IN THE INTERNATIONAL COURT OF JUSTICE

February 1984 Term

Between:

NATURALIA,

Applicant,

and

INDUSTRIA,

Respondent.

MEMORIAL FOR THE RESPONDENT

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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 Industria has standing to assert the counterclaim.

II.

Whether the attachments imposed by the Industrian courts were proper.

III.

Whether Minex should receive specific performance for Naturalia's breach of the concession agreement.

IV.

Whether the compensation offered by Naturalia was sufficient.

SUMMARY OF ARGUMENT

I.

Industria has standing to bring the counterclaim of this suit. A State has standing to bring a private party's claim before the International Court of Justice if that party is a national of that State. This court should use the genuine link test rather than the place of incorporation test to determine Minex' nationality. Under the genuine link test, Minex is a national of Industria and so Industria may represent it. Even if the I.C.J. decides that Industria may not represent Minex, Industria still has standing to bring the counterclaim because the counterclaim is, in reality, a claim brought by Industrian nationals. This court should rule that Industria has standing so that it can proceed to the merits of this counterclaim and clarify international law.

II.

The Industrian Court of Final Appeals was correct in attaching Naturalia's and Natmin's assets. Naturalia did not have immunity from the Industrian Court of Appeals' jurisdiction. The Project Agreement did not bind Minex and Lencot to bring their claims in Naturalian courts. Moreover, the restrictive theory of sovereign immunity, which is the appropriate immunity theory for international law, did not allow immunity for Naturalia's and Natmin's acts. Naturalia's and Natmin's acts of breaching a contract and taking over the Project without proper compensation were commercial acts and thus were not subject to immunity. Since the Industrial courts had jurisdiction over Naturalia and Natmin, the prejudgment attachments were permissible and in fact necessary under the restrictive theory. The Naturalian and Natmin property which the Industrian Court of Appeals attached

was entitled to no special execution immunity and the Industrian Court of Appeals properly attached Naturalian and Natmin property in order to satisfy Minex' and Lencot's claims.

III.

Minex should be awarded specific performance for Naturalia's breach of the concession agreement. Naturalia's breach was a clear violation of international law. A State cannot break an international agreement. Even if Naturalia could repudiate on ordinary concession contract, Naturalia granted Minex irretractable rights by placing a stabilization clause in the Project Agreement. The proper remedy for Naturalia's breach is specific performance.

V.

Compensation is sufficient when it is "prompt, adequate and effective." Naturalia's offer fails to meet any of these elements. Even if the developing nations' standard of "appropriate" compensation was applied, Naturalia's offer is still insufficient. In this particular case, the appropriate compensation is full compensation. Minex did not unduly influence Naturalia. Minex brought new capital and technology into Naturalia. Finally, Naturalia broke a concession contract, and Minex deserves compensation for the expected duration of the agreement. All of these factors indicate that Naturalia's offer was insufficient.

I. INDUSTRIA HAS STANDING TO REPRESENT LENCOT IN ITS SUIT AGAINST NATURALIA.

A State has standing to bring a private party's claim before the International Court of Justice if that party is a national of that State.[1]

A. The "Place Of Incorporation Rule" Should Not Control.

A corporation's place of incorporation should not determine its nationality.[2] The "place of incorporation test" causes problems when the corporation concerned is owned or controled by nationals from other States.[3] When such a situation arises, courts should not allow the State of incorporation to claim the corporation as its national. There are other States that have a more legitimate interest in the rights of the corporation.[4] As The Honorable Phillip Jessup observed in Barcelona Traction, Light and Power Co., Ltd., titles of incorporation are often mere "flags of convenience." The titles are meaningless in international business unless there exists a genuine link between the State and the corporation.[5]

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1. I.C.J. Statute, Article 34; Nottebohm Case (Lichenstein v. Guat.), [1955] I.C.J. Rep. 4, 24.

2. S.S "Wimbledon" (Fr. v. Ger.), 1923 P.C.I.J. Ser. A., No. 1, (Judgment of 17 August); W. Levi, Contemporary International Law: A Concise Introduction 152, note 79, (1979); Harris, The Protection of Companies in Light of The Nottebohm Case, 18 Int'l & Comp. L.Q. 275, 278 (1969).

3. C.W. Jenks, "Multinational Entities in the Law of Nations," Transnational Law In A Changing Society: Essays In Honor of Philip C. Jessup, 80 (W. Friedman, L. Henkin and O. Lissitzy eds., 1972); G. Schwarzenberger, Foreign Investments and International Law, 112 (1969); G. Von Glahn, Law Among Nations, 215 (4th ed. 1982).

4. Metzger, Nationality of Corporate Investment Under Investment Guaranty Schemes - The Relevance of Barcelona Traction, 65 Am. Jur. Intl. L. 532, 533 (1971); Jenks supra at 80; Kronstein, The Nationality of International Enterprises, 52 Colum. L. Rev. 873, 988 (1952).

