IN THE INTERNATIONAL COURT OF JUSTICE

February 1984 Term

Between:

NATURALIA,

Applicant,

and

INDUSTRIA,

Respondent.

MEMORIAL FOR THE APPLICANT

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Ellen H. Gray
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Agents for the State of Naturalia

Team No.

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JURISDICTION

Article 36 of the Statute of the International Court of Justice confers to the Court jurisdiction over all cases that parties to a dispute submit to it. The parties to the present dispute submit to the Court's jurisdiction pursuant to Article 40 of the statute.

STATEMENT OF FACTS

The parties to this dispute have agreed to the facts as presented in the Compromis.

QUESTIONS PRESENTED

I.

Whether Respondent's Assertion Of Jurisdiction And Attachment Of Assets Violated International Law.

II.

Whether Naturalia's Offer Of Book Value For Minex Is Proper Under International Law.

III.

Whether The Remedy Afforded Minex For The Revocation Of The Project Agrcment Was Appropriate Under Naturalian As Well As International Law.

SUMMARY OF ARGUMENT

I.

Standing before the International Court of Justice is granted only to States. Industria's counterclaims on behalf of Lencot and Minex arise from Naturalia's revocation of a long-term, natural resource concession agreement. The parties to the contract were Naturalia and Minex. It conferred no rights on Industria; it established no duties owed by Naturalia to Industria; it simply regulated the contracting relationship between Minex and Naturalia. Industria lacks standing to counterclaim in its own behalf. Additionally, close scrutiny of Minex and Lencot reveals a strong affiliation with Naturalia, and only tenuous connections to Industria. Absent the necessary ties of an internationally recognized relationship, Industria lacks standing to assert a claim on behalf of Minex or Lencot as nationals.

Concession contracts are not international agreements or treaties, because they do not represent obligations between States. The exercise of sovereignty over natural resources permits revocation of a concession agreement and nationalization of property upon payment of adequate compensation. United Nations General Assembly resolutions provide ample evidence of international support for full recognition of this inalienable right. Judicial notice of nationalizations in keeping with the U.N. resolutions indicates acceptance of the standard as jus cogens. The counterclaims, therefore, do not come within the jurisdiction of the Court, because they fail to assert a violation of international law.

II.

The State's right to nationalize property for the public welfare supervenes an outstanding concession agreement with a private party. Industria's failure to recognize this sovereign authority constitutes an unwarranted exercise of prescriptive jurisdiction over the acts of the Naturalian government. Even under the restrictive theory of sovereign immunity, an acta jure imperii is an exception to jurisdiction entitling Naturalia and Natmin to immunity from suit in foreign courts. Industria's attempt to restrict Naturalia's nationalization by attaching all available assets and the Central Bank funds equals economic and political coercion. Only the return of all assets or restitution for their value can rectify Industria's violations against Naturalia and Natmin.

III.

No international court or tribunal has ever awarded specific performance of a legally revoked concession contract, nor have courts provided restitutio in integrum for nationalization of concession rights when compensation was available. To allow Minex, Lencot, or Industria additional damages discriminates against Naturalian citizens, abrogates Naturalian law, and denies the rights of self-governance. The remedy the Naturalian Tribunal provided Minex satisfied the international standard of compensation. "Appropriate" compensation for nationalized property equals the book value of the property. An award of going concern value would unjustifiably include a speculative profit margin. Naturalia's offer to pay Minex interest-bearing bonds is an internationally accepted method of prompt and effective payment.

I. INDUSTRIA'S STANDING DOES NOT EXTEND TO ASSERTION OF COUNTERCLAIMS.

A. Only States May Be Parties To An Action Before The International Court Of Justice.

1. Industria has no cause of action in its own interest.

Only states may be parties to cases before the Court.[1] A State asserting claims on behalf of individuals is in reality asserting its own rights.[2] Pursuant to its municipal laws, the Government of Naturalia and Minex, a State corporation, concluded a twenty-five year concession agreement. Industria is not a party to the agreement; therefore, no privity of contract arises between the two governments.[3]

The Court addressed a very similar situation in the Anglo-Iranian Oil Co. case.[4] It rejected the claim of the United Kingdom on behalf of a national corporation for lack of jurisdiction.[5] Appropriately, the Court stated that the contract was not an international treaty or agreement. Additionally, it stated that under the contract, Iran could claim no rights from the United Kingdom that

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1. Statute of the International Court of Justice art. 38, § 1, 59 Stat. 1055, T.S. 993.

2. See Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 23-25 (Second Phase); Nottebohm Case (Lichtenstein v. Guat.), 1955 I.C.J. 4, 24; Panevezys-Salduteskis Railway Case (Estonia v. Lithuania), 1939 P.C.I.J., Ser. A/B, No. 76, at 16; Serbian Loans Case, 1929 P.C.I.J., Ser. A/B, No. 76, at 17-18. See also Jones, Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies, 26 Brit. Y.B. Int'l L. 225, 231 (1949) [hereinafter cited as Jones].

3. See Anglo-Iranian Oil Co.(Greece v. U.K.), 1952 I.C.J. 93, 112; Anglo-Iranian Oil Co. v. Idemitsu Kosan Kubushiki Kaisha, 20 I.L.R. 305, 312 (High Court of Tokyo 1953).

4. 1952 I.C.J. 93.

