THE 1984 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE

February 1984

State of Naturalia
Applicant

v.

State of Industria
Respondent

MEMORIAL FOR THE APPLICANT

Team 9-10
Agents for the State of Naturalia

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The parties have submitted the present dispute to this Court pursuant to the Statute of the International Court of Justice, Article 36, paragraph 1. The counterclaims are properly presented under Article 80 of the Rules of the Court.

STATEMENT OF FACTS

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

QUESTIONS PRESENTED

I.

Whether Industria may assert counterclaims on behalf of Minex and Lencot before this Court.

II.

Whether the legality of the nationalization measures taken by Naturalia is subject to a determination under international law.

III.

Whether Naturalia's nationalization measures are in accord with international law.

IV.

Whether Industria's assertion of jurisdiction over Naturalia and Natmin is in accord with international law.

V.

Whether Industria's attachment of the bank accounts and alumina owned by Naturalia and Natmin is in accord with international law.

VI.

Whether either party is entitled to relief.

SUMMARY OF ARGUMENT

Industria cannot espouse counterclaims on behalf of Minex or Lencot before this Court. Industria cannot espouse the claims of Minex, because Minex is a corporate national of Naturalia. Even if Minex is determined to be a corporate national of Industria, Industria may not espouse the claims of its corporate national which has failed to exhaust its local remedies. Industria may not espouse the claims of Lencot directly because Minex is capable of defending its shareholders' interests in Naturalia. Additionally, Minex and Lencot have contractually waived the diplomatic protection of Industria absent a "denial of justice" under the Calvo doctrine. Because similar treatment has been afforded Industrian nationals and citizens of Naturalia, no denial of justice has occurred to give Industrian nationals reason to deserve the diplomatic protection of Industria before this Court.

The legality of Naturalia's nationalization measures is a matter to be determined solely under Naturalian law. Termination of a contract between a State and a foreign corporation is a matter of municipal law regardless of agreements to the contrary. Similarly, nationalization and appropriate compensation for property taken by nationalization are matters governed by municipal law. Sovereignty implies full freedom of legal action subject to the condition that a state affords similar treatment to foreigners and nationals of the State.

Even assuming arguendo that the principles of international law govern the legality of Naturalia's nationalization measures, Naturalia has not violated international law. Under international law, agreements between a state and a foreign private investor should be upheld in good faith. However, Naturalia's termination of the project agreement is justified under supervening principles of international law. The emergence of the peremptory norm of permanent sovereignty over a state's natural resources, wealth, and economic activities, justifies the termination of a conflicting agreement. The project

agreement, by granting irrevocable control over Naturalia's natural resources and economy to Minex for 25 years, has alienated Naturalia's permanent sovereignty over its natural resources, wealth and economy, and thus is subject to lawful termination under international law. Additionally, the elective change in Naturalia's government and the emergence of the new international economic order dictating permanent sovereignty constitute a fundamental change of circumstances justifying termination of the agreement. The election of a government espousing this new ideology is tantamount to a State succession in Naturalia. Successor States may selectively opt out of agreements inimical to the welfare of the State, thus lending further justification for the termination of this unconscionable agreement with Minex.

Naturalia's nationalization of the project and assets of Minex fully complies with the requirements of international law. The nationalization was effected for a public purpose, was not discriminatory, and provision for appropriate compensation was made. Only compensation for the value of property rightfully owned by Minex is necessary. Just compensation for the value of that property, the book value of the project minus depreciation and depletion, was offered to Minex.

Naturalia's nationalization measures complied with the international minimum standard of procedural justice due to aliens. Naturalia's nationalization measures were not arbitrary or discriminatory, and access to a fair and impartial tribunal was afforded Minex for the determination of just compensation for the nationalization of its property.

The exercise of jurisdiction by the Courts of Industria over Naturalia and Natmin violates international law. Naturalia and Natmin are immune from jurisdiction in Industria under the doctrine of sovereign immunity. Additionally, Industria's exercise of jurisdiction over Naturalia and Natmin is not supported by any recognized basis for jurisdiction in international law.

Industria's attachment of the bank accounts and alumina owned by Naturalia

and Natmin violates international law. The bank accounts and alumina are immune from prejudgment attachment by Industrian Courts. Industria's attachments constitute a "taking" of property without just compensation in violation of international law. Additionally, the attachments constitute unlawful economic coercion against Naturalia by Industria, and cannot be justified as redress under international law.

Industria's unlawful exercise of jurisdiction and attachment of funds and property should not be recognized by this Court. Naturalia is entitled to the vacation of the attachments or damages in the amount of the funds and property attached, plus attorneys fees.

I. INDUSTRIA CANNOT ESPOUSE COUNTERCLAIMS ON BEHALF OF MINEX OR LENCOT BEFORE THIS COURT.

A. Industria cannot espouse counterclaims on behalf of Minex before this Court.

1. Industria cannot espouse the claims of a foreign corporate national. Only the national State of a corporation may provide diplomatic protection for that corporation.[1] Minex is a corporate national of Naturalia. The prevailing method for determination of corporate nationality provides that the nationality of a corporation is established by its place of incorporation and its registered office.[2] Minex is incorporated under the laws of Naturalia, and its principal place of business is in Naturalia. Therefore, Industria cannot espouse the claims of Minex, a corporate national of Naturalia.