5. Barcelona Traction, Light and Power Co., Ltd. Case [1970] I.C.J. Rep. 3, 64 (Sep. Op. J. Jessup) 195, note 74.

For this reason, courts should look at the "economic reality of the relevant transaction." They should identify which State the corporation has its strongest ties with.[6] In other words, the proper test is the genuine link test rather than the place of incorporation test.[7]

B. The Genuine Link Test Gives Industria Standing.

International legal authorities have touted the genuine link test as the most accurate test of corporate nationality.[8] This court should use the genuine link test to determine Minex' nationality.

1. The genuine link test "lifts the veil" of the subject corporation.

The goal of the genuine link test is to determine the real and effective nationality of a corporation.[9] The test is based on the premise that corporate legal planning often shrouds a corporation in an artificial cover.[10] Hence, it is often necessary for a court to "lift the veil" of a corporation in order to justly determine which State's nationals have the dominant interest in the

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6. Barcelona Traction (Sep. Op. J. Jessup) at 169; Lillich, Two Perspectives on Barcelona Traction, 65 AJIC 522, 531 (1971); Vagts, The Corporate Alien: Definitional Questions In Federal Restraints On Foreign Enterprise, 74 Harv. L. Rev. 1489, 1526 (1961).

7. Radnay, Piercing The Corporate Veil Under International Law, 16 Syracuse L. Rev. 779, 789 (1965); 2 Encyclopedia of Public International Law 32 (R. Bernnhardt ed. 1981); Von Glahn supra note 3, at 215.

8. Id.

9. Nottebohm at 22; cf. Harris, note 2, at 275 (Nottebohm "genuine link" requirement applicable to corporations).

10. Barcelona Traction, (Sep. Op. J. Jessup) at 80; Radnay, supra note 7, at 797.

corporation. The court should look at which nationals actually control the corporation in terms of management and in terms of asset-holding.[11]

2. A "lifting" of the Minex "veil" reveals that Minex was an Industrian Corporation.

Under the genuine link test, Minex was a national of Industria. Prior to Naturalia's taking of Minex, Industrian nationals owned eighty percent of the capital and one hundred percent of the technology for the Minex project. Furthermore, the Industrian nationals had complete management control over the Minex mines and factory.[12] A lifting of the Minex veil reveals that Industrian nationals had overwhelming management and asset control over Minex. A genuine link did not exist between Minex and Naturalia. Rather, Minex' genuine link existed with Industria. Industria was the State of real and effective nationality. Therefore, Industria has standing to represent the former Minex stockholders.

C. Even If Industria Does Not Have Standing To Represent Minex, It Still Has Standing To Bring The Counterclaim Of This Suit.

1. Industria is representing Minex shareholders rather than Minex.

If this Court decides that Industria does not have standing to represent Minex, this Court should view Industria's counterclaim as a shareholder's suit. Minex cannot possibly be bringing the suit since, due to Naturalia's taking, Minex no longer exists as a corporation.[13] The reality of this case is that the

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11. Note to Mexican Government Regarding Mexican Eagle Oil Company, 20 April 1938, reprinted in 8 Whiteman, Digest of International Law 1273, 1273 (1967); Barcelona Traction, (Sep. Op. J. Jessup) at 80; E.S. Cohn and C. Simitis, Lifting the Veil in the Company Laws of the European Continent, 12 Int'l and Comp. Law Q. 1891 217; Kronstein supra note 4, at 873; Bernhardt, supra note 7, at 22.

12. Compromis at 1.

13. Compromis at 2.

former Minex shareholders, most of whom are Industrian nationals,[14] are depending on Industria to represent them as they seek redress.

2. Barcelona Traction's "liquidation rule" gives Industria standing.

The situation in this case is highly analogous to a hypothetical situation posed by the Court in Barcelona Traction. In Barcelona Traction, the I.C.J. described a situation in which an international corporation goes into liquidation. The Court said that once such liquidation has occurred, the national State from which the stockholders predominate has standing to assert claims for the shareholders arising out of the company's failure.[15]

Minex has liquidated. Liquidation is a corporation's act of winding up such that the corporation's assets are distributed for the purpose of settling with the corporation's creditors.[16] The Naturalian Government has terminated the Minex operation. The Naturalian Compensation Tribunal has reviewed Minex' assets and liabilities and distributed those assets for the purpose of settling with Minex' creditors.[17] Since Minex has liquidated, the national State from which Minex' shareholders predominated is the State with standing.[18] The national State from which Minex' shareholders did predominate is Industria;

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14. Compromis at 1.

15. Barcelona Traction, at 31-50.

16. Garrett Co. v. Morton, 35 Misc. 10, 71 N.Y.S. 17 (1901); Young v. Blandin, 215 Minn. 111, 9 N.W.2d 313 (1943).

17. Compromis at 1.

18. See Jones, Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies 26 Brit. Y.B. Int'l L. (1949) 225, 231-232; M. Akehurst, A Modern Introduction to International Law, 100 (4th ed. 1982).

eighty percent of Minex' shareholders were from Industria.[19] Therefore, under Barcelona Traction, Industria has standing.

