IN THE

INTERNATIONAL COURT OF JUSTICE

AT THE

PEACE PALACE, THE HAGUE

THE NETHERLANDS

FEBRUARY 1984

NATURALIA

Applicant

v.

INDUSTRIA

Respondent

ON SUBMISSION TO THE

INTERNATIONAL COURT OF JUSTICE

Memorial for the Applicant

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JURISDICTION

Naturalia is party without reservation to the jurisdiction of the International Court of Justice under Article 36 of the Statute of the Court.

STATEMENT OF FACTS

The parties have agreed to the statement of facts which has been filed before the court.

QUESTIONS PRESENTED

I.

Whether the nationalization decree of April 15, 1981 was in violation of any legal obligation.

II.

Whether Industria's courts asserted jurisdiction in violation of international law.

III.

Whether the attachments of bank accounts of Natmin and of the Central Bank of Naturalia located in Industria as well as of the quantities of alumina warehoused in Industria were in conformity with international law.

IV.

Whether Industria is under an obligation to vacate the attachments, or in the alternative, to pay damages to Naturalia in the amount of the value of the property attached in Industria.

V.

Whether the court actions may be justified as a reprisal.

SUMMARY OF ARGUMENT

The nationalization by Naturalia did not infringe upon the rights of Industria. Minex, a corporation organized under the laws of Naturalia, is a Naturalian national; the rights of Lencot, a corporation organized under the laws of Industria, were not directly affected by the nationalization. Therefore, Industria lacks locus standi in the instant case.

The nationalization by Naturalia was not in violation of international law. The right to nationalize by a sovereign State cannot be restricted by the terms of a private contractual agreement. The Project Agreement was merely a Concession Contract between two parties and cannot be interpreted as internationally binding upon a foreign sovereign State. Therefore, the stabilization clause in the Project Agreement does not help Industria, since to give the clause internationally binding effect would be fundamentally inconsistent with the inalienable sovereign rights of Naturalia. Moreover, the clause does not provide against extraordinary measures such as nationalization.

The method of compensation offered to Minex by Naturalia was adequate pursuant to international law. Even if the nationalization is deemed to have been unlawful, Naturalia would still not be held to the standard of specific performance under the Project Agreement insofar as this would fundamentally conflict with Naturalia's sovereign right to nationalize.

The measures taken by the courts of Industria were clearly in violation of international law. The courts of Industria had no jurisdiction to adjudge the validity of the Nationalization Decree of Naturalia. By doing so, the courts of Industria disregarded the sovereign immunity of the Naturalian State. Moreover, Natmin, an agency of the Naturalian Government, was acting iure imperii in Industria. Finally, the bank accounts of Natmin and of the Central Bank were

immune from attachment insofar as they were accounts directed to a public purpose.

The Nationalization Decree of Naturalia became immediately effective aboard the vessels on the high seas transporting quantities of alumina subsequently attached by the courts of Industria. This Nationalization Decree should have been respected by the courts of Industria.

The attachments by the courts of Industria constituted an unlawful taking of property. Such unlawful attachments cannot be justifiable on the ground that they constituted lawful reprisals. Under international law, reprisals cannot be set judicially and must be accompanied by prior notification to the affected party. In the instant case, the measures were set by a judicial body and there was no prior notification to Naturalia.

A. INDUSTRIA'S COUNTERCLAIMS ARE INADMISSIBLE SINCE THERE IS NO DIPLOMATIC PROTECTION.

With respect to its counterclaims, Industria's standing before this Court rests upon its right to afford diplomatic protection.

1. Industria is not entitled to give diplomatic protection to Minex.

A State may give diplomatic protection only to its own nationals. It follows that a private party must have the nationality of the State seeking to protect it.[1] In the case of a corporation, the International Court of Justice (hereinafter referred to as "ICJ") has attributed the right of diplomatic protection to "the State under the laws of which it is incorporated and in whose territory it has its registered office."[2] Minex is incorporated under the laws of Naturalia and maintains its corporate seat in Naturalia which is also the center of its commercial activity. Therefore, Minex is a Naturalian national even pursuent to the view that some substantial and effective connection between the legal entity and the State is required.[3] State practice has not accepted the criterion of control according to which the nationality of a corporation follows the nationality of the majority of its shareholders.[4] This theory has almost exclusively been used as a method of economic warfare.[5] Control is not susceptible to precise definition because of differing corporate organizational functions and types of shares. It follows therefore that Minex is a Naturalian national and that Industria cannot extend its diplomatic protection to the national of another sovereign State.

