

THE 1983 PHILIP C. JESSUP INTERNATIONAL
LAW MOOT COURT COMPETITION

The Chesterfield Highway Case

IN THE INTERNATIONAL COURT OF JUSTICE

March 1983

Between:

FEDERATION OF RICHMOND
Applicant

and

REPUBLIC OF BELTERRE
Respondent

MEMORIAL FOR THE RESPONDENT

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JURISDICTION

The parties have submitted the present dispute to this Court pursuant to the Statute of the International Court of Justice, Article 36, paragraph 1.

STATEMENT OF FACTS

The parties have accepted the facts as presented to this Court in the Compromis.

QUESTIONS PRESENTED

I.

Whether Richmond's unilateral termination of the Chesterfield Highway Treaty, and the activities associated therewith, were in accord with international law.

II.

Whether Richmond can bring a claim on behalf of its nationals who have failed to exhaust local remedies.

III.

Whether Belterre's blocking order was in accord with international law.

IV.

Whether Richmond's nationalization of Belterrian property at the Port of Xanadu was in accord with international law.

V.

Whether either party is entitled to relief.

SUMMARY OF ARGUMENT

The Rule of Exhaustion of Local Remedies should be invoked to bar the claims of Richmond nationals before this Court. There is no evidence that the nationals on whose behalf Richmond presents claims have made any attempt to redress their claimed injury in Belterre. Until they do so, an action on their behalf in an international forum by Richmond is premature.

The Chesterfield Highway Treaty established certain rights and obligations to which Richmond has not adhered. Richmond set up an "Agricultural Checkpoint" on the Chesterfield Highway in direct contravention of Paragraph 3 of the Highway Treaty. After Belterrian vehicles refused to honor this illegal checkpoint, Richmond terminated the Highway Treaty without notice and barricaded the Highway. In addition to being in violation of the notice provision of the Treaty, Richmond's termination cannot be condoned under any recognized justification for termination of a treaty: a fundamental change of circumstances had not occurred, Richmond had no right to resort to self-defense, and Belterre was not in material breach of the Treaty. By barricading the Highway, Richmond breached its obligations under Paragraph 2 of the Treaty, illegally infringed upon Belterre's servitude over the Highway, and denied Belterre its right of access to the sea under customary international law.

Richmond aggravated these violations by nationalizing Belterrian property located at the port of Xanadu, thereby breaching Paragraph 3 of the Highway Treaty. Richmond's nationalization also violates customary international law because it constitutes a taking of property without just compensation, as well as a discriminatory taking.

In contrast, Belterre's blocking order of September 25, 1980, was in full conformity with international law. In instituting the blocking order, Belterre was merely exercising its sovereign rights to control wealth and economic resources within its borders and to regulate trade. Furthermore, Belterre received approval of its blocking order from the International Monetary Fund. However, in the event that this Court should find that the blocking order was not a proper exercise of Belterre's sovereign rights, it was nevertheless justified under international law as a valid act of reprisal. Belterre's November 1, 1980, amendment to the blocking order was also in accord with international law. The November 1 amendment merely extended the application of the blocking order to nationals of Belterre who might not have been encompassed by the original order.

I. RICHMOND'S UNILATERAL TERMINATION OF THE CHESTERFIELD HIGHWAY TREATY,¹ AND THE ACTIVITIES ASSOCIATED THEREWITH, WERE NOT IN ACCORD WITH INTERNATIONAL LAW.

A. Richmond breached its obligations under the Highway Treaty by setting up an "Agricultural Checkpoint" at the Belterre border.

Paragraph 3 of the Highway Treaty provides that Belterrian goods transported over the Highway "shall not be considered to be within the customs territory of Richmond, and shall not be subject to inspection ... or interference of any kind by the authorities of Richmond."²

Richmond's demands that Belterre make its shipments available for inspection and the establishment of an "Agricultural Checkpoint" at the Belterre-Richmond border are in direct contravention of the express language of the Highway Treaty.³

B. Richmond breached its obligations under the Highway Treaty and customary international law by terminating the Treaty.

1. Richmond breached its obligation under the Highway Treaty to give Belterre two years notice prior to termination. Paragraph 5 of the Highway Treaty provides that after January 1, 1975, neither party may terminate its obligations under the Treaty except "upon two year's express written notice to the other State party."⁴ Richmond cannot escape its obligation under this provision by attempting to characterize its action as a suspension rather than a termination. A suspension must be temporary and the treaty must be resumed when the conditions causing the suspension lapse.⁵ There is no evidence of any intent on the part

1. Treaty concerning the Use of Xanadu Harbor and the Chesterfield Highway, Jan. 1, 1965, Richmond-Belterre [hereinafter cited as Highway Treaty].

2. Highway Treaty, supra note 1, para. 3.

3. A treaty should be interpreted in accordance with the ordinary meaning of its terms in their context. A. McNair, *The Law of Treaties* 365 (1961); T. O. Elias, *The Modern Law of Treaties* 72 (1974).

