IN THE INTERNATIONAL COURT OF JUSTICE

April 1976

Between

UNITED STATES OF AMERICA

Applicant

and

FRANCE

Respondent

MEMORIAL FOR THE APPLICANT

TEAM NUMBER:

Agents for the United States:

P. D. Jackson
R. van Banning

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Convention of Establishment (France and the United States), Article V, U.S.T. (1960) 2 2398, 2404; T.I.A.S. 4625. 5

Montevideo Convention, U.S.T.S. 881; 165 L.N.T.S. 19, 4. Malloy 4807 article 9 11

O.E.C.D. Draft Convention on the Protection of Foreign Property, O.E.C.D. Publication No. 15, 637 (December, 1962) 5

United Nations Charter, article 2 4

UNITED NATIONS RESOLUTIONS

G.A. Resolution 1803 (XVII) December, 1962, (Permanent Sovereignty over Natural Resources). 4, 9

G.A. Resolution 2200 (XXI) December, 1966, Article 1, section 1 (International Covenant on Economic, Social and Cultural Rights) 4

G.A. Resolution 3171 (XXVIII) December, 1973, Articles 1, 3 (Permanent Sovereignty over Natural Resources). 4, 6, 9

G.A. Resolution 3281 (XXIX) December, 1974, Article 2, sections 1, 2 (Charter on Economic Rights and Duties of States) 4, 6, 9

CASES AND OPINIONS

Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, [1953] I.L.R. 305, 309; aff'd [1953] I.L.R. 312 (High Court of Tokyo, First Civil Affairs Section). 18

List of Authorities cont'd — Page

Anglo-Iranian Oil Co. v. S.U.P.O.R., [1955] I.L.R. 23 (Civil Court of Rome, Italy, 1954). 17

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 416 (1964). 17

Bank Indonesia v. Senembah Maatschappij and Twentsche Bunk, 30 I.L.R. 28, 29-30 (Court of Appeals Amsterdam, The Netherlands 1959). 17

Blackstone v. Buttermore, 53 Pa. St. 266 (1867). 18

Case concerning the Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain) Second Phase, [1970] I.C.J. 3. 19

Case of the S.S. Lotus (France v. Turkey), [1927] P.C.I.J., ser. A, No. 10 at 28. 12, 14.

Jacoby v. Speyer, 215 N.Y.S. 145 (1926). 18

Judgment of 26 March, 1936, 31 Rev. Crit. (Cour d'appel de Paris, 1936). 17

Kahler v. Midland Bank, [1949] 2 All E.R. 621 (House of Lords) 21

Kohl v. United States, 91 U.S. 367, 371 (1875). 6

Luther v. Sagor, [1921] K.B. 532. 16

Macaura v. Northern Assurance Co., [1925] A.C. 619. 19

Martin v. Bank of Spain, 42 Rev. Crit. (Cass. Civ. Ire., 1952). 17

Mrs. T. v. K., Judgment of 18 June, 1971, [1971] D.S. Jur. (Cour d'appel, Paris). 20

Naim Molvan v. A. G. Palestine [1948] A.C. 351. 2

Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1891). 1

North Sea Continental Shelf Cases (Fed. Rep. of Germany v. Denmark; Fed. Rep. of Germany v. the Netherlands), [1969] I.C.J. 44. 12

N. V. Verenigde Deli-Maatschappijen and N.V. Senembah Maatschappij v. Deutsch-Indonesische Tabak Handelsgesellschaft m.b. H., in 8 Whiteman, Digest of International Law 1051 (1967), (Bremen Court of Appeals, Fed. Rep. of Germany 1959). 17

List of Authorities cont'd

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Oetjen v. Central Leather Co., 246 U.S. 297 (1917). 17

Princess Olga Paley v. Weisz, [1929] 1 K.B. 718. 16

Pullman Car Co. v. Missouri Pacific Co., 155 U.S. 587 (1885). 19

Re Helbert Wagg & Co., [1956] 1 All E.R. 129. 16

Salomon v. Salomon [1897] A.C. 22. 19

Saphire International Petroleums Ltd. v. National Iranian Oil Co., 35 I.L.R. 136, 171 (Arbitral Award, 1963). 20

Underhill v. Hernandez, 168 U.S. 250 (1897). 17

U.R.S.S. v. Intendant Général Bourgeois ès-qualité et Société La Ropit, [1927-28] Ann. Dig. 67, 68 (Court of Cassation, France 1928). 17

Walter Fletcher Smith v. Compania Urbanizadora del Parque y Playa de Mariano, 24 A.J.I.L. 386-7 (1930) (Arbitral Award, 1929) 9

STATUTES

Foreign Investment Review Act, Statutes of Canada, 1973-74, c. 46. 1, 2

Law of May 23, 1949, Basic Law For the Federal Republic of Germany (1949) article 14. 6