2. Alternatively, Industria may not give diplomatic protection to Lencot as a shareholder of Minex.

a) A State may only afford diplomatic protection to the shareholders of a company, "if the act complained of is aimed at the direct rights of the share-

holders as such."[6] By nationalizing Minex' assets, Naturalia only affected Lencot's economic interests[7], that is the interest of the shareholder in maintaining a profitable investment. The continous flow of divedends in which Lencot is interested is not a protectible right under international law.[8] Loss of dividends is a commonly accepted, inherent risk of investing capital whether abroad or at home.

b) An exception the rule that a State may only afford diplomatic protection to shareholders where direct rights are affected is not applicable in the situation where the corporation has thesame nationality as the State responsible for the acts complained of. Such a contention ignores the basic principle that the personality of a corporation is entirely distinct from the personality of its shareholders[9] and derogates from the"traditional rule that a State is not guilty of a breach of international law for injuring one of its own nationals."[10] Accordingly, Judge Morelli has described it as a "wholly illogical and arbitrary deduction."[11]

Contemporary international law does not provide such an independent right for the shareholders as a result of injuries to the corporation. Several arbitral awards clearly rejected such a contention.[12] With respect to State practice, it should be noted that the United Kingdom and the United States governments have in a few cases maderepresentations to other States on behalf of stockholders. Such interventions were always opposed, however, by the States to which they were addressed.[13] In the case of the Tiahualilo Company[14] and the Mexican Eagle Oil Company[15] the Government of Mexico took the position thatthese enterprises were Mexican and therefore the defence of their interests did not appertain to a foreign State. Similar attempts to intervene on behalf of shareholders have repeatedly failed.[16] Some arbitral awards to the contrary were given "ex aequo et bono" (all those of the U.S.-Mexican Arbitral Commission).[17] Others concerned partnerships (e.g. the Ziat, Ben Kiran Case) where the partners bear an unlimited responsibility for the debts of the company.[18] As far as corporations are concerned, it is only wh

the company has been dissolved and its separate legal entity has ceased to exist that the shareholders may defend the company's own rights as its successors.[19]

The nationalization of all the property owned by a juridical person does not automatically bring about the termination of the corporate existence.[20] In the present case, Minex has a claim for compensation worth 560 million Naturalian dollars. It has started court actions in Industria as well as in Naturalia to protect shareholders' interests.

B. THE NATIONALIZATION OF THE PROJECT AND ALL ASSETS OF MINEX WAS LAWFUL.

1. Naturalia had the right to nationalize.

It is unquestionable today that a State has the right to nationalize its natural resources. [21] The exercise of this right is regarded as an expression of the State's territorial sovereignty and is recognized under customary international law.

2. Article XXII of the Project Agreement did not preclude the exercise by Naturalia of its sovereign right to nationalize the Project.

Article XXII of the Project Agreement (hereinafter referred to as "P.A.") contains a so-called"freezing" or "stabilization" clause. It was intended to guarantee the inalterability of the contractual and legal régime for the Project. These clauses are anachronistic and merely reflect the weak bargaining power of Naturalia's former Government.[22] The number of these clauses has decreased considerably in modern concession agreements.[23]

Article XXII would have no impact whatsoever in the instant case even if it

were conceded that a State would be willing to restrict its future legislative and administrative action in a contract with a private investor. The exclusion of nationalization measures is a particular serious undertaking which would have to be expressly stipulated in the concession contract itself.[24] There is no reference to nationalizations in Article XXII. If the generally accepted method of treaty interpretation is applied, the starting point is the elucidation of the ordinary meaning of the terms in their context.[25] Article XXII speaks of "all questions relating to the interpretation, application, termination or extension of this Agreement." Hence it only refers to the normal contractual relationship between the parties and never to such extraordinary circumstances as the reorganisation of the entire economy.[26]

Additionally, provisions implying a limitation upon a State's sovereignty are to be interpreted restrictively.[27] Such a limitation cannot be deduced from the general language of this freezing clause. Finally, the Basic Law of Naturalia as the proper law of the contract creates a strong presumption against any privileges for foreigners. It provides that "foreigners may not claim greater rights than those afforded to citizens of Naturalia."

