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CONGRESS OF
INTERNATIONAL LAW SOCIETIES
PHILIP C. JESSUP
INTERNATIONAL LAW
MOOT COURT COMPETITION
CONFERENCE OF
INTERNATIONAL LAW JOURNALS

1993 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

Case Concerning the Nationalization of Certain Property

Bastonia

v.

Frontera

MEMORANDUM OF LAW AND AUTHORITIES FOR JUDGES

**NOT TO BE DISCLOSED TO PARTICIPANTS IN THE JESSUP
INTERNATIONAL LAW MOOT COURT COMPETITION**

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INTRODUCTION

This memorandum shall be divided into two general categories of comments: Comments intended to assist judges in judging the Jessup Competition generally; and comments intended to assist the judges in evaluating the competitors' performance on this year's Compromis specifically. Neither set of comments is intended to be either dispositive or exhaustive. The comments are merely guidelines which, hopefully, will make the Jessup Competition rewarding for judges and competitors alike.

The 1993 Jessup Problem was drafted to allow students the maximum opportunity to address the current state of international law and to encourage the imaginative application of legal principles. The relevant international instruments and determinative factual references were kept to a minimum to allow participants the ability to approach the problem creatively and to ensure that neither side was given an advantage. Judges should take care to note the the many twists and turns which participant's arguments could possibly take as they study the Bench Memoranda and Problem.

I. JUDGING THE JESSUP COMPETITION

There are differing opinions as to what role a judge should play in a moot court competition. On the one hand, there are those who believe that a judge should do whatever is necessary to ensure that the competitors complete their entire presentation. At the other extreme are those who believe that competitors are tested only when they spend their entire allocation of time responding to questions. There is no "correct" position on this issue. However, when judges ask questions sufficient to prevent the competitors from merely giving a rehearsed speech, many of those involved with the competition in the past agree that such an approach works well. In any event, a rehearsed presentation is not particularly interesting from the judges' standpoint, and, when asked, competitors have indicated that they do not enjoy passive benches--it is to each judge to balance these two extremes.

Judges in the Jessup Competition play a different role than those in the real world. They do not indicate the determinations they have made in the form of opinions, but rather are there to assess the validity of the participant's arguments, the persuasiveness of their

presentation and the thoroughness of their preparation. While the competition is modeled after the World Court and its practice, there are no specific issues of Court procedure or competence raised in this year's Problem. Judges are encouraged, however, to review the Statute of the Court prior to the competition to re-familiarize themselves with the basic jurisdictional and theoretical nature of that body.

Judges are expected primarily to judge the performance of the participants as outlined by the criteria noted on the judging forms for the written and oral aspects of the competition. Once submitted, participants may not revise their written memorials. As they advance through the competition, however, participants are sure to revise their argumentative style and legal presentation. It is important that judges in the oral rounds keep this fact in mind, as their questions and responses to the participants should be formulated so as to encourage that learning process.

There are certain tactics judges in the oral rounds can employ to test a competitor's flexibility without unduly interfering with the competitor's performance. These include asking a competitor to resolve apparent internal contradictions between her position and that of her partner; or asking about the particular remedy sought for a particular international delict. In these ways, a judge can make a meaningful contribution to a performance without being unduly intrusive.

A judge should refrain as much as possible from insisting upon an answer to a question when it appears as if a competitor has already made a good faith effort to respond. In the final analysis, however, a moot court competition should, as much as possible, emulate a real courtroom to maximize the learning experience for the competitors. Just as there is no truly "correct" judging style in a courtroom, there is no correct judging style in a moot court competition.

The substantive rules of judging the Jessup Competition are set forth in the rules promulgated by the International Law Students Association, and, as they are available to judges through the ILSA office, shall not be repeated here. Judges must be familiar with these rules to avoid controversy during the competition. Judges are also asked to review carefully the instructions provided with the Memorial Scoresheets or Oral Argument

Scoresheets, as these contain an abbreviated list of general judging criteria upon which judges should formulate their opinions.

As concerns the legal arguments to be made by the competitors, it is important to keep in mind that the competitors choose neither the problem nor the side of the issue that they argue. In spite of every attempt to make the *Compromis* factually and legally equal as between the parties, inevitably international law favors one side or the other. As such, a competitor may be forced into making a weak legal argument. This by itself should not be held against the competitor. On the other hand, if the competitor incorrectly states the law, mis-cites a holding, or is unaware of an obvious source of relevant international law, a judge should bring it to the attention of the competitor through questioning and scoring.

It appears that, in the past, judges who do not have a strong background in international law have hesitated to ask questions during the oral rounds for fear that such questions are too fundamental. It is important, however, to have those questions asked to ensure the competitors have an understanding of the fundamental issues and are not merely regurgitating memorized details. Further, in a real courtroom, it is often the case that a judge is not expert in the substantive law at issue. Pertinent fundamental questions are as appropriate as the more complex questions.

The following are some specific suggestions for questioning:

- 1) Frequently utilize questions which call for a "yes" or "no" answer. They test a competitor's ability to answer a question directly, and the questions themselves tend to be shorter and more concise.
- 2) Avoid asking rhetorical questions or making statements.
- 3) Avoid lengthy debates with the competitors. As much as possible, the interaction between the competitors and the bench should be in question and answer format.
- 4) Do not focus all of your questioning on one competitor or team. Try as much as possible to interject evenly throughout the round.
- 5) Avoid detailed questioning about a co-counsel's argument. Each competitor should outline the beginning of his or her presentation the points he or she will cover. Although it is sometimes difficult to avoid questioning on a co-counsel's argument, such questioning should be general in nature when necessary.

