1970 Philip C. Jessup International Law Moot Court Competition

MEMORANDUM ON ISSUES

Prepared Solely for the Use of Judges

The moot court problem is based largely upon the facts of the recent U.S.-Peruvian dispute concerning Peru's expropriation of the assets of the International Petroleum Company and Peru's claim to a 200-mile territorial sea. These facts have been varied to add interest and raise additional issues involving the law of treaties, intervention, reprisal, UN-OAS relations, and the effect of Security Council resolutions.

This memorandum is intended to assist judges by briefly suggesting the major issues, arguments and authorities which might be raised. It does not attempt a comprehensive analysis of these issues or citation of all relevant authorities. Teams may appropriately identify other issues, draw on other authorities, and formulate and organize their arguments in different ways.

I. Did Any of the Circumstances of Amazonia's Expropriation of UPC Assets Constitute Violations of International Law.

A. May the U.S. assert an international claim for any such violation?

Amazonia may argue that: (1) UPC is a Canadian, not an American, company, and the U.S. consequently has no standing to espouse its claim; and (2) in any event, UPC's continued operations subsequent to adoption of the 1936 "Calvo-clause" constitutional amendment constitute a waiver of any rights of diplomatic protection.

The U.S. may argue that: (1) the virtually complete American ownership of UPC warrants U.S. espousal of its claim; (2) the 1936 amendment cannot displace this right since: (a) it was not specifically agreed to by UPC and cannot retroactively effect the 1923 grant, (b) such a "Calvo-clause" is ineffective to waive the international law right of protection, which inheres in and can be waived only by the U.S. itself, and (c) the waiver

would in any case effect only UPC itself and not necessarily its shareholders; and (3) the U.S. has in any event a separate basis for claim in the 1905 treaty, a specific international undertaking which cannot be overridden by Amazonian internal law.

Prevailing practice supports the right of a state to espouse claims for takings of property of non-national corporations in which its nationals hold substantial interests, at least to the extent of those interests. See, e.g. the Romano-Americana Claim, 5 Hackworth, Digest of International Law 840 (1943); Lillich and Christenson, International Claims (1962) pp. 15-20; compare Restatement, Foreign Relations Law, sec. 172, and the related question in the recent Barcelona-Traction Case (Belgium v. Spain) before the I.C.J. While the effects of "Calvo-clauses" are unclear, there is authority that they cannot effect a waiver of national rights of espousal and at most reinforce the existing international law requirement as to exhaustion of domestic remedies, see U.S. v. Mexico (North American Dredging Co.) (U.S.-Mexican Claims Comm. 1926, 4 U.N.R.I.A.A. 26); Shea, The Calvo-Clause (1955). The forfeiture provision in the constitutional amendment would not seem valid. If the 1905 treaty is valid (but see below), Amazonia's obligations under it cannot be varied by its changes in its own Constitution. See, e.g. Shufeldt Claim (U.S. v. Venezuela) (1930) 2 U.N.R.I.A.A. 1079; U.N. Convention on Law of Treaties, Art. 27.

B. Was the taking itself illegal?

The U.S. may argue that: (1) the 1923 governmental grant to UPC of all rights to the Tacos tract, including ownership of the subsoil resources, was by its terms "irrevocable" and that such an agreement in these circumstances partakes of the nature of a binding international commitment and cannot be arbitrarily violated without international responsibility; (2) the taking was discriminatory since exclusively directed at what was in

fact almost entirely American-owned property; and (3) the taking was in any event contrary to the express terms of the 1905 treaty by which Amazonia agreed to regard such commitments as "inviolable".

Amazonia may argue that: (1) international law recognizes the right of every government to take private property or effect private rights in the pursuit of legitimate governmental interests, and no national legislature or administration may bargain this right away; (2) the taking here is for a public purpose and non-discriminatory in intent; a state cannot be foreclosed from exercising its powers of eminent domain over a vital sector of its economy solely because that sector happens to be dominated by foreign interests; and (3) the 1905 treaty is either: (a) void as a treaty forced on Amazonia by duress or, alternatively, as inconsistent with peremptory norms of international law regarding each nation's permanent sovereignty over its resources (jus cogens); (b) no longer effective, having lapsed either through disuse or as a result of fundamental changes in circumstances (rebus sic stantibus), or (c) by its terms to be interpreted as requiring only compliance with existing norms of international law, which must presently be conceded to permit such takings.