Seen against this background, the broad language of the freezing clause does not under any circumstances lend itself to the interpretation that the sovereign right to nationalize in furtherance of public interest has been waived by Naturalia.

3. Alternatively, the termination of a concession agreement is not an internationally wrongful act.

An internationally wrongful act can be viewed as the violation of an international obligation incumbant upon a State. [28] The observance of an agreement between a State and a private corporation is not required under international law.[29] A State can only bind itself internationally under a treaty.

Minex, a corporation established under the laws of Naturalia, is not capable of concluding a treaty. The choice of international law as the governing law of the contract does not place the P.A. on the international plane.[30] The Permanent Court of International Justice (hereinafter referred to as "PCIJ"), in the Case Concerning the Payment of Various Serbian Loans issued in France, found that "any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."[31] This view was confirmed by the ICJ in the Anglo-Iranian Oil Company Case. The concessionary contract under consideration also contained a stabilization clause.[32] Nevertheless the ICJ deniedthat such a contract can create obligations between States.[33] It is incompatible with the sovereignty of a State that a private investor may interfere in the self-determination of its economic and political system.[34]

The theory of "internationalized contracts", the breach of which would by itself create international responsibility, has no foundation in customary international law. The fact that most States usually abide by such an agreement is not sufficient to prove an opinio iuris vel necessitatis. It would only be possible to speak of an international custom if such abstention were based on a belief that it is rendered obligatory by the existence of a rule of international law.[35] But even leading capital-exporting countries like the United States[36] and the United Kingdom[37] demand some element beyond the mere breach of contract which would constitute a confiscatory taking or a denial of justice. In the recent Libyan nationalizations, the crux of the British[38] and American[39] argument was that the nationalizations were essentially discriminatory and political in character and that such takings mandated compensation. Finally, Industria may not rely on the tenor of op. para. 8 of General Assembly Resolution 1803 (XVII). The "travaux préparatoires" clearly show that many States have opposed the internationalization of State contracts.[40] Op. para. 4 of the same resolutionrecognized public utility and national interest as overriding purely individual and private interests.

The fact that some arbitral awards have applied the principle "pacta sunt servanda" is itself not conclusive. The earlier awards clearly took account of a situation where the State which was party to the contract had an inadequate legal system.[41] All these arbitrations have only dealt with the contractual relationship between the parties. None of them have examined the international responsibility of the nationalizing State vis-à-vis the home State of the investor. Furthermore, recent awards have repudiated the idea that the nationalization of concession rights was unlawful as such and granted only compensation.[42] Even municipal courts of industrialized countries have held that the power to take private property for public use "cannot be surrendered, and if attempted to be contracted away, it may be resumed at will."[43]

4. Article XXII of the Project Agreement does not constitute a binding unilateral promise.

It has been argued that stabilization clauses fulfill the requirements of a binding unilateral promise.[44] In the Nuclear Tests Cases the ICJ acknowledged that a State can bind itself by unilateral acts.[45] But the Court emphasized that "when States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."[46] In the present case, no evidence can be adduced to prove Naturalia's intention to be bound towards Industria. Unlike the situatuion in the Nuclear Tests Cases, Naturalia did not make any statements publicly and "erga omnes". The sole purpose of the P.A. was to regulate the relations between the Government of Naturalia and Minex,[47] a Naturalian company. Therefore, Industria may not claim any rights deriving from the P.A.

5. The compensation offered by Naturalia was in accordance with international law.

a) The compensation based on the book value of the Project was appropriate.

In the case of a nationalization involving a change in a country's socio-economic structure, there is no obligation to compensate for the full market value of the property taken.[48] Since World War II State practice shows that partial compensation has become the norm. Most investment disputes have been settled by lump-sum agreements that did not provide full compensation.[49] In Light of this practice, the compensation standard offered by Naturalia represents a laudable concession to the necessities of an interdependent world economy.

The depreciated book value is the best standard for the valuation of nationalized property.[50] It is an objective standard which is formally recorded in the books of a corporation. It would be unreasonable to use one standard for purposes of tax payments and another (much higher) for purposes of valuation.[51] The book value is described as "the practicle definition of adequate compensation reflected in most of the settlements of expropriations in recent year years."[52] Capital-exporting countries have acquiesced in its use by the majority of developing countries. They even use it in their municipal laws.[53]

b) Compensation for anticipated profits is not required under international law.

