1974 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

MEMORANDUM FOR JUDGES

This memorandum has been specially prepared for judges, with a view to summarize the issues raised in the problem. UNDER NO CIRCUMSTANCES IS IT TO BE SHOWN TO CONTESTANTS. Regional Administrators are urged to use utmost discretion in keeping this memorandum from the eyes of students.

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I. The Issues.

There are three principal issues in this problem. First is the international legal validity vel non of Latia's extension of jurisdiction over the resources at Tract #1. Second is the international legal status of the resources situated in Tract #1, assuming Latia does not have valid legal rights thereto. Third is the international legal validity vel non of the use of force by Latia in terminating the mining activities of Industria at Tract #1.

II. Background Materials.

For those judges not already familiar with the current international law of the sea negotiations and particularly the deep seabed mining questions presented in the problem, I would recommend reading either or both of the two following short law review articles Auburn, "The 1973 Conference on the Law of the Sea in the Light of Current Trends in State Seabed Practice," 50 Canadian Bar Review 87 (1972); Laylin, "The Law to Govern Deepsea Mining Until Superseded by International Agreement," 10 San Diego Law Review 433 (1973). Judges should certainly familiarize themselves with General Assembly Resolutions 2574(D) (XXIV) and 2749 (XXV), copies of which are attached to this memorandum. These two resolutions will form the basis for several of the arguments on the issues to be discussed below.

Of course, the problem tracks the recent factual developments in deep seabed mining and the law of the sea negotiations (up to the point of actual mining and confrontation) and thus any materials relevant to these occurrences would also make good preparatory reading for judging the current Jessup Competition.

III. Arguments for Each Party on Each Issue.

A. Issue No. 1: Extension of Latia's Jurisdiction.

The fundamental issue is the international legal validity vel non of Latia's claimed extension of jurisdiction over the resources at Tract #1. Latia's claim may be based on one or more of the fol-

lowing: (1) territorial sea claim of 200 miles (1966); (2) economic resource zone claim of 300 miles (1973); and (3) continental shelf jurisdiction pursuant to the Convention on the Continental Shelf.

If Latia can succeed in establishing as valid any one of these three assertions, then the resources are in fact subject to her jurisdiction and Industria acted contrary to international law in initiating the exploitation activities at Tract #1. This does not, of course, preclude a finding that Latia acted ultra vires in the application of force to the Industria equipment, an issue to be outlined below.

The basic arguments which judges should expect to hear on this issue, then, are as follows:

For Latia (i.e., favoring legality of the extension of jurisdiction).

1) Territorial sea claim. There is no conventional international agreement on the breadth of the territorial sea, although the concept of a zone of ocean space adjacent to a nation's coast over which it has near-absolute sovereignty is universally accepted. There being no internationally agreed breadth, each nation is free to delimit its territorial sea in accordance with its national needs and interests. Practice among coastal states is at present so diverse in respect to claimed breadths of the territorial sea that no customary rule of law can be said to exist on the subject.

2) Continental shelf claim. Latia and Industria are both parties to the 1958 Convention on the Continental Shelf ("Conshelf Convention" hereinafter) and are thus bound by its provisions. That agreement provides that coastal states have exclusive sovereign rights for the purpose of exploring for and exploiting the natural resources of the seabed and subsoil adjacent to their coasts to a depth of 200 meters or beyond that limit "to where the depth of the superjacent waters admits of the exploitation of the natural resources." There is no direct connection between this legal definition of the extent of continental shelf jurisdiction and the geological definition of the continental shelf, slope, and rise. Thus Latia will assert that although the resources are beyond the 200 meter isobath, they meet both the "adjacency" and the "exploitability" criteria of the Conshelf Convention.

Although there is dicta in the International Court of Justice ("ICJ" hereinafter) decision in the North Sea Continental Shelf Cases to the effect that 100 miles offshore is not "adjacent," most

international scholars and decision makers believe that adjacency is a totally subjective test and that the ICJ comment is not particularly important or relevant. The "exploitability" criterion of the Conshelf Convention is equally subjective, but the fact that Industria was mining the nodules at Tract #1 makes it fairly easy to prove this allegation.

Thus, if adjacency can be established, the resources belong to Latia under the Conshelf Convention since those rights do not depend on any action by Latia, i.e., in the words of the convention, "the rights of the coastal state over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."

