

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 Respondent

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JURISDICTION

Industria 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 Naturalia is under an obligation to honor and perform the Project Agreement, and to pay damages to Industria for any loss suffered by Lencot, directly or indirectly, in consequence of the Decree of April 15, 1981, including:

- (1) lost rights and profits resulting from the termination of the P. A.;
- (2) compensation for the value of the project in U. S. dollars at the market rate of exchange;
- (3) the value of the property confiscated; and
- (4) counsel fees.

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

Industria is entitled to protect the rights of its nationals, Minex and Lencot, by giving them diplomatic protection against unlawful measures taken by Naturalia.

The nationalization by Naturalia violated Industria's rights. The duty of Naturalia to honor and perform the Project Agreement (P. A.) is derived from international customary law. Article XXII of the P. A. excludes any right of Naturalia to nationalize the project. The stabilization clause is not incompatible with Naturalia's sovereignty. Art. XXII of the P. A. constitutes a unilateral promise of Naturalia to Industria which is binding under international law. At the very minimum, the nationalization is contrary to the principles of bona fides and estoppel.

The compensation offered by Naturalia was inadequate insofar as it was based on the book value of the project and excluded the calculation of anticipated lost profits. The method of compensation was not reasonable since it deliberately exposed Minex to the financial risk of devaluation. Finally, the procedure to determine the compensation violated international law. The Government of Naturalia committed an internationally wrongful act; it is therefore bound to honor and perform the P. A.

In contrast to the violation of international law by the nationalization, the measures taken by the courts of Industria were in accord with international law. The courts of Industria could exercise jurisdiction over the

Government of Naturalia and Natmin since they had acted 'iure gestionis'. Furthermore, the courts of Industria were entitled to attach Natmin's bank accounts since they were not directed to a specific public purpose. The same is true for the bank accounts of the Central Bank of Naturalia as long as the contrary is not proven. The attached alumina is the property of Minex. There is no rule of international law which prohibits the courts of one State from determining the validity of another State's enactment in its own territory. In addition, the nationalization decree was never jurisdictionally effective on the ships carrying alumina on the high seas.

In the final analysis, the courts of Industria were competent to use the pre-judgment attachments as a means of reprisal against Naturalia. Under the circumstances, the importance of taking these reprisal measures clearly outweighed the necessity to make a prior request for redress.

A. INDUSTRIA HAS STANDING IN THIS ACTION SINCE IT IS ENTITLED TO GIVE DIPLOMATIC PROTECTION TO MINEX AND, ALTERNATIVELY, TO LENCOT

No allegations can be put forward against the standing (ius standi) of Industria in this matter. Industria has a sufficient legal interest, since it may provide diplomatic protection for Minex resp. Lencot.

1. Industria is entitled to give diplomatic protection to Minex.

a) Every State is entitled to give diplomatic protection to its nationals. Certain criteria exist which determine the nationality of a corporation. An important determinant of the nationality of a corporation is the nationality of the persons who exercise control over and have a substantial beneficial interest in the corporation.¹ This test was first used in the Peace Treaties after World War I and II² as well as in a considerable number of lump-sum agreements.³ In the case of Minex, an Industrian national owns 80 % of the voting shares; Minex is managed exclusively by nationals of Industria; all technology of Minex originates from Industria. It is difficult to imagine a better example of a close connection between a corporation and a State.

b) Further, Naturalia is estopped from treating Minex as its own national. Nationality and diplomatic protection may rest on estoppel⁴ which is a general principle of international law. By negotiating the Project Agreement (P. A.) directly in Industria, the Naturalian Government implicitly recognized the economic control and influence exercised by Lencot over Minex. It concluded with Minex a P. A. which in Art. XXII explicitly referred to international law. In the same agreement both parties stipulated to the applicability of the Naturalian standard tax régime. Such a stipulation would have been unnecessary in the case of a Naturalian

company. Naturalia is, therefore, estopped by its prior conduct from now contesting the alien character of Minex.

