICCPR and ICESCR apply to the people of Rubria.....	35
c.	Article 27 of the ICCPR should not inhibit Rubria’s right to pursue vital economic development	36
4)	Rubria has fulfilled its international environmental law obligations	37
a.	An indigenous right to consultation has not crystallized in international law	37
b.	There is no evidence of transboundary environmental harm to Acastus from construction of the pipeline	38
PART III. THE ACTIONS OF PROF ARE NOT IMPUTABLE TO RUBRIA		41
1)	Rubria is not responsible for the alleged wrongful conduct against the Elysians because the acts of PROF are not imputable to Rubria	41
a.	Prof is not an organ of Rubria.....	41
b.	Prof is not an agent or officer of Rubria	42
c.	Rubria did not have effective control over the actions of PROF	43
2)	Rubria did not violate legal obligations owed to Acastus	44
a.	Rubria was not negligent in its protection of aliens	44
b.	Rubria reserves the sovereign right to investigate domestic matters of the State.....	45
c.	Rubria is enforcing its obligations under the ICCPR and complying with the international minimum standard of treatment of aliens by investigating the conduct of PROF	46
PART IV. ACASTUS IS IN BREACH OF ARTICLE 52 OF THE RABBIT.....		49
1)	Acastus has breached the MCRA.....	49
a.	Article 52 transforms breaches of the MCRA into breaches of the RABBIT	49
2)	The outcome of the <i>Borius</i> litigation places Acastus in breach of Article 52 of the RABBIT	51
a.	The assurances provided by the Prime Minister of Acastus are binding obligations that are incorporated into the framework of the RABBIT by Article 52	51
b.	The outcome of the <i>Borius</i> litigation is inconsistent with Acastus’s obligations under Article 52.....	53
Prayer for Relief.....		55

INDEX OF AUTHORITIES

Cases

<i>Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)</i> , [1951] I.C.J. Rep. 116.....	30
<i>Asylum Case (Columbia v. Peru)</i> , [1950] I.C.J. Rep. 266.....	30
<i>Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada</i> (Communication No. 167/1984), UN GAOR, 45th Sess, Supp No 40, Annex 9, UN Doc A/45/40 (1990).....	35, 37
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<i>Corfu Channel Case (United Kingdom v. Albania)</i> , [1949] I.C.J. Rep. 4.....	45
<i>Electronica Sicala S.p.A. (United States v. Italy)</i> , [1989] I.C.J. Rep. 15.....	46
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UN Doc. A/48/18 (1993).....	48
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<i>Military Activities In and Against Nicaragua (Nicaragua v. United States)</i> , [1986] I.C.J. Rep. 14.	43, 46
<i>Neer Claim (United States v. Mexico)</i> , [1926] 4 R.I.A.A. 60.....	47
<i>North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and v. Netherlands)</i> , [1969] I.C.J. Rep. 3.....	30
<i>Nuclear Test Cases (Australia v. France; New Zealand v. France)</i> , [1974] I.C.J. Rep. 253.....	52
<i>SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan</i> (Case No. ARB/01/13) (2003), 42 I.L.M. 1290 (ICSID).	50
<i>SGS Société Générale de Surveillance S.A. v. Republic of the Philippines</i> (Case No. ARB/02/6) (2005), 8 ICSID Rep. 528 (ICSID).....	50, 53
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<i>U.S. Diplomatic and Consular Staff in Tehran Case (United States v. Iran)</i> , [1980] I.C.J. Rep. 3.....	43, 44
<i>Treaties, Conventions, and Statutes</i>	
<i>Charter of the United Nations</i> , 26 June 1945, Can. T.S. 1945 No.7.....	22, 27, 46
<i>Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters</i> , 25 June 1998, 38 I.L.M. 517 (entered into force 30 October 2001).	39
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STATEMENT OF JURISDICTION

In accordance with Article 40(1) of the Statute of the International Court of Justice, the Republic of Acastus and the State of Rubria have transmitted to the Registrar of the Court a Compromis of the Differences between the Republic of Acastus and the State of Rubria Concerning the Elysian Fields.

The Republic of Acastus and the State of Rubria recognize that differences have arisen between them concerning the Elysian fields and other matters, that the parties concerned have not been able to settle their differences through negotiation, and that the issues should be further defined by the International Court of Justice.

The Republic of Acastus and the State of Rubria have not agreed to the Court's *ad hoc* jurisdiction. However, the Court has ordered that, given the nature of the dispute, it will hear arguments relating to jurisdiction and the merits of the case at the same time, while at all times reserving its jurisdictional objections.

Accordingly, the Court can claim jurisdiction in the case at hand, to the extent necessary to determine the jurisdictional and substantive issues of the disputes in question, in accordance with Article 36(1) of the Statute of the International Court of Justice and the Compromis referred to it by the Republic of Acastus and the State of Rubria.

QUESTIONS PRESENTED

1. Does the International Court of Justice have jurisdiction over the parties and all claims in this case, since Acastus has succeeded to Nessus's status as a party to the Statute of the International Court of Justice?
2. By permitting the construction of the pipeline as proposed, is Rubria exercising rights attendant to its sovereignty over territory and natural resources, and complying with international law?
3. Are the actions of PROF imputable to Rubria under international law, or in the alternative, did they violate any international legal obligation owed by Rubria to Acastus?
4. Does the Acastian civil court's decision in the Borius litigation place Acastus in breach of Article 52 of the RABBIT?

STATEMENT OF FACTS

In 2000, the State of Nessus, a member of the United Nations [“UN”] was dissolved and its territory divided into two new states, the Republic of Acastus and the State of Rubria. Neither Acastus nor Rubria has retained a majority of Nessus’s territory, population, resources, or armed forces and there is no devolution agreement between the two states. Acastus has declared the former capital city of Nessus to be the capital city of Acastus.

Nessus had accepted the International Court of Justice [“Court”]’s compulsory jurisdiction. In April 2001, Rubria applied as a new member to the UN and was admitted in October 2001. Acastus, however has not applied for membership, despite being encouraged to do so by the Security Council [“SC”] in a unanimous Resolution dated December 1, 2001.

Acastus is an industrial nation with a history of successful trade. Rubria is rich in natural resources but has remained largely undeveloped. Following independence, Rubria attempted to boost its economy by encouraging international investment in its mineral and oil industry. In February 2003, Rubria and Acastus signed the Rubria-Acastus Binding Bilateral Investment Treaty [“RABBIT”]. In order to commit to the RABBIT, Rubria insisted that a piece of domestic Acastian legislation, the Multinational Corporate Responsibility Act [“MCRA”], be incorporated into the RABBIT by reference. In addition, it was agreed that Article 52 of the RABBIT stipulate that Acastus would, in carrying out its obligations under the terms of the treaty, enforce all aspects of its domestic law, including the MCRA.

The MCRA is a corporate responsibility act that was passed by the Acastian Parliament in December 2002. It gives the Acastian civil courts mandatory jurisdiction over suits for damages brought by individuals suffering losses for alleged violations¹ of “all governing norms of conventional and customary international law”² at the hands of Acastian corporations conducting themselves abroad. The purpose of the MCRA is to encourage states to enter into bilateral investment treaties with Acastus, and to ensure that Acastian corporations conduct themselves in accordance with high standards. At the time of promulgation Prime Minister Lethe of Acastus declared that under the MCRA, trading partners of Acastus could “trust our corporate citizens. They will obey the standards of the Act, and we will hold them to those standards. In the unlikely event that they fall short of full compliance, you may be assured that compensation will be provided to anyone harmed by their actions.”³

The 600-kilometer border between Acastus and Rubria runs through the Elysium, a territory inhabited by the indigenous Elysian community. The residential villages of the Elysians are in Acastus and the Elysians migrate across the common border to cultivate agricultural lands owned by Rubria. The Acastian villages have little or no access to electricity, running water, modern communications or basic medical facilities. Rubria has never restricted the movement of the Elysians across the common border.

¹ *Compromis*, Annex A, Sec. 2 (1).

² *Ibid.*, Sec. 4.

³ *Compromis*, at para.14.

Acastus has granted the Elysians all rights of citizenship, even reserving for the community one seat in Parliament, while under Rubrian law no Elysian has met the requirement to become a permanent resident of Rubria.

In 2002, a rich deposit of oil was discovered in Rubria's portion of the Elysium. The joint venture, Corporation for Oil & Gas ["COG"], incorporated and headquartered in Rubria, was formed for the purpose of extraction and exportation of the oil deposit. There are two shareholders in COG. The majority shareholder is the Acastian Trans-National Corporation ["TNC"]. The minority shareholder is the Rubrian Ministry of Natural Resources. The majority of COG's Board of Directors were appointed by TNC, while the remainder were appointed by the Government of Rubria. COG has exclusive rights to operate in the Elysium.