2. Even if this Court determines that Minex is a national of Industria, Industria cannot espouse the claims of a corporate national which has failed to exhaust its local remedies. The rule of exhaustion of local remedies prohibits a State from instituting an action in an international tribunal on behalf of its nationals until those nationals have exhausted all possible means of redress under the municipal law of the foreign jurisdiction.[3] Minex has failed to exhaust its remedies in Naturalia. Minex has made no attempt to appeal to the courts of Naturalia for redress for the purported breach of the Project Agreement or for the uncompensated "taking" of the project. This avenue for redress was open to Minex; only the decision by the Naturalian Compensation Tribunal on the amount of compensation due Minex was declared not subject to appeal.[4]

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1 Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 46.

2 Id. at 35.

3 Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 5, 27; Panevezys-Saldotivkis Railway Case (Estonia v. Lithuania), 1939 P.C.I.J. Ser. A/B, No. 76 at 4, 21.

4 See Clarifications, No. 3.

B. Industria cannot espouse counterclaims on behalf of Lencot before this Court.

Industria cannot espouse the claims of Industrian shareholders in a foreign corporation. This Court, in the Barcelona Traction Case, established the general rule that a State may not espouse the claims of its nationals who are shareholders in a foreign corporation.[5] Where the corporation is a national of the State causing the purported injury, the corporation itself must defend its shareholders in the courts of that State.[6] The equitable argument that Minex is unable to defend the interests of its shareholders and that diplomatic protection of Lencot is thus necessary is not justified in this case. The corporate entity of Minex is not defunct, regardless of the nationalization of its assets,[7] as evidenced by Minex's instigation of suit in Industria. Minex is capable of defending its shareholders' interests in the courts of Naturalia as well.

C. Minex and Lencot have contractually waived the diplomatic protection of Industria, absent a "Denial of Justice."

Minex and Lencot have contractually bound themselves to be governed by the laws of Naturalia.[8] The basic law of Naturalia in force as of the date of the agreement embodies the "Calvo Doctrine"[9] by providing that foreigners may claim no greater rights than citizens of Naturalia.[10] By contractually binding itself to be

5 Barcelona Traction, 1970 I.C.J. 3, 46.

6 See Baasch and Romer v. Venezuala, Ralston, Venezualan Arbitrations of 1903, 909-10; Jones, Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies, 25 Brit. Y.B. Int'l L. 246 (1949).

7 Barcelona Traction, 1970 I.C.J. 3, 40-41.

8 See infra argument at II.A.1.b.i.

9 The use of the Calvo Clause in State Constitutions is prevalent in Latin America. See, e.g., Constitution of November 23, 1945, Art. 18 (Bol.); Constitution of March 28, 1936, Art. 19 (Hond.); Constitution of March 22, 1939, Art. 29 (Nicar.); Andean Foreign Investment Code, Dec. 30, 1970, reprinted in 11 I.L.M. 126 (1971) (adopted by Chile, Peru, Colom., Ecuador, and Bol.); Foreign Investments Law, Aug. 13, 1976, Art. 1, reprinted in 15 I.L.M. 1364, 1367 (1976) (Argen.); Constitution of April 9, 1933, Art. 31 (Peru); Constitution, Art. 127 (Venez.), reprinted in 4 A. Peaslee, Constitutions of Nations 1309 (rev. 3d ed. 1970).

10 Garcia-Mora, The Calvo Clause in Latin American Constitutions and International Law, 33 Marq. L. Rev. 205, 207-08 (1950).

governed by this law, Minex has agreed to be treated as a Naturalian citizen, governed by Naturalian laws and tribunals. Thus, Minex and Lencot may not appeal to an international tribunal for any alleged breach of contract or uncompensated taking of the project, since such issues are governed by Naturalian law.[11] Minex and Lencot may only avail themselves of the diplomatic protection of Industria upon the occurrence of a violation of international law, i.e., a "denial of justice."[12] No "denial of justice" has been suffered in this case since Naturalia has afforded similar treatment to Industrian nationals and Naturalian citizens.[13] Minex and Lencot may not avail themselves of the diplomatic protection of Industria in this case. Therefore, Industria cannot espouse the claims of Minex or Lencot before this court.

II. THE LEGALITY OF THE NATIONALIZATION MEASURES TAKEN BY NATURALIA IS NOT GOVERNED BY INTERNATIONAL LAW.

A. The Project Agreement between Minex and Naturalia is governed by Naturalian municipal law.

1. International law requires municipal law to govern concession agreements between States and foreign private investors. Because private corporations are not subjects of international law, agreements between a State and a private corporation must be governed by municipal law.[14] This Court has recognized that concession agreements are not analogous to treaties and should not be governed by international law.[15] An alien who voluntarily contracts with a foreign State subjects himself

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11 See supra argument at II. See also H. Steiner & D. Vagts, Transnational Legal Problems 522 (1981).

12 See, e.g., United States of America (North American Dredging Co. of Texas) v. United Mexican States, United States - Mexican Claims Comm'n, 4 U.N.R.I.A.A. 26 (1926).

13 International Law: The Collected Papers of H. Lauterpacht (E. Lauterpacht, ed. 1970), [citing Standard Oil Company Tankers Case, (Annual Digest, 3 (1925-6), case no. 167); Canadian Claims for Refund of Duties Case, (Annual Digest 3 (1925-26) case no. 168.]; Garcia-Mora, supra note 10 at 210;

14 Case Concerning the Payment of Various Serbian Loans Issued in France (France v. Serbia), 1929 P.C.I.J., Ser. A, No. 20, at 42; Hudson, The Thirteenth Year of the World Court, 46 Am. J. Int'l L. 1, 246 (1952).