5. Id. at 114. See also Onejeme, The Law of Natural Resources Development: Agreements Between Developing Countries and Foreign Investors, 5 Syracuse J. Int'l L. & Com. 1, 41-42 (1977) [hereinafter cited as Onejeme].

it could demand of the oil company, nor could the United Kingdom force Iran to perform obligations owed to the company.[6] The document agreed to by Naturalia and Minex serves only to regulate the relationship between the two signatory parties.

2. Industria has no cause of action on behalf of a national.

The State bestowing nationality alone can assert protection of an individual or corporate entity.[7] For this reason the Court consistently examines the strength of ties between the State and the "citizen."[8] Close scrutiny of Minex and Lencot reveals strong affiliation with Naturalia, but only tenuous connection to Industria.

Though the site of incorporation is an indicator of nationality, it is not the only one.[9] More importantly, courts and arbitrators grant diplomatic protection to the State that bestows the benefits of business operations, provides the safety of domicile, and confers political rights.[10] Minex is incorporated in Naturalia. All business, and the profits and tax benefits resulting therefrom, were conducted under the protection of Naturalian law.

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6. 1952 I.C.J. 93, 112.

7. Barcelona Traction at 32; Nottebohm at 20-21.

8. Barcelona Traction at 42; Nottebohm at 25.

9. See Akehurst, A Modern Introduction to International Law 103 (4th ed. 1979); Brownlie, Principles of Public International Law 296 (2d ed. 1973); Levi, Contemporary International Law: A Concise Introduction 149 (1979); Starke, An Introduction to International Law 274 (4th ed. 1972); 6 Whiteman, Digest of International Law 89 (1968) [hereinafter cited as Whiteman]; Akehurst, Jurisdiction in International Law, 46 Brit. Y.B. Int'l L. 145, 156-57 (1975).

10. Barcelona Traction at 41-43; Nottebohm at 24-25; Weis, Nationality and Statelessness in International Law 170-175 (2d ed. 1979).

In the Barcelona Traction, Light and Power Co. case, the Court denied Belgium's claim to represent individual majority shareholders of a nearly bankrupt Canadian corporation.[11] Just as in this case, approximately 80% of the company stock was owned by foreign nationals seeking diplomatic protection to recoup their losses. However, the Court held that foreign investors do not alter the nationality of the corporation.[12] "Piercing the corporate veil" failed to serve its purpose. As a test to prevent shareholders from avoiding creditors' claims, the court found it inappropriate.[13]

Rather, the I.C.J. recognizes the frequency with which individuals and entities seek nationality status strictly for convenience. In Nottebohm, the Court decided that Lichtenstein lacked standing to offer diplomatic protection and State representation to Nottebohm, a naturalized citizen.[14] Though Nottebohm acquired formal status as a citizen of Lichtenstein, he was born in Germany and maintained a business and domicile in Guatamala. The Court found his citizenship to be a method of avoiding adverse actions in Guatamala.[15] Clearly, even though Lencot is incorporated in Industria, its base of operations, business profits, and favorable tax treatment resulted from Naturalian

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11. Barcelona Traction at 40-45. See generally Briggs, Barcelona Traction: The Jus Standi of Belguim, 65 Am. J. Int'l L. 327 (1971).

12. Barcelona Traction at 35.

13. Barcelona Traction at 39-40. See also Delagoa Bay Railway Case, in Moore, 2 International Arbitrations 1865 (1898); Bagge, Intervention on the Ground of Damage Caused to Nationals, With Particular Reference to Exhaustion of Local Remedies and Rights of Shareholders, 34 Brit. Y. B. Int'l L. 162, 171 (1959) [hereinafter cited as Bagge].

14. Id.

15. Id. at 25-26.

operations. There is no evidence to indicate that Lencot's incorporation in Industria is for any purpose other than convenience. Under the standards established by Barcelona Traction and Nottebohm, the Court should deny Industria's assertion of standing to represent Minex or Lencot.

B. The Counterclaim Is Not Within The Court's Jurisdiction.

1. Nationalization is not an international violation upon which to base an international claim.

Article 80 of the I.C.J. Statute requires not only that the subject matter of the counterclaim be directly connected with the claims asserted, but it also requires the claim to be within the jurisdiction of the Court.[16] Two primary conditions for State intervention on behalf of individuals are that the individual suffer damage by the act of a foreign state, and that the act is a violation of international law.[17] Concession contracts are not international agreements because private companies are not subject to international public law,[18] nor can they be considered treaties because they do not represent privileges or obligations between States.[19] Therefore revocation of the Project Agreement does not constitute a breach of international law.

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16. I.C.J. Statute Art. 80 §1.

17. Bagge, supra note 13, at 162.

18. De Arechaga, Application of the Rules of State Responsibility to Nationalization of Foreign-Owned Property, in Legal Aspects of the New International Economic Order 220, 228 (K. Hossaim ed. 1980) [hereinafter cited as De Arechaga]; See generally Friedman, Expropriation in International Law 156 (1953) [hereinafter cited as Friedman]; White, Nationalisation of Foreign Property 83 (1961) [hereinafter cited as White]; Wortley, Expropriation in Public International Law, 54-55 (1959) [hereinafter cited as Wortley]; Varma, Petroleum Concessions in International Arbitration, 18 Colum. J. Transnat'l L. 259, 270 (1979).

