

1976 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

MEMORANDUM FOR JUDGES

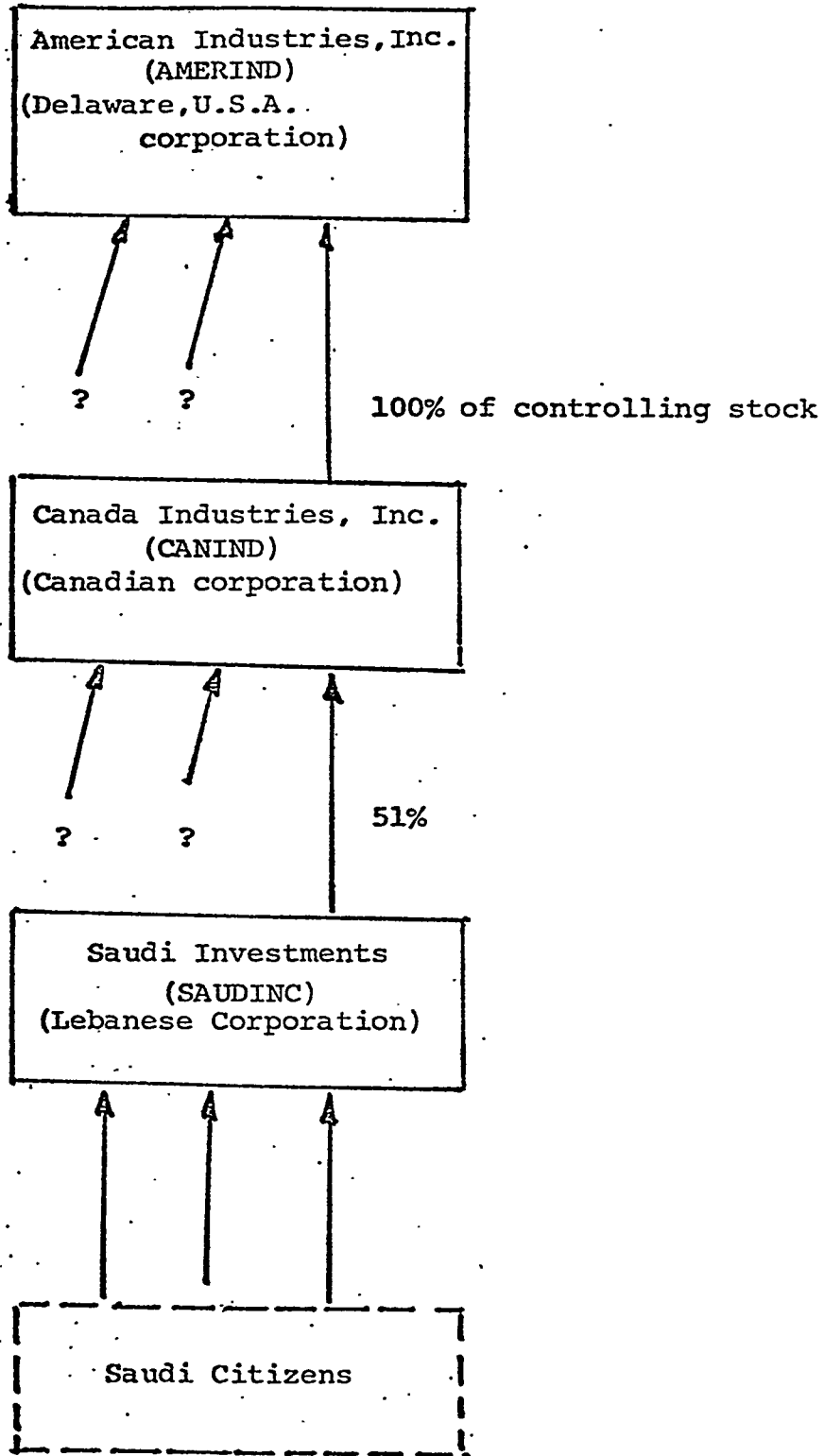
This memorandum has been specially prepared for judges, with a view to summarizing the issues raised in the problem. UNDER NO CIRCUMSTANCES IS IT TO BE SHOWN TO CONTESTANTS.