Amazonia's action might be characterized either as a taking of property (assuming the sub-soil grant is valid) or alternatively as affecting a contract or concession agreement between Amazonia and UPC. International law regarding governmental responsibility as to takings of the property of aliens and actions affecting governmental contracts or concession agreements with aliens is unsettled and the learning on this subject voluminous. This is recognized, for example, in Banco Nacional v. Sabbatino, 376 U. S. 398 (1964). It seems clear that international law recognizes the general right of every state to take private property for public use, at least so long as the taking is not discriminatory or retaliatory and some compensation is accorded;

it seems also clear that states may limit their rights in this respect by international agreement. See, e.g. Chorzow Factory Case, P.C.I.J. Ser. A, No. 17 (1928). Practice as to contract and concession rights is even less clear, although it would appear that, while such agreements are generally governed by municipal rather than international law, see e.g. Saudi Arabian-Aramco Arbitration (1958), 27 Intl. L. Reps. 17 (1963), at least arbitrary annulment or action specifically violating treaty obligations entails international responsibility, see, e.g. El Triunfo Co. (U.S. v. Salvador) (1902, U.S. For. Rels. 859). The argument that a concession was invalid because a predecessor government lacked authority to grant the concession was raised in the recent Argentine petroleum concessions dispute. See Note, "Argentina and the Hickenlooper Amendment", 54 Calif. L. Rev. 20 (1966). See generally on these issues, Restatement, Foreign Relations Law, Secs. 185-195.

There have been various attempts to clarify or unify these rules. A very significant development in this respect is the U.N. Declaration on Permanent Sovereignty over Natural Resources, U.N.G.A. Res. 1803 (XVII) (1962), which in pertinent part provides:

> "1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
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> 2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.
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> 3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.

> "4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with International law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication ...
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> 8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution...."

The Declaration was adopted by an 87-2-12 vote of the Assembly. There are, of course, questions as to the interpretation of the Declaration and its law-codifying or creating effect. See, generally, Schwebel, "The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources", 49 A.B.A.J. 463 (1963).

As another example, Article 12 of Professors Sohn and Baxters' "Draft Convention on the International Responsibility of States for Injuries to Aliens", 55 Am. J. Intl. L. 518 (1961), provides with respect to the concession problem:

> "1. The violation through an arbitrary action of the State of a contract or concession to which the central government of that State and an alien are parties is wrongful. In determining whether the action of the State is arbitrary, it is relevant to consider whether the action constitutes:
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> (a) a clear and discriminatory departure from the proper law of the contract or concession as that law existed at the time of the alleged violation;
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> (b) a clear and discriminatory departure from the law of the State which is a party to the contract or concession as that law existed at the time of the making of the contract or concession, if that is the proper law of the contract or concession.

> (c) an unreasonable departure from the principles recognized by the principal legal systems of the world as applicable to governmental contracts or concessions of the same nature or category; or
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> (d) a violation by the State of a treaty.
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> "2. If the violation by the State of a contract or concession to which the central government of a State and an alien are parties also involves the taking of property, the provisions of Article 10 shall apply to such taking." [Art. 10 requires prompt payment of compensation].

The question of the effect of the 1905 treaty will probably evoke discussion of the recently adopted U.N. Convention on the Law of Treaties, 8 Intl. Leg. Mat. No. 4 (July 1969) pp. 679 et seq., which is not yet in force. While prior law would appear to regard only personal duress against a negotiator as grounds for declaring a treaty void, Article 52 of the Convention states that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of internationl law embodied in the U.N. Charter. However, Article 4 provides the Convention is not retroactive. Article 53 provides that treaties conflicting with peremptory norms of general international law (jus cogens) are invalid, and Article 64 extends that principle to newly emerging peremptory norms affecting preexisting treaties, with apparently some protection under Article 71 for rights acquired under such preexisting treaties. There is, of course, considerable question as to whether the U.N. Declaration on Permanent Sovereignty can be said to embody such a peremptory norm. Article 62(1), dealing with the rebus sic stantibus principle, provides:

> " A fundamental change of circumstances which has occured with regard to those existing at the time of the conclusion of the treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
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> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
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> (b) the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty."

