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 RESPONDENT

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Agents for the State of Industria

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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 its nationals before this Court.

II.

Whether this Court should apply international law to determine the legality of Naturalia's nationalization measures.

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 commercial assets of Naturalia and Natmin is in accord with international law.

VI.

Whether either party is entitled to relief.

SUMMARY OF ARGUMENT

Industria may espouse counterclaims on behalf of its nationals before this Court. Minex and Lencot, corporate nationals of Industria, are victims of internationally unlawful nationalization measures taken by Naturalia. All possible remedies available to Minex and Lencot in Naturalia have been exhausted. Naturalia may not claim that the Calvo-type clause in its basic law prevents Industria's espousal of the claims of Minex and Lencot. The right of espousal of the claims of a State's nationals is a sovereign right not subject to waiver by private individuals.

The legality of Naturalia's nationalization measures, enacted by the Special Decree of April 15, 1981, must be determined by reference to the principles of international law. Naturalia entered a binding concession agreement with Minex which guaranteed the stability of Minex's investment. Long-term development agreements of this type are properly governed by international law, particularly where the parties agree to apply international law for the resolution of disputes.

Under the applicable principles of international law, the nationalization measures taken by Naturalia constitute both a breach of a binding international contract and a "taking" of property in violation of international law. Additionally, Minex and Lencot were denied procedural justice in Naturalia in violation of the international minimum standard of treatment for aliens. Naturalia cannot justify these violations of its international obligations by assertion of either its own laws or of a conflicting peremptory norm. Additionally, Naturalia cannot justify its actions by virtue of the doctrine of rebus sic stantibus or State succession.

Because of the flagrant violations of international law committed by Naturalia, Minex and Lencot are entitled to an award of specific performance of

the Project Agreement, restitution of property in kind, damages for the losses suffered by Lencot, and attorneys' fees.

The assertion of jurisdiction by the courts of Industria over Naturalia and Natmin is in accord with international law. Naturalia and Natmin cannot claim sovereign immunity from suit in Industria under the "commercial exception" to sovereign immunity because the actions of Naturalia and Natmin which gave rise to the cause of action were commercial activities. Industrian jurisdiction is validly based on the "direct effects" test, because the extensive financial loss suffered by Minex and Lencot caused a substantial, foreseeable, and immediate effect within Industria.

The attachment of the bank accounts and alumina owned by Naturalia and Natmin is in accord with international law. Attachment of commercial assets located within the forum State to satisfy an eventual judgment is appropriate under international law. Industria's attachment of commercial assets does not constitute "economic coercion" or a "taking". Alternatively, Industria's attachment of Naturalian assets is justified and legitimized as redress.

I. INDUSTRIA MAY ASSERT THESE COUNTERCLAIMS ON BEHALF OF ITS NATIONALS BEFORE THIS COURT.

A. Industria may assert these counterclaims on behalf of both Minex and Lencot.

A State may espouse the claims of its corporate nationals who have suffered injury in a foreign State, provided that all available local remedies have been exhausted.[1]

1. Industria may assert these counterclaims on behalf of Minex.

a. Minex is a corporate national of Industria. Under the established "control test" of corporate nationality,[2] Minex, which is 80% owned and controlled by Lencot, an Industrian corporation, must be considered a corporate national of Industria. The primary justification against application of the "control test," that the possibility of sale of stock by shareholders would engender fluctuating nationality,[3] does not logically apply where the majority of shares is owned by a single corporation of one nationality. In combination with the fact that 100% of the management and technology of Minex is supplied by Lencot, the 80% ownership of Minex by Lencot supports the determination that Minex is a subsidiary of Lencot and a corporate national of Industria.[4]

b. Minex has exhausted all possible local remedies. No appeal from the decision of the Compensation Tribunal was allowed by Naturalia.[5]

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

2 Certain German Interests in Polish Upper Silesia (Germ. v. Pol.), 1923-1927 C.P.J.I. Recueil des Arrets, Ser. A, No. 7, at 68-70 (Judgment of May 25, 1966); Restatement (Second) of the Foreign Relations Law of the United States §27 comment d (1962); G. Schwarzenberger, International Law 389 (3d ed. 1957).

3 Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 50; 2 E.Rabel, The Conflict of Laws: A Comparative Study 57-59 (2d ed. 1960).

4 See, e.g., E. Stein, Harmonization of European Company Laws: National Reform and Transnational Coordination 29 (1971); C. Wallace, Legal Control of the Multinational Enterprise: National Regulatory Techniques and the Prospects for International Controls 2 (1982).

5 See Compromis, p. 3.

c. Alternatively, Minex is relieved of its duty to exhaust local remedies. A widely recognized exception to the requirement of exhaustion of local remedies provides that remedies which would be futile need not be pursued.[6] Because the injury to Minex arises from the Naturalian government's actions, the pursuit of a remedy in Naturalian courts may properly be considered futile.[7] Thus, Minex is relieved of its duty to seek redress in Naturalian courts and may be represented by Industria at this time.

2. Alternatively, Industria may assert this counterclaim on behalf of Lencot. Assuming arguendo that Minex is a national of Naturalia, Industria may directly espouse the claims of Lencot. Although generally a State may not espouse the claims of its nationals who are shareholders in a foreign corporation,[9] an exception has been created where the corporation is a national of the State which has caused the damage.[10] Because a corporation whose State has expropriated all its assets cannot adequately defend its shareholders against its national State, the national State of the injured shareholders is allowed to assert their claims directly.[11]

Despite the equal treatment of Industrian and Naturalian shareholders of Minex, Industria may assert the claim of Lencot. Where, as in this case, a special law is enacted taking property and not providing adequate appellate machinery or

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6 Case of Certain Norwegian Loans (Nor. v. France), 24 I.L.R. 782, 797 (1957); F. Dawson & I. Hood, International Law, National Tribunals and the Rights of Aliens 298 (1971).

