

TEAM NO. 464A

THE 1993 PHILIP C. JESSUP INTERNATIONAL LAW  
MOOT COURT COMPETITION

IN THE  
INTERNATIONAL COURT OF JUSTICE AT THE PEACE PALACE  
THE HAGUE, NETHERLANDS

---

---

STATE OF BASTONIA,

Applicant,

v.

STATE OF FRONTERA,

Respondent.

---

---

SPRING TERM 1993

ON SUBMISSION TO THE  
INTERNATIONAL COURT OF JUSTICE

---

---

MEMORIAL FOR THE APPLICANT

---

---

TABLE OF CONTENTS

|  |          |
|--|----------|
| INDEX OF AUTHORITIES . . . . .   | iv       |
| STATEMENT OF JURISDICTION . . . . .  | xii      |
| STATEMENT OF FACTS . . . . .   | xiii     |
| QUESTIONS PRESENTED . . . . .  | xvii     |
| SUMMARY OF PLEADINGS . . . . .   | xviii    |
| PLEADINGS AND AUTHORITIES. . . . .   | 1        |
| <b>I. UNDER THE BILATERAL INVESTMENT TREATY,<br/>FRONTERA MUST COMPENSATE THE INTERNATIONAL<br/>PETROLEUM COMPANY FOR ITS INVESTMENT LOSSES. . . .</b>           | <b>1</b> |
| A. Frontera Had the Power and Authority to<br>Conduct its Own Foreign Policy When it<br>Entered Into the Treaty . . . . .  | 1        |
| B. Frontera Must Abide by its International<br>Treaty Obligations, <i>Pacta Sunt Servanda</i> . . . .  | 1        |
| C. Expropriations May Not Conflict With the<br>Bilateral Treaty. . . . .   | 2        |
| 1. Existing domestic law and the<br>Revolutionary Peoples Government's<br>representations to Bastonia preserve<br>Frontera's Bilateral Treaty obligations. . . . | 2        |
| 2. Frontera violated the terms of the<br>Bilateral Treaty when it expropriated<br>PharmCo. . . . .   | 3        |
| 3. Frontera's expropriation cannot be<br>justified on grounds of necessity. . . . .  | 4        |
| <b>II. FRONTERA'S FAILURE TO COMPENSATE FOR A TAKING OF<br/>PRIVATE PROPERTY VIOLATES INTERNATIONAL LAW . . . .</b>  | <b>5</b> |
| A. Bastonian Citizens have Acquired a Vested<br>Right in their Investment, therefore,<br>Compensation is Required. . . . .                                       | 6        |
| B. Compensation is Required under International<br>Law . . . . .   | 6        |
| C. Compensation is Governed by International<br>Law Standards . . . . .  | 8        |

|             |  |           |
|-------------|--|-----------|
| D.          | Effective Compensation Under International Law has the Support of International Tribunals . . . . .  | 9         |
| E.          | State Practice Supports Just, and, in Many Cases, Full Compensation. . . . .   | 11        |
| F.          | Frontera's Discriminatory Privatization Policy Violates International Law . . . . .  | 12        |
| <b>III.</b> | <b>THE RPG CAN BE HELD RESPONSIBLE FOR THE COLONIAL GOVERNMENT'S OBLIGATIONS UNDER THE CONTINUITY OF STATES PRINCIPLE . . . . .</b>                          | <b>13</b> |
| A.          | Mere Changes of Government Do Not Protect New Governments from Responsibility for their Predecessor's Actions . . . . .                                      | 13        |
| B.          | The <i>Rebus Sic Stantibus</i> Principle Does Not Apply to the Investment Treaty Between Frontera and Bastonia . . . . .                                     | 15        |
| C.          | Both the RPG's Representations, and the Treaty Itself, Must be Interpreted to Preserve Fundamental Principles of International Economic Law. . . . .         | 16        |
| D.          | The RPG's Efforts Contravened Recognized Means of Achieving Economic and Political Self-sufficiency. . . . .   | 18        |
| <b>IV.</b>  | <b>THE REVOLUTIONARY PEOPLE'S GOVERNMENT OF FRONTERA IS LIABLE FOR THE IPC'S LOST INVESTMENTS UNDER TRADITIONAL PRINCIPLES OF INTERNATIONAL LAW. . . . .</b> | <b>19</b> |
| A.          | Frontera is Responsible to IPC for Breaching an Internationalized Contract . . . . .   | 19        |
| B.          | Frontera is liable under fundamental principles of international economic law designed to promote economic development. . . . .                              | 21        |
| C.          | Failure of the Fronteran Courts and Administrative Agencies to Reach the Merits of IPC's Claim Represents a Denial of Justice. . . . .                       | 22        |