D. The I.C.J. Should Rule That Industria Has Standing So That The I.C.J. Can Clarify International Law.

The I.C.J. will clarify international law if it rules that Industria has standing and proceeds to the merits of this case. The topic of this suit, expropriation, is of timely importance. World development is currently taking place on a grand scale. The key to success in modern international development is that international investors and developing nations are working together for mutual benefit. Contract defaults and inequitable property takings are stumbling blocks to such relationships. Such problems could ultimately impair good relations between investors and developing countries and thus impede world development.[20] So that the I.C.J. can rule on the merits and clarify the law on expropriation, the I.C.J. should grant standing for Industria to assert its counterclaims.[21]

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19. Compromis at 1.

20. Metzger supra note 4, at 532.

21. Cf., Barcelona Traction (Jessup Op.) at 161 (in which Judge Jessup makes a similar argument).

II. THE INDUSTRIAN COURT OF FINAL APPEALS WAS CORRECT IN ATTACHING NATURALIA'S AND NATMIN'S ASSETS.

A. Naturalia And Natmin Did Not Have Immunity.

1. The Project Agreement did not bind Minex and Lencot to bring their claims in Naturalian courts.

Article XXII "internationalizes" the Project Agreement. It states that all disputes regarding the Agreement are subject to the laws of Naturalia and the rules and principles of international law. In matters of international dispute, international law is supreme. In the dispute of Naturalia and Natmin versus Minex and Lencot, the Industrian Court was entitled to hear the matter as long as it applied the rules and principles of international law.[22] The Industrian Court did apply international rules and principles and so the Project Agreement permitted the Industrian Court to hear the case.

2. The restrictive theory of sovereign immunity is the appropriate immunity theory for modern international law.

The realities of modern international transactions require that the restrictive theory of sovereign immunity replace the absolute theory.[23] States widely supported the absolute theory during the nineteenth century when countries rarely engaged in commercial transactions. The world community assumed at that

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22. See Texaco Overseas Petroleum Co. (TOPCO)/California Asiatic Oil Co. (CALASIATIC) v. Libyan Arab Republic, 17 Intl. Legal Mat. 1 (1978) [hereinafter referred to as TOPCO] where arbitrator held that agreement similar to XXII "internationalized" the TOPCO-Libyan contract, thus making it proper to have the case heard outside Libyan courts.

23. Alfred Dunhill of London, Inc. v. The Republic of Cuba, 425 U.S. 682 (1976); Letter from State Dept. Legal Advisor J. Tate, May 19, 1952, 1952 Dept. of State Bull. 984, 984-985; 12 Weekly Comp. of Pres. Doc. 1554 (1976); F. Van Hermstra, Sovereign Immunity and Judicial Remedies Against the Netherlands Government, 10 Intl. Law. 441, 441 (1976).

time that States were always immune from jurisdiction of foreign courts.[24] Developments of the twentieth century have changed that assumption. Many States now trade heavily in the world market.[25] The sovereign immunity theory has had to adapt to reflect this commercial involvement.[26] The contemporary approach to sovereign immunity restricts States' immunity. Restrictive sovereign immunity bestows immunity upon a State's governmental activity. It does not, however, recognize immunity for a State's commercial activity. The effect is to make States and private parties equal before the law in commercial transaction cases.[27]

3. The I.C.J. should uphold the restrictive theory in this case.

The I.C.J. should uphold the Industrian Court's application of the restrictive theory for four reasons. First, the restrictive theory is the modern theory of sovereign immunity.[28] The restrictive theory has gained such strong

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24. See Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 147 (1812); Compania Naviera Vascongado v. S.S. "Christina" (1938) A.C. 485, 490 as reported in Gori-Montanelli and D. Botwink, Sovereign Immunity-Italy, 10 Int'l L. 451 (1970).

25. T. Giuttari, The American Law of Sovereign Immunity, 63 (1970); H. Backrach, Sovereign Immunity in Belgium, 10 Intl. Law 459, 461-463 (1976); R. Von Mehren, The Foreign Sovereign Immunities Act of 1976, 17 Col. J. Transnat'l L. 36, 36 (1978).

26. Trendtex Trading Corporation v. Central Bank of Nigeria, (1972) 2 W.L.R. 356, 385-386; D. Lissitzyn, "Sovereign Immunity As A Norm of International Law", Transnational Law supra at, 194; Gori-Montanelli and Botwink, supra note 24, at 451; B. Sen, A Diplomat's Handbook of International Law and Practice, 373-374 (1979).

27. Nederlandsche Rynbank, Amsterdam v. Muehlig Union Glasindustry of Teplitz Scchoenau, Czeckloslavavia, Council for Restoration of Legal Rights, Amsterdam 1947, N.O.R. 1947, No. 990, Ann. Digest 1947, 77 as reported in F. Van Heemstra, supra note 23, at 443; Bachrach, supra note 25, at 461-463.