7 H. Lauterpacht, Oppenheim's International Law §162 (8th ed. 1955); See also, F. Dunn, The Protection of Nationals 167 (1932); Fawcett, The Exhaustion of Local Remedies, 31 Brit. Y.B. Int'l L. 452 (1954).

8 See, e.g., The El Truinfo Case (U.S. v. Salvador), Arbitration Under Protocol of 1901, 1902, 1902 For. Rel. U.S. 859.

9 Barcelona Traction, 1970 I.C.J. 3, 49.

10 Barcelona Traction, 1970 I.C.J. 3, 72 (separate opinion of Judge Fitzmaurice).

11 Id. at 72; See also Delagoa Bay Case, 1902, For. Rel. U.S. 848; El Triunfo Case, 1902 For. Rel. U.S. 859.

compensation,[12] aliens, even despite equal treatment with nationals, are entitled to the diplomatic assistance of their State on the grounds that there are no local remedies to exhaust and that consequently they have been denied procedural justice.[13]

B. Minex and Lencot have not waived the diplomatic protection of Industria.

The basic law of Naturalia on the date of the Project Agreement provides that ". . . foreigners may not claim greater rights than those afforded to citizens of Naturalia."[14] Assertion by Naturalia that this phrase embodies the Calvo doctrine and thus prevents Industria from affording diplomatic protection to its nationals is untenable. A Calvo clause may not operate to deprive a State of its right to vindicate violations of international law committed against its nationals. This right is a sovereign right, and therefore it is not subject to waiver by private parties.[15]

II. THE LEGALITY OF NATURALIA'S NATIONALIZATION MEASURES MUST BE DETERMINED BY REFERENCE TO INTERNATIONAL LAW.

A. The general principles of international law govern the contractual relationship between Minex and Naturalia.

Normally a simple contract between a foreign private investor and a host State is governed by the State's municipal law.[16] However, an exception for the long-term economic development agreement, or economic concession,[17] has been created which allows a private corporation to contract for the right to develop or extract a State's natural resources without subjecting the agreement to the dangers of subse-

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12 See infra argument at III, C.2.

13 Restatement (Second) of Foreign Relations Law of the United States §172 (1965).

14 See Compromis, p. 2.

15 North American Dredging Co. Case (U.S. v. Mex.), 4 U.N. Rep. Int'l Arb. Awards 26 (1951); W. Friedmann, O. Lissitzyn & R. Pugh, Cases and Materials on International Law 830-40 (1969).

16 Case Concerning Payment of Various Serbian Loans Issued in France (France v. Serbia), 1929 P.C.I.J., Ser. A, No. 20.

17 Award on the Merits: Dispute Between Texaco Overseas Petroleum Company/ California Asiatic Company and the Government of the Libyan Republic (hereinafter cited as TOPCO), 17 I.L.M. 1 (1978); Revere Copper & Brass, Inc. v. Overseas Private Investment Corp., 56 I.L.R. 258, 279 (1978); Neville, The Present Status of Compensation by Foreign States for the Taking of Alien Owned Property, 13 Vand. J. Transnat'l L. 51 (1980).

quent reinterpretation under municipal law.[18] Protection of foreign investors' rights is insured by "internationalization,"[19] or subjection of the agreement to international law for the resolution of disputes.

The facts of this case as discussed below support the application of the principles of international law in determining the legality of the Naturalian government's repudiation of the Project Agreement with Minex, a corporate national of Industria.[20]

1. Minex and Naturalia evinced the intent to "internationalize" the project agreement. Sovereign States are empowered to form contractual agreements with foreign corporations which are binding under international law.[21] Contractual exegesis reveals the binding intent of Minex to remove the Project Agreement from the power of Naturalia's internal legal system.

a. Article XXII of the Project Agreement mandates application of international law to resolve this dispute. Where dual reference is made in a choice of law provision to municipal and international law, international authority supports the interpretation that municipal law applies only for ordinary purposes of the agreement under the jurisdiction of the State,[22] such as taxation. International law must be applied to resolve disputes in all other areas, including situations where actions damaging to the interests of the foreign investors are taken by the State.[23]

b. Article XXII mandates the "internationalization" of the Project Agreement. Inclusion of the reference to "Naturalian law as of the date of this

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18 Von Mehren & Kourides, The Libyan Nationalization, 12 Nat. Resources L. 419 (1979).

19 TOPCO, 17 I.L.M. 1, 17 (1978).

20 See supra argument at I.A.1.

21 Radio Corp. of America v. Republic of China, reprinted in 30 Am. J. Int'l L. 535, 540 (1936); Government of Saudi Arabia v. Arabian American Oil Co., 27 I.L.R. 117, 168 (1958).

22 Revere Copper, 56 I.L.R. 258, 271 (1978).

23 Id. at 271.

agreement," and the statement that no change is allowed without consent of both parties, removes the agreement from the possibility of unilateral Naturalian legal action. Contracts containing such provisions, known as "stabilization clauses," are effectively "internationalized."[24] Consequently, the legality of any further action on the part of the host State must be determined by reference to international law.

2. The nature of the Project Agreement between Minex and Naturalia mandates its "internationalization". The Project Agreement constitutes a long-term economic development agreement, or economic concession.[25] Long-term economic development agreements between a foreign investor and a host State have been classified as sui generis expressions of contract which must be governed by international law.[26] Such agreements are rightfully subject to international law because they are entered into as part of the contemporary international process of economic development.[27] In conformity with most economic development agreements, the Project Agreement has characteristics which distinguish it from normal government-private party contracts. The Project Agreement, approved by the legislature of Naturalia, has the character of both legislation and contract, and is therefore analogous to a treaty between two governments.[28] The inherently international character of the agreement and the quasi-governmental status assumed by Minex support the treaty analogy.[29] Thus, it is appropriate that principles of international law, rather than the laws of Naturalia, should govern this agreement.