|    |   |    |
|----|---|----|
| V. | <b>BASTONIA HAS STANDING TO PRESENT A CLAIM FOR THE<br/>ILLEGAL NATIONALIZATION OF IPC'S INVESTMENTS . . .</b>                                    | 23 |
| A. | Bastonia's Sovereign Rights were Violated . .   | 23 |
| B. | Alternatively, Bastonia has a Right to<br>Exercise Diplomatic Protection on Behalf of<br>its Nationals' Direct Rights as<br>Shareholders. . . . . | 24 |
|    | CONCLUSION AND PRAYER FOR RELIEF.. . . .  | 25 |

## TABLE OF AUTHORITIES

### TREATIES AND OTHER INTERNATIONAL AGREEMENTS

|  |                   |
|--|-------------------|
| American Convention on Human Rights, November 22, 1969,<br>O.A.S. Treaty Series No. 36, O.A.S. Off. Rec.<br>OEA/Ser. L/V/II.23 doc. 21 rev. 6 (1979), <i>reprinted</i><br>in 9 I.L.M. 673 (1970) . . . . . | 21                |
| Convention for the Mutual Protection of Private Property<br>Rights in Foreign Countries <i>reprinted</i> in 53 Am. J.<br>Int'l L. 371-8 (1959) . . . . .   | 21                |
| Convention on the Settlement of International Investment<br>Disputes Between States and Nationals of Other States,<br>March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090,<br>575 U.N.T.S. 159 . . . . .     | 24                |
| European Convention for the Protection of Human Rights<br>and Fundamental Freedoms, Protocol (No. 1), March 20,<br>1952, art. 1, Europ.T.S. No. 9 . . . . .  | 21                |
| OECD Draft Convention on the Protection of Foreign<br>Property, 2 I.L.M. 241 (1963) . . . . .  | 22                |
| Treaty of Amity, Economic Relations and Consular Rights,<br>August 15, 1955, United States-Iran, 8 U.S.T. 899 . . . . .  | 10                |
| Vienna Convention on the Law of Treaties, 1155<br>U.N.T.S. 331, <i>reprinted</i> in 8 I.L.M. 679 (1969). . . . .   | 1, 2,<br>3, 15 17 |

### UNITED NATIONS DOCUMENTS

|   |       |
|---|-------|
| Declaration on the Establishment of a New Economic Order,<br>G.A. Res. 3201, May 1, 1974, U.N. GAOR, 6th Sess.,<br>Special, Supp. No. 1, at 3, U.N. Doc. A/9559 (1974),<br><i>reprinted</i> in 13 I.L.M. 715 (1974) . . . . . | 8     |
| Draft Articles on State Responsibility [1980] 2 Y.B.<br>Int'l L. Comm'n 34, U.N. Doc. A/CN.4/Ser. A/1980 . . . . .  | 5     |
| Charter of Economic Rights and Duties of States, G.A.<br>Res. 3281, December 12, 1974, U.N. GAOR, 29th Sess.,<br>Supp. No. 31, U.N. Doc. A/9631 (1975), <i>reprinted</i><br>in 14 I.L.M. 251 (1975) . . . . .                 | 8, 22 |

|   |          |
|---|----------|
| Letter dated 8 October 1947 from the Chairman of the Sixth Committee Addressed to the Chairman of the First Committee, U.N. Doc. A/C.1/212, 11 October 1947 . . . . .                                   | 15       |
| <i>Report of the International Law Commission to the General Assembly, U.N. GAOR, 21st Sess., Supp. No.9, U.N. Doc. A/6309/Rev. 1 (1966), reprinted in 61 Am. J. Int'l L. 248 (1967) . . . . .</i>      | 1        |
| Resolution on the Permanent Sovereignty over Natural Resources, G.A. Res. 1803, Dec. 14, 1962, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (1963), reprinted in 2 I.L.M. 223 (1963) . . . . . | 9, 20    |
| United Nations Charter, 1976 Y.B.U.N. 1043 . . . . .  | 1, 8, 15 |
| Universal Declaration of Human Rights, U.N.G.A. Res. 217A, Dec. 10, 1948, 3rd. Sess., U.N. Doc. A/810, at 71 (1948) . . . . .   | 21       |