There does not appear to be any international law principle providing for the termination of treaties by disuse over a long period.

C. Did Amazonia's handling of the question of compensation make the expropriation unlawful?

The U.S. may argue that: (1) the compensation procedure was a sham since the Board was composed of political sympathizers of the regime; (2) the Board's so-called "award" was clearly inadequate in that it covered only UPC's physical facilities and excluded any compensation for the taking of UPC's subsoil rights; and (3) the "award" was in any event rendered wholly illusory by the Board's recognition of Amazonia's specious claim to "unjust enrichment", which completely nullified any possibility of payment.

Amazonia may argue that: (1) the procedures were fair and fully adequate and there is no evidence of actual impropriety or bias; (2) international law requires compensation only for takings of property or rights rightfully possessed by aliens, and in no way precludes states from determining in good faith under their own law questions respecting the validity of titles or contractual agreements; (3) in this case the 1923 grant of subsoil rights, whether viewed as a grant of title or as a concession agreement, was clearly invalid either, as inconsistent with established law barring such grants of subsoil rights, or alternatively, as procured by bribery and improper influence; (4) the award itself was fully fair and adequate as to the only property rightfully owned by aliens, namely the physical facilities; (5) international law in no way precludes a state from in good faith claiming legal redress against an alien corporation for its wrongful conduct, or from setting off the amount of any recovery against a compensation award; and (6) UPC's extremely high return on its actual investment should be taken into account in determining the amount to which it is entitled.

Once again, the international standard regarding compensation to be awarded for takings or deprivation of contractual rights is at present unsettled. Paragraph 4 of the U.N. Declaration, as quoted above, provides only that "appropriate" compensation must be accorded.

In contrast, the Restatement, Foreign Relations Law provides that the taking of alien-owned property is wrongful under international law if, inter alia, "there is not reasonable provision for the determination and payment of just compensation ... under the law and practice of the state in effect at the time of the taking." "Reasonable provision" requires a state to afford an alien fair legal proceedings, including impartial judicial or administrative authorities. Section 186 states that a failure to pay just compensation is wrongful, whether or not the taking itself was wrongful. Just compensation, as defined in Section 187, must be "adequate in amount", "paid with reasonable promptness", and paid in a form that is effectively realizable to the alien, to the fullest extent that the circumstances permit. As to adequacy, Section 188 provides that under the ordinary conditions, "the amount must be equivalent to the full value of the property taken."

II. Was Amazonia's Sinking of the American Fishing Vessel a Violation of International Law?

A. Is Amazonia's claim to a forty-mile territorial sea valid?

The U.S. may argue that there is no support in international customary or treaty law for Amazonia's claim since: (1) international law has never clearly accepted any claim of territorial sea broader than 3 miles; (2) even proposals for general international recognition of a broader territorial sea have not exceeded 12 miles; (3) the Amazonian claim is contradicted by the practice of almost all other states, only a few of which claim territorial seas of more than 12 miles; (4) there is no basis for inferring the existence of a regional custom supporting the validity of Amazonia's claim, or of U.S. acquiescence in such a claim.

Amazonia may argue that: (1) international law establishes no rule as to the limits of the territorial sea and the failure of the Geneva Law of the Sea Conferences to agree to such a rule permits Amazonia to establish such limit as is reasonable under its special circumstances; (2) the 40 mile

limit is reasonable in view of the heavy dependence of Amazonia on its offshore fishing grounds; (3) long acquiescence in Amazonia's claim has established a regional custom warranting its assertion; and (4) the U.S. has in particular tacitly accepted the Amazonian claim by its failure to protest Amazonia's assertions of jurisdiction over U.S. vessels in this zone.