19. De Arechaga, supra note 18, at 228; 1952 I.C.J. 93, 112.

2. Municipal, not international, law governs the claims of Minex and Lencot.

Conduct of a State which does not violate international law cannot be the basis of an international claim merely on the grounds that domestic remedies were exhausted without full redress of grievances.[20] Evidence of damage does not ipso facto justify a diplomatic claim.[21] Though shareholders suffered the repercussions of nationalization, this risk was a factor to be evaluated with others at the time of investment.[22] Because the Naturalian government revoked contractual rights under the Project Agreement, those rights represent property and contract interests subject to the eminent domain of the territorial State, and are therefore subject to municipal law.[23]

II. INDUSTRIA'S ASSERTION OF JURISDICTION AND ATTACHMENT OF ASSETS VIOLATED INTERNATIONAL LAW.

A. Naturalian Law Governs Both The Contract And the Relations Between The Parties.

1. The Project Agreement specifies application of Naturalian law.

Naturalia and Minex agreed upon use of Naturalian municipal law in the event of a dispute. Even if Minex and Lencot are not considered domestic corporations, several reasons support the selection of domestic law for

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20. Freeman, International Responsibility for the Denial of Justice 407 (1970); Foighel, Nationalization: A Study in the Protection of Alien Property in International Law 74 (1957)[hereinafter cited as Foighel]; Bagge, supra note 13, at 163-64.

21. Barcelona Traction at 36.

22. Id. at 35.

23. 1939 P.C.I.J. Ser. A/B, No. 76, at 18. See also White, supra note 18, at 74; Smit, Galston and Livitsky, International Contracts 37 (1981).

resolution of a conflict.[24] Traditionally, a State is presumed to contract under its own laws and is not subject to the laws of another State without express consent.[25] Concurrently, a foreigner is assumed to consent to the jurisdiction of the State he enters.[26] The appropriate interpretation of the Project Agreement is embodied in the Calvo Doctrine: By entering the country, a foreigner is entitled to nondiscriminatory treatment, and he impliedly consents to treatment as a national and renounces his right to call upon his own country for protection.[27]

2. Concession agreements are customarily governed by municipal law.

The choice of domestic law in concession agreements is customary. For example, the Andean Commission requires member states to use contract clauses which retain jurisdiction over foreign investment controversies in the member states.[28] The Organization of Petroleum Exporting Countries (OPEC) requires that all disputes between a member government and a concession contractor be adjudicated in the national court or a specialized regional court.[29] Nigeria requires that oil leases be granted only to Nigerian citizens or companies

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24. Jones, supra note 2, at 234-35; Bagge, supra note 13, at 175.

25. Rajan, United Nations and Domestic Jurisdiction 18 (2d ed. 1961) [hereinafter cited as Rajan]; Onejeme, supra note 5, at 49.

26. Rajan, supra note 25, at 21.

27. Id. at 17-18, 21 at n. 85. Falk, The Role of Domestic Courts in the International Legal Order 80-81 (1964) [hereinafter cited as Falk].

28. Andean Commission, Dec. 24, 1970, Art. 51, reprinted in 10 I.L.M. 152, 166 (1971).

29. OPEC Res. XVI 90, reprinted in 7 I.L.M. 1183, 1186 (1968).

incorporated in Nigeria.[30] As with Naturalia, the intent of each method is to assure application of the State's domestic law.

3. United Nations Resolutions of State sovereignty over natural resources declare the jurisdictional authority of the nationalizing state.

The United Nations support of true permanent sovereignty over natural resources[31] includes the right of each state to exercise authority over compensation disputes.[32] Resolution 3281 (XXIX), the Charter of Economic Rights and Duties of States, specifies that such disagreements should be settled under the domestic laws of the nationalizing state and by its tribunals.[33] UNCTAD Trade and Development Board Resolution 88 (XII) states that any dispute over compensation must fall within the sole jurisdiction of the courts of the nationalizing state.[34] Absent a breach of an international law, the dispute cannot be resolved by any legal system other than that of the state.

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30. Nigerian Petroleum Decree of 1969, SS. 2(2)(a) - 2(2)(b), cited in Onejeme, supra note 5, at 22.

31. G.A. Res. 626 ¶1 U.N. GAOR Supp. 20, at 18 U.N. Doc. A/2361 (1952) (Right to Exploit Freely Natural Wealth and Resources). G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) 17 U.N. Doc. A/5217 (1962) (U.N. General Assembly Resolution on Permanent Soveriegnty Over Natural Resources). G.A. Res. 3201, 28 U.N. GAOR, Supp. (No. 30) 52, U.N. Doc. A/9030 (1973). G.A. Res. 3201, Sixth Special Sess. U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974) (United Nations Declaration of the Establishment of a New Economic Order. G.A. Res. 3281, U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974) (Charter of Economic Rights and Duties).

32. G.A. Res. 1803, supra note 31, at 15; G.A. Res. 3171 U.N. Doc. A/9400 (1973), reprinted in 13 I.L.M. 238 (1974).

33. G.A. Res. 3281, supra note 31. See also Onejeme, supra note 5, at 50.

34. U.N. Doc. TD/B/423 (1893) reprinted in 11 I.L.M. 1474, 1475 (1972).

B. International Principles of Sovereignty Entitle Naturalia And Natmin To Immunity From Suit In Industria.

1. Industria failed to acknowledge the absolute authority of the Naturalian government.

Several basic tenets of international law support the sovereignty of a state within its borders. The doctrine of Absolute Sovereign Immunity maintains that as a foreign sovereign, Naturalia cannot, without its consent, be charged as a defendant in the courts of another sovereign state.[35] Current use of the Act of State doctrine precludes evaluation of sovereign acts in the courts of another state, unless that act violates international law.[36] Additionally, since 1952, the United Nations General Assembly has voiced the universally accepted principle that use and exploitation of natural resources is inherent to the absolute sovereignty of a nation.[37]

The first restriction of international law placed on states is that they may not exercise jurisdiction over acts outside their territory unless a permissive law to the contrary permits the action.[38] As a principle governing the relationship between states, sovereignty "...signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to

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35. See Schooner Exchange v. McFadden, 2 U.S. (7 Cranch) 116, 478 (1812); von Glahn, Law Among Nations 137-39 (4th ed. 1981).

