1979 PHILIP C. JESSUP
INTERNATIONAL LAW MOOT COURT
COMPETITION

JUDGES' BENCH MEMORANDUM

Not to be seen by student participants

INTRODUCTION

This problem explores the extent to which international law circumscribes the national legislative, administrative and judicial measures taken by States with respect to foreign owners of industrial property and of other tangible property rights.

The present content of international law is key to the discussion of the issues. In this case, several of international obligations are founded on treaties to which both Patria and Justia have subscribed. The principle common to the specific treaty obligations is national treatment. Certain obligations arising out of customary international law can be asserted concurrently or independently of the treaty obligations.

These treaty and customary international law principles are confronted in this problem with the assertions by the developing country (Justia) that new norms of international behaviour have replaced previous ones, and that with respect to most measures taken by States only national rules are relevant; these assertions are articulated in the various declarations of the General Assembly of the United Nations (usually based on a majority vote with opposition or absention by some of the countries members of the OECD, that is Western Countries). Among such declarations are the resolutions adopted at the 5th Special Session of the General Assembly, proclaiming a New International Economic Order and the General Assembly resolution on the Charter of Economic Rights and Duties of States.

It is important to note that customary international law principles and rules relative to the protection of the economic interests (primarily property) of foreigners has never been universally settled, and were put in practice essentially by the European States and the

United States. Developing countries today maintain that these rules, whose purpose is to protect the private property interests of foreigners, do not apply to them, since they did not participate in creating them and since they are an external impediment to the economic development of countries which wish to raise the standards of living of their peoples.

The International Court of Justice is bound to apply international law, the sources for which are set out in its Statute. Of course, there is ample room for flexibility by the I.C.J. in determing the content of customary international law and general principles. However, it must be kept in mind that historically the content of international law in ecomonic matters has been confined to concern with the protection of private property on rights of foreigners.

Issue I: Whether Justia violated any obligation it might have had under international law to extend national treatment to foreign licensors or investors?

The obligation of Justia to grant national treatment to Pharmaca arises from specific treaty obligations (Paris Convention and Friendship Commerce Treaty) as well as from customary international law.

Possible violations of both the Paris Convention and the I.C.J. Treaty by Justia are the following:

a. The new Law on the Protection of Industrial Property of Justia discriminates against foreigners (Pharmaca) by the retroactive as well as prospective shortening of the life of foreign owned patents (Note the retroactive shortening of patent protection raises issues of acquired rights which would be relevant to compensation) (See

Article 2, Paris Convention, Articles V and VIII (1) F. & C. Treaty).

b. The new International Property Law also discriminates against foreigners (Pharmaca) by requiring trademark linkage.

Possible further violations of the F. and C. Treaty relate to the requirements of divestiture in the amended Law on the Protection and Regulation of Foreign Investment (Article IV(1)(4), Article V), and to th e revocation of work permits to Patrian nationals working for Subpharm (Article VI).

Moreover, arguments based on customary international law rules and principles on the responsibility of States for economic rights of aliens should be made on behalf of Patria.

The President of Justia has stated that new international law principles exist against which all existing international obligations must be measured. These principles can be derived from the recent U.N. General Assembly Declaration, and particularly from the general consensus, to be found in all fora in which developing countries are negotiating the new terms of economic relations, that special treatment must be accorded the developing countries in order to enable them to achieve economic development and raise the standards of living of their people. The fundamental principle of special or preferential treatment is to be found in GATT, as well as in the various instruments negotiable in UNCTAD and under the auspices of international organizations such as the European Communities and the OECD.

Justia could terminate its obligations under the Paris Convention and the F. & C Treaty in accordance with the provisions in these treaties (Paris Convention, Article 26, F. & C. Treaty, Article XVIII(2). The declaration of the President could well be taken to be attempts

not to take the absolute steps of dissolving treaty relations, but rather of subjecting them to the new international standards. Justia, it is true, became a party to the treaties in question, but there have been fundamental changes in the regime and in the principles governing international economic relations. Justia's actions recognize these changes. It is in the same sense that what can be termed traditional international law principles on the responsibility of states for the protection of the property rights of foreigners must yield, at least in the relations between developed countries and the developing countries, to the new principles which are embodied in the Charter of Economic Rights and Duties of States. The principles call essentially for the exercise of national sovereignty in economic matters, except where specific international obligations have been freely undertaken.