**CASES AND ARBITRAL DECISIONS**

|  |          |
|--|----------|
| <i>AGIP v. Popular Republic of the Congo, 21 I.L.M. 726 (1982) . . . . .</i>   | 23       |
| <i>American International Group Inc. v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 96 (1983-III) . . . . .</i>   | 10       |
| <i>Amoco International Finance Corp v. Islamic Republic of Iran, 15 Iran-U.S. Cl. Trib Rep. 189 (1985-II) . . . . .</i>  | 7, 8, 10 |
| <i>Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), 1952 I.C.J Pleadings . . . . .</i>   | 12       |
| <i>Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981) . . . . .</i>   | 7        |
| <i>Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d. Cir. 1962), . . . . .</i>  | 4        |
| <i>Benvenuti and Bonfant Srl v. Government of the Popular Republic of the Congo, 67 I.L.R. 345 (1980) . . . . .</i>  | 7        |
| <i>BP Exploration Co. (Libya) Ltd. v. The Government of the Libyan Arab Republic, BP/Libya Concession Tribunal Award (Merits), reprinted in 53 I.L.R. 297 (1979) . . . . .</i> | 11       |

|  |              |
|--|--------------|
| <i>Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase) (Belgium v. Spain) (Second Phase)</i> , 1970 I.C.J. 3 . . . . .             | 3, 24, 25    |
| <i>Case Concerning Chilean Nationalization of El Teniente Mine (Superior Ct. of Hamburg 1973)</i> , reprinted in 12 I.L.M. 251 (1973) . . . . .                        | 3, 24        |
| <i>Case Concerning the Chilean Nationalization of El Teniente Mine (Court of Extended Jurisdiction of Paris 1972)</i> , reprinted in 12 I.L.M. 182 . . . . .           | 24           |
| <i>Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)</i> , 1932 P.C.I.J. (ser. A/B) No. 46 . . . . .                               | 13           |
| <i>Certain German Interests in Upper Silesia</i> , 1926 P.C.I.J. (ser. A) No. 7 . . . . .  | 4, 13, 14    |
| <i>Chorzów Factory Case (Germany v. Poland)</i> , 1928 P.C.I.J. (ser. A), No. 17 . . . . .   | 6, 7, 10, 13 |
| <i>Delagoa Bay Railway Case (U.S. v. Portugal)</i> , reprinted in II J. Moore, <i>International Arbitrations History</i> 1865 (1898) . . . . .                         | 23           |
| <i>Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers Case</i> , 1926 R.I.A.A. 777 (1949). . . . .  | 12           |
| <i>EAP v. Republic of Surinam</i> , 87 I.L.R. 79 (Court of Appeal of Amsterdam 1992) . . . . .   | 14           |
| <i>Elettronica Sicula S.p.A. (United States v. Italy)</i> , 1989 I.C.J. 15 . . . . .   | 3, 25        |
| <i>Expropriated Portuguese Religious Property Case (France, Great Britain &amp; Spain v. Portugal)</i> , Hague Ct. Rep. (Scott) 166 (Perm. Ct. of Arb. 1914) . . . . . | 6            |
| <i>Free Zones of Upper Savoy and the Distirct of Gex (France/Switzerland)</i> , 1932 P.C.I.J. (ser. A/B) No. 46 . . . . .  | 13, 14       |
| <i>German Settlers in Poland</i> , 1923 P.C.I.J. (ser. B) No. 6 . . . . .  | 4, 14        |
| <i>Goldenberg Claim (Germany v. Rumania)</i> , 2 R. Int'l Arb. Awards 901 (1928) . . . . .   | 23           |