COG experts reviewed plans of operation for almost a year, and in 2004 they submitted a recommendation to construct an oil and gas pipeline through Rubria's portion of the Elysium. This recommendation was the only economically feasible option, as all alternate routes were financially prohibitive. Though the experts agreed that construction of the pipeline would damage the lands used by the Elysians and affect their agricultural yields, the pipeline would not enter the territory of Acastus. The experts' recommendation was unanimously accepted by COG's shareholders and put into operation in June 2004. To safeguard its personnel, COG entered into an agreement with a private security concern, Protection & Retention Operation Force ("PROF"), a distinct corporate entity⁴ headquartered in Rubria. The agreement provided that COG would

⁴ *Clarifications*, at para. 6.

supply PROF with vehicles and communication equipment and pay a fee for its services. COG was not involved in PROF's assessment or procurement of weapons or ammunition.

Some objections have been raised to the pipeline proposal. Doris Galatea, an Elysian and Member of Parliament representing the Elysian community, has contended that construction of the pipeline will interrupt the Elysians' traditional way of life. This contention is based on the report of the Institution of Local Studies and Appraisals ["ILSA"], a non-governmental organization retained by Acastus. ILSA has concluded that construction of the proposed pipeline would make it impossible for the Elysians to continue their traditional way of life. In September 2004 an action for damages was initiated by a group of Elysians, including Davide Borius, in the Acastian civil courts. It was filed against COG, Rubria, PROF, and TNC. The action alleged that PROF forced the Elysians to perform dangerous work without compensation in contravention of international law and the MCRA. The action claimed that the defendants were responsible for those violations under international law.

On November 8th, 2004 TNC and PROF were dismissed as defendants. PROF was dismissed because it had no assets and conducted no business in Acastus. TNC was dismissed because the court held that a mere shareholder cannot be held liable for the actions of a corporation even if it owns a controlling interest, absent exceptional circumstances that were not present in the case. On November 10th, 2004 Rubria's request for dismissal was denied on the grounds that as a sovereign state Rubria had allegedly violated internationally guaranteed human rights. Rubria declined to participate further in the proceedings and the Acastian civil court ruled against Rubria and COG based solely on evidence from the plaintiffs and ILSA. Rubrian President Fides

immediately dispatched a diplomatic note informing Prime Minister Lethe that Rubria would not recognize the illegal, extraterritorial judgment of the Acastian court. President Fides accused TNC of responsibility under the MCRA for the alleged unlawful conduct of its subsidiary PROF. President Fides also informed Prime Minister Lethe that Acastus was obligated to enforce the MCRA against TNC and that if it failed to do so Acastus would be liable to Rubria for reparations. The President reminded the Prime Minister of his promise that if Acastian corporations fell short of full compliance with the MCRA the Acastian courts would provide compensation to anyone harmed.

Acastus and Rubria have submitted a *Compromis* to this Court which constitutes a stipulation of agreed facts but not an agreement to the Court's *ad hoc* jurisdiction. The Court has ordered that it will hear arguments relating to jurisdiction and the merits of the case at the same time.

SUMMARY OF PLEADINGS

1. The Court does not have jurisdiction *ratione personae* over Acastus. Acastus is not a Party to the Statute of the Court. Nor has it deposited a Declaration with the Court accepting the Court's jurisdiction in accordance with Article 35(2) of the Court's Statute. And it is not a party to a treaty that was in force in 1945 with a provision conferring jurisdiction upon the Court in accordance with Article 35(2) of the Court's Statute. Therefore Acastus cannot access the Court.

Acastus has not applied as a new member to the UN. Nor can it properly be characterized as the continuation of the former Nessus because it has not maintained a sufficient legal identity with Nessus. It has not accepted the Court's jurisdiction, and the RABBIT, a bilateral investment treaty entered into between Acastus and Rubria in 2003, was not a treaty in force between the parties in 1945. Further, Acastus has not made a Declaration under Article 36(2) of the Court's Statute accepting the compulsory jurisdiction of the Court over all claims. Therefore, the Court does not have jurisdiction *ratione materiae* over the Parties to this dispute.

2. Rubria has the sovereign right to permit construction of the pipeline. The oil deposit is located in the Rubrian territory and all States have full permanent sovereignty over their natural resources. By permitting construction of the pipeline Rubria is acting in the national best interest which international law recognizes as overriding purely individual or private interests. The Elysian indigenous community is not afforded special land rights as international law pertaining to indigenous rights over land has not developed sufficiently to bind Rubria. Revenue from the pipeline will benefit the citizens of Rubria and facilitate their realization of human rights guaranteed under the

International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Both Covenants acknowledge the right of the Rubrian people to exploit their natural wealth and resources and neither Covenant should be invoked to prevent Rubria from engaging in vitally important national development. Rubria complied with its international environmental law obligations as alternatives to the pipeline proposal were diligently assessed prior to Rubria's endorsement. Rubria was not required under international law to consult Acastian citizens on the construction of a pipeline which will not cause transboundary environmental harm to Acastus.

3. The actions of PROF, a private security concern, are not imputable to Rubria. PROF is neither an organ nor an agent of Rubria. It has no official capacity under Rubrian law and was never granted any governmental function nor did it ever act under the guise of any official authority. The alleged wrongful conduct of PROF was not perpetrated under Rubria's direction and control. Rubria did not violate any international legal obligations owed to Acastus. There is no evidence of culpable negligence on the part of Rubria in violation of international standards for state responsibility. Rubria has the sovereign right to investigate the alleged wrongful conduct of PROF. By implementing an investigation of PROF's actions Rubria is fulfilling its commitment to international human rights and the international minimal standard for the treatment of aliens.

4. Acastus is in breach of its obligations under Article 52 of the RABBIT. By incorporating the terms of the MCRA by reference into the RABBIT, Rubria and Acastus agreed that all breaches of the MCRA would be considered breaches of the RABBIT. If this Court holds that COG violated the Elysians' human rights, then Acastus must bear

responsibility because an Acastian corporation, TNC, through its foreign investment in COG, has breached the MCRA.

The outcome of the Borius litigation places Acastus in breach of Article 52 of the RABBIT. The Acastian Prime Minister's declaration that compensation will be provided to anyone harmed by the actions of Acastian corporations conducting themselves abroad suffices to bind Acastus to the high standards promulgated in the MCRA. Rubria has relied in good faith upon the Prime Minister's declaration in agreeing to enter into the RABBIT. Acastus has violated the MCRA by allowing the Acastian courts to dismiss claims against a business incorporated in Acastus and governed by the provisions of the MCRA.

PLEADINGS

PART I. THE COURT DOES NOT HAVE JURISDICTION *RATIONE PERSONAE* OVER ACASTUS

The International Court of Justice [hereinafter “the Court”] does not have jurisdiction *ratione personae* over Acastus because 1) Acastus is not a party to the Statute of the Court, 2) it has not deposited a declaration with the Registrar of the Court accepting the Court’s jurisdiction, and 3) the RABBIT, a bilateral investment treaty between Acastus and Rubria, is not a treaty that was in force in 1946.

The Court has held that it can only exercise jurisdiction over states that can access the Court and that have accepted the Court’s jurisdiction.⁵ If a state does not enjoy the right of access to the Court, the Court is not open to it and the question of jurisdiction *ratione materiae* does not arise.⁶

A State can only access the Court in accordance with Articles 35(1) and 35(2) of the Court’s Statute. Article 35(1) states that “[t]he Court shall be open to the States parties to the present Statute.”⁷ Article 35(2) states that “[t]he conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council...”⁸ Acastus has satisfied neither

⁵*Case Concerning Legality of Use of Force (Serbia and Montenegro v. Portugal)*, (15 December 2004), at para. 45, online: International Court of Justice <<http://www.icj-cij.org/icjwww/idecision.htm>> [*Case Concerning Legality of Use of Force*].

⁶ *Ibid.* at para. 29.

⁷ *Statute of the International Court of Justice*, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, Art. 35(1) [*Statute of the ICJ*].

⁸ *Ibid.* at Art. 35(2).

the conditions of Article 35(1) nor 35(2) of the Court's Statute. Accordingly, the Court is not open to Acastus.