Under recognized principles of international law, a lawful expropriation involves the duty to pay compensation for direct losses (damnum emergens). The loss of anticipated profits (lucrum cessans) must only be compensated for in cases of wrongful takings.[54] A few precedents to the contrary exist, but were promulgated before the recent development of the concept of permanent sovereignty over natural resources.[55] It should be noted that in two more

recent arbitrations compensation for loss of anticipated profits was awarded, but the arbitrations are distiguishable insofar as they involved rich oil-producing countries with no difficulty of repayment.[56] In one of these awards, the tribunal itself acknowledged that its assessment of the amount of compensation went beyond the international minimum standard.[57]

Damages pursuant to Industria's claim would amount to a compensation for subsoil rights which Minex never owned. Minex only had a "property interest in land". This could never be viewed as an absolute title to the bauxite resources of the Project. Natural resources are an inalienable part of the national patrimony. Under the principle of permanent sovereignty over natural resources, the ownership of these resources is vested in the State.[58] Finally, the stream of earnings constitutes an unreasonably high standard reflecting excess profits. Minex' annual net profits amounted to 20% of the original capital investment. One authority in international investment regulations has concluded that a "just revenu" is generally considered to be between 12 to 14%.[59] An obligation to compensate for future earnings would effectively prevent a poor country from exercising its legitimate right to reorganize its economy.[60] the instant financial burden would be unbearable for Naturalia, a State in only the early and cr stages of its development.

c) The method of compensation offered by Naturalia was reasonable under the circumstances.

Compensation need not be paid promptly in foreign exchange.[61] Developing countries have frequently used deferred payment in government bonds as a method of compensation.[62] Industrialized countries have accepted special arrangements so as not to aggravate the already difficult foreign exchange position of developing countries.[63] They have consented to the use of State bonds if these bonds yield sufficient interest and their maturation date is

not too far int the future.[64] In this connection, Naturalian bonds are marketable thus providing compensation in an effectively realizable form. They are redeemable in ten annual installments and bear 6% interest until redeemed. On maturity, Minex will receive Naturalian dollars which are freely convertible and can be transferred abroad. The terms offered by Naturalia are advantageous in comparison with the payment arrangements offered by other countries. For instance, many lump-sum agreements provide payment over a period up to 30 years[65], most of them returning no interest at all.[66]

The discrepancy between the official rate of exchange and the market rate has no bearing on the adequacy of compensation. The official rate of exchange is generally used for transactions in Naturalia and guaranteed by the Central Bank. Tribunals have traditionally tended towards its use in compensation disputes.[67] Finally, no State is responsible for currency depreciations unless they are discriminatory in character.[68]

d) The procedure to fix the compensation due was in accordance with international law.

aa) The compensation can be finally determined by the Compensation Tribunal. International law does not require more than one judicial forum.[69] Minex was able to submit its claim before this tribunal and was accorded due process guaranties.

bb) Under the special circumstances of this nationalization, the creation of a special tribunal for the determination of an appropriate compensation was justified.[70] Ordinary courts lack the competence to decide matters which present juridically and technically difficult problems. The appointment of two members of this Tribunal by the Minister of Mines does not violate international law. The executive is competent to appoint judges. Industria must carry the burden of proof that the instant compensation procedures resulted

in a denial of justice.[71] There is no evidence here to support the allegation that Minex'rights were prejudiced by a mistake in substantive or procedural law.

6. As an alternative: Industria is not entitled to "restitutio in integrum".

Even if the nationalization were found to be unlawful, the Government of Naturalia would not be obligated to adhere to the requirement of specific performance under the P.A. . Although restitutio in integrum is a generally recognized principle, its application in the present case would be fundamentally incompatible with Naturalia's sovereignty.