- 6) Avoid extensive questioning after time has expired, which requires in part being cognizant of the time elapsed for a particular presentation (which will be constantly updated by the court bailiff).
- 7) If there is a competitor in the round who is not a native speaker of English, it is important to word questions carefully. It is especially important in these instances to avoid asking questions with overly complex sentence structure.

II. SPECIFIC COMMENTS

The following are the specific comments regarding the substantive issues presented in the 1993 Problem. The material presented here is not exhaustive, but merely illustrative of the legal issues and authorities which may be discussed by the competitors. The illustrative nature of these materials should be kept in mind when evaluating competitors--as they have been researching the problem for several months, they may have found issues and authority not presented here that are equally relevant to the proceedings. While judges should not typically inquire into remote or even irrelevant tangential issues, judges should reward competitors for imaginative treatment of the Problem.

Judges are also encouraged to gather with their counterparts on the bench for each oral round of the competition and briefly discuss the Problem, their areas of specialty and where they expect to be the most active during the arguments, and to share their views on judging and any interesting points they may have noted in previous rounds. The Jessup Competition is, first and foremost, an educational experience. Just as no professor would present a lecture without first reviewing background materials and outlining an approach, we hope that the judges in the Jessup Competition will take a similar view of the role they play as part of the student's education in international law.

A. Does Bastonia Have Standing To Sue?

Before Bastonia may assert its claim against Frontera, it must show that it has standing to espouse the claim of IPC. This requires first that IPC exhaust all its remedies in Frontera. *Ambatielos Arbitration (U.K. v. Ger.)*, 12 U.N. Rep. Int'l Arb. Awards 82, 118 (1963); *Interhandel Case (Switz. v. U.S.)*, I.C.J. Rep. 6 (1959). Here, Bastonia will argue that I.P.C. exhausted its remedies by taking its claim to the Fronteran court of ultimate

jurisdiction. Frontera should respond that, because the Fronteran courts did not reach the merits of I.P.C.'s claim, I.P.C. did not exhaust all its remedies.

The second element of espousal is nationality. Where the private party is a corporation, there must be a "genuine link" between the corporation and the claimant state. *Nottebohm Case (Liecht. v. Guat.)*, 1955 I.C.J. Rep. 4 (1955). Factors for nationality include (1) the place of incorporation, Lillich, R.A. & G.A. Christenson, *International Claims: Their Preparation and Presentation*, 38-39 (1962); (2) the principal place of business (*siège social*), Grieg, D.W., *International Law* 540 (2d ed. 1976); and (3) where the corporation is controlled. Generally, the nationality of corporate shareholders is insufficient by itself to establish whether there is a genuine link. *Barcelona Traction Case (Belg. v. Spain)*, 1970 I.C.J. Rep. at 3 (1970); *Restatement (3d) of Foreign Relations Law of the United States*, §713, comments a & f.

Frontera may argue that, because of PharmCo's nationality and principal place of business, Bastonia has no genuine link to PharmCo, and therefore has no standing to assert PharmCo's claim. Bastonia will respond that it is asserting I.P.C.'s claim, and not that of PharmCo. Since I.P.C. is a Bastonian corporation with a principal place of business in Bastonia, Bastonia has a sufficient link to I.P.C. to assert its claim. Frontera may argue, in turn, that IPC, as a large multinational corporation, has no genuine link to Bastonia specifically.

B. Why Sue The New Fronteran Government?

Frontera should argue that Bastonia should pursue Empira as the former Colonial Government for its remedy. The simple response to this is that the remedies Bastonia may have against Empira should not affect Bastonia's remedies against Frontera. Frontera may be liable for the expropriation of PharmCo even if Empira is also liable. Further, from the facts, it appears that Empira is not a party to the bilateral Treaty. Therefore, Bastonia could not bring its cause of action under the Treaty against Empira.

C. Succession of State Liability

1. The Law Of Succession Generally

The law of succession is concerned with the extent to which rights and obligations transfer in states which have changed or lost their identity to other states or entities. The key to this issue is the degree to which the personality of the state is affected by a change in sovereignty. If sovereignty of a state changes to the extent that the pre-existing identity of the state is completely altered or destroyed, a total state succession has occurred, thereby creating a new state. 1 O'Connell, *State Succession in Municipal Law and International Law* 3-5 (1967). In such a circumstance, the traditional view, which treats state succession as an external matter, is that the state emerges with a "clean slate", and is thereby not bound by the treaty obligations incurred by its predecessor unless it chooses to be so bound. Brownlie, *Principles of International Law* 668 (1990). Some examples of where the "clean slate" doctrine has been applied are the North American Colonies' secession from Great Britain in 1776; Panamanian independence from Colombia in 1903; and Finland's secession from Russia in 1919.

On the other hand, pursuant to the doctrine of continuity, which treats such a change as a purely internal matter, rights and obligations continue unimpaired in the event of a change in sovereignty, irrespective of the desires of the new state. 2 Whiteman, *Digest of International Law* 759 (1963); O'Connell, *supra*, at 3-4. Examples of the continuity doctrine are found in *The Tinoco Claims (U.K. v. Costa Rica)*, 1 U.N. Rep. Int'l Arb. Awards 375 (1948), and *Trans-Orient Marine Corp. v. Star Trading and Marine, Inc.*, 731 F. Supp. 619 (S.D. N.Y. 1990). However, even under the continuity doctrine, it appears that if a change is so drastic as to warrant treating the new government as a different state, there would be no continuation of treaty obligations. Grybowski, K., *Soviet Public International Law* 92-95 (1970).

The International Law Commission's Draft Articles on State Responsibility provide further guidance on state responsibility when in the event of insurrection:

Art. 14(1) The conduct of an organ of an insurrectional movement, which is established in the territory of a State or in any other territory under its administration, shall not be considered as an act of that State under international law.