3) Economic resource zone claim. Although there is no conventional international agreement granting coastal states exclusive jurisdiction over living and non-living resources off their coasts (save for the continental shelf doctrine, outlined above), there is a growing practice and expression of views favoring such a regime. In a nutshell, the "economic resource zone" concept postulates that all coastal states should have exclusive rights to all living and non-living resources within 200 miles (the distance usually asserted; note that Latia's claim is for 300 miles) off the coast. Although it is difficult to prove that a customary rule of international law exists today on this point, there are nonetheless many evidences supportive of the assertion, including: (1) adoption, on a unilateral basis, by several nations of such zones (here you might find argued a customary law process analog to the emergence of the continental shelf doctrine from the Truman Proclamation of 1945); (2) explication of the concept by legal scholars and even by an ICJ judge (Nervo) in the Fisheries Jurisdiction case; and (3) a clear trend in the preparatory meetings for the Third U.N. Conference on the Law of the Sea favoring the concept, a view which many observers feel now compels the 2/3 vote necessary for adoption of the concept at the conference.

For Industria (i.e., against the legality of the extension of jurisdiction).

1) Territorial sea claim. The position of Latia is completely untenable. Even though there is no written agreement on the breadth of the territorial sea, state practice clearly indicates a customary rule setting the maximum breadth at 12 miles. Although delimitation of maritime zones is clearly a national function, nonetheless the ICJ in the Anglo-Norwegian Fisheries Case held that there is a substantial international community and international law interest in the method of that delimitation. Thus the coastal state does not have unbridled discretion in delimiting its territorial waters.

Prior to the first U.N. Law of the Sea Conference in 1958, three miles was regarded as the maximum breadth -- indeed, prior to the 1958 U.N. Law of the Sea Conference, an absolute majority of states claimed 3 miles. Today, claims center about 12 miles, the extensions having been primarily for fisheries jurisdiction purposes. In fact, more than 4/5 of all coastal nations claim 12 miles or less (3, 4, 6, and 10 miles are also claimed). Only a few, isolated nations claim more. Thus, it is clear that state practice over the past quarter century indicates the emergence of a customary international law rule limiting the breadth of the territorial sea to 12 miles.

2) Continental shelf claim. First, though there is not a one-to-one relationship between the legal and geological definitions of the continental shelf, nonetheless the legislative history of the Conshelf Convention and the opinion of the ICJ in the North Sea Continental Shelf Cases clearly indicate a strong connection between the two. No nation or industrial interest group today asserts that seabed resource jurisdiction under the continental shelf doctrine or the Conshelf Convention extends beyond the physical shelf-slope-rise structure. Adjacency must, then, be viewed not only in terms of an absolute mileage (and 130 miles is clearly not adjacent, considering the ICJ comment that 100 miles is not adjacent) but also in relation to the nature of the geology of the offshore area. In this instance, Tract #1 can by no stretch of the imagination be considered as a part of the continental structure, and thus it is neither adjacent nor does it constitute an area contemplated by the framers of the Conshelf Convention as being within that doctrine.

3) Economic resource zone claim. The very simple argument here is that there is at present no conventional or customary international law principle (apart from the continental shelf doctrine) giving coastal states resource jurisdiction beyond 12 miles from their coasts. Trends in that direction do exist, but they are just that -- trends; they are merely initial evidences of a nascent rule of customary international law. Such zones are regularly protested by many nations and cannot yet have achieved the acquiescence required for consideration as a customary rule of law.

B. Issue No. 2: Status of the Resources if Latia has no Valid Jurisdictional Claim.

The fundamental issue is the international legal status of the resources situated in Tract #1, for if Latia does not have jurisdiction, then the vital question is the validity of Industria's exploitation activities. In short, if the resources are "res nullius" (i.e., the property of no one, title vesting in the first to reduce the resources to his possession), then Industria acted legally in her opera-

tions; if the resources are "res communis" or constitute the "common heritage of mankind" and are to be exploited only in accordance with an international regime to be agreed upon, then Industria acted illegally.

The basic arguments which judges should expect to hear on this issue, then, are as follows:

For Latia (i.e., favoring "res communis").

Although such seabed resources may in the past have been classified in international law as "res nullius," General Assembly Resolutions 2574(D) and 2749 ended that legal regime.

Resolution 2574(D) (the so-called "moratorium" resolution) prohibits exploitation activities with respect to seabed resources beyond the limits of national jurisdiction. Though such resolutions are not "international law" as such, they are strong evidence thereof, indicating national and international community expectations.

More importantly, Resolution 2749 (the so-called "principles" resolution) declared that such resources were the "common heritage of mankind" and were subject to exploitation only pursuant to an international regime to be agreed upon (the DOMA legislation does not constitute such an "international" regime). That resolution was passed by a vote of 108-0-14. Such an overwhelming vote indicates the expectations of the community of nations and is persuasive evidence of a new rule of customary international law. The resources thus being an international asset, Industria was engaged in an illegal activity in mining them.