The Chorzów Factory Case is not a conclusive authority for the remedy of restitution. The remedy of restitutio in integrum was deemed to be appropriate by the Court because the expropriation in question violated a treaty which was specifically designed to preserve the status quo.[72] International practice does not reveal any case in which a State has anulled its nationalization decree in order to return expropriated property to a foreigner. The situation is not different in cases concerning State contracts.[73] Although a recent arbitration awarded restitutio in integrum,[74] the dispute was finally settled by the payment of compensation.[75] Two other arbitrations have clearly rejected the remedy of restitution.[76]

Restitutio in integrum is incompatible with Naturalia's sovereign right to nationalize and directly interferes with its freedom to determine its own economic system.[77] Balancing restitutio in integrum against State sovereignty, Special Rapporteur Riphagen of the International Law Commission gave priority to the latter.[78]

C. THE ASSERTION OF JURISDICTION BY THE COURTS OF INDUSTRIA AND THE ATTACHMENTS BY INDUSTRIA WERE IN VIOLATION OF INTERNATIONAL LAW.

1. The assumption of jurisdiction by the courts of Industria was in violation of international law.

a) The courts lacked jurisdiction to adjudge the validity of the domestic laws of a foreign sovereign State.

aa) Industria's courts lacked competence to exercise jurisdiction over the internal affairs of Naturalia. The nationalization of one of its nationals by Naturalia was a sovereign act occurring within the reserved domain of Naturalia's domestic jurisdiction. Industria lacked a sufficient nexus[79] to empower its courts to assume jurisdiction.

bb) Naturalia's Government is not amenable to the courts of another country with respect to sovereign acts done within its own territory.[80] Industria's courts are asked to adjudge the validity of a law of a foreign State within its own territory so that the validity of that law becomes the res of the res iudicata in the suit. Industria's courts do not confine themselves to determine the title to certain goods as in hot pursuit litigations.[81] The perfect equality and absolute independence of sovereign States interdicts such an undue encroachment on the reserved domain of domestic jurisdiction.[82]

cc) Even if the expropriation of Minex could be viewed as an injury to an alien investor, Lencot's and Minex's claims would be non-justiciable in Industria's courts. It is an exclusive right of the State to have its nationals enjoy a certain treatment in foreign States. Aliens must rely on the Executive to pursue their claims through diplomatic protection. Industria alone is authorized to make a claim for compensation.[83] By allowing its courts to grant self-help seizure remedies, Industria violated the principle of non-intervention. Every State has the inalienable right to choose its economic system without interference in any form.[84]

b) The courts of Industria voilated international law by disregarding the sovereign immunity of the Government of Naturalia.

A State may not be sued in a foreign court for the exercise of its sovereign rights without its express consent.[85] To nationalize through legislative act is one of the classic instances of acta iure imperii.[86]

The nationalization of Naturalia does not derive a commercial character from the commercial nature of the P.A. Nationalization is the inherent risk of every investment,[87] since the State's responsibility for the benefit of a large community sometimes requires the use of such sovereign powers.[88] It is inadmissible to restrict the autonomous development of a sovereign community by means of "commercial agreements". Thus, nationalization can be regarded as a quintessentially sovereign act without a commercial character.[89]

c) The courts of Industria violated international law by disregarding the sovereign immunity of Natmin.

aa) Although organized as a separate legal entity, Natmin is set up as an agency of the Government of Naturalia. It is managed by State officials of highest rank. It is therefore entitled to immunity ratione personae.[90]

bb) Additionally, Natmin is an agency acting iure imperii and therefore entitled to immunity ratione materiae. Naturalia regards the exploitation and marketing of the country's main natural resources as an exclusive State activity and as an integral part of the exercise of its sovereign authority. Whether an activity is to be regarded iure imperii or iure gestionis must be determined by the acting State itself.[91] A qualification based on the lex fori, as is common in most western States, fails to correctly apply fundamental principles governing international relations. The law of State immunity is firmly based on the principle of sovereign equality between States.[92] Sovereign equality includes the duty of every State to respect the personality of other States and the right of every State to freely choose its political, economic and cultural system.[93] Consequently, it is the exclusive internal

affair of every State to determine the scope of its activity iure imperii. To disregard its choice constitutes an unlawful intervention.[94] In particular, it is inadmissible to invoke simple pragmatic considerations in order to determine the nature of a State's activity according to the lex fori, e.g., admission to the national market only under the condition of an expressed waiver or conclusion of treaties.[95] Inasfar as such conditions are not complied with, every State must bear disadvantages resulting from the different socio-economic systems in the heterogeneous world community.[96]

cc) In the alternative, Natmin was wrongfully brought before the courts of Industria, because Natmin cannot be held liable for the actions of the Government of Naturalia under either Minex' or Lencot's theories of liability. Natmin is not an alter ego of the Government of Naturalia; it is, instead, a separate and independent legal entity and had no role whatsoever in the termination of the P.A. and the taking of the assets.[97] The nationalization was exclusively an action by the Government of Naturalia.