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CHRONOLOGY

January, 1975-	SAUDINC acquires 51% of CANIND.
February 14, 1975-	CANIND, through the NYSE finishes acquisition of 100% of the controlling stock of AMERIND.
February 27, 1975-	Contract between AMERIND & ANP.
March 6, 1975-	SEC takes notice of acquisition.
March 9, 1975-	President directs the institution of suit in U.S. District Court. Suit filed in U.S. District Court.
April 18, 1975-	District Court holds Act unconstitutional
May 23, 1975-	Court of Appeals reverses.
May 27, 1975-	Shipment of AMERIND plastics leaves U.S. to Germany.
May 29, 1975-	Secretary of Treasury recorded as owner of record of all AMERIND Stock.
June 4, 1975-	Shipment of AMERIND plastics to CNFP (France).
June 10, 1975-	Shipment arrives in Germany.
June 12, 1975-	Shipment arrives in France.
June 16, 1975-	U.S. notifies CNFP & French government that it owns AMERIND.
June 18, 1975-	U.S. files suit in French court.
June 30, 1975-	Certiorari denied.
July 3, 1975-	U.S. sues ANP & CANIND in German Courts.
August 1, 1975-	German court holds that U.S. without remedy.
August 11, 1975-	French court notes German court decision and directs p.yment to CANIND.

Corporate Structure Just Prior to U.S. Action



III. INTRODUCTION AND OVERVIEW

The public taking of foreign interests is considered to be an economic injury to aliens and is regulated by principles of international law. There is authority in international judgments and arbitral decisions, in the expressions of national governments and among publicists for the position that a taking of property is improper under international law if it is not for a public purpose, is discriminatory, or retaliatory and is without provision for prompt, adequate and effective compensation.

Historically, the United States Government and American business interests have been the victims of the taking of property without compensation in other countries. Here it is the United States Government that is taking foreign owned property, as a result of a violation of a United States statute.

This memorandum will summarize the issues which should be dealt with in any brief and oral argument presented to the Court. This memorandum will also mention certain issues which are not of any significance in this problem.

IV. PRINCIPAL ISSUES

The principal issues in this problem include:

1. whether the United States action constitutes an expropriation, and if so, is the expropriation valid under international law norms;

2. whether the United States statute is a penal law, and if so, is this law enforceable before the International Court of Justice;

3. the effect to be given by the International Court of Justice to the decisions of national courts on the issues raised by this problem; and

4. the appropriate remedies to be ordered by the Court.

A. Expropriation

Pursuant to an act of Congress, which act has been judicially approved in the courts of the United States, the United States Government has, by operation of law, transferred ownership, and therefore control of a corporate organization (organized under the laws of the United States) without payment of compensation. The federal government has sought to enforce incidents of ownership in the courts of Germany and France and now in the International Court of Justice. The principal issue in this problem is whether the action of the United States was proper under international law, either as a valid form of nationalization or as a valid exercise of its sovereign police power.

The generally accepted standard of a proper "expropriation" is (1) that it be for a public purpose; (2) that it be non-discriminatory and non-retaliatory in nature; and (3) that there be given prompt, adequate and effective consideration of the property so taken.*

1. Public Purpose

The issue as to whether or not the taking was for a public purpose must be dealt with by analysis of the nature of the industry affected, and the stated purpose of the taking. Since AMERIND was engaged in oil refining, reference should be made by the contestants to the nature of the oil industry and its importance to the United States economy and security. Contestants should also make reference to the statute, which speaks in terms of a "corporation engaged in activities that the President of the United States has found to be of importance to the economy or defense of the United States."

2. Non-Discriminatory and Non-Retaliatory

The non-discriminatory and non-retaliatory nature of

*This is the consensus view on the standard of compensation. Other standards may be argued by the contestants.

the taking should be analyzed in terms of whether all "like" industries have been treated equally and whether citizens of particular countries have been the objects of discrimination. In this connection your attention is directed to Section 13D (1) (B) (ii) of the statute which, at least on its face, appears to have a retaliatory motive. That section speaks in terms of a national or citizen of a country which engages in discriminatory trade practices or acts of policy burdening United States Commerce. You will note that if, for example, Canada or Canadian nationals were the ultimate controlling persons in this case, the two-part test of Sec. 13D (1) (B) (i) and (ii) would not be met. Nevertheless, on the basis of the facts before the Court, it is unclear whether the operation of Sec. 13D (1) (D) was triggered by a violation of Sec. 13D (1) (A) or Sec. 13D (1) (B), since both sections were violated.

Thus, under Sec. 13D (1) (B), there appears to be at least some discriminatory and retaliatory elements to the taking. On the other hand, the actions of the OPEC countries, including Saudi Arabia, arguably have threatened the security of the United States. It could be argued that this U.S. action is necessary for its security and the protection of vital commodities.