28. Venne v. Democratic Republic of the Congo, 5 D.L.R. (7d) 128, 138 (1969) Que. Q.B. 818; Trendtex, at 386; Alfred Dunhill at 703.

acceptance among world community members[29] that it now represents the standard for sovereign immunity in world law.[30] Second, the restrictive theory will guard against inequitable results.[31] It will prevent a situation where Naturalia may shield itself from claims arising out of Minex business transactions while Minex and the Minex shareholders would not have the right to the same defense. Third, the I.C.J., in adopting the restrictive theory, will reassure private parties and encourage world trade.[32] The I.C.J. will be demonstating to private international businesses that they may enter into business agreements with the confidence that they will be entitled to judicial review if claims arise against States with which they are doing business.[33] Fourth, the I.C.J. should apply the restrictive theory because the policy rationale for recognizing immunity to foreign States' acts is not compelling in the context of this case. Judicial review of Naturalia's and Natmin's commercial activities is less of an encroachment on Naturalia's sovereignty than judicial review of Naturalia's political activities would be. This is because Naturalia and Natmin, when they were transacting the business that is the subject of this suit, did not employ those powers which international law traditionally makes immune from the review of

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29. See, e.g., the cases listed in Alfred Dunhill, at 702, n.15, which were decided in the courts of Austria, Belgium, Canada, England, France, Germany, Greece, Hong Kong, Italy, Pakistan, The Phillipines and Yugoslavia and which uphold the restrictive theory.

30. The Phillipine Admiral, 2 W.L.R. 214, 230, (1976); Penthouse Studios, Inc. v. Republic of Venezuela, (1970) 8 D.L.R. 3d 686 (Quebec Ct. App., 1965). "Tate Letter", supra note 23, at 984-985.

31. Sinclair, The European Convention On State Immunity 22 Intl. and Comp. L.Q. 254, 255 (1973); Alfred Dunhill, at 703.

32. Cf., Alfred Dunhill, at 703.

33. Cf., Id. at 702.

other State's courts. Naturalia and Natmin did not employ those powers that are unique to sovereigns. Naturalia and Natmin were acting as if they were private parties. Naturalia and Natmin should therefore be subject to the same laws that private parties are subject to. They should not be allowed to claim special governmental immunity.[34]

4. Naturalia and Natmin had no sovereign immunity because Naturalia's and Natmin's acts were of a commercial nature and had a sufficient nexus with Industria.

Under the restrictive theory, the Industrian Court had jurisdiction over Naturalia's and Natmin's commercial activities with the Industrian nationals. The approach for deciding whether a state's act constituted a commercial activity is to look at its nature rather than its purpose.35 The acts of Naturalia and Natmin which were the subject matter of the Industrian court suit were commercial activities. Naturalia, in terminating the Project Agreement,[36] had breached a commercial contract with Minex and Lencot.[37] Furthermore, Naturalia's and Natmin's combined takeover of the Project was nothing more than a corporate takeover; although Naturalia and Natmin may refer to the takeover as an expropriation because it was government-orchestrated, Naturalia's and Natmin's actions of

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34. Cf., Aldred Dunhill, at 703-704; Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, at 885.

35. Alfred Dunhill, at 704; Trendtex, at 890-891; Lissitzyn, supra note 3 at 195-196; Sinclair, supra note 31, at 255; Von Mehren, supra note 25, at 33.

36. Compromis at 3.

37. Cf., Penthouse Studios, at 687, (where the Quebec Court of Appeals held Venezuela was not entitled to sovereign immunity from a claim for breach of contract to any commercial goods.)

taking over the Project were the same type of actions that private corporations perform when they take over other corporations.[38]

Since Naturalia's and Natmin's acts were of a commercial nature, the Industrian Court had jurisdiction if there was a sufficient nexus between Naturalia's and Natmin's acts and Industria.[39] Such a nexus did exist. Naturalia's and Natmin's acts had direct and substantial effect on many Industrians. Industrians who were Minex shareholders suffered severe financial losses.[40] Naturalia and Natmin, then, had no sovereign immunity under the restrictive theory because they had engaged in commercial activities which had a strong nexus with Industria.

B. The Naturalian and Natmin Assets Were Attachable.

1. Minex' and Lencot's prejudgment attachments and the Industrian's Court's attachment execution were permissible.

Attachment and prejudgment jurisdiction are logical and necessary functions of the restrictive theory.[41] If a domestic court had no power to attach the property of a State or agency, the court's decisions would have little or no effect anytime the decisions were adverse to the State or agency.[42] Likewise, claimants must be able to attach the property of a foreign State or agency in

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38. Cf. S. Rubin, Private Foreign Investment, 45 (1956) (in which the author states that the reality of expropriation to business owners is that they no longer have the freedom to use their property and to run their business which at one time they had).

39. von Mehren, supra note 25, at 47.

40. Compromis at 4.

41. Crawford, Execution of Judgments and Sovereign Immunity, 75 Am. Jnl. Int'l L. 820-859; 15 Weekly Comp. Pres. Doc. 2118 (Nov. 14, 1979); Gordon, The Blocking of Iranian Assets, 14 Intl. Law 659, 671 (1980); Kaleta, Prejudgment Attachment of Iranian Assets, 12 L. & Pol'y Int'l Bus. 1001, 1003 (1980.