Art. 15(1) The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State.

Based upon these general principles, Bastonia will argue that, in spite of the fact that a revolution took place in Frontera, the changes in that country were merely cosmetic and are not so severe as to extinguish Frontera's treaty obligations. Frontera appears to have always been given a great deal of autonomy in conducting its foreign affairs, in that it was allowed to enter into treaties on its own behalf, e.g., the U.N. Charter, the bilateral Treaty, and the Vienna Convention on the Law of Treaties.¹ Colonial Frontera also had a seat in the United Nations prior to the revolution. Finally, the new government is simply made up of former members of the old government.

Frontera should respond by pointing out its new status as a fully sovereign state as opposed to an Empiran "colony". The new Fronteran government has also been formally recognized by many other states, including Bastonia. Finally, the members of the new government consist in large part of mid-level bureaucrats, as opposed to high ranking officials from the former government who had been appointed by Empira.

2. The Vienna Convention On The Law Of Succession And The Treaty

There is no treaty to which Frontera and Bastonia are parties which definitively decides the issue of succession in this case. Of other treaties, it appears as if the most important is the Vienna Convention on Succession of States in Respect of Treaties, U.N. Doc. A/Conf. 80/31 (Aug. 22, 1978), as corrected by A/Conf. 80/31/Corr. 2 (Oct. 27, 1978) ("Convention on Succession"). *By its terms, the Convention on Succession enters into force only after 15 states have ratified it.* Convention on Succession, Art. 49(1). As of January 1992, only eight states had ratified the Convention on Succession. Therefore, the Convention on Succession controls, if at all, only if it is found to be evidence of custom.

¹ It is possible for entities that are not truly independent states to sign multilateral treaties. For example, in 1982, the Byelorussian SSR, the Ukrainian SSR, and Namibia signed the Law of the Sea Convention. The Trust Territory of the Pacific Islands signed the Final Act of the Convention, albeit with observer status. Byelorussia and the Ukraine participated in the vote on the Vienna Convention on the Law of Treaties, although they abstained.

The Convention defines "state succession" as "the replacement of one State by another in the responsibility for the international relations of territory." Convention on Succession, Art. 2(1)(a). "Newly-Independent State" is defined as "a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible." Convention on Succession, Art. 2(1)(f). Frontera would appear to come within this definition. On the issues of whether this was truly a state succession and whether Frontera is a newly-independent state, Frontera and Bastonia should make the same arguments as they did with respect to the law of succession generally.

It appears as if the Convention on Succession incorporates the clean slate doctrine.

Article 16 provides as follows:

[a] Newly-Independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of succession of states the treaty was in force in respect of the territory to which the succession of states relates.

Convention on Succession, Art. 16.

Part III of the Convention on Succession governs newly-independent States. There is a provision regarding bilateral treaties which controls in the case of newly independent states, which provides as follows:

A bilateral treaty which at the date of succession of States was in force in respect of the territory to which the succession of States relates is considered as being in force between a newly independent state and the other State party when:

- (a) they expressly so agree; or
- (b) by reason of their conduct they are to be considered as having so agreed.

Convention on Succession, Art. 24(1).

There were two relevant statements made by the new Fronteran Government after the revolution which arguably reflect Fronteran conduct vis-a-vis the Treaty. The first was the statement that the good relations between Frontera and Bastonia should continue. The second statement renounced all acts of the former Colonial Government which were inconsistent with

the policies of the current Government. Further, in examining General Law 1991/007, treaties are exempted from the general repeal of the prior government's acts. No statement expressly sets forth Frontera's specific intentions regarding the Treaty. Of course, Frontera's actions since the revolution seem to indicate that Frontera did not agree to continue to be bound by the Treaty.

Unilateral statements generally have no binding force and effect on the nation making such statements, Vienna Convention on the Law of Treaties, Art. 38, except where such statements have caused detrimental reliance by third parties, in which case an estoppel is, effectively, created. *Nuclear Tests (Austl. v. France)* 1974 I.C.J. 253 (1974). Therefore, Bastonia should be prepared to demonstrate how it relied to its detriment on the statements made by Frontera.

There are two additional provisions of the Convention on Succession which should be noted. First, Article 6 provides that the Convention applies only with regard to successions of States "occurring in conformity with international law." A question may arise as to whether succession in the form of revolution is "in conformity with international law" within the meaning of Article 6. Whoever is contesting the application of the Treaty may argue that the Fronteran revolution was illegal, and that the Vienna Convention does not apply.²

Secondly, Article 13 of the Convention provides that:

Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources.

Given Article 13, Frontera may argue that, because PharmCo is nothing more than a Fronteran resource, the former Fronteran government was entitled to dispose of PharmCo in any way it saw fit. There is no legal authority that we have noted which *expressly* recognizes a corporation as a natural resource, but it is possible that students will have

² The Problem does not provide enough significant details on the revolution to thoroughly assess its "legality" or "illegality" under international law. However, some competitors may come prepared with lines of reasoning to which such an assessment will apply. Judges may want to consult the major texts on the Laws of War for further background, but should be aware that the question at hand is essentially "What is the effect upon the validity of the Treaty if the revolution was not 'legitimate'?", which should not require any in-depth analysis of the international norms regarding the legitimacy of revolutions.

located individual authors, government agencies, or lower courts which have voiced this opinion.

3. Results If The Bilateral Treaty Applies

If it is determined that the new Fronteran government is bound by the terms of the Treaty, then Frontera's acts and obligations will be governed by the provisions of the Treaty, as such provisions are interpreted by the Court.