2. The attachments of bank accounts were unlawful.

a) The attachments of Natmin's bank accounts were in violation of international law.

Natmin's bank accounts were immune from prejudgment attachments. Even if Natmin's activities are regarded as non-exempt, the same is not necessarily true for its funds. Coercive measures touch more sharply upon another State's positions and must therefore be applied more cautiously.[98]

Here, not only the origin but also the purpose of funds is decisive.[99] Natmin's funds are not only used for the conduct of Natmin's affairs, but they supply the treasury of Naturalia with the necessary reserves. The Dutch Court of Appeal of The Hague has held it to be self-evident that funds of a State corporation which are directly payable to the treasury are exempt from attachment.[100] There are good reasons for this view. The well-established principle of "permanent sovereignty

over natural resources" would be considerably weakened if the foreign exchange resulting from the sale of resources could be infringed upon by other States. Exports by Natmin account for 60% of the foreign exchange earned by Naturalia. The profits drawn from these transactions are dedicated to the public service of Naturalia which, as a country in its initial stages of development, is heavily dependent on them. In the interdependent world economy, a State is coerced more easily and effectively by another State's blocking of assets which result from the sale of its natural resources, than through more classical means of intervention, such as military aggression.[101]

Taking into account the extremely low G.N.P. of Naturalia, the attachment of assets worth U.S. dollars 800 million highly endangers Naturalia's developing economy. The functional independence of Naturalia's State activity is deeply affected by these measures which can therefore be viewed as an unlawful intervention in the internal operations of a foreign sovereign State.[102]

b) The courts of Industria violated international law by attaching the bank accounts of the Central Bank.

Attachments can only be exercised with respect to property which is not dedicated to a public purpose.[103] The Central Bank of Naturalia performs a variety of administrative functions, such as fiscal agent of the State, keeper of money reserves, responsible agent for money, and capital transfers and monetary policy, financial supplier of embassies and State corporations, etc. .[104] Most of these activities are unquestionably acta iure imperii. They are also commonly performed abroad. The importance of these tasks on the one hand, the impossibility to separate the funds used for their accomplishment on the other, has convinced many jurisdictions to accord a virtually absolute immunity from attachment execution on foreign central banks.[105] These regulations confirm the tendency to recognize the activities of a State's Central Bank in performance of external transactions as being at the core of the State's sovereign powers.[106]

3. The attachment of alumina was unlawful.

a) The courts of Industria violated international law by executing the prejudgment attachments of alumina located as inventory in Naturalia at the time of the nationalization.

aa) Par in parem non habet imperium. Industria cannot take Naturalia's property without violating Naturalia's sovereignty. Per the Nationalization Decree, the alumina located in Naturalia on April 15, 1981 was vested in Natmin. Naturalia's title is also valid in Industria, because, as a rule, measures of expropriation taken by foreign States are to be respected by the courts of other States, if they are confined to commodities situated within the foreign State's territorial jurisdiction at the time of the expropriation. This follows from the internationally recognized principle of territoriality.[107]

bb) Lacking manageable standards by which to adjudicate, judicial self-restraint is required of the courts of Industria in this regard. They are not authorized to exercise jurisdiction in an area of international law which has been influenced to a great degree by the fundamentally opposite ideological goals of various States.[108] This can only be the task of an international tribunal. Since no clearly established rule of international law has been manifestly violated, international lawfulness is to be presumed by the municipal courts of Industria.[109]

b) The attachment of the alumina aboard vessels on the high seas at the time the Nationalization Decree became effective was in violation of international law.

The property was vested in Natmin when the vessels arrived in Industria. Each State is bound to recognize the acts of another State within its own jurisdiction.[110] Vessels registered in Naturalia are under the exclusive jurisdiction of Naturalia.[111] The laws of Naturalia are effective on those ships.[112] One must correctly distinguish between a ship within the territorial waters of another State - where the courts must not recognize an expropriation decree, thus dismissing the old theory of "territoire flottant" - and the ship being on the high

seas - where it is under the exclusive jurisdiction of the flag State and where the State's orders must be respected by foreign courts.[113]

There is no additional requirement of actual possession. Its allegation is a fruitless attempt to shift the burden of proof in order to justify the pursuit of nationalized products. Under modern conditions, every ship can be contacted at any time. The loyalty of the crew is to be presumed. It follows that there is sufficient control to justify the application of the principle of deference to the sovereign acts of a foreign State acting within its own jurisdiction. Therefore, Natmin had acquired the alumina.