4. Highway Treaty, supra note 1, para. 5.

5. T. O. Elias, supra note 3, at 299. C.f., *Louis Wolf and Co. v. United States*, 1 Cust. Ct. 213, 219 (1938).

of Richmond to resume the Highway Treaty. More than two years have elapsed since the "suspension" of the Treaty by Richmond and the danger which prompted that act has long passed; despite this, concrete barricades still block Belterre's access to the Highway. Thus, Richmond's action is more properly characterized as a termination than as a suspension.⁶

2. Richmond breached its obligation to perform the Highway Treaty in good faith. Under the norm pacta sunt servanda, every treaty is "binding upon the parties to it and must be performed by them in good faith."⁷ This principle represents an essential element in the relations between States, without which international law would be a mere mockery.⁸ Thus, nations may not freely refuse to perform their obligations under a treaty, nor may they unilaterally terminate or suspend a treaty simply because its terms are no longer agreeable.⁹

3. Richmond cannot invoke the doctrine of "fundamental change of circumstances" to justify its unilateral termination of the Highway Treaty.

a. Article 62 of the Vienna Convention represents a codification of customary international law regarding the doctrine of fundamental change of circumstances. The doctrine of fundamental change of circumstances (rebus sic stantibus), as it exists in customary inter-

6. Moreover, Richmond did not properly provisionally suspend the Treaty. See argument at II.3.c. infra.

7. Vienna Convention on the Law of Treaties, opened for signature 22 May 1969, art. 26, U.N. Doc. A/CONF. 39/127 [hereinafter cited as Vienna Convention]. See also E. Jimenez Archaga, Curso de Drecho International Publico 133 (1959); W. Bishop, International Law 133 (2d ed. 1962); T. O. Elias, supra note 3, at 40; Hassan, Good Faith in Treaty Formation, 21 Va. J. Int'l L. 443 (1981).

8. B. Cheng, General Principles of Law as Applied by International Courts and Tribunals 113 (1953).

9. A. McNair, supra note 3, at 494.

national law,¹⁰ is embodied in Article 62 of the Vienna Convention. The redactors of the Convention, realizing the enormous potential for abuse in this doctrine¹¹ purposely framed the language of Article 62 in a negative tenor.¹² Article 62, which applies equally to terminations and suspensions,¹³ states that the doctrine may not be invoked unless four conditions are met: 1) the alleged change of circumstances must have occurred with regard to those existing at the time of the conclusion of the treaty; 2) the alleged change of circumstances must have been unforeseen by the parties; 3) the alleged change must go to the raison d'etre of the agreement; and 4) the alleged change must have the effect of radically transforming the extent of obligations still to be performed under the treaty.

b. Richmond's unilateral termination did not fulfill the requirements of Article 62.

1) The alleged change of circumstances claimed by Richmond was foreseeable. To invoke the doctrine of fundamental change of circumstances, the change forming the basis for the terminating party's claim must have been unforeseen by the parties. The change upon which Richmond bases its claim--the presence of a dangerous insect in New Hostia--was not only foreseeable, but inevitable. Being primarily an agrarian state, Richmond was aware of the ever-present menace which harmful pests present to agriculture. Although the dreadfully in particular may not have been foreseen, the general circumstance certainly

10. In the Fisheries Jurisdiction Case, this Court recognized that Article 62 represents "a codification of existing customary international law on the subject of the termination of a treaty relationship. (U.K. v. Ice.) 1973 I.C.J. 3.

11. Report of the Commission to the General Assembly, 2 Y. B. Int'l L. Comm. 257 (1963).

12. Id. at 259.

13. Vienna Convention, supra note 7, art. 62, para. 3.

was. Richmond cannot reasonably contend it was not foreseeable that one or more of the crops in the surrounding region would at some point in time be attacked by harmful pests. One of the primary purposes of customs inspection of agricultural products is to prevent the importation of these pests. Thus, when Richmond, in Paragraph 3 of the Treaty, gave up its right to inspect Belterrian goods transported over the Highway, it entrusted the Belterrian authorities with the duty of ensuring that these pests would not be transported into Richmond.¹⁴ Having foreseen the possibility of the problem and having previously agreed upon its resolution, Richmond fails to satisfy the requirement that the alleged change be unforeseen by the parties when the treaty was concluded.

2) The alleged change of circumstances claimed by Richmond did not affect the raison d'etre of the agreement. The doctrine of fundamental change of circumstances is easily misused "to excuse the breach of a treaty obligation that a State finds it inconvenient to fulfill."¹⁵ The redactors of the Vienna Convention recognized this potential misuse when they commented that "the risks to the security of treaties which this doctrine presents in the absence of any general system of compulsory jurisdiction are obvious. The circumstances of international life are always changing and it is easy to allege that the changes render the treaty inapplicable."¹⁶ The doctrine, therefore, is limited to those changes which affect the raison d'etre of the agreement.

14. This duty derives from Belterre's covenant to use the Highway in a manner respectful of Richmond's territorial sovereignty. Highway Treaty, supra note 1, para. 4.

15. J. Brierly, *The Law of Nations* 244 (4th ed. 1949).

16. Report of the Commission to the General Assembly, supra note 11, at 257.

The absence of the dreadfly in New Hostia in 1965, the circumstance at the time the Highway Treaty was concluded, was not an essential basis of the conclusion of the Treaty. The purpose of the Treaty is set forth in Paragraph 1--"to assure that the people of Belterre shall not be disadvantaged by the accident of geography which has denied Belterre direct access to the sea." Thus, the only change of conditions sufficient to uphold application of the doctrine of fundamental change of circumstances in this case would be a change in the geographical relations denying Belterre direct access to the sea.¹⁷

3) The alleged change of circumstances claimed by Richmond did not affect the obligations still to be performed under the treaty. The presence of the dreadfly in New Hostia has not altered either Richmond's or Belterre's obligations under the treaty. Richmond remains obliged to allow Belterre uninterrupted use of the Highway. Belterre remains obliged to use the Highway in a manner consistent with international law and respectful of Richmond's territorial sovereignty. These obligations remain unaffected.

c. Richmond's unilateral determination that a fundamental change of circumstances had occurred did not fulfill the procedural requirements of customary international law.