TREATISES, DIGESTS, RESTATEMENTS AND MISCELLANEOUS

I. Brownlie, Basic Documents on Human Rights (1971) 6

I. Brownlie, Principles of Public International Law 518 (2nd ed., 1973). 7

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List of Authorities cont'd

J. Castel, International Law 991 (1965). 12

17A Corpus Juris Secundum Contracts section 519 (1963). 18

Dalloz, Encyclopedie Juridique, Reportoire de Droit Int'l 502-504 (1969). 20

Dicey and Morris on the Conflict of Laws (9th ed., 1973). 16, 21

Diplomatic Correspondence on Mexican Expropriations of Agrarian Properties, 19 Dept. of State Press Releases 50 (1938). 7, 11

A. Fatouros, Government Guarantees to Foreign Investors 40 (1962). 1

W. Friedmann, O. Lissitzyn, and R. Pugh, (eds.), International Law 53 (1969). 14

1, C. Hyde, International Law 216-218 (rev. ed., 1945). 1

International Centre for the Settlement of Investment Disputes, Investment Laws of the World. 1

S. Mills, The Genoa Conference 409 (1922). 12

E. Mooney, Foreign Seizures (1967). 7

1, L. Oppenheim, International Law 254 (7th ed. H. Lauterpacht ed., 1948). 3

1, W. Phillimore, International Law Ch. 10, section 220 (3rd ed.). 1

Restatement (Second) Conflict of Laws, sections 188, 191 (1971). 21

Restatement (Second) of the Foreign Relations Law of the United States Section 185 (1965). 8

"U.N. Charter of Economic Rights and Duties of States" (Memo prepared by the legal Bureau of the Dept. of External Affairs, October 1975). 4

G. White, Nationalization of Foreign Property (1961). 7

B. Wortley, Expropriation in Public International Law (1959). 2, 19

8, M. Whiteman, Digest of International Law 1051 (1967). 17

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List of Authorities cont'd

JOURNALS

Amador, "Fourth Report on International Responsibility" (1959), 2 Y.B. Int'l L. Comm'n 15, U.N. Doc. A/CN 4/101 (1959). 8

Anderson, "Municipal Laws on Confiscation", 21 A.J.I.L. 525 (1927). 6

Behrens, "Rechtsfragen im chilenischen Kupferstreit", 37 Rabels Zeitschrift 394 (1973). 13

Fatouros, "Int'l Law and the Third World", 50 Va. L. R. 783, 809 (1964). 12

Fickel, "Enteignungsrecht und internationales Privatrecht", 20 A.W.D. 69 (1974). 13

Williams, "International Law and the Property of Aliens", 9 B.Y.I.L. 1, 28 (1928). 14

Mann, "Outlines of a History of Expropriation", 75 L.Q.R. 188 (1959). 6

Podesta Costa, "La responsibilidao internacional de estado", 2 Havana Academy of Int'l Law 207. 13

Seidl-Hohenveldern ., "Chilian Copper Nationalization Cases before German Courts", 69 A.J.I.L. 110, (1975). 21

Sohn and Baxter (reporters), Explanatory Note to Article 10, Draft Convention on the Int'l Responsibility of States for Injuries to Aliens, Draft No. 12, 55 A.J.I.L. 545, 555 (1961). 8

Vilkov, "Nationalization and International Law", 1960 Soviet Y.B. Int'l L. 58, 78. 13

Wehser, "Volkerrechtswidrige Verstaatlichung der Kupferminen in Chile", 29 Juristenzeitung 117 (1974). 14

JURISDICTION

The parties submit the present dispute by special agreement pursuant to Article 40, Section 1, of the Statute of the International Court of Justice, which provides:

> 1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

Article 35 of the Statute provides that "1. The Court shall be open to the states parties to the present Statute", and Article 36 stipulates that the jurisdiction of the Court compromises all cases which the parties refer to it. Under Article 93, Section 1, of the Charter of the United Nations, "1. All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice."

As the United States of America and the Republic of France are both Members of the United Nations, it must follow that the Court has the jurisdiction to resolve the present dispute.

STATEMENT OF FACTS

The parties have agreed to the Statement of Facts which has been filed before the Court.

QUESTIONS PRESENTED

I

Is the Foreign Investors Act of 1975 contrary to international law?

II

Should France be ordered to make payment to the United States for the plastic products shipped on June 4, 1975?

SUMMARY OF ARGUMENT

The Foreign Investors Act of 1975 is regulatory legislation to control foreign investment. As such, the Act and penalties imposed to enforce it are valid under international law.

If, contrary to our submission, the Act and the seizure are held to be an expropriation, they are nevertheless valid under international law.

The French court erred in directing that payment be made to CANIND. Payment should be made to the United States.

ARGUMENT AND AUTHORITIES

I. THE FOREIGN INVESTORS ACT OF 1975 IS REGULATORY LEGISLATION AND IS VALID UNDER INTERNATIONAL LAW.

A. Every State has a sovereign right to enact regulatory legislation to control foreign investment.

1. International law recognises the sovereign right of States to control admission of aliens and their capital.

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[1]

Almost every country in the world has passed legislation controlling or limiting foreign investment in some manner.[2] "From a legal point of view the lawfulness of the practice in international law cannot be contested."[3] Canada's Foreign Investment Review Act[4] is but a recent example. Numerous American companies

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1. Nishimura Ekiu v. United States 142 U.S. 651, 659. (United States Supreme Court, 1891, Mr. Justice Gray citing Vattel, lib. 2, No. 94, 100);

   And see,

   1, C. Hyde, International Law 216-218 (rev. ed., 1945);
   1, W. Phillimore, International Law, Ch. 10, section 220 (3rd ed.);
   A. Fatouros, Government Guarantees to Foreign Investors 40 (1962).