42. Id.

order to insure execution of the judgment.[43] Thus, without attachment and prejudgment attachment jurisdiction, the purpose of the restrictive theory would be frustrated.[44] The State or agency would be immune from the court's jurisdiction in effectively the same way that it would have been immune under the absolute theory.[45]

2. The Naturalian and Natmin property was attachable.

The bank accounts of Natmin located in Industria were attachable. When a State agency is heavily involved in commercial trade, its property is presumably set aside for that purpose.[46] Accordingly, a domestic court may attach, in commercial cases, the property of a State agency. The domestic court may also execute judgments against that agency.[47] Natmin is an agency which is heavily involved in commercial trade;[48] it markets Naturalia's mineral products and also buys goods, services and technology. Natmin's bank accounts were therefore subject to attachment and judgment execution.

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43. Id.; cf., Propper v. Clark, 337 U.S. 472 (1949) (U.S. Sup. Ct. upheld freezing of assets of foreign nationals until U.S. Govt. could determine whether those assets were needed to compensate either U.S. citizens or U.S. Govt.).

44. Id.

45. Id.

46. Crawford, supra note 41, at 865-866; cf., U.S. Foreign Sovereign Immunities Act, Section 1610(b)(2) (under which all property of a foreign state agency or instrumentality is liable to execution in respect of a claim to which the agency or instrumentality is not immune).

47. Id.; see In re Republic of the Phillipines, 46 BVerfGE 342 (1977), reprinted in 38 ZEITSCHRIFT FUR AUSLANDISCHES OFFENTLICHES REICHT UND VOLKERRECHT [ZAORV] 242, 275 (1978), summarized in 73 AJIL 295, 305, 703 (1979) (in which the West German Federal Constitution Court concluded unanimously that there is no general rule of customary international law that prohibits the state of a forum from executing against the assets of a foreign state.)

48. Compromis at 3.

At the same time, the alumnia from the Project which was located in Industrian warehouses was also attachable. A domestic court may attach property of a foreign State or agency when that property was used for the commercial activity upon which the claim is based.[49] The alumnia which had been located at the Project and the alumnia which had been enroute to Industria when Naturalia breached its contract and Natmin took over the Project were materials which Minex and Lencot claimed were their own. Both the breach of contract claim and the uncompensated takeover claim centered around the alumnia.[50] For that reason, the alumnia was attachable.

The central bank assets were also attachable. Central bank funds are unattachable only if they are used strictly for public purposes.[51] When a court is considering attaching a State's central bank funds, the burden is on the State to demonstrate that the funds are not used for any private or commercial purposes. Domestic courts have required the State to make such an affirmative showing so that States may not gain easy attachment immunity for their funds by simply claiming that the funds are public.[52] In the case at bar, Naturalia did not make the affirmative showing. Naturalia's central bank funds were thus attachable.

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49. See, U.K. State Immunity Act, Section 13 (1978) and U.S.F.S.I.A., supra note 46, at 1016(a)(2) and (b)(2), (both of which allow such attachments); and see In re Republic of the Phillipines, supra at 73 AJIL, at 305.

50. Compromis at 4.

51. Crawford, supra note 46, at 864; see U.S.F.S.I.A. Section 1611(b)(1) which only exempts property of a foreign central bank held for a public purpose; but see Trendtex, at 882 (in which the Court of Appeals upheld an interim injunction restraining the removal of central bank funds from the jurisdiction).

52. See e.g., Banque Centrale de la Republique de Turguie c. Weston Cie. de Finance et d'Investissement S.A. (1978), 104 ATF Ia 367, summarized in Crawford, supra at, 837; Birch Shipping Corp. v. Embassy of Tanzania, Misc. No. 80-247 (D.D.C. Nov. 18, 1980); In re Republic of the Phillipines.

III. MINEX SHOULD BE AWARDED SPECIFIC PERFORMANCE FOR NATURALIA'S BREACH OF THE CONCESSION AGREEMENT.

A. Naturalia's Breach Of The Project Agreement Violates International Law.

1. Naturalia's right of expropriation does not include the power to break concession agreements.

A sovereign State has the right to expropriate property within its borders.[53] Naturalia's expropriation, however, is more than a nationalization of property. Naturalia granted Minex a concession contract, protected by international law. Naturalia cannot break this contract.[54]

The instant case is analogous to the dispute in Texaco Overseas Petroleum Company and California Asiatic Petroleum Company v. The Gov't of the Libyan Arab Republic (hereinafter TOPCO).[55] In TOPCO Libya nationalized several petroleum concessions held by two American companies.[56] The ICJ appointed Professor Rene-Jean Dupuy sole arbitrator.[57] Dupuy held that unilateral revocation of a concession contract violates international law.[58] In the instant case, Naturalia's acts were similar to Libya's. Both States acquired capital and technology by making long term concession contracts. Both States broke those international agreements. The ICJ should follow Professor Dupuy's example by holding Naturalia's act illegal.

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53. 53 G.A. Res. 1803, 17 GAOR, Supp. 17, U.N. Doc. A/5217 (1962).