1) Acastus is not a party to the Statute of the Court

a. Acastus is not a member of the UN

Acastus cannot gain access to the Court by claiming that it is a new member of the UN. Though all members of the UN are *ipso facto* parties to the Statute of the Court,⁹ Acastus has not applied for UN membership, despite being urged to do so by the SC. In a unanimous Resolution dated December 1, 2001, the SC resolved that “Nessus has ceased to exist” and that “Acastus... should apply for membership in the United Nations.”¹⁰

In order to become a member of the UN, a State must apply and qualify for membership in accordance with the terms of Article 4 of the *Charter of the United Nations* [hereinafter “the *Charter*”].¹¹ By that Article, the sole power to determine which States may be granted membership in the UN is given to the General Assembly, upon recommendation by the SC. Acastus has not applied for UN membership and neither the General Assembly nor the SC has admitted Acastus as a new member. Accordingly, Acastus cannot, on this basis, be considered a party to the Statute of the Court.

b. Acastus is not the continuation of the former Nessus

Acastus has not maintained a sufficient legal identity with Nessus to continue Nessus's membership in the UN. The basic principle underpinning the practice of the UN in regards state succession is that only a State which constitutes the continuation of

⁹ *Charter of the United Nations*, Art. 93(1) [*Charter*].

¹⁰ *Compromis*, at para. 1.

¹¹ *Charter*, *supra* note 9 at Art. 4.

the pre-existing legal person will retain its UN membership.¹² This principle was first stated by the Sixth Committee in its recommendations to the First Committee of the General Assembly concerning the legal rules that should apply when a UN Member State is dissolved and a new State or States seek to enter into international life.¹³ A State's claim to successfully continue the legal identity of a former State can be assessed in two ways: a) by analyzing objective factors related to state succession, and b) by analyzing the international community's response to the successor State's claim.

- i) *Objective Factors: Acastus has not retained a majority of Nessus's territory, population, resources or armed forces and it does not have a devolution agreement with Nessus or Rubria*

Academic commentators have held that most theories on State continuity proceed from the basic criteria of statehood, *i.e.* territory, sovereign and independent government, and people or nation.¹⁴ Accordingly, the continuity of a State is said to be supported by the retention of certain characteristics, such as a) a substantial amount of territory, b) a majority of the State's population, c) a majority of the State's resources, d) a majority of the State's armed forces, e) the retention of the State's seat of government, or f) the existence of a devolution agreement.¹⁵

Though Acastus has retained the former Nessus's seat of government, it has not retained a) a substantial amount of Nessus's territory, b) a majority of its population, c) a

¹² UN GAOR, Annex 14g, 1st Comm., UN Doc. A/C.1/212 (1947) at 582-83.

¹³ *Ibid.*

¹⁴ Konrad G. Buhler, "Casenote: Two Recent Austrian Supreme Court Decisions on State Succession from an International Law Perspective" (1997) 2 *Aus. Rev. Int'l & Eur. L.* 213 at 225.

¹⁵ Williamson "State Succession and Relations with Federal States, Panelist's Remarks" (1992) 86 *ASIL Proc.* 1 at 14.

majority of Nessus’s resources, d) a majority of its armed forces, or e) a devolution agreement with Rubria. This makes Acastus’s situation similar to that of the Federal Republic of Yugoslavia [“FRY”] following the disintegration of the former Socialist Federal Republic of Yugoslavia [“SFRY”] in 1992, and dissimilar to the situation of India and Russia following the breakup of the former British India and Soviet Union. In the case of the FRY, the SC,¹⁶ and ultimately this Court,¹⁷ held that the FRY was not the legal continuation of the SFRY, while in the case of the former British India and Soviet Union, the SC allowed Indian and Russia to continue the former states’ memberships in the UN.¹⁸

In the case of the succession of India and Pakistan in 1947, India successfully retained the former British India’s membership in the UN in part because India held onto 75% of the former British India’s territory and 80% of its population. It also had a devolution agreement stipulating that India was to continue British India’s membership in the UN, and it kept the name India.¹⁹

In the case of the former Soviet Union, Russia successfully retained the former Soviet Union’s membership in the UN in part because it held on to 75% of the former Soviet Union’s territory (including its historic territorial hub) and more than half of its population. Russia also retained more than half of the Soviet Union’s resources, nuclear

¹⁶ SC Res. 777, UN SCOR, 47th Sess., 3116th mtg., UN Doc. S/RES/777 (1992) 1 [*SC Resolution 777*].

¹⁷ *Case Concerning Legality of Use of Force*, *supra* note 5 at para. 78.

¹⁸ Michael P. Scharf, “Musical Chairs: The Dissolution of States and Membership in the United Nations” (1995) 28 *Cornell Int’l L.J.* 29 at 50 [Scharf, “Musical Chairs”].

¹⁹ *Ibid.* at 50.

weapons, nuclear assembly plants, and army, and there was a devolution agreement stipulating that Russia was to inherit the Soviet seat at the UN.²⁰

In contrast to India and Russia, the FRY was not able to hold onto the former SFRY's membership in the UN in part because it did not constitute a majority, let alone a substantial majority, of the SFRY's land, population or resources. It only retained 40% of the SFRY's territory and 45% of its population. There also was no devolution agreement stipulating that the FRY was to inherit the SFRY's seat at the UN.²¹ Like Acastus, the FRY retained the capital city of Belgrade and a large portion of the SFRY's governmental machinery, but even so, the SC and international community refused to recognize the FRY as the continuation of the SFRY. Instead, this Court held that it did not have jurisdiction *ratione personae* over Serbia and Montenegro, the successor to FRY at the time of Serbia and Montenegro's application.²² By analogy, Acastus cannot claim to be the continuation of Nessus because Acastus has not retained a majority of Nessus's state components and it does not have a devolution agreement in place with Rubria.

ii) *The UN's reaction to Acastus does not support Acastus's claim to be the continuation of the former Nessus.*

Another way to determine whether a successor State is considered the continuation of a former State is to assess the response of various UN bodies to the successor State's continuation claim.²³ In *Case Concerning Legality of Use of Force*, the Court assessed various SC resolutions in determining that Serbia and Montenegro (the

²⁰ *Ibid.*

²¹ *Ibid.* at 53.

²² *Case Concerning Legality of Use of Force*, *supra* note 5 at para. 78.

²³ *Ibid.* at paras. 52-72.

successor state to the FRY) could not access the Court.²⁴ Accordingly, the Court held that it did not have jurisdiction *ratione personae* over Serbia and Montenegro.

In the case of the former Yugoslavia, the SC passed a Resolution declaring that the SFRY had ceased to exist.²⁵ Similarly, the SC has passed a Resolution in the case at bar declaring that Nessus has ceased to exist.²⁶ The SC has also stated that it is unclear whether Acastus should properly be deemed the successor state to Nessus as a matter of international law. Though the Under-Secretary-General has interpreted the SC's Resolution as meaning that Acastus is not prevented from temporarily continuing the membership of Nessus in the UN until such time as Acastus had been admitted as a new member state, Rubria reminds the court that legal opinions of the Under-Secretary-General are not binding upon the Court.²⁷ Accordingly, Rubria submits that Acastus has not maintained a sufficient legal connection with Nessus to be properly considered the continuation of Nessus for the purposes of retaining Nessus's seat at the UN.

Though the UN Secretariat has allowed Acastus to continue Nessus's arrears payments and has allowed the nameplates and flag to be switched to those of Acastus at the UN and its bodies, the actions of the Secretariat towards Acastus are merely administrative practices. They cannot on their own change the legal status of Acastus. A mere arrangement for financial purposes or positioning of nameplates and flags cannot serve as a legal basis for admission to membership in the UN. No executive acts or

²⁴ *Ibid.*

²⁵ *SC Resolution 777, supra* note 16.

²⁶ *Compromis*, at para. 9.

²⁷ *Compromis*, at para. 11.

communications, even from within the highest sources within the UN Secretariat, can create membership in the absence of a positive decision on admission. Acastus's membership in the UN is a matter for formal decision by the SC and the General Assembly under Article 4 of the *Charter*.²⁸

2) Acastus has not deposited a declaration accepting the jurisdiction of the Court

If Acastus is not a member of the UN, it is not otherwise a party to the Statute of the Court, since it has not deposited a declaration accepting the jurisdiction of the Court pursuant to Article 93(2) of the *Charter* and the terms of SC Resolution 9 of 1946.²⁹ Nor has a specific determination been made by the General Assembly upon the recommendation of the SC as to the conditions upon which Acastus may become a party to the Statute of the Court. As with the preceding section, the Court is not therefore, on this basis, open to Acastus pursuant to Article 35(2) of the Statute.