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24 TOPCO, 17 I.L.M. 1, 17 (1978); Arechaga, State Responsibility for the Nationalization of Foreign Owned Property, 11 N.Y. L.J. Int'l & Pol. 179, 191 (1978), (quoting Weil, les claus stablisation ou d'entangibilitie economique, in Melanges Offertus a Charles Rousseau (1974).

25 Note, Arbitration of Economic Development Agreements: The Impact of Revere v. O.P.I.C., 20 Va. J. Int'l L. 861 (1980).

26 Revere Copper & Brass, Inc. v. O.P.I.C., 17 I.L.M. 1321, 1331 (1978).

27 Id. [citing C. Amerasinghe, State Responsibility for Injury to Aliens (1967)].

28 H. Steiner & D. Vagts, Transnational Legal Problems 496 (2d ed. 1976).

29 Id. at 505.

B. Alterntatively, the international minimum standard of justice governs the relationship between Industrian nationals and the government of Naturalia.

Assuming arguendo that the project agreement is not deemed "internationized," thus validating the application of Naturalian law and legitimizing the effects of the Special Decree, the legality of Naturalia's nationalization measures must be determined by reference to the international minimum standard governing the treatment of aliens. Compliance with Naturalian law is not sufficient to validate the Decree. Even where a State's laws are indiscriminately applied to both foreigners and nationals, the State will be held internationally responsible for any injury resulting to an alien in violation of the international minimum standard.[30] The question of the conformity of a State's legislation with its international obligations is a matter of international law. More specifically, the propriety of a State's treatment of foreign nationals' property by a State is cognizable under international law, even if the dispute involves the application of a State's domestic laws.[31]

III. NATURALIA'S NATIONALIZATION MEASURES, AND THE EFFECTS THEREOF, ARE NOT IN ACCORD WITH INTERNATIONAL LAW.

A. Naturalia's termination of the Project Agreement is not in accord with international law.

1. Naturalia's termination of the Project Agreement violates the international norm of pacta sunt servanda. Naturalia's unilateral termination of the Project Agreement violates Article XXII of the agreement, which prohibits unilateral Naturalian legal action.[32] The breach of this binding agreement violates the firmly established principle of pacta sunt servanda. This principle, which is applicable to

30 Id. at 358 (citing Huber's Report of October 3, 1924, on the Responsibilities of the State in the Situations Covered by the British Claims, British Claims in the Spanish Zone of Morocco, 2 U.N.R.I.A.A. 615, 639).

31 Certain Norwegian Loans (Nor. v. France), 1957 I.C.J. 9, 37-38 (Separate opinion of Judge Lauterpacht); see also I. Brownlie, Principles of Public International Law 255 (1966).

32 See supra argument at II.A.1.b.

contracts betwen a State and a foreign corporation,[33] dictates that contractual agreements are binding on the parties involved and must be observed in good faith.[34] Naturalia has not only violated its agreement, but has also acted in bad faith. The arbitrary termination of the Project Agreement was effected abruptly, without valid legal justification or opportunity for renegotiation.

2. Naturalia's termination of the Project Agreement violates the international principle of respect for acquired rights. International law recognizes the principle that a State must respect acquired rights, i.e., any rights, corporeal or incorporeal, capable of assessable monetary valuation.[35] The irrevocable mining rights contractually granted to Minex by Naturalia constitute acquired rights.[36] Termination of the project agreement cancelled, and thus violated, these rights.

3. Naturalia's termination of the Project Agreement constitutes an unlawful "taking" of property. Under international law, contractual rights are property which is capable of being expropriated by a State. Compensation must be paid for expropriation of such contractual rights.[37] Naturalia, by terminating Minex's mining rights, and by preventing the performance of the management contract between Minex and Lencot, has unlawfully "taken" Minex's and Lencot's contractual rights without offer or payment of compensation.[38]

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33 TOPCO, 17 I.L.M. 1, 8 (1978); Wehberg, Pacta Sunt Servada, 53 Am. J. Int'l L. 775, 786 (1959).

34 Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, 17 U.N.G.A.O.R. 135, Supp. (No. 17), U.N. Doc. A/5217 (1962); U. Bishop, International Law 133 (2d ed. 1962); Kunz, The Meaning and the Range of the Norm Pacta Sunt Servanda, 39 Am. J. Int'l L. 180 (1945).

35 D. O'Connell, State Succession in Municipal Law and International Law 239, 245 (1967).

36 Government of Saudi Arabia v. American Oil Co., 27 I.L.R. 117, 168 (1958); accord Sapphire International Petroleum, Ltd. v. National Iranian Oil Co. (U.K. v. Iran), 35 I.L.R. 136 (1963); O'Connell supra note 35, at 240.

37 Claim of Frederick Fraenkel, Foreign Claims Settlement Commission, Decision No. 356, Docket No. 706 (1954); Norwegian Shipowners Case (Nor. v. U.S.), 1 R. Int'l Arb. Awards 207 (1922).

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

4. Naturalia's termination of the Project Agreement violates the international minimum standard of protection for aliens. The use of governmental power to defeat the obligations of a contract appears as a theme in many cases involving the international minimum standard of justice.[39] Arbitrary annulment by a contracting government without legal claim of justification or provision for opportunity of redress constitutes a "denial of justice"[40] in violation of the international minimum standard.

B. Naturalia's nationalization of the project and all assets of Minex is not in accord with international law.

1. Naturalia's nationalization constitutes a breach of a binding contract in violation of international law. The stablization clause in Article XXII of the Project Agreement constitutes a binding committment by the parties to prevent nationalization.[41] The nationalization in disregard of Article XXII constitutes a violation of the international norm of pacta sunt servanda.[42]

2. Naturalia's nationalization constitutes an unlawful expropriation under international law. Although international law recognizes the sovereign right of expropriation of foreign-owned property,[43] the expropriation will be recognized only if it is carried out for a public purpose, and prompt, adequate and effective compensation is paid.[44]

a. The expropriation was unlawful because it was not effected for a public purpose. There is no evidence of public necessity to support this expropriation.