15 Anglo-Iranian Oil Company Case (U.K. v. Iran), 1952 I.C.J. 112.

to local law, and must take into account the probabilities of performance by the foreign State, and the available local remedies, if any.[16]

a. Recent arbitral awards which have "internationalized" concession agreements[17] are not binding or persuasive precedent in this case. Recent arbitration awards which have applied international law to govern concession agreements are not binding on this Court under article 38 of the Statute of the International Court of Justice.[18] Additionally, these awards do not indicate a consistent trend towards "internationalization" of concession agreements.[19] Moreover, the concession agreements in these awards contained choice of law provisions which clearly expressed a preference for application of international law.[20]

b. Absent its express consent, a State is presumed to have contracted under its own law.[21]

i) Article XXII of the Project Agreement specifies application of Naturalian municipal law. Article XXII requires application of "the laws of Naturalia in force as of the date of this agreement and such rules or principles of international law as may be applicable."[22] Proper interpretation of this exact language is detailed by Professor Onejeme: "[T]his provision . . . requires, in the absence of express provision otherwise, that primary resort be to the local law of

16 D. Kronfol, Protection of Foreign Investment 81 (1972).

17 Texas Overseas Petroleum Co. (TOPCO) & California Asiatic Oil Co. v. Government of the Libyan Arab Republic 53 I.L.R. 422 (1979). Revere Copper and Brass, Inc. v. Overseas Private Investment Corp., 56 I.L.R. 258 (1978);

18 Statute of the International Court of Justice, art. 38, para. 1.

19 See B.P. Exploration Co. (Libya) v. Government of the Libyan Arab Republic, 53 I.L.R. 397 (1979), aff'd on reh'g, 53 I.L.R. 375 (1979); Delaume, What is an International Contract? An American and a Gallic Dilemma, 28 Int'l & Comp. L.Q. 258 (1979); Roman, Transactional Corporations, International Law and the New International Economic Order, 6 Syracuse J. Int'l L. & Com. 17 (1978).

20 Revere Copper, 56 I.L.R. 258, 271-72 (1978); TOPCO, 53 I.L.R. 422, 442 (1979).

21 Serbian Loans in France, 1929 P.C.I.J., Ser. A, No. 20, at 42; Case Concerning the Payment in Gold of the Brazilian Federal Loans issued in France (Fr. v. Braz.), 1929 P.C.I.J., Ser. A, No. 21, at 121.

22 See Compromis, p. 2.

the contracting State, and secondary resort be to the rules of international law. . . . .[I]nternational law, therefore, is to compliment the local law, and not to supplant it."[23]

ii) Article XXII, even if amenable to differing interpretations, must be construed in favor of the application of Naturalian municipal law. Assuming arguendo that Article XXII is ambiguous, the presumption must be that municipal law applies. Naturalia cannot be deemed to have submitted to international law without its express consent.[24]

2. Naturalia's termination of a concession agreement governed by municipal law has no consequences in international law absent a "denial of justice."[25] No denial of justice has occurred in this case. Thus, Naturalia may not be held internationally responsible for the termination of the Project Agreement.

B. **Naturalia's nationalization of alien-owned property is governed by Naturalian municipal law.**

1. International law requires municipal law to govern nationalization. International law recognizes the inalienable sovereign right of a State to nationalize alien-owned property within its territory, even if a previous government engaged itself by contract not to do so.[26] This principle is derived from the incontrovertible permanent sovereignty of a State over all its wealth, economic activities, and natural resources, as proclaimed in successive General Assembly Resolutions,[27] and particularly in the Charter of Economic Rights and Duties of States.[28] Nationalization,

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23 Onejeme, The Law of Natural Resources Development: Arguments Between Developing Countries and Foreign Investors, 5 Syracuse J. Int'l & Com. 1, 25 (1977).

24 Id.; see supra note 21.

25 See supra argument at II.C. See also supra note 13 and accompanying text.

26 Arechaga, State Responsibilities for the Nationalization of Foreign Owned Property, 11 N.Y.U.J. Int'l L. & Pol. 179 (1978).

27 G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 17, U.N. Doc. A/5217 (1962); G.A. Res. 2158, 21 U.N. GAOR, Supp. (No. 16) 29, U.N. Doc. A/6316 (1966); G.A. Res. 2386, 23 U.N. GAOR, Supp. (No. 18) 24, U.N. Doc. A/7218 (1968); G.A. Res. 2692, 25 U.N. GAOR, Supp. (No. 28) 63, U.N. Doc. A/8028 (1970); G.A. Res. 3016, 27 U.N. GAOR, Supp. (No. 30) 48, U.N. Doc. A/8730 (1972); G.A. Res. 3171, 28 U.N. GAOR, Supp. (No. 30) 52, U.N. Doc. A/9030 (1973).

28 G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974).

as the exercise of a sovereign right, is considered entirely lawful and subject only to the laws and policies of the State. Absent a "denial of justice," nationalization cannot give rise to international responsibility.[29]

2. International law requires Naturalian municipal law to govern compensation and compensation proceedings. The Charter of Economic Rights and Duties of States provides that each State has the right to nationalize foreign property, in which case appropriate compensation should be paid by the State adopting such measures. The vast majority of States do not accept the alleged customary rule of "prompt, adequate, and effective compensation."[30] Compensation is appropriately determined according to a State's laws and regulations and according to the circumstances of each case.[31] Additionally, the Charter provides that "in any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and its tribunals."[32]

C. Under the governing municipal law and the applicable international law, Naturalia's nationalization measures are lawful.

The Naturalian law as of the date of the agreement, which governs all questions relating to the termination of the agreement, provides that foreigners in the territory of Naturalia have equal, but not greater, rights than Naturalian citizens.[33] The Naturalian nationalization measures complied with this provision, and are thus lawful. The termination of the project agreement, the nationalization, the compensation proceedings, and the compensation offered all affected the Industrian shareholders of Minex in exactly the same manner as the Naturalian shareholders. Industrian nationals may not claim more favorable treatment than Naturalian

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29 Arechaga, supra note 26, at 180; see also supra note 13 and accompanying text.