D. Nationalization³

1. Is PharmCo Merely a Fronteran Asset, and Therefore not the Proper Subject of a Charge of Nationalization?

Nationalization is generally recognized as the exercise of the sovereign right of a state to dispose of natural resources and other assets located in its territory belonging to foreigners. Domke, "Foreign Nationalizations," 55 Am.J.Int'l L. 585 (1961); Charter of Economic Rights and Duties of States, Dec. 12, 1974, U.N.G.A. Res. 3281 (XXIX), 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1975) ("Charter of Economic Rights"). In the Compromis, the Fronteran Government nationalizes PharmCo, a Fronteran corporation in which IPC, a Bastonian corporation, has a minority ownership interest to aid in its efforts to quell the revolution which eventually led to its downfall. The Problem implies that Frontera (through both the former and current governments) contends that it had the sovereign right to nationalize this domestic company.

The resolution of this issue may depend upon how one views the nationality of PharmCo, given its country of incorporation, where board meetings are held, where it pays taxes, and the citizenship of the majority owners. Under standard principles of corporate personality, prior to nationalization PharmCo would have been a national of Frontera, given its incorporation there and the majority ownership of Frontera nationals. See, e.g., Agreement on the Reciprocal Promotion and Protection of Investments, Mar. 5, 1991,

³ Note that, for purposes of this argument, Frontera will have to argue first, that the actions of the predecessor Colonial Government were legal, and second, that, for the purposes of argument, there is succession of state liability.

Australia-Vietnam, 30 I.L.M. 1064 (1991) ("Australia-Vietnam Treaty"); Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, Argentina-United States, 31 I.L.M. 124 (1992) ("Argentina-U.S. Treaty"); Eastern and Southern African States Preferential Trade Area: Charter on a Regime of Multinational Industrial Enterprises, Nov. 23, 1990, 30 I.L.M. 696 (1991) ("MIE Treaty"). However, the investments by IPC in PharmCo, i.e., stock ownership, etc., would be considered assets of a Bastonian national, and may thus be subject to international legal principles governing nationalization. Australia-Vietnam Treaty; Argentina-U.S. Treaty; Asian-African Legal Consultative Committee: Model Bilateral Agreements on Promotion and Protection of Investments, Feb. 1, 1984, 23 I.L.M. 237 (1984) ("Model Bilateral Agreements"). Further, Bastonia could argue that Fronteran majority ownership was due only to the requirements of Fronteran law.

2. Nationalization Under International Law

The World Bank recently commissioned a study to survey international law on the issue of foreign investment. The result thus far is contained in The World Bank Group, "Survey of Existing Instruments," 1 Legal Framework for the Treatment of Foreign Investment (1992) ("World Bank Survey").⁴ The authors of the World Bank Survey examined, inter alia, multilateral instruments governing foreign investment, and fashioned the following statement regarding the state of the law on expropriation:

- (1) Every state has the right to nationalize, expropriate or transfer ownership of foreign property located in its territory;
- (2) for a public purpose; and
- (3) against payment of adequate compensation.
- (4) The specific conditions of expropriation shall be regulated under the laws of the expropriating State.

⁴ This work was compiled under the direction of the General Counsel of the World Bank, the International Finance Corporation and the Multilateral Investment Guarantee Agency, and issued on March 6, 1992 for the Spring 1992 meeting of the Development Committee of the Boards of Governors of the International Monetary Fund and the World Bank.

- (5) Bilateral and multilateral foreign investment agreements shall be observed in good faith.

Tschofen, "Multilateral Approaches to the Treatment of Foreign Investment," World Bank Survey 59, 84. It is unclear whether the World Bank Survey actually represents the state of international law on expropriation. However, the rule of law set forth therein provides a good outline for discussion of the issue.

a. The Right to Nationalize Under International Law

Generally, the basic right to nationalize is not challenged under international law. The Havana Charter for an International Trade Organization (Mar. 24, 1948), Art. 12, 1, c) ("Havana Charter"); M. Gordon, *The Cuban Nationalizations: The Demise of Foreign Private Property*, 119, 231 (1976). However, many bilateral agreements limit the right to nationalize to certain circumstances. *See, e.g.*, Australia-Vietnam Treaty; Argentina-United States Treaty; Agreement Concerning the Promotion and the Reciprocal Protection of Investments, Belgium, Luxembourg-U.S.S.R., Feb. 9, 1989, 29 I.L.M. 300 (1989); and Agreement Concerning the Encouragement and Reciprocal Protection of Investment, China-Japan, Aug. 27, 1988, 28 I.L.M. 575 (1989). It will be difficult for Bastonia to argue that there is an absolute prohibition against nationalization in international law. The right to nationalize may, however, be tempered by Frontera's treaty obligations. *See* discussion, supra.

The right to nationalize is also arguably limited by the obligation that such nationalization be non-discriminatory. Banco Nacional de Cuba v. First National City Bank of New York, 207 F.Supp. 1004, 1008 n. 6 (SD NY 1967); McNair, "The Seizure of Property and Enterprises in Indonesia," 6 *Netherlands Int'l L. Rev.* 218, 243 (1959). Although the World Bank Survey did not mention this criterion when discussing multilateral instruments, it was mentioned in connection with the survey of international arbitral decisions relating to expropriation. Westberg & Marchais, "General Principles Governing Foreign Investment as Articulated in Recent International Tribunal Awards and Writings of Publicists," World Bank Survey 135, 139.