36. Hunt v. Coastal States Producing Co., 583 S.W.2d 322 (Tex. 1979); Buttes Gas and Oil Co. v. Hammer, [1981] 3 All E.R. 616, 633, 21 I.L.M. 92, 107 (1982). See generally Falk supra note 27, at 97-112.

37. G.A. Res. 626, supra note 31.

38. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. Ser. A, No. 10, (Judgment of 7 September), at 18.

the exclusion of any other state, the functions of a state."[39] Industria's violation of these long-standing, worldwide customs of international law constitutes a direct attack on the sovereignty of Naturalia and its authority to govern under its own laws.

2. An acta jure imperii is an exception to restrictive jurisdiction.

a. Nationalization is an acta jure imperii.

A legislated act for nationalization is commonly recognized under the restrictive theory of immunity as an acta jure imperii allowing the exception for sovereign immunity.[40] Naturalia's Special Decree of April 15, 1981, authorizing termination of the Project Agreement, is indicative of political action motivated by a complete and general change in national policy.[41] The implementation of these policy changes can in no way be characterized as the bartering, negotiating, and trading associated with commercial transactions.

Revocation of the Project Agreement was the first step in harnessing the resources necessary for economic development in Naturalia. When evaluating state immunity for a contract, the International Law Commission stresses examination of the contract's purpose.[42] The Commission emphasizes a need to approach the issues with great caution, "[l]est an act of sovereign authority to ensure the safety and security of nationals...be misconstrued as a simple

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39. Island of Palmas (Netherlands v. U.S.) 2 R. Int'l Arab. Awards 831, 838 (1928).

40. Idemitsu at 313.

41. Foighel, supra note 20, at 15.

42. International Law Commission Fourth Report on Jurisdictional Immunities of States and Their Property, 34 U.N. GAOR at 34-5, U.N. Doc. A/CN.4/357 (1982).

Commercial transaction, unprotected by jurisdictional immunity."[43] The purpose of the nationalization is to ensure the economic development of the nation, and thereby the safety and security of citizens.

In furtherance of this goal the legislature endowed Natmin with powers to organize and execute government operations. As a legislated government agency assigned the function of fulfilling the Special Decree's mandate, Natmin is entitled to the same immunity provided Naturalia.[44] It is irrelevant that Natmin has a separate juridical personality as long as the State's laws regard it as a government agency.[45]

b. International custom and courts recognize the right to nationalization.

Ample evidence of a state's right to regain control of its natural resources is found in the aggregate of United Nations resolutions supporting permanent sovereignty over natural resources.[46] As a present standard of acceptable international practice agreed upon by overwhelming votes, U.N. resolutions are evidence of jus cogens.[47] They reflect the consensus of

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43. Id. at 35.

44. S. Sucharitkul, State Immunities and Trading Activities in International Law 104 (1959).

45. Baccus S.R.L. v. Servicio Nacional del Trigo, 1956 3 All E.R. 715, 724-731; Krajina v. Tass, 1949 2 All E.R. 274, 281. See also Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a).

46. See supra note 34.

47. Castenada, Legal Effects of U.N. Resolutions 165-196 (1969); Higgins, The Development of International Law Through the Political Organs of the U.N. 5 (1963). Parry, The Sources and Evidences of International Law, 19-24 (1965). G.A. Resolution 1803 passed by a vote of 82 for, 2 against, and 12 abstaining. 17 U.N. GAOR Supp. (No. 17), U.N. Doc. A/5217 (1962). Resolution 3281 passed by a vote of 120 for, 6 against, and 10 abstaining. 29 U.N. GAOR (2315th plen. mtg.) at 44-45, U.N. Doc. A/PV. 2315 (1974).

decisions on important international questions, having dispositive force and effect[48] relied upon by the Courts.[49]

In particular, two courts upheld Iran's nationalization of oil property by citing the 1952 resolution.[50] Because the purpose and implementation of the act was in accord with the resolution, the act was legal under international law.[51] Naturalia's nondiscriminatory appropriation for the public welfare, coupled with an effort and offer to compensate those deprived of property, conforms with the international standard.[52] Therefore, the restrictive immunity carved out of international principles of equal sovereignty among nations still affords Naturalia and Natmin immunity from judicial action in Industria.

3. Naturalia never waived its immunity.

The singular exception whereby Industria could exercise jurisdiction over Naturalia and Natmin is a waiver of immunity and consent to jurisdiction.[53] However, at no time prior or subsequent to the initiation of suit, did Naturalia indicate a willingness to waive its immunity.[54] Additionally, no treaty or

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48. Certain Expenses of the U.N., 1962 I.C.J. 163 (Advisory Opinion).