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39 H. Steiner & D. Vagts, supra note 28, at 517-519.

40 Id. [citing Dunn, The Protection of Nationals 167 (1932)]; Borchard, The "Minimum Standard" of the Treatment of Aliens, 38 Mich. L. Rev. 445 (1940).

41 See supra argument at II.A.1.a.

42 See supra notes 36-37 and accompanying text.

43 See e.g., Eastern Extension, Australisia and China Telegraph Co., Ltd. Case (1923), American & British Claims Arbitration (Nielsen Report) 40 (1926); Goldenberg & Sons v. Germany (Rumania v. Germ.), 2 U.N.R.I.A.A. 901 (1928).

44 Chorzow Factory Case (Pol. v. Germ.), 1928 P.C.I.J., Ser. A, No. 17; De Sabla Case (U.S. v. Panama), United States and Panamanian General Claims Arbitration, 6 U.N.R.I.A.A. 377 (1933); Norwegian Shipowners Case (U.S. v. Norway), Hague Court Reports (Sott) 40, 1 U.N.R.I.A.A. 309 (Perm. Ct. Arb. 1922); Organization of Economic Cooperation and Development Draft Convention, 17 I.L.M. 117 (1978).

An effective expropriation requires a prior open and legitimate determination of public necessity.[45] No such determination or statement was made by the Naturalian government prior to the nationalization.

b. The expropriation was effected without offer or payment of prompt, adequate, and effective compensation.[46] Even an otherwise lawful expropriation becomes unlawful if made without provision for prompt, adequate and effective compensation.[47] No compensation has been paid in this case, rendering Naturalia's expropriation of the project and assets of Minex an unlawful "taking" under international law.[48]

C. **Naturalia's establishment of the Compensation Tribunal is not in accord with international law.**

Naturalia's establishment of the Compensation Tribunal violates the international minimum standard of procedural justice. The minimum standards of procedural justice require that aliens have access to "fair courts, readily open to aliens, administering justice honestly, impartially, without bias or political control."[51] The Compensation Tribunal, composed solely of Naturalian officials, and restricted by the terms of the Decree, does not constitute a fair, unbiased tribunal free from government control. The Decree empowered the tribunal to compensate Minex only for the physical assets expropriated.[52] No determination of compensation for damages for breach of contract or for the expropriation of Minex's mining rights was permitted. In addition, the Decree provided that the decision of the Compensation Tribunal was

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45 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, supra note 38, Art. 10 comment; Resolution on Permanent Sovereignty Over Natural Resources, supra note 34.

46 See infra argument at III.D.1.a, b, c.

47 Brownlie, supra note 31, at 434; I. Foighel, Nationalization and Compensation 131-133 (1963); 2 R. Lillich, The Valuation of Nationalized Property in International Law 1 (1973).

48 See supra argument at III.,A.,3.

49 See supra argument at II.A.1.a.

50 See supra argument at III.A.1.

51 Borchard, supra note 40, at 462.

52 See Compromis, p. 3.

not appealable. This denial of access to fair and impartial adjudication of the rights of Industrian nationals constitutes an internationally unlawful "denial of justice."[53]

D. The Naturalian Compensation Tribunal's determination of appropriate compensation is not in accord with international law.

The Compensation Tribunal did not provide adequate, prompt, and effective compensation, in violation of customary international law.[54]

1. The compensation was not adequate. Adequate compensation in this case must include damages for the unlawful breach of the Project Agreement, compensation for the expropriation of Minex's mining rights for the duration of the project agreement, and compensation for the assets expropriated.[55] The compensation afforded by the tribunal only accounted for the book value of the assets of Minex.[56] Even assuming arguendo that Naturalia's actions were lawful, thus necessitating compensation only for the value of the project and the assets, the compensation offered still did not comport with the requirements of international law. Book value is not considered adequate compensation under the prevailing interpretation in international law.[57] Even in cases where the expropriation is otherwise lawful, payment of fair market value is necessary for compensation to be considered appropriate.[58]

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53 Borchard, supra note 40; Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 (1948).

54 H. Steiner & D. Vagts, supra note 39, at 517-519; Brower, The Future of Foreign Investment - Recent Developments in the International Law of Expropriation and Compensation, 1975 Symposium on Private Investors Abroad 93, 152; Restatement (Second) of the Foreign Relations Law of the United States (1965); Brownlie, supra note 31, at 434; Foighel, supra note 47, at 103, 141.

55 See American Independent Oil Co. v. Kuwait, 21 I.L.M. 976, 1037-39 (1982); Organization of Economic Cooperation and Development Draft Convention, supra note 44, at 127.

56 See Compromis, p. 3.

57 American Independent Oil Co. v. Kuwait, 21 I.L.M. 976 (1982); Organization of Economic Cooperation and Development Draft Convention, supra note 94, at 127; Lillich, supra note 47.

58 Muller, Compensation for Nationalization: A North-South Dialogue, 19 Colum. J. Transnat'l L. 35, 47 (1981); Sohn & Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 Am. J. Int'l L. 535, 545 (1961).