2. See, for example, International Centre for the Settlement of Investment Disputes, Investment Laws of the World.

3. Fatouros, supra note 1, at 40.

4. Statutes of Canada 1973-74, C. 46.

have submitted to its requirements. To our knowledge its international legality has never been challenged. The Canadian legislation includes comparable penal sections to enforce compliance.[5]

2. The right to impose controls implies the right to impose reasonable penalties to enforce them.

The right of a State to protect its territory, its fisheries and territorial waters is widely accepted. Coastal States regularly fine and confiscate for fishery offences or for breach of immigration laws.[6] See, for example, Naim Molvan v. Attorney-General for Palestine.[7]

It is submitted that a State's right to control its natural resources and regulate foreign investment being likewise widely accepted, similar penalties may be imposed. Further, since the illegal acquisition of AMERIND shares was in effect a prohibited (corporate) entry of CANIND into the United States, forfeiture of the vehicle of entry (AMERIND) is particularly appropriate, and is directly comparable to forfeiture of an illegal immigrant ship (as in Molvan, supra).

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5. Id. sections 20, 24, 25, 26.
6. B. Wortley, Expropriation in Public International Law 45 (1959).
7. [1948] A.C. 351 (Privy Council).

B. The Foreign Investors Act of 1975 is regulatory legislation, not an expropriation.

1. The Act is regulatory, with penal provisions.

The Act is primarily concerned with acquiring information and with control of foreign investment. The forfeiture provision is by way of penalty only and never operates if the Act is observed. The penalty is directed against particular violators and not national property in general. The penalty is a fine proportional to the magnitude of the offence.

2. CANIND could have complied with the Act.

CANIND could easily have complied with the Act, in which event no penalty would have been imposed. Instead it continued to buy shares until February 14th without serving notice.

II. IF VIEWED AS AN EXPROPRIATION, THE FOREIGN INVESTORS ACT OF 1975 IS VALID UNDER INTERNATIONAL LAW.

A. It is a principle of international law that every State has a right of control over the natural resources and economic activities within its territory.

At the basis of the modern conception of the State is the notion of its sovereignty, an important element of which is its supreme authority over persons and things in its territory.[8]

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8. 1, L. Oppenheim International Law 254 (7th ed. H. Lauterpacht ed., 1948).

This authority has been explicitly and consistently recognized by the United Nations, beginning with its Charter,[9] and more recently in the first Resolution on Permanent Sovereignty over Natural Resources,[10] in the International Covenant on Economic, Social and Cultural Rights,[11] in the most recent Resolution on Permanent Sovereignty over Natural Resources,[12] and in the Charter on Economic Rights and Duties of States.[13] The latter declares that:

> Article 2.
>
> 1. Every State has had and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

The over-whelming majority of States have voted in favour of these resolutions. A memorandum prepared by the Canadian Department of External Affairs suggests that where there have been differences they have not been on this fundamental issue, but on some of the detailed ramifications.[14]

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9. Article 2, section 1.
10. G.A. Resolution 1803 (XVII) December 1962.
11. G.A. Resolution 2200 (XXI) December 1966, Article 1, Section 1.
12. G.A. Resolution 3171 (XXVIII) December 1973 Article 1.
13. G.A. Resolution 3281 (XXIX) December 1974, Article 2, Section 1.
14. "U.N. Charter of Economic Rights and Duties of States" (Memo prepared by the Legal Bureau of the Department of External Affairs, October 1975).

Finally, the members of the O.E.C.D., including France, the United States, and Canada have given regional endorsement to such national sovereignty in the OECD Draft Convention on the Protection of Foreign Property:

Article 1.

> (b) the provisions of this convention shall not affect the right of any party to allow or prohibit the acquisition of property or the investment of capital within its territory by nations of another party.[15]

Both France and the United States have formally recognized their respective rights with respect to the principle of sovereignty in the bilateral Convention of Establishment:

Article v.