54. See TOPCO at 22; Libyan Amer. Oil Co. v. Libyan Arab Rep., (1981) 20 ILM 1 at, 54.

55. TOPCO at 22.

56. Id. at 1.

57. Id.

58. Id. at 19-21; Fatouros, Int'l Law and the Internationalized Contract, 74 Am. J. of Int'l L. 134 (1980).

Further, if Naturalia were allowed to break the Project Agreement, it would have a negative effect on foreign investment in developing States.[59] A concession agreement is designed to protect investors' expectations of long term future profits in developing industries.[60] Because such undertakings usually require "both substantial investment, and a number of years to become profitable," the only way a capital importing State can acquire such industries is to guarantee nonintervention.[61] If States like Naturalia were allowed to repudiate their concessions as soon as the project became profitable, "the foreign investor would conclude no such contracts at all."[62] If foreign investment in developing states is to continue, the ICJ should find in favor of Minex.

2. Even if a nation can repudiate an ordinary concession contract, Naturalia granted Minex irretractable rights.

In TOPCO, Libya agreed to a stabilization clause, guaranteeing that the concession agreement will not be altered except by mutual consent of both parties."[63] Professor Dupuy held that this "stablization" clause effectively eliminated any option Libya had to nationalize.[64] Article XXII of the Naturalia-Minex Project Agreement contains almost identical language.[65] Naturalia, like Libya, agreed

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59. Carlston, Concession Agreements and Nationalization, 52 Am. J. Int'l L. 260 (1958) [hereinafter cited as Carlston]; Schwebel, International Protection of Contractual Arrangements, Am. Soc'y Int'l L. Proc. 266, 267 (1959) [hereinafter cited as Schwebel].

60. Carlston, International Role of Concession Agreements, 52 N.W. U.L. Rev. 618 (1957). Carlston, supra note 59, at 260. Schwebel, supra note 59, at 266.

61. Schwebel, supra note 59, at 267.

62. Id.

63. TOPCO, at 24.

64. Id. at 24.

65. See Compromis at 2. (The stabalization clause reads "no change shall be made in any provision of this agreement without the consent of both parties.")

not to expropriate. Naturalia, like Libya, violated international law by breaking this clause. Nothing in international law prevents a sovereign State from granting a concessionaire irretractable rights.[66]

Article XXII guaranteed that Minex assets would not be nationalized. If the new administration was not satisfied with this agreement they should have attempted to renegotiate the contract.[67] Instead, Naturalia chose to break the stabalization clause. The ICJ cannot allow such a blatant violation of international law.

B. The Proper Remedy For Naturalia's Breach Of Contract Is Specific Performance.

Naturalia breached an international agreement and this court should apply the doctrine of restitutio in integrum (specific performance). The use of specific performance in international decisions can be traced back to the Chorzow Factory Case.[68] In Chorzow, the P.C.I.J. held that "restitution in kind" was appropriate unless it is not possible.[69] In the instant case Naturalia could restore Minex to its pre-dispute position by fulfilling the contract.

In recent years the doctrine has been used sparingly, yet this does not weaken the position of a State asserting specific performance.[70] The acceptance

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66. TOPCO, supra note 22, at 24. Saudi Arabia v. Arabian American Oil Co., 27 I.L.R. 117 (1967) at 168.

67. Cf., Report of the Sec'y Gen'l on Permanent Sovereignty Over National Resources E/C.7/1983/5 7 April 1983 at 15 (stating "Renegotiation is a natural accommodation" of parties in long term mineral agreements).

68. Factory at Chorzow, 1928 PCIJ Serv. A., No. 17 at, 46, 47.

69. Id.

70. TOPCO, at 30.

of settlements by foreign investors in developing States have been "inspired basically by considerations of expediency, not legality."[71] Specific performance is still the accepted legal remedy for breach of contract.[72] The ICJ should apply the doctrine.

IV. THE COMPENSATION OFFERED BY NATURALIA WAS INSUFFICIENT.

A. Compensation is sufficient when it is "prompt, adequate and effective".

The duty of a State, under international law, to compensate an alien for the expropriation of its property, is recognized by both industrialized and developing nations.[73] Naturalia had agreed to compensate Minex. The present dispute is over the valuation of Minex' assets.

The traditional standard of compensation is that payment should be "prompt, adequate and effective".[74] This standard has been adopted by the United States,[75] and other major capital-exporting nations.[76] It has also been accepted by many

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71. Id. at 24.

72. Id.

73. Neville, The Present Status of Compensation by Foreign States for the Taking of Alien Owned Property, 13 Vand. J. of Transnat'l Law 63 (1980); Archega, State Responsibility for the Nationalization of Foreign Owned Property, 11 N.Y.U.J. Int'l L. & Pol. 179 (1978).

74. Von Glahn, supra note 3, at 233-234.

75. Public statement on "Foreign Investment and Nationalization", issued by U.S. Dept. of State on Dec. 30, 1975.

76. See U.K.-Egypt Agreement for the Promotion and Protection of Investments, June 11, 1975 in Int'l Legal Materials 1470, 1471 (1975); Jennings, The Discipline of Int'l Law [hereinafter cited as Jennings], in Report of the 57th Conf. of the Int'l Law Assn., 1976 at 620, 630 (1978).

developing nations.[77] Naturalia's offer is not prompt, adequate, or effective and Minex is justified in rejecting it.

1. The compensation offered by Naturalia was not "adequate".

Naturalia offered Minex 560 million Naturalian dollars as compensation. This offer represented the "book value" of the project as of April 15, 1981. The offer is unacceptable to Minex.

a. Payment of book value is inadequate compensation.