3) The RABBIT is not a treaty that was in force in 1945

Nor does the reference in Article 35(2) to “treaties in force” provide a basis of access to Acastus in this case. The RABBIT only came into force on 15 March 2003.³⁰ It therefore was not a treaty in force at the time that the Statute of the Court came into force in 1945 in accordance with the Court's interpretation of the access provisions of Article 35(2) in the *Case Concerning the Legality of the Use of Force*.³¹ In that case, a majority of this Court held that the phrase “special provisions contained in treaties in

²⁸ *Charter, supra* note 9 at Art. 4.

²⁹ SC Res. 9, UN SCOR, 1st year, 76th mtg., Annex 12, UN Doc. S/RES/9 (1946).

³⁰ *Compromis*, at para. 17.

³¹ *Case Concerning Legality of Use of Force, supra* note 5 at para. 115.

force” referred to treaties in force at the time that the Statute came into force, i.e. on 24 October 1945.

Absent entitlement to appear, the Court lacks jurisdiction *ratione personae* over Acastus. As this is a condition precedent to any question arising as to the Court’s jurisdiction in a particular case, the question of whether the Court has jurisdiction *ratione materiae* does not arise. However, should the Court find that it has jurisdiction *ratione personae* over Acastus, which the Respondent expressly denies, then the Respondent submits that the Court does not have jurisdiction *ratione materiae*.

4) The Court lacks jurisdiction *ratione materiae*

The principal basis upon which Acastus seeks to found the jurisdiction of the Court is declarations made by Nessus and Rubria under Article 36(2) of the Statute.³² According to Article 36(2) of the Statute, only “States parties to the present Statute” may make declarations recognizing the jurisdiction of the Court under that provision.³³ For the reasons given in Part I above, Acastus is not a member of the UN and therefore a Party to the Statute. Nor can Acastus rely on Article 36(2) of the Statute to ground the Court’s *ratione personae* jurisdiction.³⁴ Acastus cannot, therefore, make a valid declaration under Article 36(2) of the Statute.

In order to have access to the Court, Acastus must either be a party to the Statute of the Court, or claim to apply the exceptional mechanisms provided for in Article 93(2) of the Charter or in Article 35(2) of the Statute. Acastus meets neither of these

³² *Compromis*, at para. 33.

³³ *Statute of the ICJ*, *supra* note 7 at Art. 36(2).

³⁴ *Case Concerning Legality of Use of Force*, *supra* note 5 at para. 45.

requirements. Acastus has refused to apply for new membership status to the UN. It follows from this finding that Acastus is not a party to the Statute of the Court. The Court is thus not open to it through this approach and Acastus cannot rely upon a purported declaration made by the former Nessus under Article 36(2) of the Statute of the Court to ground the Court's jurisdiction.

PART II. RUBRIA IS NOT IN VIOLATION OF INTERNATIONAL LAW

1) Rubria exercised its right to permanent sovereignty over natural resources by permitting construction of the pipeline

- a. Rubria has full permanent sovereignty over natural resources in its territory

Rubria has the sovereign right to exploit all the natural resources of its territory. International law recognizes that some UN General Assembly resolutions have normative value for establishing the existence or emergence of customary international law.³⁵ The Charter of Economic Rights and Duties of States declares that, "Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources, and economic activities."³⁶ The Economic Charter was adopted by 120 votes to 6 with 10 abstentions and has been recognized by developing countries³⁷ and legal scholars³⁸ as reflective of customary international law. The persistent objection by States that voted against the Economic Charter, that it does not legally bind them, substantiates its customary nature.³⁹ The oil deposit is located in the

³⁵ *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] I.C.J. Rep. 226 at para. 70 [*Legality of Nuclear Weapons*].

³⁶ *Charter of Economic Rights and Duties of States*, GA Res. 3281 (XXIX), UN GAOR, 29th Sess., 2315th plen. mtg., Supp. No. 31, UN Doc A/9631 (1974), 50, Art. 2 [*Economic Charter*].

³⁷ Milan Bulajic, *Principles of International Development Law* (Dordrecht: Martinus Nijhoff Publishers, 1986) at 144.

³⁸ Subrata Roy Chowdbury, "Legal Status of the Charter of Economic Rights and Duties of States" in Kamal Hossain, ed., *Legal Aspects of the New International Economic Order*, (New York: Nichols Publishing Company, 1980) at 79; Ian Brownlie, "Legal Status of Natural Resources in International Law" (1979) 162 Rec. des Cours 245 at 268.

³⁹ Ian Brownlie, *Principles of Public International Law*, 5th ed. (New York: Oxford University Press, 1998) at 145 [*Brownlie*]; See generally *Anglo-Norwegian Fisheries*

territory of Rubria and by permitting construction of the pipeline as proposed; Rubria is exercising its full permanent sovereignty over natural resources.

b. Construction of the pipeline is in the national interest of Rubria

State action in the national interest has been recognized in international law as overriding purely individual or private interests, both domestic and foreign.⁴⁰ The right of all States to use natural wealth and resources in the pursuit of national development for the well-being of the people of the State concerned⁴¹ is an established norm of customary international law.⁴² Sovereignty over natural resources represents an essential prerequisite for Rubria and other developing countries to advance in an increasingly interdependent global economy. By constructing the pipeline, Rubria is acting in the national best interest of the Rubrian people. Rubria recognizes that the pipeline proposal affects the agricultural economy of the Elysian community; however, the Government of Rubria has a responsibility to act in the best interest of its people, and the pipeline proposal represents an economic initiative of national importance.

2) Customary international law does not include indigenous land rights

a. The pipeline represents a state sanctioned development project

Case (United Kingdom v. Norway), [1951] I.C.J. Rep. 116 at 131; *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and v. Netherlands)* [1969] I.C.J. Rep. 3 at 26-27; *Asylum Case (Columbia v. Peru)*, [1950] I.C.J. Rep. 266 at 277-78.

⁴⁰ *Resolution on Permanent Sovereignty over Natural Resources*, GA Res. 1803 (XVII), UN GAOR, 17th Sess., 1194th plen. mtg., Supp. No.17, UN Doc. A/5217 (1962), 17 at para. 1 [*Res. 1803*].

⁴¹ *Ibid.* at para. 4.

⁴² *Brownlie, supra* note 39 at 14; See *Texaco v. Libya* (1977), 17 I.L.M. 1, 53 I.L.R. 389 at para. 87 (Arbitrator: Pr. Rene Dupuy); *I.N.A. Corp v. Islamic Republic of Iran* (1985), 8 Iran-U.S. Cl. Trib. Rep. 373 at 386 (Judge Lagergren).

State sanctioned development projects promote economic growth by encouraging investment, creating jobs, and building public infrastructure. Rubria's exploitation of the oil deposit will benefit the State at the national level by advancing industrial development and at the local level by generating employment and income opportunities for the local population. State concern that indigenous land rights may curtail a State's ability to pursue essential development projects is reflected in the lack of widespread and representative support for international instruments on indigenous rights. The most prominent contemporary instruments relating to indigenous rights are Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries⁴³ and the UN Draft Declaration on the Rights of Indigenous Peoples⁴⁴. The *ILO Convention 169* has been ratified by only 17 countries.⁴⁵ Adoption of the *UN Draft Declaration* has been delayed pursuant to legitimate concerns of States particularly in relation to the articles concerning lands, territories, and natural resources.⁴⁶ State representatives in the

⁴³ *Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989 28 I.L.M. 1382 (entered into force 5 September 1991) [*ILO Convention 169*].

⁴⁴ UN Working Group on the Draft Declaration on the Rights of Indigenous Peoples, Eleventh Sess., (1993), *UN Draft Declaration on the Rights of Indigenous Peoples*, adopted by UN Subcommission on Prevention of Discrimination and Protection of Minorities, Res. 1994/25. UN/Doc E/CN.4/Sub.2/1994/Add.1 (1994), Art. 25, 26 [*UN Draft Declaration*].

⁴⁵ *Final report of the Special Rapporteur, Erica-Irene A. Daes on indigenous peoples' permanent sovereignty over natural resources*, UN ESCOR, Sub-Commission on the Promotion and Protection of Human Rights, 56th Sess., Provisional Agenda Item 5(b), UN Doc. ECN.4/Sub.2/2004/30 (2004) at para. 28 [*Erica-Irene Daes Report*].

⁴⁶ *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its Tenth Session*, UN ESCOR, Commission on Human Rights, 61st Sess., Provisional Agenda Item 15, UN Doc. E/CN.4/2005/89 (2005) at para. 59 [*Tenth Session*].