2. Alternatively, Industria is entitled to give diplomatic protection to Lencot as the main shareholder of Minex.

Industria is entitled to give diplomatic protection to Lencot as the main shareholder.

a) In the Barcelona Traction case, the ICJ acknowledged that a State may grant diplomatic protection to the shareholders of a company "if the act complained of is aimed at the direct rights of the shareholders as such."⁵

A nationalization of all the shares of a company would unquestionably injure the rights of the shareholders. In the present case, Naturalia did not nationalize the shares, but rather all assets of the company. From the shareholder perspective, the technical distinction between a nationalization of shares and a nationalization of assets is meaningless.⁶ The practical result is the same. When a corporation is stripped of all its assets, the mere retention of share rights is nothing more than a fiction devoid of all meaning.⁷

b) In addition, Governmental intervention for the benefit of foreign shareholders is justified when the company concerned has the nationality of the very State responsible for the acts complained of. It is in such cases that the most widespread agreement exists on the admissibility of claims on behalf of shareholders.⁸ This is especially true in a situation, where the foreign shareholder owns an overwhelming majority of the shares and controls the management of the corporation. Numerous arbitral awards have disregarded the existence of a juristic person under similar circumstances.⁹ In State practice, attempts to intervene on behalf of shareholders have frequently resulted in the conclusion of compensation agreements.¹⁰

Certain important bilateral investment treaties¹¹ and the vast majority of lump-sum agreements¹² explicitly authorize stockholder claims. This practice has apparently come to be regarded as an expression of customary international law. In 1974, Peru¹³ and Chile¹⁴ endorsed this rule and allowed compensation to foreign shareholders. The recent U.S.-Iran Claims Settlement also explicitly refers to stockholder claims.¹⁵ Fundamental equity considerations call for an intervention right on behalf of shareholders whose legitimate interests would otherwise be left without any protection on the international plane.

B. THE NATIONALIZATION OF THE PROJECT BY NATURALIA WAS IN VIOLATION OF INTERNATIONAL LAW

1. By breaching the Project Agreement, Naturalia committed an internationally wrongful act.

a) The duty of Naturalia to honor and perform the Project Agreement is derived from customary international law.

Although the P. A. cannot be classified as a treaty, it constitutes an international legal duty. Strong factual evidence for this proposition can be found in State practice: concession contracts have regularly been complied with, and breaches - or attempts at breach - have been rare exceptions. In such cases, the home States of the investors protested against acts of breach, which were regarded as in violation of international law.¹⁶

The element of opinio iuris can also be demonstrated. G. A. Resolution 1803 was the last resolution concerning sovereignty over natural resources on which there was a broad consensus between industrialized and "third world" States.¹⁷ Therefore, it should be viewed as the expression of opinio iuris necessary to ascertain the conclusion of customary international law.¹⁸

The language: "foreign investment agreements freely entered into by or between States shall be observed in good faith"¹⁹ explicitly embraces contracts of States with private foreign investors.

The rarity of a UN general agreement on sovereignty over natural resources gives added weight to this expression of opinio iuris. A similar observation can be made with respect to the World Bank Convention (WBC) of 1965 which sets up an arbitration system for disputes arising out of investments between contracting States and entities belonging to other contracting States.²⁰ This Convention provides that "such rules of law as may be agreed by the parties" and "such rules of international law as may be applicable" shall be decisive in cases of dispute.²¹ Seventy-nine States, two thirds of which are developing countries, have agreed to and ratified this Convention,²² which represents the minimal consensus²³ that contracts are to be observed and on the means of their arbitration and enforcement. A further analogy can be found in the U. N. Convention on the Law of the Sea 1982, which provides that contracts between the International Sea-Bed Authority and mining companies are to "be governed by the terms of the contract, the rules, regulations and procedures of the Authority, Part XI and other rules of international law not incompatible with this Convention..." The language indicates that the terms of the contract per se have an international legal quality.²⁴

b) Arbitral Awards have confirmed the wrongful nature of breaching concession agreements.

Certain major arbitrations have concluded that States have the capacity to enter into internationally binding undertakings with private investors. A State using its sovereign authority to grant rights is precluded from withdrawing these rights before the end of the concession.²⁵ The contracting State freely agrees to submit the agreement not to the exclusive application of its municipal law, "but to rules falling at least in part within the

framework of international law."²⁶ Such an "internationalized" contract is, in this respect virtually indistinguishable from a treaty. The traditional legal rule leaving questions of breach of contract to municipal law does not apply to "long term economic development agreements".²⁷ "Without doubt, contractual limitations on the State's right to nationalize are juridically possible."²⁸

In conclusion, several arbitrations in factually similar cases have adopted the view that a nationalization contrary to such contractual undertakings is in violation of international law.

c) Scholarly Doctrine underscores the right of the private investor to protection.

There is divergence of authority with respect to the solution of problems arising out of contracts between a sovereign State and a private investor.²⁹ There are, however, certain elementary principles common to all of these theories.

The municipal law of the host State is rejected as the sole applicable law by all of the theories. The right of the investor to enjoy legal security and thus the protection of the investment from unilateral seizure is acknowledged by all of the doctrines. The principle of pacta sunt servanda is viewed as governing the relationship between investor and host country. The "high level" at which the State participates in such relations leads to a partial restriction in the use of its sovereign rights for the term of the contract.