2. The compensation was not prompt. Indeed, no compensation has been paid at all, and well over two years have passed since the expropriation. Furthermore, even the compensation offered would not constitute prompt reparation. The inadequate sum offered was to be provided in bonds redeemable in ten annual installments. Payment over a ten-year period does not constitute prompt payment.[59]

3. The compensation offered was not effective. Inadequate compensation was offered in Naturalian bonds with face value in Naturalian dollars redeemable "subject to availability." To be considered effective, compensation must be offered in a stable currency other than that of the expropriating State, and must in fact be available to the aggrieved party.[60]

E. Naturalia has no valid justification to excuse the violation of its international obligations.

1. Naturalia cannot assert its own laws as an excuse for the violation of its international obligations. An attempt to plead either compliance with Naturalia's anti-discrimination clause, or reliance upon the embodiment of the Calvo doctrine couched within, cannot justify Naturalia's violation of its basic duty of fair treatment of foreigners.[61] Neither can Naturalia assert that the Special Decree, as law, justified its violations of the international minimum standard[62] or its breach of a binding "internationalized" contract.[63]

2. Naturalia cannot invoke the doctrine of rebus sic stantibus as justification for the repudiation of the Project Agreement. The doctrine of fundamental change of circumstances is sometimes allowed in international law to be asserted as a justification for the breach of international contracts as well as treaties.[64]

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59 Muller, supra note 58.
60 Id.; Foighel, supra note 47, at 259-60.
61 International Law: The Collected Papers of H. Lauterpacht 387 n. 1 (E. Lauterpacht, ed. 1970) citing George W. Hopkins Case, Annual Digest 3, 1925-6), case no. 167.
62 See supra argument at III.C.2.
63 See supra argument at II.A.1. a, b, c.
64 M. Mughraby, Permanent Sovereignty Over Oil Resources 184 (1966).

However, the change must relate to a fact or situation which existed at the time that the contract was entered into, and the change must be fundamental in the sense that a) the existence of the fact or situation constituted an essential basis of the consent of the parties, and b) the effect of the change is to transform in an essential respect the character of the obligations undertaken in the contract.[65] The only change of circumstances in Naturalia was the elective change in government, which does not constitute a fundamental or unforeseen change. The continuing existence of the former administration could not have been an essential basis for the consent of the parties in a State which holds periodic elections. The new administration's disapproval of the agreement does not justify the repudiation of the project agreement, whose obligations remain unchanged.

3. Naturalia cannot assert a State succession to justify the violation of its international obligations.

a. The change in administration does not constitute a State succession. The pre-existing framework of the Naturalian State is still extant after merely an elective change in administration carried out pursuant to the basic law of Naturalia. State succession connotes the succession of an entirely different legal framework.[66]

b. Even assuming arguendo that the change in administration is analogous to a State succession, there is no justification for Naturalia's actions. Successor States are required to respect pre-existing conractual responsibilities as well as the acquired rights of foreign nationals.[67]

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65 Vienna Convention on the Law of Treaties, opened for signature, 22 May 1969, Art. 62, U.N. Doc. A/Conf. 39127; see also Fisheries Jurisdiction Case (U.K. v. Ice.), 1973 I.C.J. 3.

66 O'Connell, supra note 35, at 237-39.

67 Id.; see, e.g., Government of Saudi Arabia v. American Oil Co., 27 I.L.R. 17, 168 (1950), accord, Sapphire International Petroleum, Ltd. v. National Iranian Oil Co., 35 I.L.R. 136 (1963).

4. Naturalia cannot justify the violation of its international obligations by asserting the emergence of a conflicting peremptory norm. Developing nations adhere to the Charter of Economic Rights and Duties of States[68] and the Resolution on the New International Economic Order[69] in order to justify both the repudiation of long-term economic development agreements, and the application of municipal law in order to determine the compensation, if any, to be paid to foreign investors upon expropriation of their property. Any reliance by Naturalia on recent General Assembly resolutions mandating permanent sovereignty over natural resources in order to excuse the repudiation of the Project Agreement and the expropriation of the project without payment of appropriate compensation is unjustified. General Assembly resolutions are not binding international law, but are merely recommendatory.[70] Furthermore, these particular resolutions, 3281 and 3201, are not considered evidence of customary international law.[71] Thus, Naturalia may not rely on the "new international economic order" as a conflicting peremptory norm justifying a release from its international obligations.

F. Naturalia's flagrantly unlawful actions necessitate the remedy of restitutio in integrum.

Specific performance of contractual obligations and restitution of property in kind are the preferred remedies for unlawful breach of contract and unlawful

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68 Charter of Economic Rights and Duties of States, G.A. Res. 3281, Art. 2, paras. 1, 2(c) 29 U.N. G.A.O.R., Supp. (No. 31) 50, 52, U.N. Doc. A/9631 (1974).

69 Resolution for New International Economic Order, G.A. Res. 3201, 21 U.N. G.A.O.R. (Agenda I and Comment 7), U.N. Doc. A/3201 (1974).

70 Id.; The Asylum Case (Colum. v. Peru), 1950, I.C. 26, 276; U.N. Charter, arts. 10-14; Falk, On the Quasi Legislative Composition of the General Assembly, 60 Am. J. Int'l L. 783 (1966); Magallona, Some Remarks on the Legal Character of United Nations General Assembly Resolutions, 5 Phil. Y. B. Int'l L. 86-87 (1976).

71 Award on the Merits, Arbitation Between Texaco Overseas Petroleum Co/ California Asiatic Oil Co. and the Government of the Libyan Arab Republic (hereinafter cited TOPCO), reprinted in 104 J. du Droit Int'l 319, 387-391 (1977).

expropriation.[72] It is widely accepted that reparation must, as far as possible, wipe out the consequences of illegal actions and re-establish the situation which would, in all probability, have existed had the acts not been committed.[73] Thus, Industria is entitled to claim restitutio in integrum on behalf of Minex, as well as further damages suffered by Lencot, including profits lost over the duration of the termination and counsel fees incurred in both the suit in Industria and the case at bar.

IV. INDUSTRIA'S EXERCISE OF JURISDICTION OVER NATURALIA AND NATMIN IS IN ACCORD WITH INTERNATIONAL LAW.

A. Industria's exercise of jurisdiction over Naturalia and Natmin is not barred by the doctrine of sovereign immunity.

The restrictive theory of sovereign immunity, widely accepted as a rule of international law,[74] provides that immunity from suit in a foreign State derives from the sovereignty, not the inherent governmental nature, of a State.[75] Thus, immunity from suit can be granted only when a State acts in a purely sovereign capacity (jure imperiis), not when a State acts independently of its sovereignty by entering into commercial or other private transactions (jure gestionis). This "commercial exception" to immunity dictates that where a suit against a State or agency is based upon a commercial activity of that State or agency, the State or agency may not claim sovereign immunity from suit in a foreign State.

