

THE 1983 JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

THE CHESTERFIELD HIGHWAY CASE

FEDERATION OF RICHMOND

v.

REPUBLIC OF BELTERRE

JUDGES' BENCH MEMORANDUM  
(Not to be seen by Participants)

Introduction

The 1983 Jessup Moot Court problem raises questions of treaty interpretation and termination, self-help, retaliation, and extra-territoriality.

Participants should be judged on their skills as advocates. Effective advocacy, of course, encompasses a great many aspects: mastery and organization of the facts, knowledge of legal sources, creativity in design and presentation of argument, marshalling of facts and law, allocation of emphasis, use of language, ability to answer questions, and so on. Judges are asked to evaluate competitors on the basis of these factors. In addition, they are encouraged to make full use of their own experience in determining what makes a good advocate.

The purpose of this Memorandum is to present in very broad outline the types of argument judges are likely to hear from the two sides and to indicate the principal sources upon which contestants will probably rely. It should not be read as the immutable "answer" to the problem; indeed, it does not purport to be an "answer" at all.

Many competitors may approach the problem in a very different way from those presented here, and judges should value novel, creative approaches. Nor should judges feel that particular authorities must be covered in detail; the selection of emphasis is an important component of good advocacy.

In this connection, it should be stressed that there is no substitute for thorough familiarity with the problem on the part of judges.

Judges are reminded that they are to judge the participants, and not their "clients." A judge's assessment of the relative strength of Applicant's or Respondent's position may color his or her rating of a contestant's skill, but it should not be considered as an independent basis for judgment.

Judges should also bear in mind that the problem is a complex one. Contestants may well not cover all of the issues that can be identified. While obviously "issue-spotting" is a critical skill that a good advocate must have, a mere listing of the many aspects of the problem is not to be favored. Nor should judges insist that considerable amounts of time be spent discussing the particular features of the problem in which they are most interested.

#### Jurisdiction and Standing

It is unlikely that either side will challenge the Court's jurisdiction in this case. Nor will either party challenge the standing of the other to raise its claims.

#### The Closing of the Chesterfield Highway

The typical submission of Richmond will run as follows:

(1) the use of the Highway by Belterre was not protected by Paragraph 4 of the Treaty, because it was in violation of international law;

(2) even if Belterre did not violate the Treaty strictu sensu, Richmond has an overriding right to act to defend its sovereignty, and the protection of its essential crops is an aspect of that sovereignty; and

(3) Richmond retained and/or Belterre acquiesced in the reasonable exercise of police powers over the Highway, and the refusal of permission to inspect cargoes in the circumstances was so unreasonable as to allow Richmond to terminate the Treaty.

Belterre can be expected to respond that:

(1) there was no proved violation of international law by anyone acting under authority of Belterre;

(2) the Treaty absolutely requires that the Highway be left open;

(3) the Treaty reserves no right to inspect cargoes or to erect checkpoints;

(4) to the extent that there was any danger to Richmond, Belterre's offer to provide certificates was a reasonable measure of protection; and

(5) the provisions of Articles 65 and 67 of the Vienna Convention on the Law of Treaties for suspension of treaties, including notice in writing, were not observed. The press conference of President Karafa may not have been a substitute for legal requirements (however, there is authority for the contrary view in the

Nuclear Tests case [1974] I.C.J. 457).

Judges should try to elicit a discussion of whether and to what extent, when relations between nations are governed by treaty, customary international law has any role to play, either in interpreting treaty terms or in "filling gaps" in the language of the agreement.

Both parties to the dispute are also parties to the Vienna Convention on the Law of Treaties which came into force in 1980. It is reproduced at 8 Int'l Legal Materials 679. The general rules regarding interpretation of treaties are set out in Articles 31 and 32, which may be cited by the parties. To what extent is a state permitted under international law to take "self-help" measures, such as closing the Highway, as long as such measures stop short of invasion of another state's territory? Are self-help steps subject to a test of reasonableness or propriety in the circumstances?

Richmond may argue that to read the Treaty as requiring it to tolerate the risk of dreadfully would be tantamount to seeing it as a concession of sovereignty to Belterre over Richmond's own territory. Such an argument should be probed; every treaty is to some degree a waiver of sovereign rights. This issue, in the specific context raised here, was considered by the Court in the Right of Passage case [1960] I.C.J. Rep. 6 concerning access to the former Portuguese enclave of Goa. Both sides should be expected to discuss that case.

The Blocking of Assets: The Belterre Order

The blocking order was instituted by Belterre in response to what was perceived to be a breach of the treaty by Richmond. Procedures for terminating and suspending treaties are set forth in Articles 65 and 67 and, as noted, a question may be raised by Belterre as to whether those procedures were followed when Richmond declared the treaty suspended.