"Book value" is inadequate compensation. A payment of "book value" merely replaces lost assets. The cost of an expropriation to an investor is the "loss of opportunities foregone."[78] When Minex investors chose to risk their assets in Naturalia, they gave up the opportunity of investing in other potentially profitable enterprises. These investors cannot now reclaim these lost opportunities. Payment of "book value" does not take this factor into account. It is therefore inadequate.

Accepting "book value" as adequate compensation would have a "chilling effect" on foreign investment in Naturalia. Nearly eighty percent of all foreign investments come from developed nations.[79] Inadequately compensated expropria-

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77. Cf. Jennings, supra note 76, at 630 (referring to over 140 bilateral treaties between developed and developing states, "but also including treaties between developing states"); see also Bolivian Supreme Decree No. 10607 of Dec. 1, 1972 (concerning compensation for Mina Matilde Corporation), 12 Int'l Legal Materials 980 (1973).

78. Weigel & Weston, "Valuation Upon the Deprivation of Foreign Enterprises: A Policy Oriented Approach to the Problem of Compensation Under Int'l Law" in 1 The Valuation of Nationalized Property in International Law [hereinafter cited as Weigel & Weston]16 (Lillich ed. 1972).

79. Smith, The U.S. Gov't Perspective on Expropriation and Investment in Developing Nations [hereinafter cited as Smith], 9 Vand. J. of Transnat'l L. 519, 522 (1976).

tions constitute a major threat to this flow of capital.[80] An award of mere "book value" would have a detrimental effect on the future of foreign investment in Naturalia.

b. The valuation of Minex assets as a "going concern" provides adequate compensation.

Measuring Minex assets as a going concern would provide an accurate assessment of Minex' assets. The "going concern" approach estimates a project's "earnings power" and takes into account "future profits."[81] It's strongest advocate is the United States,[82] yet is has been applied by International Tribunals.[83]

Valuation of Minex assets as a "going concern" would also increase the likelihood of foreign investment in Naturalia. Naturalia's compensation standard will effect foreign investment because it effects investor's perceptions "concerning profit, risk, and the uncertainty of investment."[84] If Naturalia is to acquire any future foreign investment, it is essential Minex investors receive at least the "expected future earnings they could derive from their investment."[85]

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80. Id. at 521.

81. Pedersen, infra note 83, at 88.

82. Smith, supra note 79, at 519.

83. Factory at Chorzow, at 46-47; Pedersen, Expropriation in Int'l Law - Strategies of Avoidance and Redress, 10 Univ. of Tol. L. Rev. 89 [hereinafter cited as Pedersen]; see also Weston, International Claims: Postwar French Practice 181 (1971) [hereinafter cited as Weston]; Wesley, Establishing Minimum Compensation Criteria for Use in Expropriation Disputes, 25 Vand. L. Rev. 943 (1972); Schwebel, supra note 59, at 266.

84. Weigel & Weston, supra note 78, at 29.

85. Id. at 33.

2. The compensation offered by Naturalia was not "prompt."

Payment of compensation should be made "promptly".[86] This standard is usually considered to mean "payment as soon as is reasonable under the circumstances."[87] Naturalian bonds, redeemable in ten annual installments, bearing 6% interest does not meet this standard. Naturalian bonds are only "freely convertible" at the Central Bank of Naturalia. Payment of compensation in longterm, relatively unmarketable bonds is not acceptable.[88]

3. The compensation offered by Naturalia was not "effective."

Even if Naturalia was offering "adequate and prompt" payment, its offer would still fail the effectiveness standard. Settlements cannot be be effective if they are paid in a form which cannot be used by the injured alien.[89]

Naturalia's proposed method of payment creates foreseeable convertability problems. At present, Naturalian dollars are only convertible at a two to one rate, at the Central Bank of Naturalia. This rate is "subject to the availability of funds." In Naturalia's current early stage of development, it is likely available funds will be low. The problem of shortages of hard currency

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86. Pedersen, supra note 83 at 93. Restatement (Second), Foreign Relations Law of the United States §§ 187-190 (1965).

87. Restatement (Second), Foreign Relations Law of the United States, Reporters Notes, § 187-190.

88. Wesley, supra note 83, at 939.

89. Lillich & Weston, Int'l Claims: Their Settlements By Lump Sum Agreements 208 (1975). Cf. Case of the S.S. Wimbledon at 32 (requiring "payment in stable or hard currency ...currency supported by dollars, pounds or gold reserves.")

becomes more acute after a large nationalization program.[90] The widespread nationalization will cause a heavy draw on the Central Bank. It is likely Minex will be forced to accept the 5 to 1 market rate for Naturalian bonds. If so, settlement will only amount to 112 million U.S. dollars plus interest.[91] This amount would be both ineffective and inadequate.

B. The "Appropriate" Compensation In This Case Is "Full" Compensation.

Developing States argue that that the I.C.J. should adopt the "appropriate" compensation standard proposed by the U.N.[92] That standard, however, does not exclude requiring the payment of "full" compensation.[93] In fact, to be consistent with the objectives of the appropriate compemsation standard, the I.C.J. should award Minex full payment.