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72 TOPCO, 104 J. du Droit Int'l 319 (1977); see also Mavrommatis Jerusalem Concession (Greece v. Palestine), 1925 (P.C.I.J., Ser. A, No. 5; Temple of Preha Vehear Case (Cambodia v. Thailand), 11 Am. J. Int'l L. 674, 730 (1917); H. Lauterpacht, Private Law Sources and Analogies in International Law 149 (1927); O'Connell, supra note 35, at 347.

73 Chorzow Factory Case, 1928 P.C.I.J., Ser. A., No. 17, at 47; see also, TOPCO, 17 I.L.M. 1, 36 (1978); Lauterpacht, supra note 70.

74 Foreign Sovereign Immunities Act, 28 U.S.C. §1605(s)(2), (3) (1976 Supp. V, 1981); European Convention on State Immunity, Council of Europe, Art. 4(1), reprinted in 11 I.L.M. 470 (1972); State Immunity Act, 1978 §3 45(II) Annuair de l'Institut du Droit International 301-02 (1954); (1952) Report of the 5th Conference of the International Law Association 210-32.

75 Note, Immunity of a Foreign State from Execution: French Practice, 46 Am. J. Int'l L. 520 (1952).

1. Naturalia may not assert the defense of sovereign immunity to bar the exercise of jurisdiction by Industrian courts.

a. Under the "commercial exception" to sovereign immunity, Naturalia is not immune from suit in Industria. The suit against Naturalia arises from the commercial activities of Naturalia; thus, under the "commercial exception," Naturalia may not claim immunity from suit. A commercial activity means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of the act is determined by reference to the nature of the course of conduct or act, rather than by reference to its purpose.[76] The carrying on of a contractual concession agreement is considered a commercial activity.[77] Additionally, termination or breach of such a contract, even under the guise of nationalization, has been considered a basically commercial activity, thereby barring the assertion of the defense of sovereign immunity.[78] The nature of the contractual relationship between Minex and Naturalia giving rise to this suit is commercial. The formation, observance, and breach of the Project Agreement constitute a commerical course of conduct by Naturalia in a governmental, not sovereign, capacity.

b. Naturalia has not met its burden of proof. The burden of proof of immunity lies upon the State, which must prove that its acts in question are clearly jure imperiis and not jure gestionis.[79] Naturalia has not met this burden, and thus is not entitled to sovereign immunity from suit.

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76 Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d cir. 1981); Foreign Sovereign Immunities Act §1603(d); M. Whiteman, Digest of International Law 556, 557-69 (1968).

77 H. R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6, 16 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6614-15 [hereinafter cited as House Report].

78 State Immunity Act of 1978, §3; Mann, The State Immunity Act of 1978, 50 Brit. Int'l L. 44, 51 (1979); Von Mehran, The Foreign Sovereign Immunities Act of 1976, 17 Colum. J. Transnat'l L. 33, 54 (1978).

79 Foreign Sovereign Immunities Act, §1605(a)(2); House Report, supra note 4, at 6616.

c. Alternatively, even should this court determine that Naturalia was acting in a sovereign capacity, Naturalia is not immune from suit in Industria. If the claim being litigated relates to property taken in violation of international law, and that property or anything exchanged for it is present in the forum State, sovereign immunity will not bar the suit.[80] Both Naturalia's breach of the Project Agreement and its expropriation of the property of Industrian nationals constitute unlawful "taking" of property without compensation under international law.[81] Part of that property unlawfully taken is present in Industria. Thus, sovereign immunity cannot bar Industria's exercise of jurisdiction over Naturalia.

2. Natmin may not assert the defense of sovereign immunity to bar the exercise of jurisdiction by Industrian courts.

a. Natmin is not a governmental entity inseparable from the executive branch of Naturalia. Juridical entities which are capable of suing and being sued and which are distinct from the executive organs of the State are not allowed the privilege of sovereign immunity under customary international law.[82] As a distinct juridical entity not under the control of the government of Naturalia, Natmin is not entitled to immunity from the jurisdiction of Industria's courts.

b. Alternatively, even should this court decide that Natmin is a governmental entity, Natmin is not entitled to sovereign immunity from suit in Industria because Natmin was acting in a commercial capacity. Entities operating as part of the government are not entitled to immunity if they engage in commercial activity relating to the cause of action.[83] Natmin's assumption of control over the project constitutes commercial activity directly related to the litigation, thus Natmin is not entitled to claim sovereign immunity from suit.

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80 Foreign Sovereign Immunities Act, §1605(3).
81 See supra argument at III.A.3.and III.B.2.c.
82 State Immunity Act of 1978, §14(1)(c), European Convention Art. 27(1) and (3).
83 Zander, The Act of State Doctrine, 53 Am. J. Int'l L. 826 (1959).

B. Industria's exercise of jurisdiction complies with internationally accepted criteria for assertion of jurisdiction over a foreign State.

1. Industria's exercise of jurisdiction is valid under the "direct effects" test. Under the internationally accepted "direct effects" test,[84] the courts of a State may assert jurisdiction over a foreign State under certain conditions. When the acts of a foreign state which give rise to the cause of action are committed outside the foreign State in connection with a commercial activity, jurisdiction over the foreign State is proper if its actions caused substantial, foreseeable, and immediate effects within the forum State.[85]

a. Naturalia's acts giving rise to the cause of action were in connection with commercial activity. Naturalia's breach of the project agreement and uncompensated taking of property constitute commercial activity,[86] and are the direct cause of this suit.

b. Naturalia's acts caused substantial, foreseeable, and immediate effects within Industria. The Naturalian breach of the Project Agreement and uncompensated "taking" of the project and the assets of Minex caused grave financial losses to Minex and Lencot, nationals of Industria.[87] Extensive financial losses caused by a foreign State to corporate nationals of the forum state cause substantial, foreseeable, and immediate effects within the forum State.[88]

2. Industria's exercise of jurisdiction is procedurally just. Naturalia and Natmin carried on extensive activity in Industria, as evidenced by the existence of commercial activity, property, and bank accounts within Industria. Naturalia and

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84 J. Sweeney, C. Oliver & N. Leech, The International Legal System 112 (1973).