Working Group on the Draft Declaration on the Rights of Indigenous Peoples ["Working Group"] repeatedly argued that indigenous rights to land must be balanced with the importance of development in the public interest and management of natural resources at the national level.⁴⁷ Government representatives from Australia, the United States, Canada, and New Zealand were unwilling to endorse the articles in their current form due to the exclusive and unqualified rights afforded indigenous peoples over traditional lands and resources.⁴⁸

- b. Many states with significant indigenous communities do not recognize indigenous communal land rights

Rubria's assertion of state control over its portion of the Elysium is consistent with the practice of numerous other States with indigenous communities. The majority of the World's indigenous communities are located in South Asia where the norm is non-recognition of customary land rights.⁴⁹ Most Southeast Asian States have no legal rules granting indigenous peoples the right to State owned land. The establishment of national parks and reserves on indigenous traditional lands has been a common practice in both

⁴⁷ *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 on its Seventh Session*, UN ESCOR, Commission on Human Rights, 58th Sess., Provisional Agenda Item 15, UN Doc. E/CN.4/2002/98 (2002) at paras. 42-44; *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 on its Eighth Session*, UN ESCOR, Commission on Human Rights, 59th Sess., Provisional Agenda Item 15, UN Doc. E/Cn.4/2003/92 (2003) at para. 46 [*Eighth Session*].

⁴⁸ *Eighth Session*, *supra* note 47 at paras. 29, 32.

⁴⁹ Rodolfo Stavenhagen, "Indigenous Peoples in Comparative Perspective" (Background Paper for UN Development Programme 2004 Human Development Report) at 1, online: UN Development Programme Human Development Reports <<http://hdr.undp.org/publications/papers.cfm>> [*Development Report*].

African and South Asian States.⁵⁰ These States adopt the position that legally the lands occupied by indigenous peoples are owned by the State which has the authority to grant concessions for development activities on the land.

3) Rubria has complied with its obligations under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights⁵¹

a. Construction of the pipeline benefits the citizens of Rubria

The Government of Rubria is elected by its citizens and has an obligation to act in their best interest. Rubria has been a benevolent neighbor by permitting the Elysians to continue their use of state owned land. With the discovery of the oil deposit, the Government of Rubria had an obligation as the representative of the Rubrian people to exploit this natural resource. The citizens of Rubria have a right to employment, fair wages, and a standard of living that includes adequate housing and the continuous improvement of their living conditions.⁵² Despite its robust industrial economy, Acastus seems content to ignore the needs of the Elysians. They continue to lack access to electricity, running water, modern communications, and basic medical facilities.⁵³ Rubria is unwilling to accept the same standard for its citizens. Revenue from the pipeline will

⁵⁰ *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65*, UN ESCOR, Commission on Human Rights, 59th Sess., Provisional Agenda Item 15, UN Doc. E/CN.4/2003/90 (2003) at paras. 22,23.

⁵¹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, 1976 Can. T.S. No. 47 (entered into force 23 March 1976) [ICCPR], *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, 1976 Can. T.S. No. 46 (entered into force 3 January 1966) [ICESCR].

⁵² *ICESCR, ibid.* at Art. 11.

⁵³ *Compromis*, at para. 3.

aid Rubria in building the state infrastructure necessary to ensure the full realization of the human rights of the Rubrian people. Rubria's action corresponds with the position of other developing countries, that the exercise of permanent sovereignty over natural resources is indispensable in order to accelerate their industrial development.⁵⁴

b. Article 1 of the ICCPR and ICESCR applies to the people of Rubria

In fulfilling its obligations under Article 1, Rubria considered the economic interests of the Elysians and weighed them against the national development interests of the Rubrian people. The right under Article 1 of all peoples to self-determination, to freely dispose of their natural wealth and resources, and to not be deprived of their own means of subsistence applies to the Rubrian people.⁵⁵ If Rubria decided not to permit the construction of the pipeline, it would be denying its citizens their right to freely dispose of their natural wealth and resources in pursuit of industrialization as a means of national economic advancement. This concern is reflected in the UN Human Rights Committee's ["HRC"] cautious consideration of Article 1 in the context of indigenous complaints⁵⁶ where state consent has been required for indigenous peoples to claim under Article 1.⁵⁷

⁵⁴ M.S. Rajan, *Sovereignty over Natural Resources*, (New Jersey: Humanities Press, 1978) at 26.

⁵⁵ *General Comment No. 12: The right to self-determination of peoples (Art. 1)*, UN CCPROR, 21st Sess., U.N. Doc. HRI\GEN\1\Rev.1 (1984) 12 at para. 5.

⁵⁶ See *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (Communication No. 167/1984), UN GAOR, 45th Sess, Supp No 40, Annex 9, UN Doc A/45/40 (1990) [*Lubicon Lake Band*]; *Ivan Kitok v Sweden* (Communication No. 197/1985), UN GAOR, 43rd Sess., Supp. No. 40, UN Doc. A/43/40, (1988).

⁵⁷ James S. Anaya, *Indigenous Peoples in International Law*, 2nd ed. (New York: Oxford University Press, 2003) at 113.

c. Article 27 of the ICCPR should not inhibit Rubria's right to pursue vital economic development

Rubria supports the protection of the Elysian culture but challenges the application of Article 27 as a provision limiting the ability of a state to pursue nationally important economic development. The ICCPR and the ICESCR explicitly state that neither Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.⁵⁸ The oil pipeline represents a national initiative to vitalize Rubria's economic growth and by endorsing the proposal Rubria is fulfilling this obligation. The European Commission on Human Rights has recognized that development projects necessary for the economic well-being of the country will excuse some environmental harm to indigenous traditional lands.⁵⁹ The Elysian interests were considered in the development of the pipeline proposal but a conclusion was reached that any alternative proposal would be prohibitively expensive.⁶⁰ The HRC has stated that consideration of indigenous interests prior to deciding on development measures counters finding a violation of Article 27.⁶¹ It has been acknowledged in the HRC that the enjoyment of culture should not imply that a traditional way of life must be preserved intact at all costs. Article 27 may not be

⁵⁸ *ICCPR*, *supra* note 51 at Art. 45; *ICESCR*, *supra* note 51 at Art. 25.

⁵⁹ *G and E. v. Norway* (Apps. No. 9278/81 & 9415/81) (1984), 35 Eur. Comm. H.R.D.R. 30.

⁶⁰ *Compromis*, at para. 21.

⁶¹ *Ilmari Lansman et al. v. Finland* (Communication No. 511/1992), HRC, 57th Sess, pt. 1, UN Doc CCPR/C/57/1 (1996) 74.

violated where outright refusal of a group to change its traditional way of life may hamper national economic development.⁶²

4) Rubria has fulfilled its international environmental law obligations

a. An indigenous right to consultation has not crystallized in international law

The Elysians' interest in Rubria's agricultural lands was considered in the assessment of potential alternatives to the pipeline proposal. Rubria was under no international law obligation to consult the Elysians on a development project pursued for a public purpose affecting state owned property. State practice demonstrates that the indigenous right to consultation on development projects has not achieved sufficient consensus to constitute a customary norm. The International Labor Organization ["ILO"] has reported that despite paragraph 6 of the *ILO Convention 169* setting out an obligation to consult indigenous peoples on development projects, many State parties do not comply with this stipulation.⁶³ Rubria, which is not party to the *ILO Convention 169*, should not be held to a higher international standard than those States who are party to the Convention. State representatives in the Working Group were unwilling to endorse Article 30 of the *UN Draft Declaration* requiring States to obtain indigenous consent prior to the approval of any project affecting indigenous lands.⁶⁴ The representative from Canada noted that prior informed consent might not be required for development that is

⁶² *Lubicon Lake Band*, *supra* note 56 (ind. op. of Nisuke Ando, App. 1).

⁶³ *Development Report*, *supra* note 49 at 14.

⁶⁴ *Tenth Session*, *supra* note 46 at 29.

in the public interest.⁶⁵ In Norway, where the Sami indigenous people enjoy expansive political rights, the Norwegian authorities have granted development licences on traditional lands without prior consultation with the Sami.⁶⁶

- b. There is no evidence of transboundary environmental harm to Acastus from construction of the pipeline

International environmental law acknowledges Rubria's sovereign right to exploit its own resources pursuant to its own environmental policies provided they do not cause damage to the environment of other States.⁶⁷ *Principle 21* is recognized as a restatement of customary international law⁶⁸ and reflects an obligation of due diligence rather than an obligation of result.⁶⁹ In the *Lac Lanoux* arbitration the Tribunal ruled that France had complied with its obligation to consider Spain's interests in the development of its

⁶⁵ *Eighth Session, supra* note 47 at 46.

⁶⁶ Garth Nettheim, Gary D. Meyers & Donna Craig, *Indigenous Peoples and Governance Structures*, (Canberra: Aboriginal Studies Press, 2002) at 219.