Issue II: Whether there was a violation of international law in Justian legal procedures and practices relating to the invalidation of the agreement between Pharmaca and Subpharm or to the nationalization of Subpharm?

The licensing agreement was entered into between two distinct legal persons, one created and operating in Patria and the other in Justia. The right of Justia to regulate the transfer of technology to its nationals in Justia, appears to be well founded, even if the national enterprise to which the Technology is transferred is owned or controlled by the foreign licensor. Justia and Patria had no treaty relations to prevent such regulations, unless the F. & C. Treaty could be read to prevent regulation of the trade in technology, and in particular the practices prescribed in the national law.

The Transfer of Technology Law provided for registration of all

agreements by the national Registry, including agreements entered into before the passage of the Law. If registration is refused by the competent authority, then the applicant may request review of the case by the Ministry of Industry. Evidence may be submitted by the applicant and a decision must be reached within 45 days of submission of the evidence. The Law is silent on the right to a hearing.

There was available to the applicant, Subpharm, the right to appeal the administrative decision of the Minstry of Industry to a special panel of the Justian Supreme Court. In some Latin American national systems, this review is obtained through the use of a legal device known as amparo.

Retroactive application of the Law on Transfer of Technology resulted in the non-approval of the agreement. Non-approval of the agreement was not based on considerations involving the parties to the agreement, but rather general policies of the Government of Justia. The forum for review provided for in the Law (The Ministry) is not a neutral forum. The decision of the Ministry did not take into account the dispute settlement mechanism freely agreed to by the parties to the agreement, namely, neutral arbitration.

The approach taken in the paragraph above, could be applied to the process of the nationalization of Subpharm. Existing property rights, protected (albiet vaguely) by treaty (F. & C. Treaty) and by traditional rules of international law on state responsibility were disregarded. No judicial review is provided, and the administrative remedies could be said to be notoriously non-neutral. Moreover, the premature nationalization of the subsidiary was in conflict even with Justian law.

The immediate issue here, however, relates to the content of international law against which national law on the procedural aspects of the determination of private property rights of foreigners can be determined. Is there the equivalent of "due process" in international law? If so, what are the sources for such "due process" standards and what is its content?

Justia enacted legislation with significant public policy content to regulate economic affairs within the country. Both the national laws concerned provided for review of the decisions of the administrative authorities. These requirements fulfill Justian notions of justice and are well within traditional standards of international law, if such standards can be said to be applicable to this situation. There was no denial of justice.

The Justian Laws clearly stated national policy and left the authorities administering these policies some necessary discretion in making decisions. The issues raised with respect to the licensing agreements were not merely contractual disputes between the parties, but rather fundamental issues between Justia and the parties to the agreement (both of which were foreign owned and controlled). The arbitration clause between the parties to the licensing agreement was irrelevant to the regulation by Justia of technology transfer.

It should be noted that the parties to the agreement attempted to disregard Justian law. The parties had identical interests, Subpharm being owned and controlled by Pharmaca. Thus, Justian authorities were confronted by a situation in which an enterprise created under Justian law and operating in Justia entered into an agreement to be performed in Justia which contravened basic Justian public policy. Pursuant to such agreement an arbitration was held

in Patria. It was later demanded that Justia use its judicial power to recognize such an award. It should be noted that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards contains public policy exceptions both with respect to both the enforceability of arbitration clauses and awards (Articles II (3), V(2)). Justia was not obligated by this convention either to enforce the clause or the award. There is, furthermore, no general principle in international law requiring States to recognize or enforce arbitration clauses in contracts or awards made pursuant to such clauses. Such action, like the recognition and enforcement of foreign judgments, is a matter of national decision, unless specific treaty obligations have been entered into which do not contain public policy exceptions.