1) The procedural requirements of Article 65 of the Vienna Convention do not apply to this Treaty. Article 4 of the Vienna Convention specifically provides that, except for those portions of the Convention which codify customary international law, the Convention only applies to those treaties concluded after January 27, 1980. The Highway Treaty was concluded in 1965; therefore, the procedural provisions for

17. F. Vali, *Servitudes of International Law* 327, 329 (2nd ed. 1958).

suspension in Article 65 are not applicable to the Highway Treaty.¹⁸

2) Under customary international law, Richmond may not unilaterally determine that a fundamental change of circumstances has occurred. The doctrine of fundamental change of circumstances "is particularly subject to self-serving and subjective judgments by a State invoking it."¹⁹ To prevent such abuse, the invocation of the doctrine "does not give a State the right ... to declare itself free from the obligations of a treaty, but only entitles it to claim to be released from them by the other party ... to the treaty."²⁰ When the other parties to the treaty do not acknowledge the emergence of a fundamental change of circumstances, the party claiming the change must have its claim decided by a competent international tribunal or authority.²¹ Pending the determination of the claim by such an authority, the claimant may provisionally suspend the performance of its obligations under the Treaty.²²

3) Richmond did not seek a determination by a competent international tribunal and thus cannot be said to have provisionally suspended the Treaty. Richmond did not first seek to have its claim determined by this Court. Richmond did not even seek a determination by the Court directly after its suspension of the Treaty. Richmond did not

18. The Convention embodies customary international law only to the extent that evidence exists to substantiate that a particular provision reflects international custom. In the absence of such proof, a provision is presumed not to embody customary international law.

19. Restatement (Revised) of the Foreign Relations Law of the United States § 346 (Tent. Draft No. 1, Apr. 1980) (comment (e)).

20. 1 H. Lauterpacht, Oppenheim's International Law § 539 (8th ed. 1955).

21. Id.; Harvard Draft Convention on the Law of Treaties, art. 28, reprinted in 29 Am. J. Int'l L. (Supp.) 653, 1096-97 (1935) [hereinafter cited as Harvard Draft].

22. Harvard Draft, supra note 21, art. 28(b).

come to this Court until more than two years had passed and even then, it did not come primarily to seek a determination of its claim of a fundamental change of circumstances, but to challenge Belterre's response to its actions. Richmond's delay in submitting this issue to this Court evidences its failure to abide by the only procedure required of it by customary international law.

4) Alternatively, if Richmond did provisionally suspend the Highway Treaty, it is liable for an unjustified suspension. While it is for this honorable Court to determine whether a fundamental change of circumstances has occurred, if it is determined that it has not, Richmond may be held liable for the effects of its unjustified suspension.²³

4. Richmond's unilateral termination of the Highway Treaty was not justified by self-defense.

a. Self-defense may only be exercised in cases of armed attack. Richmond may not justify its termination of the Treaty as an act of self-defense in response to a threat to its economic interests. Article 51 of the Charter of the United Nations,²⁴ which delimits the scope of the right of self-defense, confines that right to the case of an armed attack.²⁵

b. Alternatively, if self-defense may be exercised to protect economic interests, it is not justified in this case.

1) Self-defense is justified only in cases of necessity.

In the Caroline Steamer Case, Daniel Webster expressed what has now

23. Id. art. 28 (comment).

24. U.N. Charter, art. 51.

25. P. Jessup, A Modern Law of Nations 165-166 (1948); Report of the 48th Conference of the International Law Assoc., New York, pp. 512-513 (Statements of Judge Krylor of the U.S.S.R.).

become a famous formulation of the right of self-defense. Webster proclaimed that an act of self-defense is justified only when the necessity for the action is "instant, overwhelming, leaving no choice of means, and no moment for deliberation."²⁶

2) Richmond's unilateral termination of the Highway Treaty was not necessary, evidenced by the reasonable alternative proffered by Belterre. In response to Richmond's expression of concern over the presence of the dreadfly in New Hostia, Belterre offered to inspect and certify all fruit coming from the region nearest New Hostia. Inspection by Belterrian authorities would prevent the shipment of any dreadfly infested fruit through Richmond territory, while conforming to the terms of the Treaty. The presence of the dreadfly in New Hostia did not necessitate suspension of the Chesterfield Highway Treaty because a choice of means was available.

5. Richmond's unilateral termination of the Highway Treaty was not justified by a material breach on the part of Belterre.

a. Belterre performed its obligations under the Highway Treaty. In accordance with the provisions of the Highway Treaty, Belterre paid Richmond \$50 million over a period of ten years for the right in perpetuity of access to and use of the Chesterfield Highway. Moreover, Belterre at all times used the Highway in full conformity with international law and respectful of the territorial sovereignty of Richmond.

b. Belterre did not abuse its rights under the Highway Treaty. To constitute an abuse of rights under international law, a legal right must be exercised for the purpose of causing injury to

26. 29 British & Foreign State Papers 1137-38 (1957); See 2 J. Moore, Digest of International Law 412 (1906).

another.²⁷ At no time did Belterre exercise its rights under the Highway Treaty in a manner intended to cause harm to Richmond. Nor did Belterre exercise its rights in a manner which, in fact, caused harm to Richmond. Richmond's claim that Belterre introduced dreadflies into Richmond territory is not supported by the evidence. The only confirmed presence of dreadfly was within the borders of New Hostia. There have never been any dreadflies in Belterre, either before or after Richmond closed the Highway.