⁶⁷ *Stockholm Declaration of the UN Conference on the Human Environment*, 16 June 1972, princ. 21, UN Doc. A/CONF.48/14, 1 I.L.M. 1416 (1972) [*Principle 21*].

⁶⁸ *Legality of Nuclear Weapons, supra* note 35 at 241-42; Phillippe Sands, *Principles of International Environmental Law* (New York: Cambridge University Press, 1998) at 186; Edith Brown Weiss et al., *International Environmental Law and Policy* (Gaithersburg: Aspen Law & Business, 1998) at 316; David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy* (New York: Foundation Press, 1998) at 345.

⁶⁹ Gunther Handl, "National Uses of Transboundary Air Resources: The International Entitlement Issue Reconsidered" (1986) 26 Nat'l Res. J. 405 at 429 (eC); See also David D. Caron, "The Law of the Environment: A Symbolic Step of Modest Value" (1989) 14 Yale J. Int'l L. 528 at 536 (eC); Riccardo Pisillo-Mazzeschi, "Forms of International Responsibility for Environmental Harm" in Francesco Francioni & Tullio Scovazzi, eds., *International Responsibility for Environmental Harm* (Norwell, MA: Kluwer Academic Publishers Group, 1991) 15 at 24.

hydroelectric scheme. Although the final scheme implemented by France was contrary to Spanish interests the Tribunal stated:

By making this choice France is only making use of its right; the development works of Lake Lanoux are on French territory, the financing of and the responsibility for the enterprise fall upon France, and France alone is the judge of works of public utility which are to be executed on her own territory.⁷⁰

COG experts spent almost a year assessing alternative plans for the pipeline construction and eventually determined that any alternative would be prohibitively expensive. The assessment of alternative plans demonstrates that the pipeline proposal was not arbitrarily formulated but rather involved diligent consideration of all pertinent interests. The pipeline will be constructed completely within the territory of Rubria and there is no evidence of any harm to the environment of Acastus.⁷¹ The necessity for environmental impact assessments ["EIA"] has been restricted on the international plane to significant transboundary harm resulting from cross-border pollution.⁷² The *Espoo*⁷³ and *Aarhus*⁷⁴ Conventions are regional agreements that lack sufficient global recognition

⁷⁰ *Lac Lanoux Arbitration (France v. Spain)* (1957), 12 R.I.A.A. 285 at 316.

⁷¹ *Compromis*, at para. 21.

⁷² *Trail Smelter Case (United States v. Canada)* (1941), 3 R.I.A.A. 1905; See John H.Knox, "The Myth and Reality of Transboundary Environmental Impact Assessment" (2002) 96 Am. J. Int'l L. 291 (eC); See also Franz Xaver Perrez, "The relationship between "permanent sovereignty" and the obligation not to cause transboundary environmental damage" (1996) 26:4 *Envtl. L.* 1187 at 1197.

⁷³ *Convention on Environmental Impact Assessment in a Transboundary Context*, 25 February 1991, 1989 U.N.T.S. 310, 30 I.L.M. 800 (entered into force 10 September 1997) [*Espoo Convention*].

⁷⁴ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, 38 I.L.M. 517 (entered into force 30 October 2001) [*Aarhus Convention*].

to be considered reflective of customary international law. Both Conventions represent EIA standards implemented in Western developed countries; however, state practice in developing countries demonstrates that neither Convention binds Rubria.⁷⁵ Financial constraints on developing countries like Rubria frequently limit the amount of resources available for the assessment of the environmental effects of development projects.⁷⁶ The pipeline does not interfere with the territorial integrity of Acastus and therefore does not contravene international environmental law requiring the prevention of transboundary harm in neighboring States.

⁷⁵ Clive George, "Comparative Review of Environmental Assessment Procedures and Practices" in Norman Lee & Clive George, eds., *Environmental Assessment in Developing and Transitional Countries* (New York: Wiley Publishers, 2000) 35 at 49.

⁷⁶ John H. Knox, "Assessing the Candidates for a Global Treaty on Transboundary Environmental Impact Assessment" (2003) 12 N.Y.U. *Envtl. L.J.* 153 at 167 (eC).

PART III. THE ACTIONS OF PROF ARE NOT IMPUTABLE TO RUBRIA

Rubria is responsible for the actions of its state organs, agents acting with governmental authority in their official capacity, and private individuals or groups over which Rubria has direct and effective control. The connection between PROF, a private security concern contracted to protect COG's personnel,⁷⁷ and Rubria, a minority shareholder in the joint-venture COG,⁷⁸ does not meet any of these requirements. There is no evidence of negligence on the part of Rubria to engage international responsibility for the activities of PROF. Rubria's actions subsequent to learning of the alleged wrongful conduct of PROF demonstrate Rubria's commitment to its international obligations.

1) Rubria is not responsible for the alleged wrongful conduct against the Elysians because the acts of PROF are not imputable to Rubria

a. PROF is not an organ of Rubria

PROF is not an organ of Rubria since there is no evidence that it has been afforded "that status in accordance with the internal law of the State".⁷⁹ While the absence of domestic recognition is not determinative,⁸⁰ it does indicate a lack of official capacity. An entity that represents itself as capable of providing security services does not *automatically* become an organ of the State simply because its function is similar to a

⁷⁷ *Compromis*, at para. 23.

⁷⁸ *Compromis*, at para. 19.

⁷⁹ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, GA Res. 56/83, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/Res/56/83 (2001), Art. 4(2) [*Draft Articles*].

⁸⁰ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) 98 at para. 11 [*Crawford*].

service provided by the government. In order to perform a function *on behalf* of the State, authority must be granted *by the State*. The fact that a joint-venture desires greater protection for its personnel and contracts with a private entity to perform such a function, does not indicate that the State has granted said entity the official capacity of the State to protect.

b. PROF is not an agent or officer of Rubria

To hold a State liable for the acts of an agent, international law requires that the wrongful act be committed under the guise of the authority and using the means granted to the official by the State. In the *Caire* case, the French-Mexican Claims Commission found Mexico responsible for the murder of a French national by Mexican officers because "they acted under cover of their status as officers."⁸¹ In the *Mallen* case a deputy constable twice attacked the same man. The first attack constituted a personal attack on the street and did not attract state responsibility while in the second the constable's use of his badge to assert his official capacity warranted state responsibility.⁸² At no time did PROF exercise government authority⁸³ nor is there evidence that it ever represented itself as an official Rubrian military force. Employees of PROF were not acting under the guise of official state authority as confirmed in the testimony of Davide Borius where he refers to them as "PROF men"⁸⁴ not as Rubrian officers. Furthermore, PROF employees wore distinctive hats when on duty to distinguish them from the Rubrian public

⁸¹ *Caire Claim (France v. Mexico)* (1929), 5 R.I.A.A. 516, at 531 (translation) [*Caire*].

⁸² *Mallen (United States v. Mexico)* (1927), 4 R.I.A.A. 173, 174-77.

⁸³ *Draft Articles, supra* note 79 at Art 5.

⁸⁴ *Compromis*, at para. 26.

authorities.⁸⁵ PROF's actions “had no connexion with the official function and [were], in fact, merely the act of private individual[s].”⁸⁶

c. Rubria did not have effective control over the actions of PROF

Acts of private persons may be attributed to the State provided the person or group is "in fact acting on the instructions of, or under the direction or control of," the State.⁸⁷ It is not enough for a State to have the *power* to exercise direction and control,⁸⁸ it must actually exercise that power in order to impute responsibility. In the words of the European Court of Human Rights in *Loizidou v. Turkey*, Rubria must have “exercise[d] effective overall control”⁸⁹ over PROF's actions. In the *Nicaragua* case, this Court made it clear that even though the United States had provided heavy subsidies and had its hand in the “planning, direction and support” of the *contras*, this connection was insufficient, in and of itself, to impute responsibility to the United States for the actions of the operatives.⁹⁰ In the *US Diplomatic and Consular Staff in Tehran Case* this Court held that the actions of militants were not directly imputable to Iran as they were not acting on orders from the government.⁹¹ State endorsement of the militant actions was required to

⁸⁵ *Clarifications*, at para. 6.

⁸⁶ *Caire*, *supra* note 81.

⁸⁷ *Draft Articles*, *supra* note 79 at Art. 8.

⁸⁸ *Heirs of the Duc de Guise (France v. Italy)* (1951), 13 R.I.A.A. 150 at 161.

⁸⁹ *Loizidou v. Turkey*, [1986] Eur. Ct. H.R. (Ser. A) 2260 at 56.