49. Western Sahara, 1975 I.C.J. 32-33 (Advisory Opinion).

50. Idemitsu at 305; Anglo-Iranian Oil Co. Ltd. v. S.U.P.O.R., 22 I.L.R. 23 (Rome 1955).

51. Idemitsu at 313; S.U.P.O.R. at 40.

52. Lillich and Weston, International Claims: Their Settlement by Lump Sum Agreements 144 (1975).

53. Cf. Note, Question of Iran's Immunity: Jurisdiction Over a Foreign Sovereign; Brooklyn J. Int'l L. 41, 63-67 (1981) [hereinafter cited as Note].

54. See European Convention on State Immunity, Art. 3(2) (Council of Europe 1972). See generally Sinclair, The European Convention on State Immunity, 22 Int'l & Comp. L. Q. 254 (1973) [hereinafter cited as Sinclair].

agreement provides an explicit waiver.[55] Never has Naturalia or Natmin extended an unintended waiver of immunity in Industria. Furthermore, Naturalia did not waive its immunity when appearing before the Court of Industria to contest jurisdiction.[56]

C. Industria's Attachment Of All Naturalian Assets Equals Economic Coercion Violative Of International Law.

The attachment of foreign government assets is an extreme action taken only in those cases in which tribunals anticipate complete inability to recover for a justifiable injury. Even under the restrictive doctrine of jurisdiction, a state is accorded immunity from the levy of execution against its property.[57] Because Naturalia's nationalization of Minex is legal, there is no violation of international law to serve as the basis justifying prejudgment attachments.

Lenient attachment and execution standards still require that as a condition to execution, property be definitively associated with the challenged commercial transaction.[58] Industria's order to attach all bank accounts failed to delineate that portion of Natmin's co-mingled funds attributable to Minex activities. Central bank accounts funding government operations are

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55. Note, supra note 53, at 65-67.

56. European Convention on State Immunity and Additional Protocol, May 16, 1972 Art. (3)2. See Sinclair, supra note 53, at 266.

57. See Dexter and Carpenter v. Kunglig Jurnvagsstryrelsen, 43 F.2d 705 (2d Cir. 1930), cert. denied 282 U.S. 896 (1931); Weildmann v. Chase Manhattan Bank, 21 Misc. 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959). Restatement (Second) of Foreign Relations Law of the United States (1965), § 74(3) Comm. C.

58. Patrikis, Foreign Central Bank Property: Immunity From Attachment in the United States., 1 U. 111. L. Rev. 265 (1982) [hereinafter cited as Patrikis]; Crawford, Execution of Judgments and Foreign Sovereign Immunity, 75 Am. J. Int'l L. 820, (1981) [hereinafter cited as Crawford].

specifically accorded immunity from attachment in a foreign state.[59] Thus, Industria seized those funds necessary for Naturalian government administration.

Furthermore, the warehoused bauxite attached by Industria retained Naturalian title under the Special Decree. The Idemitsu court found that oil already extracted from wells and stored in tanks was subject to Iran's Nationalization law.[60] Similarly, all bauxite at the Project and aboard Naturalian vessels belonged to Naturalia.

The international consensus within the United Nations denounces such action as violating principles of self-determination and non-intervention which could constitute a threat to international peace and security.[61] Specifically, "no state may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of [permanent sovereignty over natural resources]."[62] Industria's sweeping attachment of all available Naturalian assets indicates a blind and arbitrary attempt to restrain the foreign activities of Naturalia. The Court's action effectively bars the government from any financial exchange, rendering Naturalia impotent to oversee its daily administration. Only complete return of all assets or full restitution for Industria's unlawful attachments will rectify the violations against Naturalia and Natmin.[63]

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59. Patrikis, supra note 58, at 265; Crawford, supra note 58, at 837.

60. Idemitsu at 314-15.

61. Report of the Economic and Social Council 38 U.N. GAOR (No. 12) at 8, U.N. Doc. A/38/625/E/1983/85 (1983).

62. A/RES/3201 (S-VI) ¶ 4(e).

63. See generally Corfu Channel, 1949 I.C.J. 4 (Merits); Factory at Chorzow (Belg. v. Pol.), 1928 P.C.I.J. Ser. A, No. 17 (Merits).

III. THE REMEDY AFFORDED MINEX FOR THE REVOCATION OF THE PROJECT AGREEMENT WAS APPROPRIATE UNDER NATURALIAN LAW AND UNDER INTERNATIONAL LAW.

A. Naturalia Justifiably Revoked The Project Agreement.

1. The language of the Project Agreement does not "internationalize" the contract.

a. The phrase "...and such rules or principles of international law as may be applicable" does not ipso facto "internationalize an agreement.

In the Topco arbitral decision,[64] the arbitrator, Rene Dupuy, distinguished the provision in the contract between Topco and Libya which internationalized the agreement, thereby subjecting the determination of the issues to international law.[65] Of the criteria Dupuy examined in characterizing the agreement, he considered the language of the choice of law clause to be of primary importance.[66] The choice of law clause in the Topco arbitration is materially different from the clause in the case at bar. In Topco, the parties had agreed to use Libyan law and those general principles of international law common to it, rather than Libyan law and international rules which may be applicable. Dupuy stated that Libyan, not international, law would be the law of the contract in the second instance.

b. The Project Agreement contained no arbitration clause indicative of an internationalized contract.

Additionally, Dupuy considered the presence of an arbitration clause as an essential element to the internationalizing of any concession agreement.[67]

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64. Texas Overseas Petroleum Co. (Topco) and California Asiatic Oil Co. v. The Government of the Libyan Arab Republic, 17 I.L.M. 1 (1977).