> 2. Each High Contracting Party reserves the right to determine the extent to which aliens may, within its territories, create, control, manage or acquire interests in, enterprises engaged in communications, air or water transport, banking involving depository or fiduciary functions, exploitation of the soil or other natural resources, and the production of electricy.[16]

B. International Law permits the State to expropriate property for a public purpose.

1. National sovereignty implies the power to expropriate property.

A well settled aspect of the principle of State sovereignty

15. OECD Publication No. 15,637 (December 1962).

16. U.S.T. (1960) 2 2398, 2404; T.I.A.S. 4625.

discussed above[17] is the right to expropriate property.[18] "At all stages of history, the individual owner was liable to have his property taken from him. Never and nowhere was there any support for the proposition that property could not in any circumstances be taken; that it was sacrosanct; inviolable."[19] Expropriation is specifically allowed in a large number of State constitutions, although many impose requirements that it be "in the public interest" or "according to Law."[20] An illustrative provision is article 14 of the constitution of the Federal Republic of Germany: "(3) Expropriation shall be admissible only for the well-being of the general public."[21] Typical of case law in the area is a statement by the U.S. Supreme Court in 1875: "The right [to expropriate] is the offspring of political necessity, and it is inseparable from sovereignty."[22]

2. The power to expropriate extends to alien property.

On the question of susceptibility to expropriation, the alien is in the same position as the national.[23] There is no rule of international law which prohibits expropriation of alien

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17. See section II A of this memorial.

18. Resolution on Permanent Sovereignty over Natural Resources, supra note 12, article 3.

19. Mann, "Outlines of a History of Expropriation", 75 L.Q.R. 188 (1959).

20. I. Brownlie, Basic Documents on Human Rights (1971); Anderson, "Municipal Laws on Confiscation", 21 A.J.I.L. 525 (1927)

21. Law of May 23, 1949, Basic Law for the Federal Republic of Germany, (1949) article 14.

22. Kohl v. United States, 91 U.S. 367, 371 (1875).

23. Charter on Economic Rights and Duties of States, supra note 13, article 2, section 2(c).

property per se.[24] An examination of recent history provides many examples, too numerous to mention, of such expropriation.[25] On July 21, 1938, Secretary Hill stated to the Mexican Ambassador what must be taken to be the established view on this issue:

> My Government has frequently asserted the right of all countries freely to determine their own social, agrarian and industrial problems. This right includes the sovereign right of any government to expropriate private property within its borders in furtherance of public purposes.[26]

3. The determination of what is a valid public purpose must be made by the municipal law of the expropriating State.

The requirement that expropriation must serve a legitimate public purpose has been discussed by a number of commentators. The consensus is that at present this can only be interpreted as a requirement that it be constitutional, according to a general law, and not patently arbitrary.

> This statement [that expropriation must serve a public purpose] is not at variance with the view correctly advanced by various writers that the discretionary powers of the State in the matter are in practice unlimited, provided that the latter view is understood to mean only that it is for municipal law, and not for international law, to define in each case the 'public interest' or other motive or purpose of like character which justifies expropriation.

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24. I. Brownlie, Principles of Public International Law 518 (2nd ed., 1973); G. White, Nationalization of Foreign Property 4 (1961).

25. E. Mooney, Foreign Seizures (1967); G. White, supra note 24, at 19-31.

26. Diplomatic Correspondence on Mexican Expropriations of Agrarian Properties, 19 Dept. of State Press Releases 50 (1938).

> Particularly at the present time, when regimes of private property vary widely, it would be idle to attempt to 'internationalise' anyone of them.[27]

> It is not without significance that what constitutes a 'public purpose' has rarely been discussed by international tribunals and that in no case has property been ordered restored to its former owner because the taking was considered to be other than for a public purpose. This unwillingness to impose an international standard of public purpose must be taken as reflecting great hesitancy upon the part of tribunals and of States adjusting claims through diplomatic settlement to embark upon a survey of what the public needs of a nation are and how these may best be satisfied.[27]

> There is little authority in international law establishing any useful criteria by which a State's own determination of public purpose can be questioned. ... the concept of taking for a public purpose or public use, originating in municipal law systems, may have had a reasonably definite meaning in international law when the municipal systems of the States that led in the development of international law were based on private ownership of the means of production. However, in view of the increasingly broad area of governmental activity in nearly all States, the concept of public purpose or public use seems increasingly vague and of doubtful usefulness in the future.[29]

One reported case does deal with the issue of whether an expropriation was for a public purpose. In an arbitration between

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27. Garcia Amador, "Fourth Report on International Responsibility" (1959) 2 Y.B. Intn'l L. Comm'n 15, U.N. Doc. A/CN. 4/101.

28. Explanatory note to Article 10, Draft Convention on the International Responsibility of States for Injuries to Aliens, Draft No. 12, Reporters, Sohn and Baxter, 55 A.J.I.L. 545, 555 (1961).

29. Restatement (Second) of the Foreign Relations Law of the United States, comment on section 185 at 553 (1965).

a Cuban company and an American citizen, the arbitrator held that the property had been seized, not for public purposes (as required by the Cuban constitution), but to be turned over to a private company for purposes of amusement and private profit.[30] The seizure was therefore found to be illegal. It is submitted that only when an expropriation is arbitrary and is devoid of public benefit as in the Walter Fletcher Smith case should an international tribunal hold it invalid.

The Foreign Investors Act of 1975 being a general law of the land, constitutional,[31] and not on its face devoid of public benefit, it should be assumed by this Court to be for a national public purpose.

C. There is no recognised principle of international law which requires that expropriation be compensated

1. Compensation is not required by customary international law.

(a) State custom as evidenced by the United Nations declarations suggests no compensation requirement.