The official U.S. position that international law recognizes only a 3-mile limit is widely recognized to be unrealistic. The Geneva Law of the Sea Conferences failed to reach agreement on the question of the breadth of the territorial sea, and the conventions are silent on this issue. The proposal which received most support at the conferences was for a 6-mile territorial sea and additional 6-mile exclusive fishing zone. The vast majority of states claim territorial seas not exceeding 12 miles. See 3 Intl. Leg. Mat. 551. Only Peru, El Salvador, Costa Rica, India, Ecuador, Chile, and Korea assert claims substantially in excess of this breadth -- in some cases 200 miles. This issue also raises questions involving the reach of the Fisheries Case, (U.K. v. Norway), 1951 I.C.J.Rep. 116, in which the I.C.J. upheld a Norwegian claim to use straight base lines and, in effect, a particularly wide territorial sea, at least partially on the basis of Norway's special geographical situation and economic interests in the zone and a pattern of acquiescence in its claims by other states. The court indicated that a coastal state "must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements", and took into account "certain economic interests peculiar to a region, the importance of which are clearly enhanced by a long usage" and "the general toleration of foreign states with regard to the Norwegian system."

B. Did the sinking of the U.S. fishing vessel violate international law?

If Amazonia's claim to a 40-mile territorial sea is invalid, its attempt to assert jurisdiction on the high seas clearly violates international law. See, e.g. The I'm Alone (Canada v. U.S.) (Dept. St. Arb. Ser. No. 2), in which the U.S. was required to pay compensation for sinking a Canadian rum-runner 300 miles at sea.

If Amazonia's claim is valid, it is entitled to enforce its laws within its territorial sea and to take measures reasonably necessary to apprehend vessels violating those laws. However, the sinking of the vessel may here be argued to be an excessive use of force. See e.g. Mexico (Garcia and Garza) v. U.S. (General Claims Comm. 1926), 4 U.N.R.I.A.A. 119, where the U.S. was required to pay compensation for the shooting by an American officer of a young Mexican girl engaged in an unauthorized crossing of the Rio Grande.

III. Do Any of the Various Measures Taken by the U. S. Violate International Law?

Amazonia may argue that: (1) the cutting off of economic assistance and sugar imports, given the U.S. encouragement of Amazonia's long reliance and heavy dependence on these arrangements, constitutes intervention and economic aggression; (2) the blocking of Amazonian assets is in effect a taking which violates international law in that it is retaliatory, discriminatory, not for a public purpose, includes state property in violation of doctrines of sovereign immunity, and is not justified by a condition of war; and (3) the stationing of the naval task force in Amazonian territorial waters constitutes intervention and direct aggression in clear violation of the U.N. and O.A.S. charters.

The U.S. may argue that: (1) the furnishing of economic assistance and privileges of sugar importation are, in the absence of governing treaty, matters of grace completely within its sovereign discretion and may be

suspended as lawful measures of retorsion for unfriendly or illegal Amazonian acts; (2) the blocking of Amazonian assets is justified under doctrines of self-help or reprisal; and (3) the task force is stationed on the high seas since Amazonia's claim of a 40-mile territorial sea is invalid, and, even if that claim is valid, such U.S. action is justified under doctrines of reprisal.

Various provisions of the U.N. Charter, O.A.S. Charter and U.N. Declaration on Non-Intervention bear on this problem, although there is little agreement as to their application.

Article 2 of the United Nations Charter provides, inter alia, that

> "(3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
>
> (4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ...."

Article 15 of the O.A.S. Charter provides that:

> "No state or group of states has the right to intervene, directly or indirectly, for any reason, whatsoever, in the internal or external affairs of any other state. The foregoing principle prohibits not only armed forces, but also any other form of interference or attempted threat against the personality of the state or against the political, economic or cultural elements."

Article 16 adds:

> "No state may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another state and obtain from it advantages of any kind."

Article 17 provides:

> "The territory of a state is inviolable; it may not be the object, even temporarily of military occupation or of other measures of force taken by another state, directly or indirectly, on any grounds whatever. ..."

The U. N. Declaration on Non-Intervention, UNGA Res. 2131 (XX) (1965) provides, inter alia;

> "1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.
>
> 2. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind ...."

As regards the termination of aid or sugar imports, similar actions have been taken by states on a number of occasions, e.g. by the U. S. with respect to Cuba, and there is little in the way of authority of precedent persuasively indicating that such measures violate international law. The blocking of foreign government assets, on the other hand, may require justification on some theory of self help or reprisal. If the task force is stationed in Amazonia's territorial waters, this would seem in clear violation of Article 2(4) of the U.N. Charter, again unless justified as a reprisal; it would not appear to be justifiable under Article 51 as "self-defense". Compare The Corfu Channel Case, I.C.J. Rep. 1949, p. 4 in which the Court, inter alia, held that the U. K. did not possess a right to unilaterally carry out a mine-sweeping operation in Albanian waters.