The blocking order raises the issue of what remedies are properly available for breach since each party will accuse the other of treaty violation. Richmond may argue that the only remedy available for breach is found under Article 60 of the Vienna Convention on the Law of Treaties. That article permits the termination or suspension of a treaty as a consequence of its material breach. Therefore Richmond would argue that, apart from suspension and the dispute settlement provisions found in Articles 65 and 66, other remedies, such as the blocking order, violate international law.

There are strong arguments, however, that the right of retaliation, such as the blocking order, is preserved. At the time Article 60 was drafted, the International Law Commission expressly recognized that the right of non-forcible reprisal as a remedy for breach was preserved even though the Vienna Convention does not deal with with this issue directly. [1966] 2 Y.B. Int'l L. Comm'n 253-55. A reprisal is generally said to be an act, otherwise illegal, taken by a state against another state as a measure of self-help for the purpose of obtaining what it considers to be justice for an

alleged international law violation. A reprisal is expected to be proportional to the original violation and may encompass a wide variety of activity, probably including blocking or seizing assets.

2 H. Lauterpacht, Oppenheim's International Law 136-44 (7th ed, 1982);

G. Schwarzenberger, A Manual of International Law 184 (5th ed. 1967).

The United States, of course, blocked Iranian assets in 1979 as a response to violations of diplomatic law by Iran. The blocking of Iranian assets was never brought squarely before the ICJ, but was given some measure of approval in the Hostages Case, [1980] I.C.J. Rep. 3 at 28.

Blocking of foreign assets is a well-known means of obtaining diplomatic leverage during international disputes. In U.S. law, authority for such a move goes back to the Trading with the Enemy Act of 1917. The U.S. currently blocks property of Cuba, Vietnam, and Kampuchea. The United Kingdom froze Argentine property during the Falklands/Malvinas war.

Richmond will argue that the state of relations between the parties in September 1980 did not justify so radical a step, i.e. that the retaliation was not proportional to the alleged offense. It will claim that the blocking violates customary law principles of peaceful resolution of disputes, since the effect of the order was to cause serious harm to Richmond's economy.

Belterre will claim that it has the sovereign right to legislate for its citizens, and that there is no international legal obligation to allow commerce of nationals of another state. It may point to the U.S. Supreme Court's decision in Dames Moore v. Regan, 101 S. Ct. 2972, for the proposition that the blocking is exclusively its own domestic concern.

The Order of November 1

On November 1, 1980, the blocking order was extended to encompass third-country nationals owned or controlled by Belterre citizens. Richmond will contend that Belterre has no right to regulate the conduct of these entities. Belterre will claim that they are effectively of Belterre nationality.

A discussion of the meaning of nationality should be encouraged. Parties will cite the Nottebohm Case [1955] I.C.J. Rep. 4, (to permit exercise of diplomatic protection, nationality must be real and effective), and the Barcelona Traction Case [1970] I.C.J. Rep. 4 (a corporation's nationality may be independent of its shareholders'). There should also be consideration of the doctrine of extraterritoriality: to what extent can a state claim to regulate activities outside its borders that affect it, either internally or in its foreign relations? There is little international judicial precedent here, but states' practice (in the areas of antitrust, environmental regulation, prohibition of corrupt practices, etc.) should be reviewed by both sides. See article on the Fruehauf case 83, Harv. L. Rev. 579 (1970); Restatement, Foreign Relations Law of the United States (Revised) Tent. draft No. 3 (1982, §§ 419, 420; Restatement (2d), For. Relations Law of the United States §§ 30, 40.

Richmond might be asked whether the Court can award relief regarding the Tropical Fruits contract without having the Idyllic Islands as a party (citing Barcelona Traction). Belterre should be encouraged to discuss the legal value of its claim to be able to prohibit performance of a contract between entities incorporated in other countries.

The Measure of Damages

Richmond asks for an order in the nature of specific performance. Can the Court grant such an order? Parties should be probed on the authority of the ICJ to fashion remedies.

Questions should also be raised concerning:

1. the propriety of replacement cost as the measure of damages for property lost or destroyed;
2. the foreseeability of damage to Richmond through lost sales and lost opportunities;
3. the foreseeability of damage to Belterre through higher import/exports costs; and
4. the authority of the Court to order release of blocked property (akin to the Court's order in the Hostages Case to release the hostages, [1980] I.C.J. Rep. 3).

As to each of the claims for damages, parties should be questioned on their arguments that their opponents had a legal duty not to cause the harm alleged in the compromis.