Both General Assembly Resolutions on Permanent Sovereignty over Natural Resources[32] and the Charter on the Economic Rights and Duties of States[33] provide that the issue of compensation is

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30. Walter Fletcher Smith v. The Compania Urbanizadora del Parque y Plata de Marianao, 24 A.J.I.L. 386-7 (1930).

31. See the Special Agreement governing these proceedings, Annex A, at page 1.

32. Supra note 10, article 4; and supra note 12, article 3.

33. Supra note 13, article 2, section 2(c).

to be decided according to the national law of the expropriating State. The charter states:

2. Each state has the right: ...

> (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the free choice of means. (emphasis added).

It is submitted that the United States has met this standard, having decided that in circumstances such as are outlined in the Foreign Investors Act of 1975 the appropriate compensation is none at all.

(b) Customary law as evidenced by the formulations of regional associations does not require compensation.

In 1961, the Asian-African Legal Consultative Committee adopted a set of Principles Concerning Admission and Treatment of Aliens. Nine of the Committee's ten members supported Article 12 which provided that a State has the right to acquire, expropriate or nationalise an alien's property in return for compensation determined in accordance with "local laws, regulations and orders."[34]

34. Report of the fourth session of the Asian-African Legal Consultative Committee, Tokyo 49 (1961), 131 article 12 (Burma, Ceylon, India, Indonesia, Iraq, Morocco, Pakistan, Sudan and the UAR supported article 12, Japan opposed it).

The Latin American States have recently reiterated the view first affirmed in the Montevideo Convention[35] that "there is no responsibility to an alien except in those instances in which a State is responsible to a national."[36] Thus according to this view as long as it does not compensate its own nationals, a State may expropriate the property of aliens without compensation.

(c) State practice as evidenced by statements of national policy does not support the existence of an international rule requiring compensation.

American protests over the expropriation without compensation of property of its nationals have drawn similar responses from the Governments of Guatemala[37] and Mexico,[38] both of whom have asserted the traditional Latin American view that since nationals and aliens were being treated in the same manner, there could be no complaints about lack of compensation.

The position of the Soviet bloc countries resembles that expressed by the U.N. resolutions and the Asian-African

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35. U.S.T.S. 881; 165 L.N.T.S. 19; 4 Malloy 4807, article 9.
36. Inter-American Juridical Committee, Contribution of the American Continent to the Principles of International Law that Govern the Responsibility of the State 12 (1962).
37. Ms. U.S. Dept. of State, File 814-20/6-2653 (1953).
38. Letter from Eduardo Hay, Mexican Foreign Minister to Sec. of State Hull, 3, August 1938, supra n. 26.

countries, namely that the compensation question must be determined according to national law[39] (thus admitting of the possibility that aliens may be deprived of compensation in a discriminatory manner, as long as it is done according to law). As early as 1922 the Soviet Union asserted (at the Genoa Conference) that the U.S.S.R. "cannot be forced to assume any responsibility toward foreign powers and their nationals ... for the nationalisation of private property."[40]

It might be argued that these statements are contradicted by the existence of a number of post World War II global compensation agreements involving Soviet bloc States as parties.[41] However, we submit that those agreements were made for short term advantage or political convenience, and are no evidence that the States felt themselves bound by international legal obligations. The Permanent Court of International Justice[42] and the International Court of Justice[43] have clearly stipulated that in order for State actions to be considered as evidence of customary international law, it must be demonstrated that the actions were

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39. Fatouros, "International Law and the Third World" 50 Va. L. R. 783, 809 (1964).

40. Reply of the U.S.S.R. delegation to memorandum of 2 May 1922, Saxon Mills, The Genoa Conference 409 (1922).

41. See, for example, J. Castel, International Law 991 (1965)

42. The Case of the S.S. Lotus (France v. Turkey), [1927] P.C.I.J., Ser. A, No. 10 at 28.

43. North Sea Continental Shelf Cases (Federal Rep. of Germany v. Denmark; Federal Republic of Germany v. the Netherlands), [1969] I.C.J. 44.

based on an apprehension of a legal obligation. It is submitted that the Soviet statements cited above indicate that the communist countries recognise no such legal obligation.

2. There is no unanimity among publicists of the various nations that expropriation must be accompanied by compensation.

Typical of the Soviet view on this issue is the opinion that:

> Under international law, States are sovereign, and therefore only municipal and not international law can regulate all matters connected with the acquisition, transfer and loss of ownership under the terms of a nationalisation law. This cannot become a subject for discussion by another State. The laws of the State carrying out nationalisation, and not international law, determine the conditions under which property is taken from private persons and in particular to whom the law extends, whether or not compensation shall be paid, etc., etc. This postulate applies equally to the property of aliens.[44]

The Latin American view that an alien whose property is expropriated is only entitled to such compensation as is received by nationals is expounded by the Argentinian international lawyer Podesta Costa.[45]

Among the Western-European authors who disclaim any international rule requiring compensation are Behrens,[46] Fickel,[47]

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44. Vilkov, "Nationalization and International Law" 1960 Soviet Y.B. Intl' L. 58, 78 (quoted from summary in English).