85 Decor By Nikkei International, Inc. v. Federal Republic of Nigeria, 497. F.Supp. 893, 904 (S.D.N.Y. 1980), aff'd 647 F.2d 300, cert. denied, 454 U.S. 1148 (1982)

86 See supra argument at IV.A.1.a.(i).

87 See supra argument at I.A.1.

88 American International Group, Inc. v. Islamic Republic of Iran (Iran Cases), 493 F.Supp. 522, 526 (D.C. 1980), remanded, 647 F.2d 430 (D.C. Cir. 1981); Texas Trading & Mining Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (D.C. Cir. 1981).

Natmin availed themselves of the privilege and opportunity of conducting commercial relations in Industria. Thus, it is not inequitable to require Naturalia and Natmin to defend themselves in Industrian courts against claims of injury arising from their commercial activities with Industrian nationals.[89]

C. Industria's exercise of jurisdiction over Naturalia and Natmin is not barred by the Act of State doctrine.

1. The Act of State doctrine is not a principle of international law, and should not be applied by this Court. The Act of State doctrine provides that, as a matter of policy, the courts of one State should not inquire into the validity of the sovereign acts of another State.[90] This policy is adhered to, in a very limited fashion, by only the United States and the United Kingdom.[91] Thus, the Act of State doctrine is neither binding international law nor evidence of customary international law,[92] and should not be applied by this court.

2. Alternatively, should this court apply this principle, the Act of State doctrine is not a defense to the exercise of jurisdiction by a foreign State. The Act of State doctrine only prevents a determination by a foreign state on the merits of a sovereign act.[93] The exercise of jurisdiction over Naturalia and Natmin does not constitute adjudication on the merits of Naturalia's actions,[94] thus the Act of State doctrine will not prevent Industria's exercise of jurisdiction.

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89 Foreign Sovereign Immunities Act, §1603, note 7, §1605 comment 3.

90 Restatement (Second) Foreign Relations Law of the United States (1968), Sec. 41.

91 Hjerner, The General Approach to Foreign Confiscation, 2 Scand. Stud. in Law 179, 204 (1958).

92 See The Ropit Case, 55 J. de Droit Int'l 674 (1982); Anglo-American Oil Co. v. S.U.P.O.R. Co., 22 Int'l L. Rep. 23 (Italy, Civil Court of Rome 1955); Anglo-Iranian Oil v. Idemitsu Kosan Kabushiki Kaisha, 20 Int'l L. Rep. 305 (High Court of Tokyo 1953); Bogdan, Expropriation in Private International Law 20 (1975); Zander, The Act of State Doctrine, 53 Am. J. Int'l L. 826, 844 (1959).

93 Restatement (Second) of Foreign Relations Law of the United States, supra note 11, see 41.

94 Underhill v. Hernandez, 168 U.S. 250, 252 (1897); International Ass'n of Machinists and Aerospace Workers (IAM) v. OPEC, 649 F.2d 1354, (9th Cir. 1981) cert. denied, 454 U.S. 1163 (1982).

3. The Act of State doctrine does not apply to commercial activities of a State.[95] The breach of the Project Agreement and the uncompensated taking of Industrian nationals property are commercial, not sovereign, acts of Naturalia.[96] Thus, the Act of State doctrine cannot preclude adjudication on the merits of this case.

V. INDUSTRIA'S ATTACHMENT OF THE PROPERTY OF NATURALIA AND NATMIN WAS IN ACCORD WITH INTERNATIONAL LAW.

A. Industria's attachment of commercial assets of Naturalia and Natmin within its borders is in accord with international law. The widely accepted restrictive theory of attachment provides that commercial assets of a foreign State within the borders of the forum State are not immune from attachment.[97] If the lawful exercise of Industria's jurisdiction is to be more than a mere gesture, attachment is necessary in order to satisfy a future judgment.[98]

1. Industria's attachment of the bank accounts of Naturalia and Natmin is in accord with international law. The funds in both the Central Bank of Naturalia and the bank accounts of Natmin within Industria are used for commercial purposes. Commercial property of a foreign State within the borders of the forum State is not immune from attachment.[99] It is irrelevant that funds in the Central Bank of Naturalia may be used for partially governmental purposes. Mixed bank accounts are

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95 Restatement (Second) of the Foreign Relations Law of the United States, supra note 11, Sec. 41, comment d, illustrations 4, 5, and 6.

96 See supra argument at IV.A.1.a.(i).

97 Birch Shipping Corp. v. Embassy of The United Republic of Tanzania, 507 F.Supp. 311 (D.C. 1980), Italian Minister for State Railway v. Beta Holdings S.A., 31 Annuaire Swiss de Droit Int'l 219 (1975); Procureur de la Republique v. Societe Liamco, 106 J. Droit In'tl 857, 861 (1979); Republic of the Phillipines, B Verf G 342 (1977), summarized in 73 Am. J. Int'l L. 305, 703 (1979); Socobelge v. Government of Greece (Tribunal Civil, Brussels 1951); 46 Annuaire de l'Institut de Droit Int'l, 301-02, Art. 5 (1954); Restatement (Second) of the Foreign Relations Law of the United States, supra note 11, §§68-69; Crawford, Execution of Judgments and Foreign Sovereign Immunity, 75 Am. J. Int'l L. 820, 859 (1951).

98 See Note, Collection of an International Bank Loan, 69 Colum. L. Rev. 897, 900 (1969); Note, Jurisdiction to Attach a Defendant's Property Pending Adjudication in a Foreign Forum, 58 B.U.L. Rev. 841, 849 (1978).