C. Richmond breached its obligations under the Highway Treaty and under customary international law by barricading the Chesterfield Highway.

1. Richmond breached its obligation under the Highway Treaty to allow Belterre use of the Chesterfield Highway. In Paragraph 2 of the Highway Treaty, Richmond covenants to allow Belterre free access to and use of the Chesterfield Highway. By erecting concrete blockades on the Highway at the border with Belterre and at the entrance to the Highway at the Port of Xanadu, Richmond has breached the Highway Treaty.

2. Richmond's barricade of the Chesterfield Highway illegally infringed upon Belterre's servitude over the Highway.

a. The Highway Treaty created an international servitude in favor of Belterre. International law recognizes the existence of servitudes, whereby a part of the territory of one State is in a limited way made to perpetually serve a certain purpose or interest of another State.²⁸ An international servitude consists of three elements:

1) an international right; 2) a permanent right; and 3) a right in

27. B. Cheng, supra note 8, at 121.

28. 1 H. Lauterpacht, Oppenheim's International Law § 203 (8th ed. 1955); 1 P. Guggenheim, Traite de Droit International Public 294-403 (1953); C. Fenwick, International Law 386-405 (3d ed. 1948). See generally, H. Reid, International Servitudes in Law and Practice (1932); F. Vali, Servitudes of International Law (2d ed. 1958).

rem.²⁹ The Treaty executed between Belterre and Richmond granted such a servitude. The grant was between sovereign States, was granted "in perpetuity,"³⁰ and pertained to the right of transit over the territory of Richmond, thereby satisfying all three elements of an international servitude.

b. The servitude survives the Highway Treaty. An international servitude acquires an existence independent of the agreement which created it; accordingly, the termination of the agreement does not abolish it.³¹ Although the treaty which created the servitude may be abolished to the extent that it regulates the modus of the exercise of the servitude, the servitude itself is a permanent right which survives the treaty.³² As expressed by Dr. Reid, "[t]he fundamental question is the intention of the parties to establish a permanent relationship between their respective territories; a status that would outlive the treaty itself."³³ Paragraph 2 of the Highway Treaty specifically states that the grant of access to and use of the Chesterfield Highway is "in perpetuity." The clear and unambiguous wording of this provision indicates an intent to create a permanent right,³⁴ for which Richmond has been duly compensated. Richmond's barricade of the Highway abrogates this right and is therefore a violation of international law.

3. Richmond's barricade of the Highway deprived Belterre, as a land-locked State, of its right of access to the sea under customary international law. Highly qualified publicists have noted that a land-

29. H. Reid, supra note 28, at 14-25.

30. Highway Treaty, supra note 1, para. 2.

31. Claus, Die Lehre von den Staatsdienstbarkeiten 118 (1894); H. Reid, supra note 28, at 19-21.

32. Id.

33. Id. at 20-21.

34. See note 3 supra.

locked state has an inherent right of access to and from the sea under international law.³⁵ This right of access is inferrable from well-established practices and precedents, and is evidenced by innumerable bilateral treaties,³⁶ as well as by a number of international conventions³⁷ and General Assembly resolutions.³⁸ These authorities "giv[e] rise to a presumption in favor of emergence of a customary rule of international law."³⁹ The resulting right exists independent of any treaty; a treaty can do no more than regulate the modus of its exercise.⁴⁰ By erecting concrete barriers to the Highway at the Richmond-Belterre border, Richmond blocked Belterre's only feasible means of access to the sea, thus depriving Belterre of this important right.

II. RICHMOND CANNOT BRING A CLAIM ON BEHALF OF ITS NATIONALS WHO HAVE FAILED TO EXHAUST LOCAL REMEDIES.

A. International law demands the exhaustion of local remedies before institution of international proceedings.

The Rule of Exhaustion of Local Remedies prohibits a State from instituting an action in an international court on behalf of its

35. Lauterpacht, Freedom of Transit in International Law, 44 Grotius Society Transactions 313 (1958-59); Govindaraj, Land Locked States and Their Right of Access to the Sea, 14 Indian J. Int'l L. 190 (1974).

36. "The conclusion of innumerable bilateral treaties ... raises a presumption, rebuttable only by contrary proof, as to the existence of a customary right of transit." Govindaraj, supra note 35, at 191.

37. Draft Convention on the Law of the Sea, art. 125, U.N. Doc. A/CONF.62/WP.10/Rev.3/Add. 1 (1980); Convention on Transit Trade of Land Locked States, Art. 2, 8 July 1965, 597 U.N.T.S. 42, 48; General Agreement on Tariffs and Trade, art. 5, para. 2, opened for signature 30 Oct. 1947, 55 U.N.T.S. 187, 210.