4. The attachments violated the rule prohibiting expropriation without compensation.

Prejudgment attachments are an indirect taking of property. Not only the outright taking of property but also any unreasonable interference with the use or enjoyment of property even for a limited period of time is a taking of property.[114] The attachments deprived Naturalia of the use of its property to an extent that its title was to be regarded as entirely worthless. No compensation whatsoever was offered by Industria for such a serious interference with its property rights. It follows that the attachments constituted an unlawful expropriation.

5. The measures taken by the courts of Industria are not justifiable on the ground that they constitute reprisals.

Reprisals are justified if three prerequisites have been fulfilled:[115]

- a preceding international wrong committed by the offending State,
- an action of the offended State with the sole purpose of inducing the offending State to abide by law,
- a prior demand for redress.

None of these requirements have been fulfilled:

As discussed above, the nationalization was not an internationally wrongful act. The attachments cannot be regarded as actions of the State aimed to influence Naturalia. Municipal courts are not competent to set reprisals; only State organs with the capacity to act internationally may take reprisal measures.[116] Uniformity of action is required of a State in international relations, and a State cannot guarantee for such behaviour by its courts.[117]

Finally, there was no prior request for redress. International law requires a prior notification to the offending State of the intent to take countermeasures.[118] Notification of specific measures is, however, not necessary.[119]

The necessity of prior notice cannot be left to the discretion of the State, since "recourse to counter-measures involves the great risk of giving rise, in turn, to a further reaction, thereby causing an escalation which will lead to a worsening of the conflict. Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party."[120]

6. Naturalia claims payment of its counsel fees.

a) Counsel fees of the pleadings before Industria's municipal courts:

Reparation for an illegal act must "wipe out all the consequences of the illegal act."[121] Naturalia's expenses incurred before the municipal courts of Industria are a direct consequence of the illegal court actions. Insofar as it is responsible for these actions, Industria should be obliged to pay Naturalia's counsel fees.

b) Counsel fees of the pleadings before the I.C.J.:

In accordance with Art. 64 of the Statute of the I.C.J., Naturalia requests the Court that all its costs should be paid by Industria. This claim is justified with regard to the merits of the case. The origin of this litigation must be seen in the wrongful attachments issued by the courts of Industria and the assumption of jurisdiction by those courts. Naturalia would abide by a Court order conforming to Art. 97 of the Rules of the Court.

SUBMISSIONS

FOR THESE REASONS, the submissions of the Government of Naturalia are as follows:

MAY IT PLEASE THE COURT:

(a) to adjudge and declare that the attachments issued by the courts of Industria and the assertion of jurisdiction in this matter by those courts are in violation of international law,

(b) to direct that the attachments be vacated, or in the alternative

(c) to award it damages in the amount of the value of the property attached in Industria, including the bank accounts of Natmin and the Central Bank located in Industria, the quantities of alumina warehoused in Industria, and counsel fees.