30 See 29 U.N. GAOR, C.2 (1638th mtg.) 382, 384 U.N. Doc. A/C.2/SR. 1638 (1974).

31 G.A. Res. 3281, supra note 28, Art. 2, para. 2(c).

32 Id.

33 See Compromis, p. 2.

citizens under the applicable municipal law. International law recognizes that sovereignty implies full freedom of legislation subject to the condition that a State must accord similar treatment to aliens and subjects of the the State.[34]

III. ASSUMING ARGUENDO THAT INTERNATIONAL LAW GOVERNS THIS DISPUTE, THE NATIONALIZATION MEASURES TAKEN BY NATURALIA ARE CONSISTENT WITH INTERNATIONAL LAW.

A. Naturalia's termination of the Project Agreement is consistent with international law.

Assuming arguendo that international legal principles governing contractual relationships are applicable, thus rendering the Project Agreement an inviolable international obligation, Naturalia's termination is justified under supervening principles of international law.

1. The Project Agreement is rendered invalid by operation of the doctrine of jus cogens.

a. Permanent sovereignty over a State's natural resources, wealth, and economic activities is an emerged peremptory norm of international law. This principle has been proclaimed in numerous General Assembly resolutions,[35] particularly in the Charter of Economic Rights and Duties of States. Permanent sovereignty over a State's natural resources, wealth, and economic activities constitutes a jus cogens norm, fulfilling both the basic requisites of generality of State practice and opinio juris.[36] The Charter was passed by an overwhelming majority of 120 states, with the manifest intention, evidenced by the language of the Charter, to codify the new international economic order as binding customary international law.[37]

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34 International Law (Lauterpacht), supra note 13.

35 See supra note 27.

36 Akehurst, Custom as a Source of International Law, 47 Brit. Y.B. Int'l L. 53 (1974).

37 Guertin, Remarks, Am. Soc'y Int'l L. Proc. 234 (1975); Magallona, Some Remarks on the Legal Character of U.N. General Assembly Resolutions, 5 Phil. Y.B. Int'l L. 89 (1976); Rubin, The Charter of Economic Rights and Duties of States, Am. Soc. Int'l L. Proc. 226 (1975).

2. Alternatively, the Project Agreement lost its binding legal effect by operation of the doctrine of rebus sic stantibus.

a. The doctrine of rebus sic stantibus applies to contracts. The doctrine of fundamental change of circumstances (rebus sic stantibus) is recognized under customary international law as justification for the repudiation of a contract as well as a treaty.[38] A change in circumstances which will justify the invalidation of a contract must relate to a fact or situation which existed at the time a contract was entered into, and it must be fundamental in the sense that: i) the continued existence of the fact or situation constituted an essential basis for the consent of the parties, and ii) the effect of the change is to transform in an essential respect the character of the obligations undertaken.[39]

b. The requirements for application of the doctrine of rebus sic stantibus have been met. The election of a new government in Naturalia which will not condone the previous government's alienation of Naturalia's permanent sovereignty over its resources, wealth, and economic activities, and the emergence of the new international economic order constitute a fundamental, unforseen change of circumstances in Naturalia and in international law. The continued existence of the traditional economic order allowing foreign corporations to lawfully exploit the natural resources of a State and wield control over its wealth and economy constituted an essential basis for the consent of the parties to the Project Agreement. The effect of the emergence of the new international

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38 M. Mughraby, Permanent Sovereignty Over Oil Resources 184 (1966); O'Keefe, The United Nations and Permanent Sovereignty Over Natural Resources, 8 J. World Trade L. 239, 254-55 (1974).

39 Lissitzyn, Treaties and Changed Circumstances, 61 Am. J. Int'l L. 895-96 (1967). Rebus sic stantibus has been codified in The Vienna Convention on the Law of Treaties, opened for signature 22 May 1969, 60, U.N. Doc. A/Conf. 39/27.

economic order is to render unlawful such exploitation and control by a foreign corporation.[40] Because the character of the obligations assumed under the agreement is no longer lawful under international law, the repudiation of the Project Agreement is justified.

3. Alternatively, the Project Agreement lost its binding legal effect by operation of the doctrine of State succession. The election of a radically different Naturalian government is equivalent to State succession.[41] Even though the structure of Naturalia's new government remains unchanged, the ideological framework of Naturalian politics has been radically altered because of the new government's adherence to the precepts of the new international economic order mandating permanent sovereignty over natural resources, wealth, and economic activities. Such vast changes in State ideological perspective are indicative of State succesion.[42] Successor States may selectively cancel agreements deemed inimical to the public interest.[43] Thus, Naturalia's termination of the Project Agreement is justified under the doctrine of State succession.

B. Naturalia's nationalization of the project and all assets of Minex is consistent with international law.

1. Naturalia's sovereign right to nationalize foreign property is inalienable under international law. "Contemporary international law recognizes the inalienable right of every State to nationalize foreign-owned property, even

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40 L. McNair, The Law of Treaties 448-51 (rev. 2d ed. 1969).

41 L. Chen, State Succession Relating to Unequal Treaties 35-37 (1974); D. O'Connell, State Succession in Municipal Law and International Law vi (1967); Kunz, Identity of States Under International Law, 49 Am. J. Int'l L. 68, 71 (1955).

42 See supra note 41; see also McDougal & Goodman, Chinese Participation in the United Nations: The Legal Imperative of a Negotiated Solution, 60 Am. J. Int'l L. 68, 71 (1955).