65. Id. at 11.

66. Id. at 16.

67. Id.

There is no arbitration clause in the Project Agreement.[68] In the absence of applicable Naturalian law, international law should be used only as a supplement. Therefore, the proposition that the contract is internationalized and thus must be adjudicated by international law must fail.

2. The revocation of the Project Agreement does not abrogate the principle of pacta sunt servanda.

The principle of pacta sunt servanda provides that treaty obligations between states must be observed.[69] The document at issue, however, is not a treaty; it is a private contract between a state and an alien. A state cannot limit its future action by binding itself to individuals that might eventually derogate from the welfare of the state.[70] The fundamental importance of self-preservation allows a state to terminate contracts when the act is for the benefit of the country.[71]

Even when a stabilization clause is written into a contract, an alien who voluntarily contracts with a sovereign is assumed to realize that national welfare is of paramount importance.[72] Contracts can be and have been terminated

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68. Jessup Clarifications, January 1984, No. 56 [hereinafter cited as Clarification].

69. Baldus, State Competence to Terminate Concession Agreements With Aliens, 53 Kent. L.J. 56, 80 (1964) [hereinafter cited as Baldus]; Kissam and Leach, Sovereign Expropriation of Property and Abrogation of Concession Contracts, 28 Fordham L. Rev. 177, 207 (1959) [hereinafter cited as Kissam and Leach]. See also supra note 18.

70. Hossain, Legal Aspects of the New International Economic Order 39 (1980); Kissam and Leach, supra note 69, at 198, 205. See also Friedman, supra note 18, at 220.

71. Kissam and Leach, supra note 69, at 198.

72. Id.; Foighel, supra note 20, at 74.

lawfully on those grounds.[73] Writers have termed this circumstance the assumption of the risk of economic development contracts.[74]

B. Even If This Court Determines The Project Agreement Is An International Agreement, Compensation Is The Only Relief Available To Minex.

1. An international court has never awarded specific performance for a nationalization.

a. A taking must violate either a treaty or international law to merit specific performance.

No international court has ever awarded specific performance as the remedy for nationalization.[75] Specific performance is a remedy under contract law which is intended to "wipe out all the consequences of [an] illegal act and re-establish the situation which would in all probability [exist] if that act had not been committed."[76] Furthermore, there is "no uniform general principle of law pursuant to which specific performance is a remedy available at the option of a ...party, especially not a private party acting under a contract with a government."[77]

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73. Kissam and Leach, supra note 69, at 199.

74. Baldus, supra note 69, at 71. See also Kissam and Leach, supra note 69, at 198. See generally, A. Fatouros, Government Guarantees to Foreign Investors 243-44 (1962); C.J. Olmstead, Economic Development Agreements Part II: Agreements Between States and Aliens; Choice of Law and Remedy, 49 Calif. L. Rev. 504, 512 (1961) [hereinafter cited as Olmstead].

75. BP Exploration Co. (Libya) Ltd. v. The Government of The Libyan Arab Republic, 53 I.L.R. 297, 353 (1974); Baldus, supra note 69, at 78. See generally, 8 Whiteman, supra note 9, at 1694. See also F.C. Pedersen, Expropriation in International Law—Strategies of Avoidance and Redress, 10 Toledo L. Rev. 73, 101 (1978).

76. Topco at 498.

77. BP Exploration at 352. See also Dawson and Weston, "Prompt, Adequate and Effective": Universal Standard of Compensation? 30 Fordham L. Rev. 727, 737 (1962).

b. Specific performance is appropriate when the taking is confiscatory or discriminatory.

Specific performance is available only when the nationalization has been confiscatory or discriminatory.[78] Naturalia did not confiscate Minex property and did not discriminate, because other mining, manufacturing, and agricultural interests equally were affected.[79] The BP arbitration analysis is illustrative regarding concession contracts. Libya contracted with the British government under a concession agreement for a term of years to extract oil.[80] The Libyan government legislatively terminated the agreement and authorized a committee to determine compensation. The United Kingdom requested specific performance, or in the alternative, payment of full damages, including restitution. The Arbitrator held that the Libyan Nationalization Law constituted a fundamental breach of the concession and that the taking violated public international law.

The BP arbitration is distinguishable on several grounds. The concession was between two sovereign states and therefore was considered tantamount to a treaty.[81] The nationalization was also discriminatory and for "extraneous" public reasons.[82] The Arbitrator considered the appropriate remedies only from the perspective of an illegal taking. Even so, he found that damages, not specific performance or restitution were appropriate.[83] The reliance on Chorzow

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78. Carlston, Concession Agreements and Nationalization, 52 Am. J. Int'l L. 260, 271 (1958).

79. Clarification No. 25.

80. BP Exploration at 313-17.

81. Id. at 329. See generally Kissam and Leach, supra note 69, at 195.

82. Id.

83. Id. at 355.

(in which restitution in kind was awarded) was a reliance on principles governing an illegal taking. The Arbitrator stated, "...there is no explicit support for that proposition that specific performance [as a remedy] in public international law [is] available." Furthermore, the remedy of specific performance is normally unavailable against a government under a public contract, especially a government contract with a private party.[84]

2. An international court has never awarded restitutio in integrum for the nationalization of concession rights.

a. Restitutio in integrum is dependent upon an illegal taking and expropriation of tangible items.