99 See supra note 24.

not subject to immunity merely because some of the funds are used for a public purpose.[100] A grant of immunity based on the risk that the two functions of the funds cannot be separated would create a loophole whereby every government could immunize its funds merely by using a small portion of them for a minor public purpose.

2. Industria's attachment of alumina within its borders is in accord with international law. The alumina located in Industrian warehouses is part of the commercial assets of Naturalia and Natmin and thus is not immune from attachment.[101] Additionally, the alumina is directly related to the cause of action, providing further justification for attachment.[102]

B. Industria's attachment of the property of Naturalia and Natmin does not constitute a "taking."

The attachment of property prior to a final judgment on the merits of a case merely suspends property rights; ownership of the property is not affected. An action affecting the property rights of an alien can only constitute a taking of property if the State or its nationals are enriched.[103] Since ownership of the attached property has not been transferred, Industria is not responsible for a "taking" of Naturalian property.[104]

C. Industria's attachment of the property of Naturalia and Natmin does not constitute "economic coercion."

Acts of economic coercion designed to subordinate the exercise of a State's sovereign rights are prohibited by several General Assembly Resolutions, including the Charter of Economic Rights and Duties of States.[105] Assuming, but not conceding,

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100 Birch Shipping v. Tanzania, 507 F.Supp. 311, at 313; Republic of Phillipines, 46 B Verf G 342; Englander v. Statni Banka Ceskoslovenka, 96 J. Droit Int'l 923 (1929); Crawford, supra note 24, at 840.

101 See supra note 24.

102 Foreign Sovereign Immunities Act, §1610(a)(2).

103 G. Svelle, a propos de l'establishment du monopoledes assurances en urguay 116 (1968).

104 Restatement of the Responsibility of States for Injuries to Aliens, §192 comments (1965).

105 See, e.g., U.N. Declaration on Principles of International Law, G.A. Res. No. 2625, reprinted in 65 Am. J. Int'l 243 (1971); Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. G.A.O.R. Supp. (No. 31), U.N. Doc. A/9631 (1974).

that such a principle is applicable by this Court as a general principle of international law,[106] Industria has not violated its precepts. The attachment of Naturalian property was not an attempt to subordinate the exercise of Naturalia's sovereign rights. The attachment was lawfully effected only in order to ensure later redress for Industrian nationals in the event of a judgment against Naturalia and Natmin. Alternatively, even if this court should determine that the attachment was coercive, the attachment was not designed to subordinate any exercise of Naturalia's sovereign rights. The Naturalian acts which gave rise to the Industrian attachment were commercial acts,[107] and do not constitute an exercise of Naturalia's sovereign rights. Thus, Industria's attachment does not constitute the "economic coercion" prohibited by the applicable General Assembly Resolutions.[108]

D. **Alternatively, Industria's attachment of the property of Naturalia and Natmin is justified as redress.**

1. Assuming, but not conceding, that Naturalia's actions were lawful, Industria's attachment of property is justified as a valid act of retorsion. A valid act of retorsion is a similar and proportionate response to an unfriendly but legal act of a foreign State by means of another legal action.[109] The attachment of Naturalia's property was a proportionate legal response to the financial injury suffered by Industrian nationals caused by the uncompensated nationalization of their assets and contractual rights. The property attached was equivalent in amount to the damages which a later court decision against Naturalia would have afforded as a remedy.[110]

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106 U.N. Charter, Art. 10; Haight The New International Economic Order and the Charter of Economic Rights and Duties of States, 9 Int'l Law 591, 597 (1975).

107 See supra argument at IV.A.1.a.1(i).

108 See supra note 105.

109 2 H. Lauterpacht, Oppenheim's International Law 134-35 (8th ed. 1955).

110 See Compromis, p. 4.

2. Assuming, but not conceding, that Industria's attachment of property is unlawful, the attachment is justified as a valid act of reprisal.

a. Under international law, reprisal justifies otherwise illegal acts. Reprisals are defined as "internationally illegal acts of one State against another [which] are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency."[111] Economic reprisals are acceptable under international law provided three conditions are met: 1) there must be a prior international delinquency, 2) redress by other means must be either exhausted or unavailable, and 3) the economic measures taken must be proportionate to the wrong done.[112]

b. Industria's attachment of the property of Naturalia and Natmin constitutes a valid reprisal. Naturalia's breach of the project agreement and uncompensated taking of the property of Industrian nationals constitutes an international delinquency.[113] Industrian nationals exhausted any possibility for redress by submission of a claim to the Naturalian Compensation Tribunal, whose inadequate offer of compensation was deemed final by the Naturalian government. Furthermore, the assets of Naturalia and Natmin attached by Industria were equivalent to the financial losses suffered by Industrian nationals. Therefore, the economic measures taken are in proportion to the wrong done, and are as well absolutely limited to the necessities of the case.

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111 2 Lauterpacht, supra note 36, §§ 39-41.

112 Bowett, International Law and Economic Coercion, 16 Va. J. Int'l L. 245 (1976).

113 See supra argument at III.A.3. and III.B.2.

CONCLUSION

It is respectfully requested that this Honorable Court:

1) DECLARE that Naturalia violated its obligations under international law by breaching its Project Agreement with Minex;

2) DECLARE that Naturalia violated its obligations under international law by "taking" Industrian nationals' property without offer or payment of just compensation;

3) DECLARE that Industria's exercise of jurisdiction over Naturalia and Natmin is in full conformity with international law;

4) DECLARE that Industria's attachment of the funds and commercial assets of Naturalia and Natmin is in full conformity with international law.

5) ORDER Naturalia to honor and perform its Project Agreement;

6) AWARD damages to Industria for the losses suffered by Lencot;

7) DENY all of Naturalia's claims for relief; and

8) GRANT Industria such further relief as this Court may deem just.

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