Industry's desire for the P. A. to be honored and performed is supported by scholarly doctrine; whereas the nationalization measures of Naturalia are not, they would, on the contrary, be viewed as unlawful under each of the theories.

2. The lex specialis of Article XXII P. A. excludes any right of Naturalia to nationalize the project.

a) Naturalia's sovereignty is not unlawfully curtailed by the stabilization clause.

The fundamental right of a State to nationalize its natural resources is not in dispute. This right, however, cannot result in the invalidity of the Project Agreement, especially in light of the significance of Art. XXII.³⁰ This follows from a consideration of the general principles of international law and customary law as expressed in several arbitrations and in scholarly doctrine.³¹

The Government of Naturalia entered into the P. A. in exercise of its sovereign authority. It thereby took up commitments which included the abstention from certain acts - *i. e.* unilateral changes in the contractual relationship - which would otherwise be permissible by virtue of its sovereignty. In other words, Naturalia waived, in respect to the project, for a limited time its absolute sovereignty.³²

There is no change in the nature of the contract, which would arguably give Naturalia the right to nationalize in a non-confiscatory manner. There was no "general transformation in the terms of...concessions in (a designated area), and later throughout the world."³³ The contract was ratified in 1970 and production began in 1975; the project first became profitable in 1977, although the original investment had not been recouped by the time of the illegal termination. Thus, the scope of the contract and its importance for the Naturalian economy was known, or, at least, such factors were calculable from the beginning and have not changed since.

Further, with all due respect to the intentions of both parties as expressed in the P. A., the foreign investor, Minex resp. Lencot, obviously sought that the contract not be subject

exclusively to the national law of the host State. The Government of Naturalia acceded to this request for added protection by agreeing to the stabilization clause of Art. XXII.³⁴ This request was appropriate in light of the considerable investment undertaken by the company and the fact that it alone had to carry the risks of the enterprise. The clause bearing upon the "freezing" of Naturalian law is designed to stabilize the conditions of the P. A., in other words, to make them independent of future domestic political changes. While a new government has the unarguable prerogative of enjoying different political convictions, it is also the inheritor of the legal situation created by its predecessor and, thus, is obligated to respect the obligations entered into by its predecessor.

The contract-term of twenty-five years - relatively short if compared to other international mining operations - cannot be regarded as unduly long so as to concede to Naturalia a right not to be bound by inappropriate limits.³⁵

b) As an alternative: Article XXII constitutes a unilateral promise of Naturalia binding under international law.

Naturalia's endorsement of the stabilization clause of Art. XXII of the P. A. also constitutes an international and legally binding unilateral promise.

The fact that a State can be legally bound by a unilateral action has been confirmed by the International Court of Justice.³⁶

The following indicates that Naturalia's behaviour has resulted in a unilaterally created international legal duty: (1) the P. A. was concluded by the Government of Naturalia which possesses the authority to act in an internationally binding manner, and (2), the P. A. was ratified by the Naturalian legislature. International law is made relevant and incorporated in the P. A. by means of the stabilization clause of Art. XXII. By agreeing to it, Naturalia expressly acknowledged the applicability of the rule of

the sanctity of related contracts, as enunciated by the community of Nations in G. A. Resolution 1803, to this particular relationship.³⁷

The intention to act in a legally binding fashion towards Industria can also be seen from the negotiations and the signing of contracts which took place in both countries. In this way, it is clear that Naturalia intended to be legally bound to the foreign investor, a national of Industria. The incorporation of Minex as a Naturalian national is of no effect in this question.³⁸ A contractual clause concluded in such a manner is neither an unnotheworthy manifestation of political will or mere comity, nor does it only relate to municipal law, which would not provide the legal protection for the investor that the clause is meant to provide.³⁹

The contractual nature of the stabilization clause also fulfills the formal requirement of the creation of an international legal duty. The unilateral promise does not have to be expressly addressed to the concerned party, e. g., the Government of Industria, nor is acceptance by any other State required;⁴⁰ public declaration is sufficient.⁴¹ This would appear to be unobjectionable, since the home State of the investor legally benefits only from the desired promise.

The contract qualifies as a public instrument, since there was no secrecy clause; the Government of Industria had the possibility of knowing of the obligation entered into by Naturalia.

All of the above amounts to a strict test as to whether Naturalia did in fact unilaterally bind itself. Every element of this test indicates an affirmative answer to this question.

c) As a second alternative: Naturalia's action of nationalization is contrary to the general principles of bona fides and estoppel.