Customary international law appears to impose three requirements for the valid exercise of a right of reprisal:

1. That the target of the reprisal must be guilty of the commission of a prior illegal act directed against the claimant state;

2. The claimant state must have made a prior effort to obtain redress from the target state;

3. The damage inflicted in retaliation must not be disproportionate to the damage initially inflicted.

See, e.g., Naulilaa Incident Arbitration (Portugal - German Arb. Trib. 1928) (2 U.N.R.I.A.A. 1012), and Von Glahn (Ed) Law Among Nations 498-501 (1965). As to the use of force as reprisal, Brownlie, International Law and the Use of Force by States (1963), p. 281, writes:

> "The Provisions of the Charter relating to the peaceful settlement of disputes and non-resort to the use of force are universally regarded as prohibiting reprisals which involve the use of force".

Recent practice in the Vietnam and Middle East conflicts suggest that this principle may be somewhat less well-established. On the other hand, as to the blocking of assets, Colbert, Retaliation in International Law (1948) p. 63, states, that:

> "The unquestioned right of a state to protect its nationals in their persons and property while in a foreign country ... must permit initial seizure and ultimate appropriation of assets of nationals of that country in its own territory if other methods of securing compensation for its nationals should fail."

See also Sardino v. Federal Reserve Bank of New York, 361 F 2d 106 (C.A. 2, 1966).

IV. What, If Any, Weight Should the Court Give to the Security Council's Resolution?

Amazonia may argue that the Security Council's resolution: (1) is an authoritative pronouncement and formal act by the international organ most competent to consider such questions, which in effect legitimates Amazonia's actions and requires a finding that the U. S. actions are unlawful; and (2) in any event, the resolution represents a highly persuasive interpretation of contemporary international law by an authoritative international organ, to which interpretation the court should pay great deference.

The U. S. may argue that the resolution: (1) is illegal as in excess of the authority of the Council, since the O.A.S. was currently seized of the matter; (2) has no binding legal effect, since it is only a "recommendation" of the Council under Chapter VI of the Charter, rather than a "decision" under Chapter VII; (3) cannot be regarded as in any way persuasive as an interpretation of international law in view of the small number of states

participating in the Council's vote and the abstention of the four great powers; and (4) cannot in any event relieve the Court of its duty to resolve the dispute under principles of international law the Court itself ascertains in accordance with Article 38 of its Statute.

The Court would not seem bound in any way by the Security Council's views as to the merits of the dispute before it. However, resolutions of international organs may have considerable evidentiary weight, both as reflections of contemporaneous official attitudes, and, in particular, where they constitute interpretations of their own constitutional documents. See, generally, e.g. Higgins, The Development of International Law Through the Political Organs of the United Nations (1963).

The issue of the U. N. Security Council's competence to consider matters currently being considered within O.A.S. procedures has been raised in a variety of situations. The closest analogy is Cuba's July 1960 complaint to the Security Council concerning "U.S. economic aggression"; other precedents are the Guatemalan Question (1954), Dominican Republic Acts against Venezuela (1960); Cuba's Exclusion from the Inter-American System (1962); The Cuban Missile Crisis (1962); and the Dominican Situation (1965). See generally Sohn, Cases on United Nations Law (2nd Ed. Rev. 1967), Chpt. V, Sec. 3. Pertinent Charter provisions include Article 52, which provides:

> "Art. 52. 1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

and Articles 33-35 which provide:

> "Art. 33. 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

"2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Art. 34. The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Art. 35. 1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly ...."

Various provisions of the O.A.S. Charter, Rio Treaty and Part of Bogota requiring member states to submit disputes to the O.A.S. are also pertinent. Security Council practice in the above situations has been generally to view its competence over such questions as not dependent upon or limited by contemporaneous action by regional organizations, viewing the question as at most a practical one of its own judgment as to which forum is most convenient and suitable for handling the particular matter.