This criterion is tempered by the proposition that otherwise discriminatory action may be economically justified, and therefore would not be a violation of international law. Gordon, supra. There is also state practice which runs contrary to this theoretical prohibition against discriminatory practice. Cuban Nationalization Law, Ley 851, 6 Jul. 1960, Gaceta Oficial, 7 Jul. 1960. Translated to English in 55 Am.J.Int'l L. 822 (1961). There is nothing in the fact pattern to indicate that the actual nationalization was carried out in a discriminatory fashion.

b. Nationalization for a Public Purpose

Under customary international law, the right to nationalize is arguably limited by the requirement that such nationalization be for reasons of public utility, security or the national interest. Resolution on Permanent Sovereignty over Natural Resources, Dec. 14, 1962, U.N.G.A. Res. 1803 (XVII), 17 U.N. GAOR, Supp. (No. 17) 15, U.N. Doc. A/5217 (1963) ("Resolution on Permanent Sovereignty"); Model Bilateral Agreements. What constitutes a public interest has never been established by the international community. Gordon, supra. Some scholars have suggested that the public purpose limitation is hardly a limitation at all, as a nationalizing state can always find some public purpose to be served through nationalization. Domke, supra; Harvard Draft No. 10 (May 1, 1959).⁵ The question arises in this context as to whether the nationalization by the former Fronteran government was for a public purpose by virtue of the fact that this was a nationalization of a pharmaceutical manufacturing facility during a revolution. If not, then Frontera's act may have violated a customary international norm.

⁵ One scholar has even stated that he could find no international legal decision that has turned on the issue of public purpose alone. Weston, "The New International Economic Order and The Deprivation of Foreign Proprietary Wealth: Reflections Upon the Contemporary International Law Debate," in R. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* 94 (1983).

c. Is Frontera Under Some Obligation to Pay Compensation for the Nationalization of PharmCo?

The majority of legal material recognizes that, in cases of nationalization, the nationalizing country is under some obligation to provide compensation for the nationalized investment. There is, however, a question as to what that obligation entails. In 1962, when the U.N. General Assembly adopted the Resolution on Permanent Sovereignty, the state of international law on the issue of compensation appeared to be that, in cases of nationalization, the owner was to be paid "appropriate compensation" for such action. Resolution on Permanent Sovereignty, ¶4. However, there is some question as to whether the Resolution on Permanent Sovereignty represents the current state of the law.⁶ For example, the Charter of Economic Rights provides that:

Each state has the right . . . to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.

Charter of Economic Rights, art. 2(c) (emphasis added). A similar provision was included by the General Assembly in the Resolution on Permanent Sovereignty, ¶ 4.

The trend in international law during the 1970s seemed to allow the nationalizing state to determine the appropriate amount of compensation to be paid. Lillich, *supra*. Provisions to that effect were included in the Resolution on Permanent Sovereignty, and Resolution 88 (XII) of the Trade and Development Board of UNCTAD (Oct. 19, 1972). There is also the issue of the attitude of third world nations regarding compensation.⁷ In the Declaration on the Establishment of a New International Economic Order, the General Assembly stated that the right to nationalize is an expression of the full permanent sovereignty of a state, and that

⁶ Lillich, "The Valuation of Nationalized Property in International Law: Toward a Consensus or More 'Rich Chaos'?", R. Lillich (ed. & contrib.), 3 *The Valuation of Nationalized Property in International Law 1983* (1975), ("It can no longer be assumed, however, that developing as well as developed States still consider [the Resolution on Permanent Sovereignty] reflective of customary international law").

⁷ For a discussion, *see* Girvan, "Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint," R. Lillich (ed. & contrib.), 3 *The Valuation of Nationalized Property in International Law 1983* (1975).

"[n]o state may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right." Declaration on the Establishment of a New International Economic Order, May 1, 1974, U.N.G.A. Res. 3201 (S-VI), 6 (Special U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974). See also Model Bilateral Agreements, Annex B, art. 7. Requiring a nationalizing country to provide compensation may constitute "coercion" within the meaning of the 1974 Declaration.

Since the expropriation of agricultural land by the Mexican Government in 1938, the United States' view on this issue has been that compensation must be "prompt, adequate, and effective." Restatement of the Foreign Relations Law of the United States (Draft), §712. This view tends to reflect the more dominant trend today, though judges who further investigate the subject will find that the exact means of valuation, not to mention the definitions of "prompt" and "effective," are not precisely settled. Such claims will still, in many instances, depend on the economic status of the particular country making the claim.

Frontera will undoubtedly argue that, as a newly-independent, developing nation, it is not required to compensate Bastonia, a developed state, for the nationalization of PharmCo. Further, if Frontera can make the argument that, as a developing state, it is facing dire economic conditions, it could argue that it is unable to compensate IPC for the nationalization of PharmCo. However, this inability should not limit Frontera's inherent right to nationalize property. Frontera may also argue that it has the right to determine the appropriate level of compensation, which in this case is zero.

Bastonia should counter with the instances in which international arbitration tribunals have awarded some type of compensation for nationalization. See, e.g., Chorzow Factory, 1928 P.C.I.J. (ser. A) No. 17 at 47, Texas Overseas Petroleum Co. v. Libyan Arab Republic, 53 I.L.R. 389 (1979); Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981); Arbitration between Kuwait and the American Independent Oil Co., 21 I.L.M. 976 (1982).

There should also be some discussion as to Frontera's apparent discriminatory restitution scheme as between Fronteran-owned companies, and those companies which have at least partial foreign ownership. Bastonia may argue that, by only releasing industries that were owned entirely by Frontera nationals, Frontera has acted in a discriminatory fashion in

violation of international law. Frontera should respond by arguing that there was a valid economic reason for doing so, i.e., the continued economic growth of Frontera. Further, Frontera can argue that, apparently, there was no discrimination as between Bastonian investments and the investments of third party nations, which satisfied Fronteran obligations under the Treaty. This issue depends upon the resolution of the meaning of Article 13 of the Treaty, which will be discussed below.

d. Fronteran Regulation of Nationalization

This element is present to ensure that acts of nationalization are not merely arbitrary acts of the nationalizing government which occurred during an apparent state of emergency. In such a situation, nationalizing manufacturing concerns would not appear to be arbitrary. However, a specific pharmaceutical manufacturer, such as PharmCo, does not appear to fit neatly into Frontera's category of necessity, so Bastonia may argue that Frontera's blanket nationalization of all manufacturing concerns was arbitrary.