Naturalia's action of nationalization is contrary to the general principle of bona fides.

To argue that the act of seizure was covered by Naturalia's sovereignty essentially means that the "no change without consent" clause of Art. XXII P. A. has an exactly contrary meaning than an objective reading of its language. It would be tantamount to saying that Naturalia only agreed to this clause under the silent objection of not being bound to it.⁴² The principle of bona fides does not permit such a conclusion; and the principle of estoppel bars Naturalia from making such a claim.⁴³

3. The Basic Law of Naturalia cannot interfere with the contractual obligation

As noted supra, the laws of Naturalia do not govern the P. A. to an unlimited extent. Naturalia, by freely contracting, has agreed that the rules and principles of international law shall govern possible disputes arising out of the P. A., and that any change in the contract necessitates the consent of both parties. This clause is in direct conflict with the "Calvo" provision of the Basic Law of Naturalia, which denies foreigners civil rights - and thus, legal protection - beyond those afforded to Naturalian citizens. It is clearly contradictory to invoke constitutional provisions containing such a "Calvo" clause subsequent to having accepted the applicability of international law. A State cannot set its constitution against another State in order to evade its obligations under international law.⁴⁴

4. The compensation offered by Naturalia was not in accordance with international law.

a) The compensation offered by Naturalia was not adequate.

aa) The depreciated book value of the project is unacceptable as a valuation standard. In addition to the breach of the P. A., Naturalia violated international law by not providing prompt, adequate, and effective compensation. It is true that some investment disputes have been settled by lump-sum agree-

ments providing only partial compensation. But the frequency of these settlements is not in itself enough to create internationally binding norms. The States concerned must believe that their acts are redered obligatory by a rule of law.⁴⁵ Many States agreed to these settlements for reasons of expediency. In addition to the compensation, a preferential relationship was often maintained between the State and the foreign investor.⁴⁶ In the case of Minex all relations were broken off.

Using varying terms, lump-sum agreements were designed to meet specific situations. The ICJ therefore qualified them as agreements sui generis.⁴⁷ Major capital-exporting countries have stated on several occasions that they still adhere to the principle of full compensation.⁴⁸ It is impossible to create international law against the background of persistent objections by an important group of countries having vital interests in the matter.⁴⁹ Thus the conclusion of lump-sum agreements did not amount to an abdication of the principle of full compensation.⁵⁰

The book value has been rejected as a valuation standard in a number of international juridical and arbitral decisions. In the Chorzów Factory Case, the PCIJ said that a State is entitled "to the value of the undertaking at the moment of dispossession."⁵¹ Arbitral decisions have reaffirmed the principle of requiring the payment of "going concern value".⁵² Most bilateral agreements on investment protection specify that compensation must represent the full value of the property taken.⁵³ International claims commissions in several countries have adopted a going concern standard for the purpose of determining the amount of indemnification due for takings after World War II.⁵⁴

The book value is a mere accounting device that was never intended to indicate the actual value of an enterprise.⁵⁵

It is especially inappropriate for the valuation of mining rights. Moreover, it does not take into account the interest on an investment prior to its use and inflation.⁵⁶ The use of this standard would deny any compensation for Minex' concession right which is a recognized valuable interest.⁵⁷

bb) Adequate compensation must include damages for lost profits resulting from the premature termination of the P. A. It is a well-established principle of international law that compensation for the losses of future profits is to be allowed, if it can be proven with reasonable certainty and if a causal connection can be established.⁵⁸ This principle is also confirmed by certain arbitral awards⁵⁹ and is recognized in State practice.⁶⁰

The claim to damages for future profits is particularly evident in the case of an expropriation of concession rights prior to their lawful expiration.⁶¹

The expected earnings represent the real value of the project. Minex has invested considerable sums on the assumption that Naturalia would abide by its contractual obligations. By inserting a stabilization clause in the P. A. Naturalia has created a legitimate expectation of contractual compliance.⁶²

Faced with similar circumstances, certain recent arbitral awards have recognized the concept of permanent sovereignty over natural resources and have awarded damages for future profits.⁶³ Any other result would be contrary to equity as a general principle of international law.⁶⁴

Minex' expected earnings were neither wholly uncertain nor speculative.

The amount of profits earned during previous years is a solid basis for the valuation of "lucrum cessans".⁶⁵ Since 1977 the project showed stable profits of 80 million U. S. dollars per year. There is no evidence to indicate that these profits would not have continued to so increase.

b) The method of compensation proposed by Naturalia was not reasonable.