38. G.A. Res. 1028, 11 U.N. GAOR Supp. (No. 17) 114, U.N. Doc. A/3572 (1957); G.A. Res. 1125, 11 U.N. GAOR Supp. (No. 17) 164, U.N. Doc. A/3572 (1957); G.A. Res. 2086, 20 U.N. GAOR Supp. (No. 14) 122, U.N. Doc. A/6014 (1965); G.A. Res. 2569, 24 U.N. GAOR Supp. (No. 30) 247, U.N. Doc. A/7630 (1969); G.A. Res. 2750, 25 U.N. GAOR Supp. (No. 28) 241, U.N. Doc. A/8028 (1970); Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974).

39. Govindaraj, supra note 35, at 190-91.

40. Id. at 191; Lauterpacht, supra note 35, at 318, 349.

nationals until those nationals have exhausted all available means under the municipal law of the foreign jurisdiction for redressing their injuries.⁴¹ This rule is a well-established norm of customary international law,⁴² having been repeatedly recognized by international tribunals,⁴³ including this Court.⁴⁴

B. The nationals on whose behalf Richmond brings this action have made no attempt to exhaust their remedies through Belterre.

Richmond's nationals owning assets in Belterre which were frozen by the order of October 25, 1980, have made no attempt to redress their claimed injury through the courts of Belterre. To the extent that they have not done so and have not exhausted all such avenues, Richmond cannot at this time bring their claims before this Court.

III. BELTERRE'S BLOCKING ORDER WAS IN ACCORD WITH INTERNATIONAL LAW.

A. Belterre's act of freezing the assets of Richmond nationals was in accord with international law.

1. Economic regulation is within Belterre's sovereign right.

The right of every State to exercise complete control over all wealth and resources within its territory is an essential attribute of State sovereignty.⁴⁵ This includes the right of a State to block the assets

41. Restatement of Responsibility of States for Injuries to Aliens, § 206 (1965); Harvard Draft Convention on International Responsibility, art. 19 (1961); See 8 M. Whiteman, Digest of International Law § 7 (1967).

42. Interhandel Case (Switz. v. U.S.) 1959 I.C.J. 5, 27.

43. Melilla, Ben Kiran Claim (Great Britain v. Spain), 2 Rep. Int'l Arb. Awards 615, 731 (1924); Inter-Ocean Ry. Co. of Mexico Claim (Mexico v. United Kingdom) 5 Rep. Int'l Arb. Awards 178, 186 (1931); The Ambatielos Claim (Greece v. United Kingdom) Commission of Arbitration, H.M.S.O. No. 59-129 (1956); Finish Vessels Case, Bagge Sole Arbitrator, 3 Rep. Int'l Arb. Awards 1479 (1934).

44. Interhandel Case, supra note 42; Panevezys-Saldvtiskis Railway Case, P.C.I.J. ser. A/B, No. 76 at pp. 4, 21 (1939).

45. Charter of Economic Rights and Duties of States, supra note 38, art. 2; H. Lauterpacht, International Law 28 (1975); G. Elian, The Principle of Sovereignty Over Natural Resources 15 (1979).

of aliens within its borders. At the end of World War II, the War Claims Commission rejected the claims of many American nationals, whose assets had been blocked in enemy controlled territories. Refusing compensation for these claims, the Commission stated "where the account was not sequestered and still exists, there is no loss other than the one resulting from inaccessibility to funds. The provisions bringing the funds under the control of the local authorities are legitimate restraints on the use of funds."⁴⁶ The Commission noted further that restraints such as these "may be imposed in times of peace as well as in times of war, and cannot furnish the basis for a compensable claim."⁴⁷

2. Belterre's freezing of assets was imposed in conformity with the International Monetary Fund Agreement.⁴⁸

a. The IMF Agreement makes a general distinction between regulation of capital transfers and regulation of current payments and transfers. The IMF Agreement divides payments and transfers of currency into two basic categories--capital movements and current transactions--and affords different treatment to each. Under article VI, section 3, a State may freely regulate capital transfers, whereas under article VIII, section 2(a), however, a State may only regulate current transactions with the approval of the Fund. "Current transactions," as used in the IMF Agreement, is a term of art which includes some categories of payments and transfers that would be regarded under a classic economic interpretation as capital in character.⁴⁹ Article XIX(i) defines

46. Supplementary Report of the War Claims Commission, H. Doc. 67, 83d Cong., 1st Sess., at p. 139 (1953).

47. Id.

48. The Articles of Agreement of the International Monetary Fund, 60 Stat. 1401, T.I.A.S. #1501, Dec. 27, 1975. [Hereinafter cited as IMF Agreement].

49. Gold, The International Monetary Fund and Private Business Transactions 12 (1965).

"current transactions as:

(i) Payments ... which are not for the purpose of transferring capital, and includ[ing] without limitation:

- (1) All payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities.
- (2) Payments due as interest on loans and as net income from other investments;
- (3) Payments of moderate amount for amortization of loans or for depreciation of direct investments.
- (4) Moderate remittances for family living expenses.

b. Belterre received IMF approval for restrictions on current payments and transfers. It is unclear whether the assets frozen by Belterre constitute current or capital transactions. Nevertheless, to the extent that any of these assets are considered current payments or transfers, Belterre obtained the necessary approval of the IMF to restrict such transactions.