On the other hand, there is nothing in the facts to indicate that IPC was denied access to Fronteran judicial and administrative bodies in pressing its claim against Frontera, or that those bodies decided the matter in an arbitrary fashion. Bastonia may argue, however, that there is something arbitrary about the overall result of the restitution scheme, i.e., Fronteran companies were restored to their prior ownership while other companies were not.

e. How do the Treaty Obligations Affect the Right to Nationalize?

There may be some discussion as to the controlling authority in the event there is a conflict between customary international law and the Treaty. Article 38(1) of the ICJ statute sets forth the sources of international law that the World Court can consider in rendering its opinion. There has been debate over the years as to whether Article 38 sets forth a hierarchy of international law, or whether it is merely a list in no particular order of importance. If Article 38 is a hierarchy, then treaties are the supreme source of law, as that is the first category listed, followed by custom. If Article 38 is not a hierarchy, then it is up to the competitors to provide some basis for resolving conflicts between custom and the Treaty should they arise.

Further, Article 28 of the Vienna Convention on the Law of Treaties states that treaties shall be non-retroactive, unless the parties to such treaties expressly provide for retro-activity. Frontera can argue that, because PharmCo was established in 1978, and the Treaty was not concluded until 1980, the Treaty does not apply to PharmCo. Bastonia can respond from a legal standpoint that PharmCo was an on-going investment over time, and that applying the Treaty to PharmCo would not necessarily be retro-active application. From a factual standpoint, the Compromis only sets forth five of the Treaty's substantive provisions, so there is no certainty that the Treaty does not contain a retro-activity clause. Finally, from an equitable standpoint, a strict reading of the Treaty would yield an unduly harsh result to Bastonia.

(i) Article 10

In this case, the Treaty signed by Bastonia and Frontera does not contain a provision expressly governing nationalization. The Treaty does provide, however, that:

Each State Party shall undertake to provide the most constant protection and security against loss of, or damage to, the investments of citizens or companies of the other State Party.

Treaty, Article 10.

Such provisions have formed the basis for causes of action for nationalization in the past. See, e.g., Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, Case No. ARB/87/3, 30 ILM 577 (1991). Bastonia should argue that this provision prohibited the nationalization of PharmCo by Frontera.

(ii) Article 12

Bastonia should argue that, under Article 12 of the Treaty, if Frontera breaches its obligation under Article 10, then it is obligated to provide compensation. Frontera should argue that this obligation is tempered by Articles 13 and 14 of the Treaty, and by customary international law. See discussion, II.B.2.c.

(iii) Article 13

There is also the issue of the allegedly discriminatory compensation scheme in Frontera. The issue under the Treaty is the difference between a "national treatment" provision, which requires treatment no less favorable than that accorded to nationals, and a "most favored nation" provision, which accords treatment no less favorable than that accorded to the citizens of any third country. The Treaty between Bastonia and Frontera contains what appears to be a most favored nation provision, although there is room for argument as to what the term "other state" in Article 13 means. If "other state" includes the contracting states, then this could be a national treatment provision, and Frontera's restitution scheme would violate Article 13 of the Treaty.

If Article 13 is a most favored nation provision, which it appears to be, then Frontera has not violated the Treaty, as there has been no disparity in the treatment of Bastonian investments as compared to the investments of any third party nation.⁸ Ultimately, Bastonian should argue that the breach of international law arises from Frontera's not having paid compensation to any foreign owner, and not from a breach of Article 13 specifically. The discussion should then focus upon the effect, if any, of Article 13 as a Treaty provision upon Frontera's obligation to pay compensation to anyone.

Finally, Frontera may argue that its acts of restitution are not "compensation", within the strict sense of the word, and it has not compensated anyone. As such, it has not violated the most favored nation provision of the Treaty. Bastonia should respond by stating that Article 13 of the Treaty is meant to preclude any form of discriminatory relief.

⁸ Bastonia may argue that there is some customary norm requiring Frontera to give Bastonian investments national treatment. There is, however, state practice which demonstrates the disfavor of national, as opposed to most favored nation, treatment. Comments, Model Bilateral Agreements.

(iv) Article 14

The Compromis makes it clear that Bastonian investments were lost during the revolution in Frontera.⁹ The Treaty between Frontera and Bastonia states that each nation shall undertake to protect, within its borders, the investments of the other nation. Article 14 of the Treaty also provides that the parties would not be required to compensate for nationalization, where such act was "of necessity" during a revolution. Notwithstanding this provision, there is still an issue of whether Frontera is liable to provide compensation for the nationalization of PharmCo.

In the Elettronica Sicula case, the United States suggested that the appropriate standard of liability is that states must use "due diligence" to prevent wrongful injuries to the person or property of aliens within their territory. Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. Rep., U.S. Memorial at 135.¹⁰ Bastonia may argue that the intentional act of the former Fronteran government would make Frontera liable under customary international law, irrespective of Article 14 of the Treaty. Frontera should argue that the Treaty supersedes custom. Bastonia may also raise the question as to whether a revolutionary government can invoke a provision such as Article 14, when it was the cause of the revolution.

There should also be lengthy discussion as to the degree of necessity involved in nationalizing PharmCo, with Frontera arguing the necessity of the action, while Bastonia should argue that there are no facts in the record to support Frontera's assertion that there truly was a necessity for nationalization.

⁹ Once again, Frontera may make the argument that PharmCo was nothing more than a Fronteran company. However, ownership interest by the IMC should be sufficient to constitute a Bastonian "investment" within the meaning of the Treaty.