Customary international law requires the payment of effective compensation. In order to be effective, the means of compensation must be of real economic value to the foreign recipient.⁶⁶ The vast majority of lump-sum agreements specify payment in the claimant State currency or at least in a "hard" currency.⁶⁷ Arbitral tribunals have generally awarded compensation in U. S. dollars.⁶⁸ Compensation in the form of government bonds has been rejected as

an appropriate mode of payment.⁶⁹ Naturalia not only offered compensation by means of long-term bonds, but its mode of payment was designed to reduce the amount of compensation even further. The grave discrepancy between the official rate of exchange and the market rate prevents adequate compensation.⁷⁰ After having been deprived of all its assets, it would be inequitable to require Minex to keep its funds in Naturalia. The guarantee of the Central Bank of Naturalia to change Naturalian dollars at the official rate of exchange is subject to the availability of funds. Thus, Minex is exposed to a risk of devaluation which would render its compensation valueless. Under such circumstances, a State should be obligated to provide a corresponding adjustment to reflect losses beyond the control of the expropriated company.⁷¹ Finally, a payment over a period of ten years diminishes considerably the value of the compensation. An interest rate of 6 % is insufficient. The factor of world inflation demands an appraisal that is more in line with economic realities. An arbitration tribunal has therefore recently allowed an overall rate of 10 %, to take account of the rate of inflation, in addition to a reasonable rate of interest of 7.5 %.⁷² Even if the bonds are marketable, the value received for them if sold before maturity will always be considerably less than face value.

c) The Naturalian procedure to determine the amount of the compensation was in violation of international law.

aa) The exclusion of the right of appeal constitutes a denial of due process. International law calls for the possibility of appeal against executive acts.⁷³ The decision of the "Compensation Tribunal" is an executive act for it is the only official decision of Naturalia in this matter. First of all, it constitutes the basis for assessment and the amount of compensation due. It cannot perform a juridical review at the same time. Nemo potest esse simul actor et iudex. Naturalia has expressly disregarded the duty to offer a judicial review by ordering the decision of the "Compensation Tribunal" to be final.

bb) In addition: the composition of the "Compensation Tribunal" was in violation of international law. The failure to provide for impartiality is a denial of justice.⁷⁴ The "Compensation Tribunal" is composed primarily of officials appointed by the Ministry of Mines. A judgment dictated by the executive is regarded as a well established instance of denial of justice.⁷⁵ In this case, the Minister of Mines can, through his choice of officials, indirectly influence the decision of the tribunal.

5. The Government of Naturalia is bound to honor and perform the P. A.

Having committed an internationally wrongful act, the Government of Naturalia is held to "restitutio in integrum".

The principle of "restitutio in integrum" was laid down by the PCIJ in its judgments delivered in the Chorzów Factory Case.⁷⁶ The PCIJ and the ICJ as well as arbitration tribunals have ordered specific performance on several occasions.⁷⁷ In the field of legal writing, the highest authorities have given preference to restitution in kind over all other forms of reparation.⁷⁸

Although pecuniary compensation might have been used more often, a recent study has demonstrated that specific performance is not the extraordinary remedy that some legal scholars have regarded it to be.⁷⁹ In 1977 specific performance was ordered in a similar case concerning the nationalization of concession rights by Libya.⁸⁰ There are certain reasons why there are not more precedents for the adoption of the principle.⁸¹ Its application has either been physically impossible, not requested by the claimant, or the dispute was settled prior to the judicial decision. Simply because the opportunity to apply a certain remedy has not often occurred does not mean that it should not be applied when appropriate. In the present case, there is nothing to show that restitution in kind would be physically impossible. On the contrary, Naturalia is unlikely to be in a position to grant adequate pecuniary compensation. Therefore, the appropriate

relief should be full restitution of its concessionary rights to Minex.

6. Irrespective of the determination of the Court, either to order restitution or to award damages, counsel fees have to be paid by Naturalia.

a) Counsel fees of the pleadings before municipal courts.

Following a well-established arbitral practice, compensation must be allowed for counsel fees sustained by a foreign party before municipal courts.⁸² Minex' expenses incurred before the Compensation Tribunal in Naturalia and the municipal courts of Industria are a direct consequence of the illegal taking. Minex has only defended its lawfully acquired rights.

b) Counsel fees of the pleadings before the ICJ.

In accordance with Art. 64 of the Statute of the ICJ, Industria has requested the Court that all its costs should be paid by Naturalia. This claim is justified with regard to the merits of this case and the fact that the origin of this litigation must be seen in the wrongful nationalization by Naturalia. Industria will abide by a Court order in conformance with Art. 97 of the Rules of the Court.