Decision 144 of the IMF⁵⁰ sets forth the procedure to be followed to obtain the approval of the Fund when such approval is necessary.⁵¹ The IMF must be notified within thirty days after imposition of the restrictions; in the absence of an objection from the IMF within thirty days of the notice, the member State may assume that the IMF has no objection to the imposition of the restrictions. Belterre gave notice to the IMF in accordance with Decision 144 and has received no objection, thus signifying the IMF's approval of the restrictions.

c. Insofar as Belterre's freezing of assets restricts capital transfers, it does not violate the IMF agreement. To the extent that

50. IMF Decision No. 144 (52/51) (1952).

51. Gold, *The Fund Agreement in the Courts: Parts VIII-XI 80-81* (1976).

any of the frozen assets can be characterized as capital, the restrictions need not be approved by the IMF. Under article VI, section 3, Belterre is free to restrict capital transfers without fund approval. Moreover, the IMF has interpreted article VII, section 3, which prohibits discriminatory currency practices, as not applying to restrictions on capital transfers.⁵² Therefore, although the blocking order is discriminatory, in that it restricts only the assets of Richmond and its nationals, it does not constitute a violation of the Agreement.

3. The blocking of assets does not constitute a "taking." The temporary blocking of aliens' assets within the territory of a State has not been regarded as a taking of property under international law.⁵³ Such action only suspends the right of withdrawal; it does not affect ownership.⁵⁴ An action affecting the property rights of an alien can only constitute a taking of property if the State or its nationals are enriched. "The theory of enrichment holds that there is State responsibility only when ownership of the property is transferred to the State or a private person. There is, however, no State responsibility when the property right is suspended."⁵⁵ Belterre has taken no action to affect the ownership of the frozen assets. To the contrary, Belterre has taken steps to protect the ownership of the frozen assets, by holding liquid assets in interest-bearing accounts and immunizing other goods from Belterre's legal process.

52. IMF Decision no. 541 (56/39) (1956).

53. Restatement of Responsibility of States for Injuries to Aliens, supra note 41, reporters comments to § 192.

54. Id.

55. G. Scelle, A propos de l'establisement du monopoles assurances en Uruguay 116 (1968).

B. Belterre's order prohibiting the performance of any contract for the benefit of Richmond or its nationals is in accord with international law.

1. Trade regulation is within Belterre's sovereign right. One of the basic elements of a State's sovereignty is the right to regulate trade. "A State is free to set up almost any barrier to trade and intercourse against one or all States. She may prohibit trade entirely, or in certain articles, or with certain States."⁵⁶ This principle "is too well established to permit disagreement in the context of existing international law."⁵⁷ Belterre, in prohibiting the performance of contracts with Richmond and its nationals, was merely exercising its sovereign right to regulate trade.

2. A prohibition of the performance of contracts does not constitute a taking of property. The exercise of a State's sovereign right to restrict trade has not generally been considered a taking of property in international law, even when it results in the deprivation of contract rights. The single situation in which the interference with contractual relationships has been considered to be a taking is when the contract rights are ancillary to expropriated property.⁵⁸ In other words, the underlying action must be one of expropriation of real property resulting in the destruction of contract rights. However, as noted by the Foreign Claims Settlement Commission, if a deprivation of

56. C. Eagleton, *International Government* 86 (3rd ed. 1957). See also K. Hyder, *Equality of Treatment and Trade Discrimination in International Law* 182 (1968); Henry, *Protection Against Non-Commercial Risks in Patent Licensing*, 10. *J. World Trade L.* 421, 425 (1976); Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 *Am. J. Int'l L.* 545, 547 (1961); W. Surrey, *A Lawyer's Guide to International Business Transactions* 61 (1962).

57. Muir, *Boycott in International Law*, 9 *J. Intl L. & Econ.* 187, 192 (1974).

58. See *German Interests in Polish Upper Silesia*, 1926 P.I.C.J. 510; *Norwegian Shipowner's Case*, 1 *Rep. Int'l Arb. Awards* 207 (1922).

contract rights is merely a consequence of a lawful government action which is not an outright expropriation, then that action is not a taking and international law affords no remedy.⁵⁹

C. Belterre's blocking order was not an act of aggression.

Article 2(4) of the U.N. Charter defines aggression as a threat or use of force against another State. Acts of an economic nature do not rise to the level of "aggression."⁶⁰ Indeed, a recent attempt to expand the definition of aggression to include economic sanctions was voted down in the General Assembly.⁶¹ Belterre's blocking order was not an act of force and thus did not amount to an act of aggression.

D. Belterre's blocking order did not constitute an act of economic coercion in violation of U.N. General Assembly resolutions.

1. Neither Belterre nor Richmond are signatories to any U.N. General Assembly resolutions dealing with economic coercion. Both Belterre and Richmond abstained on every vote of the General Assembly concerning resolutions dealing with economic coercion. Richmond cannot now seek to impose upon Belterre obligations which it itself was not willing to accept.

2. U.N. resolutions are not legally binding instruments.

Resolutions of the U.N. General Assembly are mere recommendations⁶² and do not have the force of law.⁶³ An attempt to give these resolutions

59. Claim of Frederick Fraenkel, Foreign Claims Settlement Commission, Decision No. 356, Docket No. 706 (1954).

60. See Summary Report of the Sixth Committee, 29 U.N. GAOR, C.6 (1471st mtg) 41, 42, para. 7, U.N. Doc. A/C.6/SR1471 (1974).