43 D. O'Connell, State Succession in Municipal and in International Law 264 Vol. 1 (1967) (citing Brierly in Hague Recueil, vol. LVIII (1937), p. 65; Udina in Hague Recueil, vol. XLIV (1933), p. 754; Baty in 35 Yale L. J. 434 (1926)).

if a predecessor government expressly contracted not to do so."[44] The sovereign right to maintain permanent control over a State's wealth, natural resources, and ecnomic activities takes precedence over contractual obligations which alienate that sovereignty.

2. Naturalia's nationalization complies with traditional criteria for a lawful nationalization under international law. Under traditional international law, three criteria must be met for a lawful nationalization: the nationalization must be carried out for a public purpose, must not be discriminatory, and provision for appropriate compensation must be made.[45]

a. Naturalia's nationalization was accomplished for a public purpose. The nationalization of the project and assets of Minex was accomplished pursuant to a nationwide program of nationalization. The new government of Naturalia, elected under a political platform espousing nationalization,[46] has the mandate of the people of Naturalia supporting its nationalization efforts. Thus, the nationalization of Minex was accompished democratically, in the best interests of the people of Naturalia and for an undeniably public purpose.

b. Naturalia's nationalization was not discriminatory. The new government nationalized Naturalian, as well as foreign enterprises.[47] Thus the nationalization did not discriminate against Industrian nationals.

c. Provision for appropriate compensation was made.[48]

C. The Naturalian Compensation Tribunal's determination of appropriate compensation is consistent with international law.

1. International law requires compensation to be determined under municipal law. Naturalia has the sovereign right to determine compensation for

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44 Arechaga, supra note 26.
45 Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, 17 U.N. GAOR.
46 See Compromis, p. 2.
47 See Clarification No. 42, at 6.
48 See infra argument at III.C.

the nationalization of the project and the assets of Minex, taking into account all relevant laws and circumstances which the Naturalian State considers pertinent.[49] Thus, any compensation deemed appropriate by Naturalia's Compensation Tribunal is acceptable under international law. Duty to pay compensation does not arise out of any illegality; rather the duty to pay arises out of equitable prohibitions against unjust enrichment.[50]

2. Alternatively, Naturalia has provided "appropriate" compensation under international law. General Assembly Resolution 1803, providing that compensation must be "appropriate", has garnered support under international law.[51] However, the rule is ambiguous, with no clear guidelines provided as to adequacy of compensation. There exists no consensus as to the amount of compensation which should be paid, nor as to the valuation method.[52]

a. Under general State practice, the compensation offered Minex is clearly adequate and acceptable. Naturalia offered Minex the book value, minus depreciation and depletion of its physical assets. Use of book value is widely accepted under international law.[53] The equity of this method of valuation is supported by the fact that it employs the value officially recorded on Minex's books for its prior dealings with Naturalia, for purposes of tax payments.[54]

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49 Charter of Economic Rights and Duties of States, supra note 28, Art. 2.

50 Arechaga, supra note 26, at 181-82.

51 Rood, Compensation for Takeovers in Africa, 11 J. Int'l L. & Econ. 521, 535 (1977).

52 D. O'Connell, International Law 792 (2d ed. 1970); Rafat, Compensation for Expropriated Property in Recent International Law, 14 Vill. L. Rev. 199, 205 (1969).

53 Muller, Compensation for Nationalization: A North-South Dialogue, 19 Colum. J. Transnat'l L. 35, 35-38 (1981).

54 Walde, Revision of Transnational Investment Agreements: Contractual Flexibility in Natural Resources Development, 10 Law Am. 265, 275; Girvan, Expropriating the Expropriators: Compensation Criterion from a Third World Viewpoint, in 3 The Valuation of Nationalized Property in International Law 167 (R. Lillich ed. 1975) [hereinafter cited as Lillich].

Additionally, this method allows for certainty over the exact figure to be paid.[55]

b. Naturalia has no duty to compensate Minex for the value of Minex's contractual mining rights. International law requires compensation only for the nationalization of property or rights rightfully possessed by aliens. In this case, the grant of property rights to Minex was invalid and unlawful as contrary to the emerged new international economic order.[56] The contract granting these rights was lawfully terminated.[57] Compensation is due only for the property rightfully owned by Minex, i.e., its physical assets.

3. "Prompt, adequate, and effective" compensation is not required under international law. The "prompt, adequate, and effective" criteria for lawful compensation adhered to by the United States has not been followed historically, nor is it presently supported under international law.[58] Thus, Naturalia's offer of compensation cannot be judged by these criteria.

4. Assuming arguendo that the "prompt, adequate, and effective" standard for lawful compensation is upheld, the standard is inapplicable in this case. The nationalization of Minex was accomplished pursuant to a nationwide program of governmental reform through nationalization.[59] Under such circumstances, international law permits the nationalizing State to set the appropriate amount of compensation.[60]

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55 Girvan, supra note 54.

56 Id. at 168.

57 See supra argument at III.A.1.,2.&3.

58 See Vicuna, The International Regulation of Valuation Standards and Processes, A Reexamination of Third World Perspectives, in 3 Lillich, supra note 54 at 132.

59 See Compromis, p. 2.

60 I. Brownlie, Principles of Public International Law 537-38 (3d ed. 1979); K. Katzarov, The Theory of Nationalization 349-57 (1964); Dawson & Weston, "Prompt, Adequate, and Effective": A Universal Standard of Compensation?, 30 Fordham L. Rev. 727, 735 (1962); Girvan, Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint, in 3 Lillich, supra note 54, at 165-68; Kuhn, Nationalization of Foreign Owned Property and Its Impact on International Law, 45 Am. J. Int'l L. 709 (1951).