¹⁰ Bastonia may argue that the stated obligations impose strict liability on Frontera to ensure the protection of Bastonian investments, irrespective of any necessity Frontera may have felt during the revolution. However, similar and even more strongly worded provisions have been held not to impose strict liability. Asian Agricultural products Ltd. v. Republic of Sri Lanka, 30 I.L.M. 577, 599-600 (1991). The International Court of Justice, in fact, held that an identically worded provision "cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed." Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. Rep. at 65. Further, Article 14 of the Treaty seems to preclude strict liability in the case of revolution.

3. Miscellaneous Issues Regarding Nationalization

a. Nationalization and the Calvo Clause

Bastonia may also make a Calvo Doctrine argument. The Calvo Doctrine was written in 1868 by an Argentine diplomat, Carlos Calvo. The Calvo Doctrine was typically employed by Latin American countries for the purpose of impairing the ability of other nations to intervene diplomatically in investment disputes. Individuals, pursuant to the Calvo Doctrine, in order to benefit from the riches and natural resources of an underdeveloped country, agreed to be bound exclusively by the laws of the country in which an investment is made, thereby waiving their right to diplomatic interposition. D. Shea, *The Calvo Clause* 34 (1955).

Pursuant to the position taken by Latin American countries, if a particular company had waived its diplomatic rights under the Calvo Doctrine, then so had its nation. *Id.* Therefore, Bastonia would have no diplomatic recourse against Frontera for the nationalization at issue. However, in order to be successful on this issue, Frontera would need to show that the Calvo Doctrine had risen to customary international law. In this regard, some commentators argue that, if a company wishes to share in the wealth of a region, it should also be willing to accept the legal standards of that country. *Id.*

b. Application of State Immunity and the Act of State Doctrine

The competitors may also raise issues of state immunity and the act of state doctrine. Typically, these issues relate to actions brought within one nation to adjudicate acts undertaken by the sovereign of another state. *See* R. von Mehren, "The Foreign Sovereign Immunities Act of 1976," 17 *Colum. J. Transnat'l L.* 33 (1978); and Bogusalsky, "Foreign State Immunity: Soviet Doctrine and Practice," 10 *Netherlands Y.B.I.L.* 167 (1979); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). As such, they probably do not apply here.

Appendix I
The 1993 Jessup Compromis

1993 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

Case Concerning the Nationalization of Certain Property

Bastonia

v.

Frontera

The Applicant is the government of Bastonia. The Respondent is the government of Frontera. The two governments have submitted the following matter by special agreement to the International Court of Justice pursuant to Article 36, paragraph 1, of the Statute of the Court. Bastonia and Frontera are original members of the United Nations and parties to the Statute of the International Court of Justice. They are contracting parties to the Vienna Convention on the Law of Treaties. They have neither signed nor ratified any other treaty relevant to this Compromis.

This is a hypothetical problem drafted exclusively for use in the 1993 Philip C. Jessup International Law Moot Court Competition.

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The 1993 Jessup Competition Problem was written by George C. Summerfield, Pennie & Edmonds, Washington, D.C. Assistance was provided by Michelle Behaylo, U.S. Dept. of Justice, Foreign Claims Settlement Commission. Review and commentary were provided by Prof. Burns H. Weston, The University of Iowa College of Law; Prof. Richard B. Lillich, The University of Virginia School of Law; Paul R. Williams, U.S. Dept. of State; and Christopher Whormsley, Foreign and Commonwealth Office (London).

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THE PROBLEM

Bastonia is a highly-developed nation with a strong industrial base. Frontera, until the Revolution of 1990, was a colony of Empira. During that time, Frontera was ruled by a Colonial Government appointed by the Empiran parliament. The Fronteran Colonial Government was afforded substantial autonomy by Empira. Frontera has had some economic growth over the last several years, but is still relatively undeveloped.

In 1980, the Foreign Trade Minister of Bastonia and the Governor General of Frontera signed a bilateral investment treaty ("Treaty"). That same year, the governments of Bastonia and Frontera ratified the Treaty. The Treaty provided, in relevant part, that:

...

Art. 2b) "States Parties", as used herein, shall mean the official organs of Bastonia and Frontera.

...

Art. 10) Each State Party shall undertake to provide the most constant protection and security against loss of, or damage to, the investments of citizens or companies of the other State Party.

...

Art. 12) In the event that a State Party fails to fulfill its obligation under Article 10 herein, such State Party shall provide compensation for such failure.

Art. 13) Each State Party shall provide compensation under Article 12 on terms no less favorable than such State Party accords the citizens or companies of any other state.

Art. 14) Notwithstanding any other provision herein, a State party shall not be required to provide compensation under Article 12 in the event that the subject loss or damage results from an act of necessity during a state of war, national emergency, or revolt.

The Treaty entered into force by its terms on January 1, 1981.

In 1978, the International Pharmaceutical Company ("IPC"), a multinational company incorporated in Bastonia, established PharmCo as a pharmaceutical manufacturing operation in Frontera. PharmCo was set up as a Fronteran corporation, 49% of which was owned by IPC, and 51% of which was owned by individuals in Frontera. Under Fronteran law, it is not possible for a corporation to be established with majority foreign ownership. IPC initially invested \$25 million in its plant, manufacturing machinery, and packaging equipment for the establishment of PharmCo, and signed a 100 year lease with the Fronteran Minister of the Interior for the 1,000 acre property on which PharmCo was to be situated.

From 1978 to 1989, the management of PharmCo was comprised entirely of Bastonian citizens who lived and worked in Frontera, and 60% of PharmCo's enormous annual profits were repatriated to IPC in Bastonia. Meetings of PharmCo's board of directors were held semi-annually at PharmCo's headquarters in Frontera, and PharmCo paid taxes in Frontera.