45. Podesta Costa, "La Responsabilidao Internacional de Estado", 2 Havana Academy of International Law, 207.

46. Behrens, "Rechtsfragen im chilenischen Kupferstreit", 37 Rabels zeitschrift 394 (1973).

47. Fickel, "Enteignungsrecht und internationales Privatrecht", 20 A.W.D. 69 (1974).

Wehser,[48] and Williams.[49]

3. Expropriation without compensation is internationally valid.

In conclusion it is submitted that there is no rule of international law requiring compensation. There is insufficient consensus on the issue to establish an international legal principle for this court to follow. In the absence of such a rule, expropriation without compensation when undertaken pursuant to a duly passed domestic law is internationally valid. "Restrictions upon the independence of States cannot ... be presumed."[50] Friedmann notes the corollary of this proposition - "international law permits what it does not prohibit."[51]

D. The Foreign Investors Act of 1975 does not fail on the grounds of discrimination against aliens.

1. There is no unanimity on a principle of international law which prohibits discrimination against alien property.

The view held by Soviet bloc countries[52] and by some Asian-African states[53] that to be valid expropriation need only conform to national legal standards implies that if a national law allows discriminatory expropriation of alien property then such expropriation is valid under international law.

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48. Wehser, "Volkerrechtswidrige Verstaatlichung der Kupferminen in Chile?", 29 Juristenzeitung 117 (1974).

49. Williams, "International Law and the Property of Aliens", 9 B.Y.I.L. 1, 28 (1928).

50. The case of the S.S. Lotus, supra note 42, at 18.

51. W. Friedmann, O. Lissitzyn, and R. Pugh, International Law 53 (1969).

52. See argument at section II C.1(c) and II C.2 of this memorial.

53. Id.

2. In any event, the Foreign Investors Act of 1975 does not discriminate against aliens.

Sec. 13(d)(1)(A) makes it clear that everyone must file the required information. The penalties in Sec. 13(d)(1)(D) apply to everyone -- alien or national -- who fails to meet the filing requirements.

III. THE FRENCH COURT ERRED IN ORDERING PAYMENT TO CANIND AND NO EFFECT SHOULD BE GIVEN TO THAT DECISION.

A. The French court should have recognised the seizure by the U.S. Government.

1. The actions of the United States were valid under international law.

For the reasons given above[54] the Foreign Investors Act is not contrary to international law. (The French Court's decision was apparently based on a contrary assumption[55] and is therefore incorrect.)

2. The French Court should have recognised the claim for payment to AMERIND in the United States.

The AMERIND company was at all times subject to the municipal law of the United States. The plastic products

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54. See Parts I and II.

55. The only reason in the record for the French Court's decision is that it noted the decision of the German court (Special Agreement Annex B, p. 6). The German Court held that the action of the United States Government "violated basic principles of German public policy, including established standards of International Law" (Special Agreement, Annex B, p. 5).

shipped to CNFP were in the United States when the confiscation became effective. It is submitted that, according to internationally recognized principles, a seizure of property effected within the confiscating authority's jurisdiction should be recognized by foreign courts.

In the leading English case, Lord Justice Bankes expounded the principle thus:

> I do not see how the Courts could treat this particular decree [of the U.S.S.R. expropriating plaintiff's factory] otherwise than as the expression by the de facto government of a civilised country of a policy which it considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the Government of this country ... and are not recognized by our laws.[56]

That the principle is well established in the common law is recognized by the Courts[57] and by writers.[58] It has been

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56. Luther v. Sagor, [1921] K.B. 532.

57. Princess Olga Paley v. Weisz, [1929] 1 K.B. 718; Re Helbert Wagg & Co., [1956] 1 All E.R. 129.

58. Dicey and Morris on the Conflict of Laws 555 (9th ed., 1973) [Hereinafter Dicey].

    "Rule 86: A governmental act affecting any private proprietary right in any movable or immovable thing will be recognized as valid and effective in England if the act was valid and effective by the law of the country where the thing was situated (lex situs) when the act is alleged to have taken effect...."

followed in the civil law countries of the European Economic Community[59] including France.[60]

The United States courts have gone further. Not only have they declined to sit in judgment on the acts of foreign states,[61] they have declined to do so even when these acts have clearly violated international law.[62] The applicant does not need to rely on this extreme position (which, has been modified by statute in the U.S.). As stressed above, it is our submission that the Foreign Investors Act and the seizure are not contrary to international law.

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59. N.V. Verenigde Deli-Maatschappijen and N.V. Senembah - Maatschappij v. Deutsch-Indonesische Tabak-Handelsgesellschaft m.b.H., (Bremen Court of Appeals, West Germany 1959), quoted in 8 Whiteman, Digest of International Law 1051 (1967);

    Anglo-Iranian Oil Co. v. S.U.P.O.R., [1955] I.L.R. 23 (Civil Court of Rome, Italy 1954);
    Bank Indonesia v. Senembah Maatscappij and Twentsche Bank, 30 I.L.R. 28, 29-30 (Court of Appeal of Amsterdam, The Netherlands 1959).