61. G. A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A19631 (1974).

62. U.N. Charter, art. 10; Southwest Africa Cases, Second Phase, Judgment, 1966 I.C.J. 4, 50-51.

63. E. Hambro & L. Goodrich, Charter of the United Nations 104 (1964); Haight, The New International Economic Order and the Charter of Economic Rights and Duties of States, 9 Int'l Lawyer 591, 597 (1975).

more binding authority was defeated at the Conference at San Francisco.⁶⁴

3. In any event, Belterre's blocking order is not "economic coercion" as envisioned by U.N. Resolutions. Although several U.N. resolutions prohibit acts of "economic coercion" designed to subordinate the exercise of another State's sovereign rights,⁶⁵ they were not meant to encompass the type of situation here. "It is inevitable and desirable that States will be concerned with and will seek to influence the actions of other States, and the objective of international law is not to prevent such activity but rather to insure that it is compatible with the sovereign equality of States and self-determination of their people."⁶⁶ Belterre's blocking order was not meant to disrupt sovereign equality, but to achieve it. The closing of the Chesterfield Highway had once again placed Belterre in the position of being disadvantaged by an accident of geography. The blocking order was merely an attempt to place Belterre in bargaining parity with Richmond concerning the Highway closing. The blocking order was not designed to achieve an upper hand for Belterre, merely an even one.

E. Even should this Court find Belterre's blocking order to be a violation of international law, it is justified as a valid act of reprisal.

1. Under international law, reprisal justifies otherwise illegal acts. Reprisals are an allowable method of retaliation under international law whereby a State may redress a wrong inflicted by another State.⁶⁷ Acts otherwise considered illegal are permitted for the

64. See P. Jessup, *supra* note 25, at 144-145.

65. See e.g., U.N. Declaration on Principles of International Law, G.A. res. no. 2625, reprinted in 65 Am. J. Int'l L. 243 (1971).

66. Remarks of Mr. Sinclair (United Kingdom), Special Committee on Principles of International Law, U.N. Doc. A/AC.125/SR.114.

67. 2 H. Lauterpacht, *supra* note 28, §§ 39-41.

purpose of reprisal if three requirements are met: 1) a prior illegal act; 2) prior negotiation; and 3) a proportionate response.⁶⁸

2. Belterre's blocking order was a valid act of reprisal.

a. Belterre was responding to an illegal act. Belterre issued its blocking order in direct response to the closing of the Chesterfield Highway. This prior international delinquency on the part of Richmond justifies Belterre's resort to an act of reprisal.⁶⁹

b. Belterre engaged in negotiations with Richmond prior to the closing of the Highway. Prior to Richmond's closing of the Chesterfield Highway, Belterre attempted, in the spirit of international cooperation, to negotiate with Richmond concerning the dreadful issue. While asserting its legitimate rights under the Treaty, Belterre offered a reasonable alternative to Richmond's demands in an attempt to prevent any interruption of Belterre's legal use of the Highway. It was Richmond, not Belterre, that abruptly broke off these negotiations and illegally closed the Highway.

c. Belterre's response was proportionate. Richmond's closing the Chesterfield Highway interrupted Belterre's flow of international trade by denying it access to the sea. Belterre, although lacking the ability to deny Richmond access to the sea, designed its response to similarly interrupt the flow of international trade of Richmond.

F. The November 1, 1980, amendment to the blocking order was a lawful exercise of Belterre's jurisdiction.

1. Belterre has jurisdiction over its nationals. An essential and necessary bond unites a state and those who bear its nationality.

68. Naulilua Incident (Port. v. Ger.) 2 U.N. Rep. Int'l Arb. Awards 1012 (1928).

69. See argument at I. supra.

This bond provides a sufficient basis to support the State's exercise of jurisdiction over all its nationals, regardless of where they are located.⁷⁰

2. The corporations encompassed by Paragraph (iv) of the amendment are nationals of Belterre. The nationality of a corporation may be determined by one of several criteria.⁷¹ One widely recognized basis of corporate nationality is the "control test."⁷² Under this test, the corporation takes the nationality of the State whose nationals own a controlling percentage of the corporation. This rule is based on practical policy considerations: "As early as 1896 the French Cour de Cassation found that a determination of corporate nationality based solely on place of incorporation dwelled only on form at the expense of substance and was thus an inconvenient way to determine corporate nationality."⁷³ Thus, it is sufficient for the purposes of paragraph (iv) of the amendment that Tropical Fruits, Ltd., and similarly situated corporations are controlled by nationals of Belterre.

IV. RICHMOND'S NATIONALIZATION OF BELTERRIAN PROPERTY AT THE PORT OF XANADU VIOLATED INTERNATIONAL LAW.

A. Richmond's nationalization of Belterrian property violates the Highway Treaty.

Under paragraph 3 of the Highway Treaty, Belterrian goods at the Port of Xanadu intended to be transported over the Chesterfield Highway are immune from "inspection, attachment, sequestration, or interference

70. Restatement of Responsibility of States for Injuries to Aliens, supra note 41, comment to § 30; J. Sweeney, The International Legal System 488 (2d ed. 1981).

71. I. Schwarzenberger, International Law 389 (3rd ed. 1957).

72. Id.; German Interests in Polish Upper Silesia, 1926 P.I.C.J. 510; Restatement of the Foreign Relations Law of the United States § 27, comment d (1962).

73. Williams & Chrussacki, The Nationality of Corporations, 49 L.Q. Rev. 334, 335 (1933).

of any kind by the authorities of Richmond."⁷⁴ By nationalizing Belterrian goods intended to be transported over the Highway, Richmond has violated the Treaty's prohibition of both "sequestration" and "interference."