1. Full compensation is appropriate because it would not harm Naturalian sovereignty, yet encourage foreign investment.

In drafting the Resolution on Permanent Sovereignty Over Natural Resources, the U.N. was attempting to guarantee the sovereignty of each State, while not impeding foreign investment in developing nations.[94] The "appropriate" compensation standard was an attempt to balance these competing interests.[95] Thus, to

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90. Wesley, supra note 83, at 944.

91. Cf. Compromis at 3-4. (The figure of 112 million U.S. dollars is reached when dividing the proposed Naturalian settlement of 560 million U.S. dollars by the market rate of 5 Naturalian dollars for each U.S. dollar.)

92. G.A. Res. 1803, 17 GAOR, Supp. 17 at 15, U.N. Doc. A/5217 (1962).

93. Banco Nacional at 875.

94. Dawson & Weston, Prompt, Adequate, and Effective: A Universal Standard of Compensation, 30 Fordham L. Rev. at 728 (1962).

95. See Hu, Compensations in Expropriations: A Preliminary Economic Analysis, 20 Va. J. Int. L.J. 61 (1979); Note, An "Appropriate Compensation Standard for Nationalized Property" Banco Nacional de Cuba v. Chase Manhattan Bank 66 Minn. L. Rev. 931 at 946.

be consistent with U.N. intentions the award would protect Naturalian sovereignty over its resources, while encouraging foreign investment in Naturalia.[96] The only way this dual objective can be met is by expropriation and "full" compensation.

2. Commentators have identified certain factors which, when present, make full compensation appropriate.

a. Naturalia was a sovereign State and entered the agreement freely.

In assessing "appropriate" compensation there is no single, specific formula which can be applied to all cases.[97] The most important factor is the "circumstances in which the foreign investment was originally made."[98] If the Minex investment had been made during a "colonial or post colonial period" a lower value would be appropriate.[99] The lower valuation is an attempt to rectify the decreased bargaining power of the colonial or post colonial State.

In the present dispute, Naturalia had substantial bargaining power. Minex had no power to dictate Naturalian policy. Minex was not even incorporated until 1969. When the "investment being nationalized is a relatively recent one, presumably there is no element of overreaching" and thus to encourage investment,

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96. C.F. G.A. Re. 1314, 13 U.N. GAOR Supp. (No. 18) at 27 U.N. Doc. A/4090 (1958) recognizing that the U.N. Commission on Permanent Sovereignty Over National Revources mandate was to strengthen each nation's control over it's own natural resources, while "encouraging international cooperation in the development in underdeveloped countries."

97. Amerasinghe, "The Quantum of Compensation for Nationalized Property", in III The Valuation of Nationalized Property in Int'l Law at 123 (Lillich ed. 1972) [hereinafter cited as Amersinghe].

98. Id. at 38.

99. Id. at 117-119.

full compensation should be considered.[100] Minex' lack of influence combined with Naturalia's bargaining power lead to the presumption the investment was based on the expectation of full compensation. Minex' expectation should be fulfilled.

b. An expropriation in violation of a concession agreement deserves full compensation.

Minex entered the agreement under the impression the investment would have twenty five years to yield a profit. As further consideration for the contract, Naturalia included a "stabilization" clause. According to former ICJ Chief Judge Eduardo Jimenez De Archega, an expropriation in violation of a stabilization clause gives rise to a higher degree of compensation.[101] Further, a nationalizing State has a "duty to compensate for the perspective gains" (anticipated future earnings), to be obtained by the private party during the period the concession still has to run.[102] According to Archega's theory, Minex should receive full compensation for Naturalia's breach of the project agreement.

c. Minex brought new technology into Naturalia.

By satisfying their end of the agreement, Minex brought new technology and capital into Naturalia. By 1980 the Minex project provided sixty percent of Naturalia's foreign exchange. Commentators argue that a transfer of new technology deserves a higher degree of compensation.[103] Minex did not drain

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100. Ameriasinghe, supra note 97, at 118; Lillich, Toward a Consensus or More Rich Chaos?" in III, The Valuation of Nationalized Property in Int'l Law 183, at 198 (Lillich ed. 1972).

101. Archega, "Application of the Rules of State Responsibility for the Nationalization of Foreign Owned Property" in Legal Aspects of the New Int'l Economic Order, 230 (Hassain ed. 1980).

102. Id.

103. Vicuna, "Int'l Regulatin of Valuation Standards," in III The Valuation of Nationalized Property in Int'l Law, 144-145 (Lillich ed. 1972).

Naturalia of it's resources and then simply leave outdated technology. Minex helped establish an important industry in Naturalia and the I.C.J. should recognize this in its decision.

V. CONCLUSION

In accordance with the authorities and arguments herein presented Industria respectfully requests this honorable court to declare that Naturalia's revocation of the concession agreement was violative of international law, that Naturalia must allow Minex to perform the original agreement or, in the alternative, fully compensate Minex for lost revenues in U.S. dollars at the market rate of exchange, and further, that Naturalia compensate Minex for the value of the property confiscated, and counsel fees.

Industria finally asks that the court deny relief to Naturalia.

Respectfully submitted,

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