3. Compensation

There is no provision in the statute, and there is nothing in the problem to indicate that the United States Government has any intention of compensating the owners of the AMERIND stock. Should the Court find that the taking is illegal under international law, the United States would be required to compensate the AMERIND shareholders. It should also be noted, however, that the Court may recognize the taking as valid, but still order the United States to pay compensation, since the legitimacy of an expropriation does not extinguish the obligation to pay compensation.

The only instance where the United States would be relieved from the duty to pay compensation would be when its actions were found to be a valid exercise of its police power.

B. Enforceability of Penal Laws

The Court can expect the contestants to argue that the taking is a legitimate penal law of the United States and is a valid exercise of its police power. In support of that argument the United States would point to the statute, which provides that the proceeds of the stock taken "shall be treated as a fine for violation of law " Sec. 13D (1) (D) [emphasis added]. The United States could argue that, like the majority of expropriatory actions, the facts in this case indicate that the purpose of the United States statute was not to provide a mechanism for nationalization of a pre-existing foreign investment. Here, it could be argued, that a statute was enacted requiring all persons, foreign and domestic, to comply with certain procedural requirements as part of the United States regulation of securities. This statute was effective before the actions of CANIND. CANIND was thus put on notice that a failure to comply with the statute could lead to a forfeiture of the stock.

C. The Effect to be Given to the Prior Decisions of National Courts

The statute of the International Court of Justice enumerates the so-called sources of international law which the Court is to apply in deciding disputes.

Article 38

1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provision of Article 59, judicial decisions and the teachings of publicists of the various nations, as subsidiary means for the determination of rules.

2) This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

The contestant should draw the Court's attention to Section (d) which provides for the use of judicial decisions as a subsidiary means for the determination of rules of law. The doctrine of stare decisis is not applicable under international law to the decisions of international tribunals or national courts. Nevertheless national court decisions are often considered by the International Court of Justice as evidence of state practice and thus, to some degree, as evidence of the customary law referred to in Sec. b. The practice of states (including their domestic decisions), however, is only viewed as customary law when there is a consistent body of state practice among nations.

In addition, although national decisions may be based in part upon principles of international law, they rely primarily upon rules of municipal law. In this problem, the contestant may argue that municipal principles of corporate law should be analogized to the "general principles of law" referred to in Section (c) of Article 38. Those general principles, however, have been interpreted to refer not merely to principles of municipal law but rather to broader principles of law which, as such, have no analogy in municipal law.

V. STANDING

This issue should be distinguished from the issue of joinder of parties. Under the stipulation in the Compromis it is not necessary to formally join any of the other parties.

On the other hand, the Compromis also stipulated that either the United States or France could raise any issue that any other party could raise had it been a party to this proceeding. The issue thus framed must be considered in light of the Barcelona Traction Case. Under Barcelona Traction the majority of the International Court of Justice held that the existing principles of international law do not allow a state standing to present a claim on behalf of its nationals who hold stock in a foreign corporation. It seems, therefore, that any attempt by the contestants to raise arguments which Canada, Saudi Arabia, or Lebanon might have raised had they been parties will have to discuss the effect of Barcelona Traction.

The application of the United States and France is not merely a request for a declaration of the parties' rights. The parties are seeking a decision on the merits. The Court should therefore order payment to the appropriate party.

VVI. ISSUES NOT PROPERLY BEFORE THIS COURT

1. There is no United States constitutional issue in this problem. The United States Court of Appeals has affirmed the constitutional validity of the statute and the Supreme Court of the United States, in its discretion, has declined to review that decision. For all the purposes of this problem, therefore, the statute in question is a constitutionally valid statute.

2. There should be no issue as to the situs of the property. The law where a corporation is organized governs the rights of the shareholders. Section 169 of the Delaware Corporation Code (the law governing AMERIND's corporate existence) provides that except for the purposes of taxation, the situs of ownership of the capital stock shall be regarded as Delaware. Thus the action by the United States Secretary of Treasury, regardless of its legitimacy under international law, was within the power of the Secretary because the property was, by operation of law, considered to be within the United States at the time of the taking.

3. There is no Act of State issue in this problem.

The Act of State Doctrine holds that one nation will not inquire into the validity of the laws of another nation for acts committed within the latter's borders. The Doctrine is one of judicial restraint which is invoked to prevent embarrassment to the Executive in the conduct of foreign affairs. Since the United States has voluntarily submitted this case for adjudication, the doctrine is clearly inapplicable here.