For Industria (i.e., favoring "res nullius").

The status of deep seabed minerals was deliberately not dealt with by the framers of the Conshelf Convention and the Convention on the High Seas. Thus, the manganese nodules, like the fish in the waters above, remain "res nullius." Industria is simply exercising her right to an unappropriated resource when she exploits these nodules at Tract #1. As for the General Assembly resolutions, they are not law and do not, for separate reasons to be noted, even reflect customary law principles.

First, the Moratorium Resolution was passed by only 62-28-28, with 8 nations absent; thus not even an absolute majority of all

U.N. member nations supported the resolution. Further, all but two industrial nations voted against the resolution, and their votes must be given special consideration for they alone possess the economic and technical ability to exploit such resources. Only resolutions which command the overwhelming assent of nations can be considered as evidences of emerging customary law practices and rules.

As to the principles resolution, the 108-0-14 vote is misleading. This resolution was the product of a highly political negotiation process and was a compromise for the sake of moving the law of the sea negotiations forward. It is, in essence, a "lowest common denominator" type of document and is not accurately reflective of the community of nations' interests in the matter. At best, however, it is only evidence of a rule of customary international law for which there is little further support, and is certainly not a rule of law itself.

Finally, even if the principles resolution is viewed as reflecting a customary international law rule, the DOMA legislation is in fact an "international regime" for it contemplates reciprocal domestic legislation in other nations thus creating a regime based on international cooperation under a common legal approach.

C. Issue No. 3: The Legality of the Use of Force.

The fundamental issue here is the international legal validity vel non of the use of force by Latia in seizing the Carrier and the Gatherer. If the use of force was unjustified, then appropriate damages or other remedies are due to Industria; if justified, then matters may proceed as set forth in the problem.

The basic arguments which judges should expect to hear on this issue, then, are as follows:

For Latia (i.e., justifying the force utilized).

International law has historically recognized the right of reprisal -- a limited use of force in response to an internationally illegal act and for which other redress is inappropriate or impractical. Latia was simply exercising her valid right of reprisal in her limited use of force. Pursuit of "Carrier" was justified on the basis of the internationally recognized doctrine of hot pursuit, embodied in Article 23 of the Convention on the High Seas.

Some further support for Latia's position might be found in the doctrine of anticipatory self-defense. A nation need not wait to

have its territory or other sovereign rights attacked or destroyed before it has a right to protect itself. Thus Latia was only acting in self-defense to protect its vital interest in jurisdiction over its seabed resources.

These arguments are based, of course, on the premise that Latia did in fact have a valid claim to the resources in question.

If the resources are found to be beyond Latia's jurisdiction, her only remaining argument seems to be that she was simply protecting the international community interest in the res communis (Resolution 2749) character of the nodules at Tract #1, on the theory that the international community had no organization or enforcement agency to do so.

For Industria (i.e., asserting the invalidity of the use of force)

The U.N. Charter, Art. 2(4), prohibits the threat or use of force in international relations. Latia's actions clearly violate the letter and spirit of the Charter, for she resorted to none of the dispute settlement techniques set forth therein.

The reprisal argument is completely invalid today. At least since the adoption of the U.N. Charter, the use of force, even in the limited form of reprisal, has been outlawed. Furthermore, the doctrine of anticipatory self-defense (which is far from generally accepted), refers to the anticipation of imminent armed attack and is irrelevant and spurious in this situation.

Finally, the principles resolution, for which Latia herself voted, contains a requirement that the parties to any dispute concerning seabed resources are to resolve the dispute in accordance with the measures set forth in Article 33 of the U.N. Charter, a procedure completely ignored by Latia.

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Another highly recommended reference is:

> Nordquist, "International Legal Problems Involved in Exploitation of Minerals in the Deep Ocean", in A Symposium: Private Investors Abroad, Problems and Solutions (The Southwestern Legal Foundation 1971), pp. 223-247.

U.N. General Assembly Resolution

2574 (D)

The General Assembly,

Recalling its resolution 2467 A (XXIII) of 21 December 1968 to the effect that the exploitation of the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, should be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, taking into account the special interests and needs of the developing countries,

Convinced that it is essential, for the achievement of this purpose, that such activities be carried out under an international regime, including appropriate international machinery,

Noting that this matter is under consideration by the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction,

Recalling its resolution 2340 (XXII) of 18 December 1967 on the importance of preserving the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, from actions and uses which might be detrimental to the common interests of mankind,

Declares that, pending the establishment of the aforementioned international regime:

(a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;

(b) No claim to any part of that area or its resources shall be recognized.