D. Naturalian legal procedures relating to the nationalization and determination of compensation are consistent with the international minimum standard of procedural justice.

1. The nationalization proceedings were procedurally just.

a. The nationalization was not arbitrary. The nationalization of the project and assets of Minex was effected for a public purpose.[61]

b. Ample notice of imminent nationalization was afforded Minex and Lencot. The new government of Naturalia was elected in 1980 pursuant to its political party's platform advocating nationalization. Thus, the imminence of nationalization was public knowledge. Adequate time prior to nationalization was given: the nationalization decree was not effected until April 15, 1981.

c. The nationalization was not discrminatory. A large percentage of totally Naturalian enterprises were nationalized.[62]

2. The compensation proceedings were procedurally just.

a. Minex had access to a fair and and impartial tribunal for the determination of just compensation. The fairness of the decision of the Compensation Tribunal is prime evidence of the impartiality of the compensation tribunal. Additionally, the fact that the Compensation Tribunal was a special court rather than a normal court is irrelevant. Use of a special court does not constitue a denial of justice.[63]

b. No appellate review of the Compensation Tribunal's decision was necessary. The finality of the Compensation Tribunal's decision does not constitute a "denial of justice." Appellate review is not required under the minimum standard of procedural justice.[64]

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61 See supra argument at III.B.2.a.
62 See Compromis, pp. 2-3.
63 C. Amerasinghe, State Responsibility for Injury to Aliens 91 (1967).
64 F. Dawson & I. Head, International Law, National Tribunals, and the Rights of Aliens 109-59 (1971); Wesley, A Compensation Framework for Expropriated Property in the Developing Countries, in 3 Lillich, supra note 54, at 30.

IV. INDUSTRIA'S EXERCISE OF JURISDICTION OVER NATURALIA AND NATMIN VIOLATES INTERNATIONAL LAW

A. Industria's exercise of jurisdiction is barred by the sovereign immun--ity of Naturalia and Natmin.

1. The courts of Industria have no jurisdiction over Naturalia because it is a sovereign State.

a. This court should recognize and apply the theory of absolute immunity. The theory of absolute immunity provides that sovereign States are only subject to the jurisdiction of foreign courts by their consent.[65]

b. Alternatively, even should this court apply the restrictive theory of sovereign immunity, Naturalia is immune from the jurisdiction of Industrian courts. The restrictive theory of sovereign immunity provides that a State is entitled to immunity in respect to its public acts (jure imperii) but not in respect to its commercial acts (jure gestionis).[66] Industria may not assert jurisdiction over Naturalia because the act giving rise to the cause of action is a sovereign, public act. The act giving rise to this suit is Naturalia's nationalization of the project and the assets of Minex. A nationalization or expropriation is clearly a sovereign or public act, capable of being

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65 Bierhuize, The Principle of Sovereign Immunity and International Contracts: Recent Developments in English Case-Law and American Legislation, 25 Neth. Int'l L. Rev. 345, 347 (1978)

66 Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1603(d), 1605(a)(2), State Immunity Act, §3(1)(a), reprinted in 17 I.L.M. 1123 (1978); European Convention on State Immunity, Council of Europe, art. 24(1), reprinted in 11 I.L.M. 470 (1972); see T. Elias, The International Court of Justice and Some Contemporary Problems (1983); Bierhuize, supra, note 1; Bouchez, The Nature and Scope of State Immunity from Jurisdiction and Execution, 10 Neth. Y.B. Int'l L. 3 (1979); Kahale & Vega, Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States, 18 Colum. J. Transnat'l L. 211, (1979); Comment, Sovereign Immunity and Judicial Remedies Against the Government in the Netherlands, Italy, Belgium and W. Germany, 10 Int'l Law 439 (1976).

performed only by a sovereign government.[67] Thus, Naturalia is immune from the jurisdiction of Industrian courts in respect to this act.

2. The courts of Industria have no jurisdiction over Natmin because it is a government agency. Government agencies are immune from suit in a foreign state unless they are both separate and distinct from the government and are capable of suing or being sued.[68] Natmin, a government agency of Naturalia, is immune from suit because it is inseparable from the government of Naturalia. Although Natmin is a juridical entity with capacity to sue and be sued, it does not have an existence separate and distinct from the government. Natmin's board of directors is composed of government officials of the Ministry of Mines of Naturalia, and thus is under government control. Additionally, Natmin is exercising a sovereign function by assuming control of Naturalia's natural resources.[69] As a government agency performing the sovereign functions of the government, Natmin is entitled to sovereign immunity from suit.

B. Industria's exercise of jurisdiction over Naturalia and Natmin has no basis in international law.

Three bases for the exercise of jurisdiction over a foreign State are recognized under international law: territoriality, nationality, and "direct effects".[70]

1. Industria's exercise of jurisdiction is not validly based upon the principles of territoriality or nationality. Under the principle of territori-

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67 Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962); 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); Kahale v. Vega, supra note 66, at 201.

68 Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1603(b); State Immunity Act §14(1) (1978); European Convention on State Immunity, Council of Europe, Art. 27(1) (1972).

69 See U.N. Resolutions, supra note 67.

70 J. M. Sweeney, O. Oliver & N. Leech, The International Legal System 90-115, 124-26 (1981).

ality, a State may exercise jurisdiction over persons and legal entities within its borders.[71] Neither Naturalia nor Natmin is within the borders of Industria. Under the principle of nationality, a State may exercise jurisdiction over all nations regardless of where they are located.[72] Neither Naturalia nor Natmin is a national of Industria.