7. Industria asks the Court to award damages in U. S. dollars at the market rate of exchange.

As we have explained above, the taking by Naturalia was unlawful. As far as restitutio in integrum might be impossible, Naturalia is liable to reparation.

As a general rule, reparation for a breach of international law must be paid in the currency of the claimant State.⁸³ In this case Industria requests a payment in U. S. dollars at the market rate of exchange. It is the currency specified in the P. A. in which the firm undertook all its investments.⁸⁴

Considering the impending danger of a devaluation of the Naturalian dollar,

a more effective currency must be used.⁸⁵

C. THE ASSUMPTION OF JURISDICTION BY THE COURTS OF INDUSTRIA
AND THE ATTACHMENTS BY THE COURTS OF INDUSTRIA WERE IN
ACCORDANCE WITH INTERNATIONAL LAW

1. The courts of Industria lawfully exercised jurisdiction.

a) The courts of Industria were entitled to exercise jurisdiction over the Government of Naturalia.

The Government of Naturalia is only immune from suit for its acta iure imperii.⁸⁶ Naturalia has intentionally breached the P. A. The nature of the act of contracting is clearly commercial.⁸⁷ Naturalia voluntarily limited its own sovereign power when it agreed to the incorporation of an anti-expropriation clause in an international contract.⁸⁸ If Naturalia chooses to engage in commercial activities, it can not be allowed to renounce its resulting obligations by resorting to the plea of sovereign immunity.⁸⁹

b) The courts of Industria were entitled to exercise jurisdiction over Natmin.

A state agency cannot invoke the doctrine of sovereign immunity when it is engaged in commercial activities.⁹⁰ This is certainly true for Natmin, since its mining and marketing of alumina as well as its numerous other activities in Industria and elsewhere are of a commercial nature. It is the paradigmatic case of a state enterprise whose increased commercial activities have led to the restriction of the old rule of absolute sovereign immunity in the vast majority of States. Natmin thus occupies the same position as a private person who can be sued anytime.⁹¹ It is the lex fori which determines the nature of the activity⁹² and the onus of proof of sovereign authority lies with the party claiming sovereign immunity.⁹³ The permanent sovereignty of a State over its

own natural resources does not automatically extend to all of its trading activities.⁹⁴

In addition, Natmin is a legal entity which is not identical with the State of Naturalia. It cannot therefore enjoy the immunity of a sovereign State.⁹⁵

Naturalia has waived the power to extend its sovereignty over Natmin by establishing it as a separate legal entity.⁹⁶

2. The attachments by the courts of Industria were lawful.

a) The attachment of Natmin's bank accounts was in accordance with international law.

Natmin cannot claim immunity for its bank accounts against prejudgment attachments. The theory of restricted sovereign immunity also applies to measures of execution, thus, a maiore ad minus, to prejudgment attachments.⁹⁷ The funds are used for Natmin's commercial activities and, therefore, are not immune. Even if Natmin had a duty to transfer its profits to the accounts of the State for further use at its discretion, immunity is not thereby established. If such a duty could provide a basis for the claim of immunity, the state corporation would then be in a better position than the State itself.⁹⁸ The State itself must establish in every case that the funds in question are directed to a public purpose.⁹⁹ Non-designated State funds only indirectly further public ends; they are not clearly earmarked for specific public purpose.¹⁰⁰ Thus, there is no absolute immunity of non-designated State funds.¹⁰¹ The fact that such funds may arise from the exploitation of natural resources does not change this result. There is no rule under international law pursuant to which the proceeds from the sale of natural resources are immune.¹⁰² While exploitation of natural resources is naturally confined to a State's own territory, the sale of such resources necessarily implies contacts with other States and affects strong foreign State interests. A concept of State sovereignty which includes the marketing of products does not find support in State practice.¹⁰³ Even the

G. A. Resolution "Charter of Economic Rights and Duties of States", which has not been agreed upon by the legal circle of industrialized States and, thus, cannot be regarded as an expression of customary international law, does not purport to extend the traditional concept of immunity to state trading corporations engaged in marketing natural resources.¹⁰⁴

b) The courts of Industria did not violate international law by attaching the bank accounts of the Central Bank.