60. Judgment of 26 March, 1936, 31 Rev. Crit. (Cour d'appel de Paris, 1936);
    Martin v. Bank of Spain, 42 Rev. Crit. (Cass. civ. Ire., 1952);
    And see U.R.S.S. v. Intendant Général Bourgeois ès-qualité et Société La Ropit, [1927-28] Ann. Dig. 67, 68 - "the principle that the courts of a State faced with a juridical situation governed by foreign legislation should apply the foreign law must be admitted" (Court of Cassation 1928).

61. Underhill v. Hernandez, 168 U.S. 250 (1897);
    Oetjen v. Central Leather Co., 246 U.S. 297 (1917).

62. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 416 (1964).

The District Court of Tokyo has held:

> This court considers that, if it were called upon to give effect within its own jurisdiction to a nationalisation law promulgated by a State for the promotion of its own public welfare, then so long as the law does not violate the public policy of this country and also having regard to the requirements of international comity and of mutual respect for sovereign power between nations, this Court could not refuse to recognize the result of the application of such a law.[63]

B. The French Court should not have recognised any claim by CANIND.

1. CANIND as payee has no legally recognised claim for payment.

It is submitted that AMERIND authorised CNFP to make payment to CANIND as agent, or trustee, acting on AMERIND's behalf. AMERIND did not intend CANIND to become a beneficiary under the contract with CNFP and there is no evidence to support any such contention. Therefore CANIND cannot claim as an intended beneficiary.[64]

Having constituted CANIND as agent to receive payment, AMERIND could at any time revoke CANIND's authority,[65] which revocation is binding on other parties with notice. CNFP clearly had notice, prior to making payment, that CANIND's authority had been revoked.

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63. Anglo-Iranian Oil Company v. Idemitsu Kosan Kagushiki Kaisha, [1953] I.L.R. 305, 309; aff'd [1953] I.L.R. 312 (High Court of Tokyo, First Civil Affairs Section).

64. Jacoby v. Speyer, 215 N.Y.S. 145 (1926); 17A C.J.S. Contracts section 519(4) (19).

65. Blackstone v. Buttermore, 53 Pa. St. 266 (1867).

2. CANIND as shareholder has no claim recognised by international law.

First, it is submitted that, insofar as CANIND's acquisition of the shares was illegal, CANIND never became a shareholder in AMERIND or entitled to any rights as such. Any shareholder rights are determined solely by the municipal laws of the incorporating State.[66] This Court held, in the Barcelona Traction case: "41. Municipal law determines the legal situation not only of ... limited liability companies but also, of persons who hold shares in them".[67]

Second, the concept and structure of the limited liability company are founded on a firm distinction between the company and the shareholder, each with a distinct set of rights. So long as the company is in existence the shareholder has no right to the corporate assets. These principles are well established[68] and have been clearly recognised by this Court in the Barcelona Traction case.[69] The alleged exception (alluded to, rather than recognised, in Barcelona Traction) to this rule is applicable only if international law has been violated. We submit that it has not been violated.

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66. Wortley, supra note 6, 40.

67. Case concerning the Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain) Second Phase, [1970] I.C.J. 3, 34 [Hereinafter Barcelona Traction].

68. Pullman Car Co. v. Missouri Pacific Co., 155 U.S. 587 (1885);
Macaura v. Northern Assurance Co., [1925] A.C. 619 (House of Lords);
Salomon v. Salomon, [1897] A.C. 22 (House of Lords).

69. Barcelona Traction, supra note 67 at 34.

3. To recognise CANIND's claim is to condone and encourage illegality.

It should be noted that the contract between AMERIND and CNFP designating CANIND as payee was made after CANIND's illegal acquisition of control of AMERIND. If this payment now be authorised the door will be open for any person to illegally acquire control of a U.S. corporation and to make contracts to transfer all its assets abroad prior to detection and U.S. Government reaction. It would be meaningless for this Court to uphold the international legality of the Foreign Investors Act if at the same time it gives its blessing to a simple procedure for completely circumventing it.

C. The French Court should not have applied French ordre public principles in this case.

1. French courts give effect to acts contrary to French ordre public which are legal in another jurisdiction.

The French concept of ordre public does not preclude enforcement of rights, legally acquired in another jurisdiction, even though acquisition of those rights within France is contrary to public policy.[70]

2. U.S. law governs the contract.

In the absence of express choice of law, in a contract between a State and an alien, it should be presumed that the alien's law governs.[71] Otherwise one of the parties has it in

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70. Mrs. T. v. K., Judgment of 18 June, 1971, [1971] D.S. Jur. (Cour d'appel, Paris);
Dalloz, Encyclopedie Juridique, Reportoire de Droit Int'l 502-504 (1969).

71. Saphire International Petroleums Ltd. v. National Iranian Oil Co., 35 I.L.R. 136, 171 (Arbitral Award, 1963).

his power to change the governing law of the contract. At the time of this agreement CNFP was an emanation of the French State.