Issue III: Whether the compensation for the expropriation of assets belong to Pharmaca or Subpharm was consistent with international law?

A preliminary determination needs to be made as to what were in fact, the assets said to have been taken. Patria can assert diplomatic protection over its national enterprise. Assets of Pharmaca taken can be the subject of such intervention. Subpharm was created in Justia and thus considered a Justian national. With respect to Subpharm's assets, the question arises whether the International Court of Justice will permit the rights of those shareholders of Subpharm, who are Patrian nationals (Pharmaca which owned 80% of Subpharm), to be defended by Patria. The issue of discrimination in the nationalization of Subpharm should not arise with respect to compensation since the shares of Justian shareholders of Subpharm were also taken. Thus is could be argued that the foreign shareholders of Subpharm received national treatment.

In addition to shares in Subpharm, Pharmaca owned industrial property rights and could also assert the taking of contract rights (licensing agreement).

The issue of the consequences of taking of property is characterized under customary international law is either lawful or unlawful. A lawful expropriation gives rise to compensation; an unlawful taking gives rise to rights of restitution (usually in terms of damages rather than specific performance).

Were the takings lawful? It is now generally recognized that States have the right to expropriate the property of foreigners. The issue arises whether these are international law standards to regulate expropriation, or whether the standards for expropriation and its consequences depend solely on the national law of the expropriating state.

In this case, it must be recalled that the F. & C. Treaty specifically stated rules on compensation for expropriation.

The International Court of Justice must first decide on the legality of the expropriation before proceeding to a decision on compensation.

In response to ascertions of violation of international law standards for compensation (even if the takings are declared lawful) the Justian position is that there exist at present no international law standards setting forth criteria for the legality of expropriations or for compensation for expropriation. Current consensus as embodied in instruments such as the Charter of Economic Rights and Duties of States is that foreigners, including transnational corporations are within the jurisdiction of the State in which they operate and are subject to its laws.

According to this view, the standard to be observed is the national standard for compensation of Justia. This standard conforms with the goals of the instruments that are declaratory of a New International Economic Order.

Issue IV: Whether the provisions of Justian law that require transfer of technology disputes to be settled in Justian Courts, and according to Justian law, are consistent with international law?

The national laws of many Western countries provide that parties to contracts should have the right to choose the law to govern their contractual relationships and the forum before which disputes between the parties may be settled. This "autonomy of wills" of the parties to contracts, including international contracts, is subject to national public policy (ordre public) considerations. It has been asserted that because of its general acceptance, the principle of the autonomy of wills" has become a general principle of international law.

The Justian law on the transfer of technology does not require that transfer of technology disputes be settled in Justian courts according to Justian law. What is stated in Article 6 (21) and (22) is that the parties cannot by contract exclude the possible application of Justian law or the right of a party to go to a Justian court. The law does not seek, nor would it be able to force, the surrender by non-Justian courts of the right to take jurisdiction and to apply laws other than that of Justia. In its law, Justia does not allow the parties to deprive its courts or its law, which clearly states important public policy, of jurisdiction or application in appropriate cases. Article 6 cannot be said to impose Justian laws or Justian courts on

the parties, but rather to refuse to assist the parties in avoiding Justian public policy.

Although it has in the past, (in private contractual relations in Western countries subject to public policy restraints) been general practice to recognize the principle of "autonomy of wills", this principle remains one of national law essentially and has often been held by national courts to yield to public policy requirements.

It is clear that Justia's law on the transfer of technology is not contrary to international law. Moreover, even if there were some international law standard supporting the "autonomy of wills", issue 4 is not material to this case, unless it can be found that the Justian Industrial Property Law breaches international law and that the patent rights must be restored to Pharmaca.

With respect to the controversy between Justia and the parties to the licensing agreement on the question of its validity, it is undoubted that Justian law is appliable. The asserted freedom of the parties to chose their law and forum (autonomy of wills) is confined to their own relationship.