The funds of the Central Bank are only immune ratione materiae when it can be shown that they are specifically directed to serve public purposes.¹⁰⁵ Central banks fulfill a variety of functions, both iure imperii and iure gestionis.¹⁰⁶ It is, therefore, not easy to ascertain to which purposes the attached bank accounts were designated. Where funds have not been clearly designated, the burden of proof rests on the institution claiming immunity.¹⁰⁷ There is no rule of law whereby the difficulty in characterizing the purposes of the funds of a central bank is to the detriment of the private creditor.¹⁰⁸ The private creditor is entitled to an opportunity to establish, pursuant to the theory of restricted sovereign immunity, that certain funds are used for commercial purposes. This is not an onerous requirement so long as the State is not required to reveal facts and purposes that are legitimately secret. Since the Central Bank has not clarified the issue, the attachments must be regarded as lawful. This result cannot be questioned by reference to the fact that some States grant a broader or even an absolute immunity to foreign central banks.¹⁰⁹ Such regulations are not based on an opinio iuris vel necessitatis, but on public policy considerations, i. e. the objective of attracting foreign capital.¹¹⁰

c) The attachment of alumina from the project was lawful.

aa) Alumina in inventory at the project in Naturalia at the time of nationalization
The alumina is Minex' property. Under the P. A., Minex acquired its title by mining the bauxite and producing alumina from it.¹¹¹ The internationally

unlawful expropriation did not confer a valid title to Naturalia or Natmin.¹¹² Industria's courts are not bound by foreign regulations which violate international law.¹¹³

Moreover, there is no general rule of international law prohibiting the municipal courts of a State from ordering prejudgment attachments of assets belonging to another State, if such assets are located in the first State's territory.¹¹⁴ This is true for all assets used for commercial purposes. The alumina found in warehouses were to be delivered to customers in Industria in fulfillment of contractual obligations. The sale of alumina is a purely commercial activity.

bb) Alumina aboard vessels on the high seas at the time of nationalization.

This alumina never became the property of Natmin.

No court is bound to recognize regulations of a foreign State concerning affairs which take place extraterritorially. Although the ships were registered in Naturalia, they cannot be regarded as "territoire flottant", which is a long-abandoned concept.¹¹⁵ Today, the State of registry has "exclusive jurisdiction", which is a concept fundamentally different in scope and purpose.¹¹⁶ Exclusive jurisdiction entails the power to expropriate - the vessel or its contents - with an effect erga omnes when the expropriating State has additionally taken actual possession of the goods.¹¹⁷ Naturalia never actually possessed the alumina and took no step to place itself in the necessary position to do so.

To insist upon recognition of the use of sovereign powers is only reasonable where the possibility of exercising or at least demonstrating this power is given.¹¹⁸ In all other cases, as in the one present, asking for recognition of State acts is asking for an extra-territorial effect of these acts. The courts of Industria are, obviously, not required to do so.

3. Alternatively: Assuming that the measures taken by the courts of Industria were unlawful, they were nevertheless justifiable as reprisals.

Reprisals which are non-forcible still form part of general international law. A reprisal is an act of self-help by an injured State in response to an act in contravention of international law and committed by an offending State.

Reprisal is limited by the doctrine of proportionality and would be unlawful without a prior act in contravention of international law. Its object is to induce the offender to return to legal means, and to avoid further offending acts.

The requirements for a lawful reprisal were met by Industria as follows:

Naturalia violated international law by breaching the P. A., or, in the alternative, by not providing adequate compensation and denying justice to Minex.

Industria reacted juridically by means of attachments. A State may delegate its power to set reprisals to lower state bodies provided they manifestly act for the State as a whole.¹¹⁹ Therefore, Industria lawfully reacted to the unlawful expropriations through judicial means.¹²⁰ The pre-judgment attachments were intended to induce Naturalia to honor the P. A. or to provide for adequate compensation to Minex. Naturalia can either move to have the attachments vacated or it can let the assets be used to satisfy Minex' claims.¹²¹

Finally, the value of the property attached does not exceed the value of the property taken; in this sense, the reprisal was proportionate.

The judicial remedy must not have been preceded by a request for redress to the Government of Naturalia. This procedure is only required when it is not clear if the execution of the reprisal would be the only successful measure.¹²²

Reprisals must be taken only in the last resort. Here, the need to act without prior request for redress is obvious. Naturalia would have otherwise been warned and would have had the opportunity to pull out its assets.¹²³ Without the attachments, there would have been little chance to induce Naturalia to redress the wrong committed.

SUBMISSIONS

FOR THESE REASONS, the submissions of the Government of Industria 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 accordance with international law,
- (b) to order the Government of Naturalia to honor and perform the Project Agreement,
- (c) to award damages to Industria for any loss suffered by Lencot, directly or indirectly, in consequence of the decree of April 12, 1981, including
 - (1) lost rights and profits resulting from termination of the Project Agreement,
 - (2) compensation for the value of the project in U. S. dollars at the market rate of exchange,
 - (3) the value of the property confiscated, and
 - (4) counsel fees.