Restitutio in integrum is the fundamental remedy when there has been an illegal taking.[85] However, when nationalization is legal, the appropriate remedy is payment of a sum which corresponds to the value which a restitution in kind would bear.[86] The I.C.J. previously has required restitution to remedy a taking in which no compensation was offered and the items were tangible.[87] In the Preah Vihear case, the expropriation of territory by Thailand was illegal, and the I.C.J. required the return of the temple and the objects belonging thereto.[88] In those cases in which restitution was granted, there was a vio-

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84. Id. at 347-352. See also Olmstead, supra note 74, at 510.

85. BP Exploration at 347; Topco at 497-98; Garcia Amador, Sohn and Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens (1974).

86. Chorzow at 47.

87. Temple of Preah Vihear (Cam. v. Thai.), 1962 I.C.J. 6, 36-37 (Judgment of June 15, 1962); Topco at 499.

88. Temple of Preah Vihear at 36-37.

lation of international law.[89] In those cases in which restitution was denied, the taking was legal.[90]

b. Restitutio in integrum is an exceptional award and courts use it only when compensation is unavailable.

Restitution should not be physical reinstatement of a party effectively and definitely removed by a sovereign. The BP arbitrator found that compensation is the principal remedy, and restitutio is clearly the exceptional one,[91] and available only when compensation is not.[92]

Moreover, no international tribunal has "ever decided...whether, despite a fully implemented nationalisation of an entire enterprise, the nationalising government is bound specifically to perform its repudiated contractual undertakings, annul the nationalisation, and restore the position of the concessionaire to the status quo ante."[93]

In particular, Naturalia requests this Court to follow the holding in Idemitsu.[94] In that case, Iran passed a Nationalization law which nationalized oil properties held under a concession contract. The Nationalization law

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89. BP Exploration at 339.

90. Id. at 340-41; Walter Fletcher Smith Claim (U.S. v. Cuba), 2 R. Int'l Arb. Awards 913, 916 (1929). See generally, Wortley, supra note 18, at 72-92.

91. BP Exploration at 347-48; Mavrommatis Jerusalem Concessions Case, 1925 P.C.I.J., Ser. A., No. 5, at 6. See also Wortley, supra note 18, at 111; Fatouros, International Law and the Internationalized Contract, 74 Am. J. Int'l L. 134, 138 (1980); Vicuna, Some International Law Problems Posed By The Nationalization of the Copper Industry By Chile, 67 Am. J. Int'l L. 711, 718 (1973).

92. BP Exploration at 353.

93. Id. at 351.

94. Idemitsu at 305.

provided for compensation. The Tokyo high court held that the nationalization was lawful since compensation was offered.[95] Furthermore, the court said that the agreement was a private contract, not an international agreement, and was thereby entitled to Iranian domestic remedies, not international ones. The Court stated that the validity of the Nationalization Law is unaffected by any breach of contract of which Iran may be guilty.[96] Naturalia requests that in view of the propriety of its nationalization, compensation be the only relief granted to Minex. To allow Minex, Lencot, or Industria additional damages discriminates against Naturalian citizens, abrogates Naturalian law, and denies the rights to self-goverance.

C. The Compensation Offered By Naturalia Was Proper Under International Law.

1. "Appropriate" compensation is the international standard.

a. U.N. resolutions and case law support an award of "appropriate" compensation.

The responsibility of a nationalizing state to compensate the owner of nationalized property is widely accepted in international law.[97] The Naturalian government ordered the creation of an arbitral tribunal to determine the "appropriate" compensation owed to the owners of Minex; the tribunal awarded the book value for the corporation. Minex rejected this award.

The international standard for a taking of natural resources, as in the case at bar, is an award of "appropriate" compensation. In 1962, the United

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95. Id. at 307.

96. Id. at 307-308.

97. See e.g., Chorzow. See also Foighel, supra note 20, at 84-87; White, supra note 18, at 231-43; Wortley, supra note 18 at 115-35.

Nations General Assembly declared in Resolution 1803 that a State which nationalizes property owes "appropriate compensation" under international law for the taking.[98] Twelve years later the General Assembly reiterated its standard in the Charter of Economic Rights and Duties of States, declaring "appropriate compensation" should be paid by a State that nationalizes or transfers ownership of foreign property.[99] Both of these declarations were passed by overwhelming margins.[100]

b. Book value is the appropriate method of valuation.

Book value is the historic cost of the assets of a corporation after depreciation and depletion.[101] In the past twenty years, "the trend is definitely toward [the] increased use" of book value as the measure of appropriate compensation.[102] In the Chilean decree law of 1974 announcing a compensation settlement between Chile and the Kennecott Copper Corporation for the nationalized El Teniente Mining Company, Chile declared monetary compensation would be paid at book value.[103] In 1969, Zambia nationalized two copper operations, and

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98. G.A. Resolution 1803 and CERDS, supra note 31. See also Kissam and Leach, supra note 68, at 184.

99. CERDS, supra note 31.

100. See supra note 47.

101. Clarification No. 23. See also McCosker, "Book Values in Nationalization Settlements", in 2 The Valuation of Nationalized Property in International Law 36 (R. Lillich, ed., 1972) [hereinafter cited as Valuation].

102. Lillich, "The Valuation of Nationalized Property in International Law: Toward a Consensus or More 'Rich Chaos'?," in 3 Valuation 183, 201 (1975).