⁹⁰ *Military Activities In and Against Nicaragua (Nicaragua v. United States)*, [1986] I.C.J. Rep. 14 at paras. 63-65 [*Nicaragua*].

⁹¹ *U.S. Diplomatic and Consular Staff in Tehran Case (United States v. Iran)*, [1980] I.C.J. Rep. 3 at paras. 56-62 [*US Diplomatic and Consular Staff in Tehran Case*].

impute responsibility to Iran.⁹² It is clear that where the entity exercises autonomy, as PROF does, responsibility ends with the individuals and entity involved.

Rubria did not have "domination over the commission"⁹³ of the alleged wrongful conduct nor did it oversee or endorse the behaviour of PROF. The only instance in evidence when the shareholders of COG voted on any issue related to PROF was in July 2004 regarding its inception.⁹⁴ TNC is a privately owned Acastian company holding the majority of shares in COG.⁹⁵ Shareholder decisions are made by a simple majority vote, on a one-share, one vote basis.⁹⁶ It was TNC which ultimately authorized the hiring of PROF. The majority of COG's Board of Directors is composed of TNC appointed directors, providing TNC with ongoing executive control over the joint-venture.⁹⁷

2) Rubria did not violate international legal obligations owed to Acastus

a. Rubria was not negligent in its protection of aliens

Illegal acts by non-state actors cannot be attributed to the State unless some fault or negligence on the part of the State engages its responsibility.⁹⁸ The concept of international responsibility for acts of omission presumes "culpable negligence" on the

⁹²*Ibid.* at paras. 71-73.

⁹³*Crawford, supra* note 80, 154 at para. 7.

⁹⁴*Compromis*, at para. 23.

⁹⁵*Compromis*, at para. 19.

⁹⁶*Ibid.*

⁹⁷ *Clarifications*, at para. 5.

⁹⁸ Hugh M. Kindred *et. al.*, *International Law: Chiefly as interpreted and applied in Canada*, 6th ed., (Toronto: Edmond Montgomery Publications Ltd., 2000) at 608.

part of the State.⁹⁹ Rubria cannot be held responsible for failing to act as there is no evidence that the Ministry of Natural Resources had any knowledge or *ought* to have known of the alleged conduct of PROF employees. In the *Corfu Channel* case this Court held that, “it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein”.¹⁰⁰ This case is distinguishable from the *Corfu Channel* case where circumstantial evidence existed to draw an inference from the facts that Albania at least *ought* to have known of the laying of mines in maritime waters.¹⁰¹ Rubria cannot be held responsible for alleged illegal acts carried out by a private security concern on Rubrian territory. To hold Rubria responsible would be to expose all States to international responsibility for every prohibited act occurring on their territory.

b. Rubria reserves the sovereign right to investigate domestic matters of the State

The conduct of a few individuals from a private security concern does not constitute a breach of any international legal obligation owed by Rubria to Acastus. The characterization of an international wrongful act is governed by international law¹⁰² and Acastus cannot rely solely on the ruling of its own civil court to establish that the actions of PROF are contrary to human rights norms. In the *ELSI* case this Court stated that the finding of local courts that an act was unlawful may be relevant to argument but may not

⁹⁹ L. Oppenheim, 7th ed., H. Lauterpacht, ed., vol. 1, *International Law: A Treatise*. (London: Longmans, Green & Co. Ltd., 1955) at para. 154.

¹⁰⁰ *Corfu Channel Case (United Kingdom v. Albania)* [1949], I.C.J. Rep. 4 at 22 [*Corfu Channel*].

¹⁰¹ *Ibid.* at 22.

¹⁰² *Draft Articles*, *supra* note 79 at Art. 3.

be sufficient to classify the act as unlawful in international law.¹⁰³ The Acastian civil court heard two months of evidence only from the plaintiffs and rendered its decision without a defence from Rubria.¹⁰⁴ The Rubrian Prosecutor-General is currently investigating PROF's activities in connection with the Elysian labourers and will decide whether criminal charges may be appropriate.¹⁰⁵ The sovereign right to non-intervention in domestic matters of the State¹⁰⁶ is a recognized principle of customary international law.¹⁰⁷ Rubria should be afforded the opportunity to conduct its own domestic investigation before any ruling is made on the international wrongfulness of the actions of PROF.

- c. Rubria is enforcing its obligations under the ICCPR and complying with the international minimum standard of treatment of aliens by investigating the conduct of PROF

Article 8(3) taken with Article 2(1) of the ICCPR imposes two obligations on Rubria: 1) a negative obligation to refrain from requiring the performance of forced or compulsory labour¹⁰⁸ and 2) a positive obligation to “prevent, punish, investigate or

¹⁰³ *Electronica Sicula S.p.A. (United States v. Italy)*, [1989] I.C.J. Rep. 15 [ELSI].

¹⁰⁴ *Compromis*, at para. 31.

¹⁰⁵ *Clarifications*, at para. 1.

¹⁰⁶ *Charter*, *supra* note 9 at Art. 2(7); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1971), Princ. 3.

¹⁰⁷ *Nicaragua*, *supra* note 90 at 106.

¹⁰⁸ *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN CCPROR, 80th Sess., 2187th Mtg., UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) at 4.

redress the harm caused by such acts by private persons or entities.”¹⁰⁹ To ensure compliance with its obligations under Article 8(3) of the ICCPR, Rubria immediately instituted an investigation into the forced labour allegations against PROF. Rubria is complying with the international minimal standard for the treatment of aliens outlined in the *Neer Claim* by exercising due diligence in investigating the allegations with a view to criminally charge PROF if proven. By taking active steps to address the Elysian concerns, Rubria's actions do not amount to "wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."¹¹⁰ Rubria recognizes the human right of workers to remuneration, reasonable working hours, and safe working conditions.¹¹¹ The evidence from Acastus is that the Elysians were provided with a bag of sorghum which we may reasonably infer constituted payment for their labour.¹¹² According to the ILSA Report, the Elysians worked from sometime in the morning until after sunset and were picked up by PROF employees in the evenings.¹¹³ The evidence before the Court is insufficient to indicate that PROF's actions constituted illegal forced labour. By instigating its own investigation of *both sides*, Rubria will conclusively determine the factual realities of the alleged conduct.

¹⁰⁹ *Ibid.* at 8.

¹¹⁰ *Neer Claim (United States v. Mexico)*, [1926] 4 R.I.A.A. 60 at 61-62.

¹¹¹ *ICESCR*, *supra* note 51 at Arts. 6 & 7.

¹¹² *Compromis*, at para. 26.

¹¹³ *Clarifications*, at para. 7.

In *L.K. v. Netherlands*,¹¹⁴ the Netherlands was found to have breached its duties under Article 4(1) of the International Convention on the Elimination of All Forms of Racial Discrimination because acts of racial discrimination and violence against L.K. were not investigated nor were the culprits punished.¹¹⁵ It was not the fact that acts of racial discrimination occurred within the territory of the Netherlands that amounted to the State's breach; rather it was the failure to investigate and punish those responsible that violated international law. Since Rubria is currently investigating the alleged wrongful conduct of PROF, it has not breached its international obligations to Acastus.

¹¹⁴ *L.K. v. Netherlands* (Communication No. 4/1991), UN CERDOR, 42nd Sess., UN Doc. A/48/18 (1993) at 131.

¹¹⁵ Sarah Joseph, "A Rights Analysis of the Covenant on Civil and Political Rights" (1999) 5 *J. Int'l Legal Stud.* 57 at 74.

PART IV. ACASTUS IS IN BREACH OF ARTICLE 52 OF THE RABBIT

1) Acastus has breached the MCRA

- a. Article 52 transforms breaches of the MCRA into breaches of the RABBIT

The object and purpose of the RABBIT is to outline the terms and conditions under which Acastian corporations can invest in Rubria by establishing a favoured nation relationship and dispute resolution procedure.¹¹⁶ The purpose of Article 52 as articulated by Rubrian President Fides is to provide “assurances for all Rubrians that our nationals may enter into business relationships with Acastian enterprises without worry about possible exploitation, abuse, or other kinds of illegal or unethical conduct.”¹¹⁷ Article 52 provides:

The parties note that Acastus has adopted the Multinational Corporate Responsibility Act, the terms of which are hereby incorporated by reference. Acastus undertakes that, in carrying out its obligations under this Treaty, it will enforce all aspects of its domestic law, including the MCRA, in its form as of the date of the entry into force of this Treaty.¹¹⁸

Municipal law, such as the MCRA, can be relevant to international responsibility when a treaty incorporates “the standard of compliance with internal law as the applicable international standard”.¹¹⁹ *SGS v. Pakistan* stands for the proposition that a provision of a bilateral investment treaty [“BIT”] can have the effect of “incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments” such that any violation of those contracts and

¹¹⁶ *Compromis*, at para. 15.