In 1989, the People's Revolutionary Coalition, led by the Fronteran Deputy Governor, Patrick Darwin, and assisted by a portion of the Fronteran Government, began a popular uprising in Frontera.

In early 1990, at the height of the revolution, the then-current Fronteran Government nationalized all manufacturing concerns for the stated purpose of putting down the revolution. PharmCo was among the companies nationalized by Frontera.

By late 1990, Revolutionary forces were prepared to overrun the Fronteran capitol. The Colonial Government fled to Empira. The Revolutionary Coalition ultimately gained control of the Fronteran capital and the remainder of Frontera. On January 1, 1991, the Revolutionary Coalition declared itself the Revolutionary People's Government of Frontera ("RPG"). The RPG was comprised primarily of former mid-level bureaucrats of the Colonial Government.

By March 1991, the RPG had been recognized by 50 nations, including the government of Bastonia, and an RPG representative had been seated at the United Nations as the official representative of Frontera. In presenting her credentials in Bastonia, the new Fronteran Ambassador stated that it was her government's hope that the long-standing tradition of economic and political cooperation between Bastonia and Frontera would continue under the new Fronteran regime.

In June 1991, the new Fronteran Parliament passed General Law No. 1991/007, which stated that "all laws enacted by the former Colonial Government which are inconsistent with the RPG's goals of economic and political freedom for all Fronteran citizens are hereby declared null and void This General Law is inapplicable to any treaty that Frontera has concluded." A few days later, the Fronteran Foreign Minister, appearing at the United Nations, stated that the RPG repudiated all acts of the former Fronteran regime which were inconsistent with the aims of the RPG.

Although the RPG restored ownership of companies nationalized by the former government during the revolution that were 100% owned by Fronteran nationals, no restitution or compensation was provided for any nationalized company, including PharmCo, that was partially owned by foreign nationals.

In August 1991, IPC, through appropriate administrative and judicial channels in Frontera, sought compensation for the nationalization of PharmCo. The judicial and administrative organs of ultimate jurisdiction in Frontera held that the Treaty did not provide a private cause of action for IPC. Although IPC exhausted its remedies in Frontera, no administrative agency or court reached the merits of IPC's claim.

IPC next raised the issue of compensation with the Bastonian Foreign Ministry, pointing to, inter alia, the guarantee provisions of the Treaty. On February 10, 1992, the Bastonian Foreign Minister sent a diplomatic note to Frontera, protesting the nationalization

of PharmCo and requesting immediate compensation for IPC, pursuant to Articles 10, 12, and 13 of the Treaty.

Upon receiving the diplomatic note, Frontera responded by stating that it was not required to provide compensation for the following reasons:

- 1) Nationalization of a domestic company, such as PharmCo, without compensation is always within the sovereign right of any state;
- 2) The RPG is not liable for any obligations undertaken, or any acts committed, by the former Colonial Government of Frontera; and
- 3) Even if the terms of the Treaty were binding on the RPG, the RPG would not be liable for compensation because the loss to IPC was occasioned by necessity during a time of war, national emergency, or revolt.

The governments of Bastonia and Frontera undertook negotiations which lasted several months without result. The government of Bastonia expressed its desire to submit this dispute to the International Court of Justice. The government of Frontera agreed. On October 1, 1992, the two governments filed a *compromis* pursuant to Article 36(1) of the Statute of the ICJ.

The government of Bastonia asks the Court to:

- 1) Declare that Frontera acted illegally in nationalizing PharmCo without restitution or compensation; and
- 2) Declare the current Fronteran government liable for losses to the investment of IPC.

The government of Frontera asks the Court to:

- 1) Declare that Frontera acted in accordance with international law in nationalizing PharmCo; and
- 2) Declare that the current Fronteran government is not liable for losses to the investment of IPC.

Appendix II

The 1993 Philip C. Jessup International Law Moot Court Competition

Clarifications to the 1993 Jessup Problem

The following clarifications have been issued by the author of the 1993 Jessup problem in response to requests submitted by participating teams pursuant to Official Rule X.

Not all questions submitted have been answered. The author of the Jessup problem has the discretion to not issue clarifications when the information requested touches too closely upon the central themes presented in the problem and would detract from the nature of participant's arguments or provide specific answers to matters left intentionally unclear.

Participants are reminded that, while some inferences must by necessity be drawn from the fact scenario in order to present your arguments, all relevant inferences must be drawn from generally supportable facts present in the problem. If a treaty or convention is not mentioned in the problem, the nations are not parties to it.

Clarifications issued

1. When did Frontera become a colony of Empira and under what circumstances?
Under what circumstances did Frontera become a member of the United Nations?

Frontera was colonized by Empira in the early 1700's. By the early 1900's, Empira allowed Frontera substantial autonomy. While Empira continued to appoint the highest officials of the Fronteran government, generally from among the Fronteran population, Frontera was allowed to conduct its own foreign policy.

Frontera was admitted to the United Nations as an original member even though at the time no formal "end" had been brought to the colonial arrangement.

2. Did the government of Frontera have the authority to enter into the bilateral treaty?

Yes.

3. Was Patrick Darwin appointed by the Empiran Parliament?

No.

4. What was the size and extent of Pharmco's business in Frontera, and what is the status of Pharmco's operations now?

Pharmco's annual gross profits averaged \$50 million. Pharmco operated as any other private corporation in Frontera, and benefitted from no special government subsidies, leases or other arrangements available only to Pharmco.

When nationalized, the colonial government placed Pharmco under government management with all other nationalized corporations. All corporations not returned to their Fronteran owners by the RPC remain under the management of agencies of the new government.