103. Chilean Decree Law Approving Settlement Agreement with Kennecott, 14 I.L.M. 135, 136 (1974). See also Comment, The Chilean Copper Nationalization: The Foundation for a Standard of "Appropriate" Compensation, 23 Buff. L. Rev. 765 (1974).

agreed to pay book value to the owners.[104] Following the Cuban nationalizations of 1960, the United States Foreign Claims Settlement Commission administered claims against the lump sum settlement paid by Cuba to the U.S.,[105] consistently returned settlements based on book value. It ruled that book value was "the most appropriate basis of valuation."[106]

The Kuwait v. The American Independent Oil Co. (AMINOIL)[107] tribunal stated hypothetically, "net book value may be suitable when it is a case of a recent investment, the original cost of which was not far from that of the present replacement cost." Naturalia's case is that hypothetical described. Naturalia nationalized Minex only six years after Minex began operations. Accordingly, book value for Minex would be close to replacement cost.

c. Going concern value is inappropriate.

A going concern evaluation includes a measure of projected profits as part of the amount of compensation.[108] Applying going concern value is difficult and highly speculative, however, when the company has a limited history of operations.[109] Minex' request for fifteen years' projected profits, based on an

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104. R. Sklar, Corporate Power in an African State—The Political Impact of Multinational Companies in Zambia 40 (1975).

105. Lillich, "The Valuation of Nationalized Property by the Foreign Claims Settlement Commission," 1 Valuation 95, 105-115 (1972).

106. Claim of Francis Grider Horst, Dec. No. CU-1418 (July 24, 1968). See also Claim of Ralston-Purina Co., Dec. No. CU-435 (Oct. 18, 1967); Claim of Sherwin-Williams Co., Dec. No. CU-31 (Feb. 1, 1967); Claim of General Milk Co., Dec. No. CU-1043 (Jan. 24, 1968).

107. 21 I.L.M. 976, 1038-39 (1982).

108. Smith, The United States Perspective on Expropriation and Investment in Developing Countries, 9 Vand. J. Transnat'l L. 517, 519 (1976).

109. Id.

operating history of fewer than four years, is unsupportable. The current world oversupply of bauxite[110] further renders Minex's argument for profits suspect.

2. "Prompt, adequate, and effective" compensation is not applicable to nationalization of natural resources.

a. The United Nations rejected the proposed standard of "prompt, adequate, and effective" compensation in 1962.

In drafting U.N. Resolution 1803, the General Assembly considered the phrase "prompt, adequate, and effective compensation" as the operative standard.[111] The General Assembly decided that appropriate compensation would address the problems and concerns of emerging nations, like Naturalia, whereas prompt, adequate, and effective compensation would perpetuate the economic dominance of established countries, like Industria.[112]

b. Naturalia and Industria never signed a Treaty of Friendship, Commerce, and Navigation containing this language.

In the middle of this century, the United States and other established nations attempted to bind developing countries to payment of "prompt, adequate, and effective" compensation by treaties of friendship, commerce, and navigation.[113] Naturalia and Industria, however, never signed such a treaty, and therefore Naturalia cannot be held to the "prompt, adequate, and effective" standard.

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110. Report of the U.N. Economic and Social Council on Permanent Sovereignty over Natural Resources, U.N. Doc. E/C.7/1983/5 at 7 (1983).

111. G.A. Resolution 1803, supra note 31.

112. De Arechaga, State Responsibility For the Nationalization of Foreign Owned Property, 11 N.Y.U.J. Int'l L. & Pol. 179, 186-7 (1978).

113. Ribeiro, Nationalization of Foreign Property in International Law 90-91 (1977).

c. Naturalia's offer of payment in bonds was proper under established world standards.

Even if "promptness" were the applicable standard for time of payment, the Naturalian Compensation Tribunal's award of bonds would be permissible. The marketability of the bonds is not an issue: Industria recognizes that a market exists for the bonds of Naturalia.[114] Additionally, the length of ten years for maturity is reasonable: Other nations have asserted the right to pay compensation in bonds over fifteen or twenty-five years.[115]

In the Indonesian Tobacco case, a German court held that "with regard to timing and amount, compensation would have to be adjusted to conditions in the expropriating state."[116] The "conditions" referred to included social, economic, and political changes in Indonesia following nationalization of the tobacco industry.[117] The Harvard Draft on the International Responsibility of States for Injuries to Aliens recommends deferred payment of compensation to protect the economy of an emerging nation immediately after a large nationalization program.[118] Staggered payments "afford compensation to the aggrieved alien without imposing upon the State a financial burden which might lead it to bankrupt-

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114. Clarification No. 24.

115. Gordon, The Cuban Nationalizations: The Demise of Foreign Private Property 128, 146-7 (1976).

116. Indonesian Tobacco Case, 28 I.L.R. 16, 35 (Court of Appeals, Bremen, Federal Republic of Germany, 1959).

117. Id.

118. Sohn and Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 Am. J. Int'l L. 545, 560 (1961).

cy."[119] By paying for Minex over ten years, Naturalia could effectively compensate Minex without jeopardizing Naturalia's economic development.

CONCLUSION

In accordance with the arguments and authorities herein presented, Naturalia respectfully requests this Honorable Court to declare that the nationalization of Minex and the compensation offered was proper under all general and specific principles, rules, and criteria relevant to the application of international law, and that the assets attached by Industria be returned or compensation be paid, to Naturalia.

Respectfully submitted,

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119. Id.