2. Industria's exercise of jurisdiction is not validly based upon the "direct effects" test. Under international law, jurisdiction may be based on conduct outside a State which causes a direct effect within that State.[73] Naturalia's nationalization did not cause a direct effect within Industria. It has been argued that a financial loss to the nationals of a State occurring outside that State may constitute a direct effect within that State. No irreparable financial loss occurred as a result of Naturalia's nationalization because appropriate compensation was offered.[74] Alternatively, any financial loss to Minex cannot constitute a direct effect within Industria because Minex is not a national of Industria.[75]

C. Industria may not justify its unlawful exercise of jurisdiction by asserting its own law.

A State may not assert its own law as justification for a violation of customary international law.[76] The courts of Industria asserted that Industrian

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71 I. Brownlie, Principles of Public International Law, 291 (3d. ed. 1979); Restatement (Second) of the Foreign Relations Law of the United States, §17 (1965).

72 Restatement (Second) of the Foreign Relations Law of the United States §30 (1965); Skol & Peterson, Export Control Laws and Multinational Enterprises, 11 Int'l Law. 29 (1977).

73 The S.S. "Lotus" (France v. Turkey), 1927 P.C.I.J., Ser. A, No. 10; Gostelradio S.S.S.R. v. Whitney and Piper, reprinted in Levitsky, Defamation and Privacy in Soviet Civil Law, 22(I) Law in Eastern Europe 151 (1979) Restatement (Second) of the Foreign Relations Law of the United States §18 (1965).

74 See supra argument at III.C.1.,2.,3., & 4.

75 See supra argument at I.A.1.

76 Restatement (Second) of the Foreign Relations Law of the United States §3 (1965).

law required the exercise of jurisdiction in this case,[77] in disregard of international principles requiring both the application of the doctrine of sovereign immunity and a valid basis for assertion of jurisdiction. Applying conflicting Industrian domestic law cannot justify the breach of international principles, and constitutes a violation of international law of itself.[78]

V. INDUSTRIA'S ATTACHMENT OF THE PROPERTY OF NATURALIA AND NATMIN VIOLATES INTERNATIONAL LAW

A. The property of Naturalia and Natmin within Industria is immune from prejudgment attachment by Industrian courts.

The property of a State connected with its public or governmental acts is immune from prejudgment attachment.[79] "Mixed" funds and property, used for both governmental and commercial purposes, are also considered immune from attachment.[80]

1. Funds in the Central Bank of Naturalia within Industria are used for governmental purposes and thus are immune from attachment. The Central Bank of Naturalia operates, as do other central banks, to manage the government's money. As a means to obtain balance of payments equilibrium, price stability, and full employment in their States' economies,[81] central banks engage in the practice of buying and selling foreign currencies, often keeping those currencies in the country where purchased for investment purposes. This diversification into a multiple currency reserve system is done in order to maintain the real value of those assets, and to increase the return on them. Thus, Naturalia's

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77 See Compromis, p. 4.

78 See supra note 76.

79 Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1610(d); State Immunity Act §13(2)(b) (1978); European Convention on State Immunity, Council of Europe, art. 23 (1972); See Crawford, Execution of Judgments and Foreign Sovereign Immunity, 75 Am. J. Int'l L. 820, 859 (1981).

80 See Crawford, supra note 79 at 63.

81 See generally, How Central Banks Manage their Reserves, A Study by the Office of the Group of Thirty (1982); C. Kindleberger & P. Lindert, International Economics (1978).

funds in the Central Bank of Naturalia in Industria are used to effectuate Naturalia's economic policies, a public and governmental purpose, and therefore are immune from attachment.[82]

2. Natmin's funds in Industria are government funds engaged in government activities, and therefore are immune from attachment. Many countries hold foreign exchange not only in the form of official reserves held by the Central Banks, but also in the form of quasi-reserves or secondary reserves held by official agencies.[83] Natmin's funds are a part of the multiple currency reserve system used to effectuate Naturalian governmental policies, and thus are immune from prejudgment attachment.[84] Additionally, Natmin is currently entrusted with control over Naturalia's natural resources, a sovereign function.[85] Accordingly, Natmin's activities in regard to the mining and marketing of mineral products are governmental in nature, and thus its funds in connection with these activities are immune from attachment.[86]

3. The alumina located in Industria is property connected with the sovereign control of Naturalia's natural resources, and thus is immune from attachment. The alumina now located in Industria was property under the territorial jurisdition of Naturalia on the date of the Special Decree, being located either in Naturalia itself or on Naturalian ships.[87] Thus, the alumina attached by Industria was expropriated as of the date of the Decree as part of Naturalia's asertion of control over its natural resources. As property connected with the

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82 Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1611(b)(1); State Immunity Act §14(4) (1978).

83 See How Central Banks Manage their Reserves, supra note 81, at 29.

84 See supra note 79.

85 See U.N. Resolutions, supra note 67.

86 See supra note 79.

87 See Compromis, p. 4.

sovereign activity of nationalization, the alumina is immune from attachment by the courts of Industria.[88]

B. Industria's attachment of the property of Naturalia and Natmin, as well as its exercise of jurisdiction over Naturalia and Natmin, contravenes the Act of State Doctrine.

Industria's attachment of property and exercise of jurisdiction are equivalent to an evaluation of the merits of a sovereign act of Naturalia. By attaching the property of Naturalia and Natmin and exercising jurisdiction, Industria has in effect asserted that it is entitled to adjudicate the merits of Naturalia's nationalization of Minex, a sovereign act.[89] Under the sound policy of the Act of State doctrine, the courts of one State should not be permitted to evaluate the merits of the sovereign acts of a foreign State.[25] Thus, it is respectfully suggested that this Court refuse to permit Industria's exercise of jurisdiction and attachment of Naturalia's property.