FOOTNOTES

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4. Caflisch 133-35; P. De Visscher, La Protection Diplomatique des Personnes Morales, 102 Recueil des Cours (RdC) 395, 444 (1961-I)
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6. Barcelona Traction Case (Judgment), (1970) ICJ Rep. 3, 36 para. 47
7. cf. Barcelona Traction Case (Judgment), (1970) ICJ Rep. 3, 36 para. 46
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16. see, e. g. Banco de Londre case, quoted in Beyer 77-79; Vacuum & Co. case, quoted in Beyer 85; Limanova case, quoted in Beyer 85
17. Barcelona Traction Case (Judgment), (1970) ICJ Rep. 3, 247, sep. op. Padilla Nervo; Diez de Velasco, supra note 5, at 137-38
18. G. Abi-Saab, The International Law of Multinational Corporations: A Critique of American Legal Doctrines, 2 Annals of Int'l Stud. 97, 119 (1971)
19. Abi-Saab supra note 18, at 114; Jiménez de Arechaga, supra note 13, at 93-95; Diez de Velasco supra note 5, at 166
20. Hydrierwerke AG, District Ct. of West Berlin (Dec. 1, 1950) W. Ger., 18 ILR 38-39 (1951); Barcelona Traction Case (Judgment), (1970) ICJ Rep. 3, 40-41 para. 65-66; White 72
21. Brownlie, Principles 533; I. Seidl-Hohenveldern, Völkerrecht (4th Ed.1980), para. 1186 a (hereinafter cited as: Seidl-Hohenveldern); Texaco Overseas Petroleum Co. / California Asiatic Oil Co. v. Government of the Libyan Arab Republic, Award (Jan. 19, 1977), (hereinafter cited as: Texaco Award), 17 ILM 1, 21 para. 59 (1978)
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105. cf. Art. 26 Europ. Conv. on State Immunity supra note 95: "executive measures ...only against property...which is used exclusively for...commercial activity"; sect. 1611 (b) (1) FSIA (U.S.): "immune from execution...the property of a foreign central bank"; sect. 14 StIA (U.K.): "property of a State's central bank...shall not be regarded...for use for commercial purposes", 17 ILM 1123 (1978); Gramlich supra note 91, at 580 & 595; J. Crawford, Execution of Judgments and Foreign Sovereign Immunity, 75 Am. J. Int'l L. 820, 864-65 (1981)
106. Gramlich supra note 91, at 595; Crawford supra note 105, at 864
107. Sociedad Minera El Teniente S.A. v. A.G. Norddeutsche Affinerie, Landgericht Hamburg, Jan. 22, 1973, W. Ger., 12 ILM 251, 273-74 (1973); cf. Brownlie, Principles 323
108. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 430 (1964); P. Weil, Le contrôle par les tribunaux nationaux de la licéité internationale des actes des États étrangers, 23 Annuaire Français de Droit International (AFDI) 9, 49 (1977)
109. Buttes Gas and Oil Co. v. Hammer (Nos. 2 & 3), (1981) 3 AllER 616, 617 & 628, 633 (Eng. H.L.); Weil supra note 108, at 48
110. 1 F. Berber, Völkerrecht 222
111. Art. 92 of the Conv. on the Law of the Sea, U.N. Doc. A/CONF. 62/122 (Oct. 7, 1982), reprinted in: 21 ILM 1261, 1287; Art. 6 of the Geneva Conv. on the High Seas (April 29, 1958), 450 UNTS 82 (1963)
112. The S.S. Lotus Case, (1927) PCIJ ser. A, No. 10, at 25
113. The Navemar, 102 F.2d 444, 448 (2d Cir. 1939); Seidl-Hohenveldern para. 932
114. Art. 10 (3) (b) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, reprinted in: F.V. García-Amador, L.B. Sohn & R.R. Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens 204 (1974)
115. K. Skubiszewski, Use of Force by States. Collective Security. Law of War and Neutrality, in: Manual of Public International Law (M. Sørensen ed., 1968), 739, 753
116. Seidl-Hohenveldern para. 1292 a; Verdross & Simma 654
117. H. Strebel, Völkerrechtliche Komponenten innerstaatlicher Zuständigkeit, 33 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 152, 167 (1973); 1 W. Wengler, Völkerrecht 621 (1964)
118. cf. Responsabilité de l'Allemagne à raison des Dommages causés dans les Colonies Portugaises du Sud de l' Afrique (Portugal v. Germany - Naulilaa Case), 2 R. Int'l Arb. Awards 1012, 1027 (1928); Seidl-Hohenveldern para. 1291; W. Riphagen, Fourth Report on the Content, Forms and Degrees of State Responsibility, Addendum, 21 para. 57, U.N. Doc. A/CN.4/366/Add.1 (April 15, 1983)
119. H.-J. Schlochauer, Die Entwicklung des völkerrechtlichen Deliktsrechts, 16 Archiv des Völkerrechts 239, 274 (1973/75); 2 Völkerrecht, Lehrbuch (Akademie für Staats- und Rechtswissenschaft der DDR ed., 2nd ed. 1982) 277
120. Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France (1978), 18 R. Int'l Arb. Awards 415, 445 para. 91
121. Chorzów Factory Case (Claim for Indemnity), (1928) PCIJ ser. A No. 17, at 17