¹¹⁷ *Compromis*, at para. 17.

¹¹⁸ *Compromis*, at para. 15.

¹¹⁹ *Crawford*, *supra* note 80 at 6.

other instruments would be treated as a breach of the BIT.¹²⁰ Rubria and Acastus have the ability to suspend the operation of the standard principle that a State cannot rely on the provisions of its internal law as against another State.¹²¹ However, there must be clear and convincing evidence that the Contracting States intended to make compliance with the MCRA the standard of compliance under the RABBIT.¹²²

In *SGS v. Philippines*, the Arbitral Tribunal interpreted the provision in question so as to make it effective within the framework of the BIT within which it was adopted.¹²³ The tribunal reasoned that it was legitimate to resolve uncertainty in the provision in favour of the interests protected by the treaty.¹²⁴

It is Rubria's position that by incorporating the terms of the MCRA by reference into the RABBIT Rubria and Acastus have agreed that all breaches of the MCRA are converted into breaches of the RABBIT.¹²⁵ Article 52 is sufficiently specific, in light of the context and purpose of the Treaty, to permit such an interpretation. First, the text of Article 52 is explicit and states that the MCRA is incorporated by reference into the RABBIT.

¹²⁰ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (Case No. ARB/01/13) (2003), 42 I.L.M. 1290 at 1311 (ICSID) [*SGS v. Pakistan*].

¹²¹ *Crawford*, *supra* note 80 at 6.

¹²² *SGS v. Pakistan*, *supra* note 120.

¹²³ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (Case No. ARB/02/6) (2005), 8 ICSID Rep. 528 [*SGS v. Philippines*].

¹²⁴ *Ibid.* at 116.

¹²⁵ *Ibid.*

In the international jurisprudence described above, the language of the provisions considered was less explicit and the parties were requesting that the Arbitral Tribunal infer incorporation by reference of the State commitments into the treaty. In the case at bar, there is no need for such inferences as the parties clearly expressed their intention to make the MCRA the applicable international standard of conduct by stating that the legislation is to be incorporated by reference.

Moreover, the declaration by Acastian Prime Minister Lethe that Acastian corporations will be held to the standard outlined in the MCRA,¹²⁶ as well as Rubrian President Fide's assertion that the RABBIT provides assurances that Rubrians will not be at risk,¹²⁷ provide further evidence of the parties' common intention to make the standard outlined in the MCRA the applicable international standard.

If the conclusion of the Acastian civil court is ruled to be correct and COG has violated the human rights of Elysians, Rubria submits that Acastus bears responsibility under Article 52 of the RABBIT because an Acastian corporation has breached the MCRA through the activities of an entity in which it is the majority shareholder. TNC, through its foreign investment, has not complied with the international standard of conduct outlined in Article 52. State responsibility therefore accrues to Acastus by virtue of the fact that the MCRA was incorporated by reference into the RABBIT.

2) The outcome of the *Borius* litigation places Acastus in breach of Article 52 of the RABBIT

- a. The assurances provided by the Prime Minister of Acastus are binding obligations that are incorporated into the framework of the RABBIT by

¹²⁶ *Compromis*, at para. 14.

¹²⁷ *Compromis*, at para. 17.

Article 52

On December 10 2002, at the promulgation of the MCRA, Prime Minister Lethe of Acastus declared,

You can trust our corporate citizens. They will obey the standards of this Act, and we will hold them to those standards. In the unlikely event that they fall short of full compliance, you may be assured that compensation will be provided to anyone harmed by their actions.¹²⁸

Such unilateral declarations are binding when it is established that the State making the declaration intended to be bound according to the terms of that declaration. The unilateral declaration takes on the character of a legal undertaking binding the State from that point forward to a course of conduct consistent with the declaration.¹²⁹

This Court in the *Nuclear Test Cases* stated that one of the basic principles governing the creation and performance of legal obligations is the principle of good faith. Trust and confidence, it was said, are inherent in international co-operation, particularly in an age when co-operation in international fields is becoming increasingly essential. As such, interested States may take cognizance of unilateral declarations and place confidence in them, and they are entitled to require that the obligations thus created be respected.¹³⁰

The guarantees provided by the Acastian Prime Minister to induce Rubria to enter into the RABBIT are binding commitments under international law. The declaration was

¹²⁸ *Compromis*, at para. 14.

¹²⁹ *Nuclear Test Cases (Australia v. France; New Zealand v. France)*, [1974] I.C.J. Rep. 253 [*Nuclear Test Cases*].

¹³⁰ *Ibid.*

a repetition of an existing municipal legal obligation outlined in the MCRA. Section one of the MCRA states:

The purposes of this Act are:

- (1) to ensure that business entities incorporated within Acastus conduct themselves abroad by the same high standards to which they are held in their domestic affairs; and
- (2) To encourage other states to enter into bilateral investment treaties with Acastus by assuring them that our domestic corporations will abide by the tenets of this Acts.¹³¹

It is reasonable for Rubria to trust these declarations and to rely on Acastus to uphold its commitments in good faith given that they were made to induce Rubria to enter into the RABBIT. Additionally, Acastus should have been aware of Rubria's reliance on the declaration as Article 52 was included in the RABBIT at Rubria's insistence.

It is reasonable to conclude that Article 52 brought the legally binding declaration into the framework of the RABBIT. This conclusion is supported by the *SGS v. Philippines* case in which the Arbitral Tribunal found that the provision in question was incorporated into the framework of the BIT because it was intended to "provide assurances to foreign investors with regard to the performance of obligations assumed by the host State under its own law with regard to specific investments".¹³²

- b. The outcome of the *Borius* litigation is inconsistent with Acastus's obligations under Article 52

In the *Borius* litigation, the Acastian civil court dismissed TNC, finding that it was not a proper defendant, as it was not accused of any direct violations. Based on Acastian domestic legal rules governing limited liability corporations, the court held that it, "cannot hold a mere shareholder liable for the actions of the corporation in which it

¹³¹ *Compromis*, Annex A, Sec. 2 (1).

¹³² *SGS v. Philippines*, *supra* note 123 at 126.

owns stock, even if it owns a controlling interest...We further consider that the MCRA does not repeal the centuries of our legal tradition that establish the principle of limited liability.”¹³³

Article 27 of the Vienna Convention on the Law of Treaties prevents a state from invoking provisions of its internal law as an excuse for failure to perform its international obligations.¹³⁴ A domestic legal rule can violate an international obligation when its application makes it impossible to invoke a claim under the international obligation. In the *LaGrand Case* this Court found that the American “procedural default” rule violated the United States’ obligation to Germany under Article 36 of the Vienna Convention on Consular Relations.¹³⁵ The rule itself was not a violation of the Convention but rather, “the manner in which it was applied in that it deprived the brothers of the possibility to raise the violations of their rights to consular notification in US criminal proceedings.”¹³⁶

By applying rules of Acastian domestic law, in particular the corporate doctrine of limited liability, the Acastian civil court barred Davide Borius and other plaintiffs from raising claims relating to rights protected under the RABBIT. This ruling violated Acastus’s international legal obligation to Rubria under Article 52 to hold Acastian corporations to the high standards outlined in the MCRA.¹³⁷

¹³³ *Compromis*, at para. 28.

¹³⁴ *Vienna Convention on the Law of Treaties*, 1969, 1155 U.N.T.S. 331, Art. 27 (in force 1980).

¹³⁵ *LaGrand Case (Germany v. United States)*, Order of 27 June 2001, [2001] I.C.J. Rep. 1 at 89 [*LaGrand Case*].

¹³⁶ *Ibid.* at 81.

¹³⁷ *Ibid.* at 79.

PRAYER FOR RELIEF

For all the aforesaid reasons argued in this memorial, the State of Rubria respectfully requests that this honourable Court adjudge and:

- 1) DECLARE that it does not have jurisdiction *ratione personae* over Acastus;
- 2) DECLARE that Rubria did not violate international law by permitting construction of the pipeline as proposed;
- 3) DECLARE that the actions of PROF are not imputable to Rubria or did not violate any international legal obligation owed by Rubria to Acastus;
- 4) DECLARE that Acastus is in breach of Article 52 of the RABBIT by virtue of the Acastian civil court's decision in the Borius litigation and that Acastus must provide full compensation to Rubria for any human rights violations proven against COG.

All of Which is
Respectfully submitted,
Team 711R