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U.N. General Assembly Resolutions on Seabed and Ocean Floor

2749 (XXV)

The General Assembly,

Recalling its resolutions 2340 (XXII) of 18 December 1967, 2467 (XXIII) of 21 December 1968 and 2574 (XXIV) of 15 December 1969, concerning the area to which the title of the item refers,

Affirming that there is an area of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, the precise limits of which are yet to be determined,

Recognizing that the existing legal regime of the high seas does not provide substantive rules for regulating the exploration of the aforesaid area and the exploitation of its resources,

Convinced that the area shall be reserved exclusively for peaceful purposes and that the exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole,

Believing it essential that an international regime applying to the area and its resources and including appropriate international machinery should be established as soon as possible,

Bearing in mind that the development and use of the area and its resources shall be undertaken in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to minimize any adverse economic effects caused by fluctuation of prices of raw materials resulting from such activities,

Solemnly declares that:

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the principles of this Declaration.

4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international regime to be established.

5. The area shall be open to use exclusively for peaceful purposes by all States whether coastal or land-locked, without discrimination, in accordance with the international regime to be established.

6. States shall act in the area in accordance with the applicable principles and rules of international law including the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970,[1] in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding.

7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries.

8. The area shall be reserved exclusively for peaceful purposes, without prejudice to any measures which have been or may be agreed upon in the context of international negotiations undertaken in the field of disarmament and which may be applicable to a broader area. One or more international agreements shall be concluded as soon as possible in order to implement effectively this principle and to constitute a step towards the exclusion of the sea-bed, the ocean floor and the subsoil thereof from the arms race.

9. On the basis of the principles of this Declaration, an international regime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. The regime shall, inter alia, provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal.

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1. Resolution 2625 (XXV). [9 I.L.M. 1292 (1970).]

10. States shall promote international co-operation in scientific research exclusively for peaceful purposes:

(a) By participation in international programmes and by encouraging co-operation in scientific research by personnel of different countries;

(b) Through effective publication of research programmes and dissemination of the results of research through international channels;

(c) By co-operation in measures to strengthen research capabilities of developing countries, including the participation of their nationals in research programmes.

No such activity shall form the legal basis for any claims with respect to any part of the area or its resources.

11. With respect to activities in the area and acting in conformity with the international regime to be established, States shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for, inter alia:

(a) Prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment;

(b) Protection and conservation of the natural resources of the area and prevention of damage to the flora and fauna of the marine environment.

12. In their activities in the area, including those relating to its resources, States shall pay due regard to the rights and legitimate interests of coastal States in the region of such activities, as well as of all other States which may be affected by such activities. Consultations shall be maintained with the coastal States concerned with respect to activities relating to the exploration of the area and the exploitation of its resources with a view to avoiding infringement of such rights and interests.

13. Nothing herein shall affect:

(a) The legal status of the waters superjacent to the area or that of the air space above those waters;

(b) The rights of coastal States with respect to measures to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat thereof resulting from, or from other hazardous occurrences caused by, any activities in the area, subject to the international regime to be established.

14. Every State shall have the responsibility to ensure that activities in the area, including those relating to its resources, whether undertaken by governmental agencies, or non-governmental entities or persons under its jurisdiction, or acting on its behalf, shall be carried out in conformity with the international regime to be established. The same responsibility applies to international organizations and their members for activities undertaken by such organizations or on their behalf. Damage caused by such activities shall entail liability.

15. The parties to any dispute relating to activities in the area and its resources shall resolve such dispute by the measures mentioned in Article 33 of the Charter of the United Nations and such procedures for settling disputes as may be agreed upon in the international regime to be established.

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NOTE TO JUDGES:

You will notice a map attached to the problem. This map represents an effort on our part to draw a land and sea configuration which would be consistent with the terms of the problem. Unfortunately, by the time the map was mailed several teams had already completed their memorials based on a somewhat different visualization of the geography involved. We have instructed teams which have brought this matter to our attention to include in their memorials a statement to this effect, and a depiction (if they wish) of the geographic situation as they understood it. The purpose of this note is to make it clear that no team should be penalized for viewing the land and sea layout differently, provided that view is consistent with the terms of the problem, as mainly described on Page 3.

A similar situation occurred with respect to some addenda to the problem which also went out late. First, the problem did not specifically state that Latia was an undeveloped country, though it did imply that it was. Therefore, memorials which may assume otherwise ought not to be penalized on this account. The other point which raised some problem was whether or not Industria protested when Latia proclaimed its 200-mile territorial sea; we informed the teams rather late in the writing process that she did indeed so protest. Again, failure to explore this issue ought therefore not to be held against any team.

It should be noted that while they have caused some disturbance on the part of the students, these are <u>minor</u> issues, not of crucial importance to advocacy on either side.