B. Richmond's nationalization of Belterrian property constitutes an illegal taking of property under international law.

1. Richmond's nationalization of Belterrian property is illegal because it is a taking of property without just compensation. It is a well accepted rule of international law that the nationalization of alien property must be accompanied by just compensation.⁷⁵ Richmond has rendered no compensation for the property it nationalized at the Port of Xanadu, nor has it made an offer to do so.

2. Richmond's nationalization of Belterrian property is illegal because it is discriminatory. A taking of property, even if otherwise lawful, is illegal under international law if directed against particular aliens by reason of their nationality.⁷⁶ This principle, which is accepted even by Communist nations,⁷⁷ prohibits the type of differential treatment afforded the nationals of Belterre by Richmond's nationalization.

C. Richmond's nationalization of art at the port of Xanadu violates international law.

1. This Court should recognize art as protected property under international law. The protection of enemy art and other cultural

74. Highway Treaty, supra note 1, para. 3.

75. Charzow Factory Case, 1929 P.I.C.J. 183; Anglo-Iranian Oil Case, 1952 I.C.J. Rep. 166 (Dissenting Opinion); see Neville, The Present Status of Compensation by Foreign States for the Taking of Alien Owned Property, 13 Vand. J. of Transnational L. 51 (1980).

76. de la Pradelle, Project Provisoire de Resolutions (1950); Herz, Expropriation of Foreign Property, 35 Am. J. Int'l L. 249 (1941).

77. Donke, Foreign Nationalizations, 55 Am. J. Intl L. 585, 605 (1961).

property in time of war has long been considered a part of customary international law.⁷⁸ In recent years, however, the international community has begun to realize the need for protection of art in time of peace as well.⁷⁹ Illegal trade in art has reached alarming proportions,⁸⁰ resulting in many nations being deprived of their national artistic patrimony along with the social and psychological benefits these works of art can produce.⁸¹ This Court should move to the forefront in recognizing that art treasures should be protected no less vigorously in times of peace than in times of war, and in condemning the theft of a vital part of a nation's cultural heritage.

2. Richmond's nationalization of Belterre's art constitutes theft. Professor Bator, in his article on the illicit transfer of art, notes that an international theft of art may result from any form of illegal taking or unlawful appropriation.⁸² Thus, Richmond's unlawful expropriation of Belterre's art treasures is nothing short of theft, and this Court should order the immediate return of this invaluable property.

D. Richmond's nationalization of Belterrian property at the port of Xanadu cannot be justified as redress.

1. Richmond's nationalization cannot be justified as an act of retorsion.

a. Retorsion consists of a legal and proportionate response.

As defined by Lauterpacht, a valid act of retorsion is a similar and proportionate response to an unfriendly but legal act by means of

78. L. Duboff, *Art Law; Domestic and International* 316 (1975); Hollander, *The International Law of Art* (1959); 2 H. Lauterpacht, *supra* note 28, §§ 142, 153, 158. See *Convention with Other Powers Respecting the Laws and Customs of War on Land*, Oct. 18, 1907, T.S. No. 539 (1909).

79. L. Duboff, *supra* note 78, at 316.

80. See Bator, *An Essay on the International Trade in Art*, 34 *Stan. L. R.* 275 (1982).

81. *Id.* at 302-306.

82. *Id.* at 286.

another legal action.⁸³

b. Richmond's nationalization was not a valid act of retorsion.

1) Richmond's nationalization was not a legal response.⁸⁴

2) Richmond's nationalization was not proportionate.

Richmond's nationalization of Belterrian property at the Port of Xanadu was a direct response to Belterre's blocking order. In responding to a temporary blocking of assets by nationalizing Belterrian property, Richmond escalated the conflict between the two nations, thereby violating the requirement of proportionality.

2. Richmond's nationalization cannot be justified as an act of reprisal.

a. A valid act of reprisal must meet three conditions: a prior illegal act, prior negotiation, and a proportionate response.⁸⁵

b. Richmond's nationalization did not meet any of these conditions.

1) Richmond was not responding to an illegal act.⁸⁶

2) Richmond's response was not proportionate.⁸⁷

3) Richmond did not seek prior negotiation. Before resorting to an act of reprisal, a nation is required to first seek redress from the provoking nation. Only when this request is denied is a reprisal justified. Therefore, Richmond, having made no attempt to seek redress from Belterre, could not legally resort to an act of reprisal.

83. 2 H. Lauterpacht, supra note 28, at 134-135.

84. See argument at IV.A., B., & C. supra.

85. See argument at II.E.L. supra.

86. See argument at III supra.

87. See argument at IV.D.L.b.2. supra.

CONCLUSION

It is respectfully requested that this honorable Court:

- 1) DECLARE that Richmond acted illegally in closing the Chesterfield Highway;
- 2) DECLARE that Belterre's blocking orders were in full conformity with international law;
- 3) DECLARE that Richmond acted illegally in nationalizing Belterrian property at the port of Xanadu;
- 4) AWARD Belterre damages for increased costs of imports and exports resulting from the closing of the Chesterfield Highway;
- 5) ORDER the release of (or payment in value of) the property nationalized at the port of Xanadu;
- 6) DENY all of Richmond's claims for relief; and
- 7) GRANT Belterre such further relief as this Court may deem just.

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Agents for the Republic of Belterre