C. Industria's attachment of the property of Naturalia and Natmin constitutes a "taking" in violation of international law.

Industria's attachment constitutes a "taking" of property without just compensation. A "taking" of property does not have to be an outright expropriation,[91] title need not pass,[92] nor must a "taking" be intended.[93] Industria's

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88 See supra note 79.

89 Restatement (Second) of the Foreign Relations Law of the United States §41 Comment (d) (1965).

90 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Higgins, Certain Unresolved Aspects of the Law of State Immunity, 29 Neth. Int'l L. Rev. 265, 275 (1982).

91 American Branch of the International Law Association, Report of the Convention on Nationalization of Property, published in Proceedings and Committee Reports of the American Branch of the International Law Association 63 (1957-58).

92 Id.

93 Certain German Interests in Polish Upper Silesia (Germ. v. Pol.), 1926 P.C.I.J., Ser. A, No. 7; Norwegian Shipowners Case (Nor. v. U.S.), 1 R. Int'l Arb. Awards 207 (1922).

attachment unreasonably interferes with the use, enjoyment, and disposal of both Naturalian funds and goods and therefore constitutes a "taking" under international law.[94] It is a widely accepted rule of law that once a "taking" has been established, just compensation must be given.[95] Industria, in violation of international law, has neither paid nor offered to pay any compensation.

D. Industria's attachment of the funds and property of Naturalia and Natmin constitutes "economic coercion" in violation of international law.

Customary international law, as evidenced by General Assembly Resolutions[96] and the Helsinki Accords,[97] prohibits acts of economic coercion designed to subordinate the exercise of a State's sovereign rights. The attachment of Naturalian funds and property, presumably to force a settlement on Industria's terms, constitutes economic coercion in derogation of Naturalia's sovereign right of nationalization.

E. Industria's attachment of the funds and property of Naturalia and Natmin cannot be justified as redress.

1. Industria's attachment of the funds and property of Naturalia and Natmin cannot be justified as an act of retorsion. Retorsion consists of a legal and proportionate response to an unfriendly but legal act.[98] Industria's attach-

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94 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 10, para. 3, reprinted in 55 Am. J. Int'l L. 577 (1961).

95 Chorzow Factory Case (Pol. v. Germ.), 1929 P.C.I.J., Ser. A, No. 17; Charter of Economic Rights and Duties of States, supra note 67.

96 U.N. Declaration on Friendly Relations, G.A. Res. 2625, U.N. G.A.O.R. Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970); Declaration on the Admissibility of Intervention in the Domestic Affairs of States, G.A. Res. 2131, 20 U.N. G.A.O.R. Supp. (No. 14) at 11, U.N. Doc. A/6220 (1965); Charter of Economic Rights and Duties of States, supra note 67.

97 Final Act, Conference on Security and Cooperation in Europe, reprinted in 14 I.L.M. 1292 (1975). Although Naturalia and Industria are not signatories, the Helsinki Accords have been recognized as reflecting customary international law. See Russell, The Helsinki Declaration: Brobdingag or Lilliput, 70 Am. J. Int'l L. 242, 248 (1976).

98 2 H. Lauterpacht, Oppenheim's International Law §31 (8th ed. 1955).

ment is not a valid act of retorsion. The attachment is not only unlawful,[99] but is also not a proportionate response to Naturalia's lawful nationalization. The attachments are equivalent to the amount claimed by Minex as full market value of its claims, i.e., 1.6 billion Naturalian dollars.[100] The compensation appropriate under international law as a result of the lawful nationalization,[101] 560 million Naturalian dollars, is less than half the value of the funds and property attached. Additionally, this amount was offered as compensation by Naturalia, yet was rejected by Minex.[102] Thus, the attachments cannot be considered a proportionate response to the Naturalian nationalization.

2. Industria's attachment of the funds and property of Naturalia cannot be justified as a reprisal. An otherwise illegal act may be justified as a valid reprisal if three requirements are met: 1) prior illegality, 2) prior negotiation, and 3) proportionate response.[103] Industria's attachment of funds and property does not meet any of these requirements for a valid reprisal. First, Industria is not responding to a prior international delinquency on the part of Naturalia, because Naturalia's nationalization is lawful.[104] Second, no attempt at negotiation with Naturalia has been made by Industria. Third, Industria's attachments are not proportionate to the harm, if any, caused by Naturalia's nationalization.[105]

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99 See supra argument at V.A.,B:, & C.
100 See Compromis, p. 3.
101 See supra argument at III.C.
102 See Compromis, p. 4.
103 See 12 M. Whiteman, Digest of International Law §4, at 149, 179 (1963).
104 See supra argument at II & III.
105 See supra argument at V.E.1.

F. Industria's unlawful attachments necessitate the remedy of restitutio in integrum.

This court has recognized the broad principle that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would have existed if the act had not been committed.[106] Under this principle, Naturalia is entitled to the vacation of the attachments, or damages in the amount of the attached funds and property, plus attorneys' fees.

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106 Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion of 12 July 1973, I.C.J. Reports 1973, at 97-98.

CONCLUSION

It is respectfully requested that this Honorable Court:

1) DECLARE that Industria may not assert its counterclaims on behalf of Minex and Lencot before this Court;

2) DECLARE that Naturalia's nationalization measures are in full conformity with international law;

3) DECLARE that both Industria's exercise of jurisdiction over Naturalia and Natmin, and the attachment of the funds and property of Naturalia and Natmin, violate international law;

4) ORDER Industria to vacate the attachments; or

5) AWARD damages in the amount of the attachments;

6) DENY all of Industria's claims for relief; and

7) GRANT Naturalia such further relief as this Court may deem just.

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