Other facts support the proposition that U.S. law governs the contract. The *situs* of the plastics was the United States, both at the time of the contract and the time of the legislation. Usually the place of delivery under a contract is the place of delivery to the carrier -- in this case to the ship in the United States. Thus the *situs*, the place of delivery and place of performance are all in the United States.[72] It is the law of the contract, not the place of the debt that is determinative.[73]

3. CANIND has no significant contact with France.

CANIND has no significant contact with the forum State. The dominant body of opinion makes recourse to *ordre public* dependent on the existence of such contacts.[74]

D. It is for this court to decide the dispute according to international law.

Both parties have submitted to the jurisdiction of this Court for a decision on the merits according to international law. French notions of *ordre public* are not relevant in this

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72. *Restatement (Second) Conflict of Laws* sections 188, 191 (1971);
Dicey, supra note 58, at 813-814.

73. *Kahler v. Midland Bank*, [1949] 2 All E.R. 621 (House of Lords);
Dicey, supra note 58, at 800.

74. I. Seidl-Hohenveldern, "Chilean Copper Nationalization Cases before German Courts", 69 *A.J.I.L.* 110, 117 (1975)

forum. This court is not acting as an appellate division in the French judiciary system but as a supra-national body charged with adjudicating disputes according to international law, independently of purely local law and "policy". The record indicates that the reason for the decision of the French Court is a finding that the United States violated international law.[75] If this honourable Court accepts our submissions that the legislation and seizure are valid under international law, the French decision must fall and payment to the United States should be ordered.

CONCLUSION

It is respectfully requested that this honourable Court:

1. Grant the United States a declaration that the Foreign Investors Act of 1975 is valid under international law.
2. Order France to pay the United States for the plastic products shipped from the factories of AMERIND to France on June 4, 1975.

All of which is respectfully submitted,

P. D. Jackson

R. van Banning

AGENTS FOR THE UNITED STATES

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75. _Supra_ note 55.

APPENDIX

Annex C

Excerpts from
THE SECURITIES EXCHANGE ACT OF 1934

As amended January, 1975, by the Foreign Investors Act of 1975 for purposes exclusively of the Jessup Moot Court Competition

(Information to be Filed by Five Per Cent Beneficial Owners and Penalties for Failing to File)

Sec. 13(d)(1)(A). Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, (or any other company engaged in activities that the President of the United States has found to be of importance to the economy or defence of the United States) is directly or indirectly the beneficial owner of more than 5 per cent of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors--

(i) the background and identity, including the nationality and permanent place of residence, of all persons by whom or on whose behalf the purchases have been or are to be effected;

(ii) the source and amount of the funds or other considerations used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purposes of acquiring, holding or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

Appendix (cont'd)

(iii) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(iv) the number of shares of such security which are beneficially owned and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the name and addresses of each such associate; and

(v) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guarantees of loans, guarantees against loss or guarantees of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(B) The statement required under paragraph (A) to be sent and filed shall be filed with the Commission at least thirty days prior to the acquisition of any security described in paragraph (A) if--

(i) the proposed acquisition will be made by any person, natural or otherwise, required by paragraph (A) to send and file such a statement; is not a national or citizen of the United States, or a United States Company, and

(ii) such person is, or is dominated or controlled by, a national or citizen of a country that is determined by the President to be engaging in discriminatory trade practices or acts or policies the effect of which is to withhold supplies of vital commodity sources from international trade or to raise the price of such commodities to an unreasonable level which burdens or restricts United States Commerce or seriously disrupts the world economy.

Appendix (cont'd)

The term "United States Company" in this section means a company organized, or having its principal place of business, in any part or possession of the United States and of which the major controlling interest is beneficially owned by citizens or nations of the United States.

(C) On application of the Commission before an acquisition has been consummated or a statement filed as required by paragraph (A), a temporary or permanent restraining order shall be issued by the appropriate United States District Court against any proposed transfer of the security until thirty days after the said statement has been filed with the Commission.

(D) If the Commission determines after such notice and hearing as shall by rule be authorized, that a particular acquisition of securities would be harmful to the domestic economy or the national security of the United States, the Commission shall report that determination to the President. If the President concurs in that determination, the company shall be informed that the proposed acquisition is illegal, and the President shall instruct the Attorney-General to institute proceedings in the appropriate United States District Court for an order (i) enjoining the proposed acquisition, or (ii) if the acquisition has been consummated as an additional penalty to those imposed by this chapter for failure to make timely reports or take actions required by this Act, declaring the forfeiture of the securities and vesting of ownership therein in the Secretary of the Treasury, as trustee. After the order of the Court has become final, the Secretary, as trustee, shall possess all rights of ownership of the securities. As soon thereafter as possible, after due notice to the public, the Secretary shall transfer ownership of the securities by sale to the highest bidder who, if a natural person, is a citizen of the United States or, if not a natural person, is a United States company, and submits a bid pursuant to regulations issued by the Secretary. The proceeds of the sale shall be treated as a fine for violation of law and shall become miscellaneous receipts of the Treasury.

(Emphasis added.)