FOOTNOTES

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3. R.B. Lillich & B.H.Weston, *International Claims*, Part I, 76-77 (1975) (hereinafter cited as Lillich & Weston)
4. Kunkel et al. v. Polish State (Germano-Polish Mixed Arb. Trib., 1925), 3 Ann. Dig. 418-19 (1925/26); Brownlie, *Principles* 403-04 & 636; D. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 *Brit.Y.B. Int'l L.* 176, 187 (1957)
5. *Barcelona Traction Case (Judgment)*, (1970) ICJ Rep. 3, 36 para.47
6. D. Bindschedler-Robert, *La protection diplomatique des sociétés et des actionnaires*, 100 *Rev. de la Société des Juristes Bernois* 141, 174 (1964); S. Beyer, *Der diplomatische Schutz der Aktionäre im Völkerrecht* 132-35 (1977)
7. cf. P. De Visscher, *La protection diplomatique des personnes morales*, 102 *Récueil des Cours (RdC)* 395, 465 (1961-I)
8. *Barcelona Traction Case (Judgment)*, (1970) ICJ Rep. 3, 72-73 para.14-15, sep. op. Fitzmaurice; *id.* at 134 sep. op. Tanaka; *id.* at 191-93 para.51-52 sep. op. Jessup; Caflisch 217; P. De Visscher *supra* note 7, at 478-79; *Restatement (Second) Foreign Relations Law of the U.S.*, §172 (a) (1965)
9. *Cerruti Case (Colombia v. Italy, 1897)*, 11 *R. Int'l Arb. Awards* 377, 394; *Fl Triunfo Case (U.S.A. v. Salvador, 1902)*, 64 *U.S. For. Rel.* 859, 873 (1902); *Alsop Claim (Chile v. U.S.A., 1911)*, 11 *R. Int'l Arb. Awards* 349, 359-60; *Ziat, Ben Kiran Case (Spain v. United Kingdom, 1925)*, *Spanish Zone of Morocco Claims* 53, 2 *R. Int'l Arb. Awards* 729, 729-30; *Shufeldt Claim (U.S.A. v. Guatemala, 1930)*, 2 *R. Int'l Arb. Awards* 1079, 1098 (hereinafter cited as *Shufeldt Claim*)
10. see, e.g. *Romano-Americana case*, 5 *Hackworth, Dig. of Int'l L.* 840, 844; *Mexican Eagle Oil Co. case*, 8 *Whitman, Dig. of Int'l L.* 1272, 1274
11. Caflisch 160-61
12. Lillich & Weston 84-91
13. Art. I (B) of the Agreement on Compensation for Expropriated Properties of U.S. Nationals (Feb. 19, 1974), 13 *ILM* 392, 394 (1974)
14. Decree-Law No. 601 (July 21, 1974), 13 *ILM* 1189, 1190 (1974)
15. Art. VII (2) of the Declaration of the Government of Algeria concerning the Settlement of Claims by the Government of the U.S.A. and the Government of the Islamic Republic of Iran (Jan. 1981), 20 *ILM* 230, 233 (1981)
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22. *Beilage zum Bundesgesetzblatt*, Part II, Fundstellennachweis B (concluded Dec. 31, 1982) 528-29, W.Ger.
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28. American Independent Oil Co. v. Government of the State of Kuwait, Award (March 24, 1982), 21 ILM 976, 1023 (1982) (hereinafter cited as Aminoil Award)
29. cf. A. Verdross, Die Sicherung von ausländischen Privatrechten aus Abkommen zur wirtschaftlichen Entwicklung mit Schiedsklauseln, 18 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 635, 635-38 (1957/58); Ph.C. Jessup, Transnational Law (1956); Lord McNair, The General Principles of Law Recognized by Civilized Nations, 33 Brit.Y.B. Int'l L.1-19 (1957); K. Zweigert, Verträge zwischen staatlichen und nichtstaatlichen Partnern, 5 Berichte der Deutschen Gesellschaft für Völkerrecht (BerDGVR) 194, 208 (1963); P.Weil, Problèmes relatifs aux contrats passés entre un Etat et un particulier, 128 RdC 95, 185 (1969-III); P.Fischer, Die internationale Konzession 451 (1974)
30. Texaco Award, 17 ILM 1, 17 (1978)
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50. M. Domke, Foreign Nationalizations. Some Aspects of Contemporary International Law, 55 Am. J. Int'l L. 585, 609-10 (1961); 1 G. Dahm, Völkerrecht 515 (1958)
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