|   |                               |
|---|-------------------------------|
| <i>Government of the State of Kuwait v. Independent Oil Co. (AMINOIL)</i> , 21 I.L.M. 976 (1982)  | 11, 23                        |
| <i>Greco-Bulgarian Communities</i> , 1930 P.C.I.J. (ser. B) No. 17  | 13                            |
| <i>INA Corp. v. Islamic Republic of Iran</i> , (Interlocutory Award), 8 Iran-U.S. Cl. Trib. Rep. 373 (1985-I)   | 7, 10                         |
| <i>Italy v. Libya</i> , U.N. Trib. for Libya, June 27, 1955, reprinted in 22 I.L.R. 103 (1955)  | 17                            |
| <i>Jurisdiction of the Courts of Danzig</i> (Advisory Opinion), 1928 P.C.I.J. (ser. B) No. 15   | 13                            |
| <i>Legal Status of Eastern Greenland</i> (Denmark v. Norway), 1933 P.C.I.J. (ser. A/B) No. 53   | 2                             |
| <i>Lena Goldfields Arbitration</i> , 5 Ann. Dig. 3 (Special Arbitral Tribunal 1930)   | 23                            |
| <i>Libyan American Oil Company v. Islamic Republic of Libya</i> , 20 I.L.M. 1 (1981)  | 3, 7,<br>8, 10,<br>11, 14, 21 |
| <i>Lighthouses Case between France and Greece</i> , 1934 P.C.I.J. (ser. A/B) No. 62   | 13                            |
| <i>Mavrommatis Palestine Concessions</i> (Greece v. United Kingdom), 1924 P.C.I.J. (ser. A) No. 2   | 14, 23                        |
| <i>Mobil Oil Iran, et al., Inc., v. Islamic Republic of Iran</i> (Award of July 24, 1987), 16 Iran-U.S. Cl. Trib. Rep. 3 (1987-III)                                       | 21                            |
| <i>North Sea Continental Shelf</i> (Federal Republic of Germany/Denmark) (Federal Republic of Germany/Netherlands), 1969 I.C.J. 1   | 3, 24                         |
| <i>Norwegian Shipowners' Claims</i> (Norway v. United States), 1 R. Int'l Arb. Awards 307 (1922)  | 23                            |
| <i>Oscar Chinn</i> , 1934 P.C.I.J. (ser. A/B) No. 63  | 4, 5, 12                      |
| <i>Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal</i> (Peter Pazmany University) (Czechoslovakia v. Hungary), 1933 P.C.I.J. (ser. A/B) No. 61 | 4, 13                         |
| <i>Phosphates in Morocco Case</i> (Italy v. France), 1938 P.C.I.J. (ser. A/B) No. 74  | 12                            |

|  |  |
|--|--|
| <i>Portuguese-German Arbitration</i> (1919) 2 U.N.R.I.A.A.<br>1035, (Award 1930) . . . . .   | 21   |
| <i>Russian Indemnity Case</i> , 11 U.N.R.I.A.A. 421 (1912) . . . . .   | 5  |
| <i>Sapphire International Petroleum, Ltd. v. National<br/>Iranian Oil Co.</i> , 35 I.L.R. 136 (1963) . . . . .   | 6, 23  |
| <i>Saudi Arabia v. Arabian American Oil Co. (Aramco)</i> ,<br>reprinted in 27 I.L.R. 117 (1958) . . . . .  | 6  |
| <i>Sedco, Inc. v. National Iranian Oil Company</i> , 10<br>Iran-U.S. Cl. Trib. Rep. 180 (1986-I) . . . . .   | 7  |
| <i>S.S. "Lotus"</i> (France v. Turkey), 1927 P.C.I.J. (ser. A)<br>No. 10 . . . . .   | 24   |
| <i>S.S. "Wimbledon"</i> (France, Italy, Japan, United<br>Kingdom v. Germany), 1923 P.C.I.J. (ser. A) No. 1 . . . . .   | 13   |
| <i>Treatment of Polish Nationals and Other Persons of<br/>Polish Origin or Speech in the Danzig Territory</i> ,<br>1932 P.C.I.J. (ser. A/B) No. 44 . . . . .                     | 13   |
| <i>Texaco Overseas Petroleum Company and California<br/>Asiatic Oil Company v. The Government of the<br/>Libyan Arab Republic</i> , reprinted in 17 I.L.M. 1<br>(1978) . . . . . | 2, 6,<br>7, 8,<br>9, 10,<br>13, 14,<br>17, 19,<br>20, 21 |
| <i>United States Diplomatic and Consular Staff in Tehran</i><br>(U.S. v. Iran), 1980 I.C.J. Rep. 3 . . . . .   | 13   |
| <i>Wyman Claim</i> , U.S. Foreign Claims Settlement Comm'n,<br>17th Report, 249 (1962) reprinted in 40 I.L.R. 97<br>(1962) . . . . .   | 7  |

**TREATISES AND DIGESTS**

|  |       |
|--|-------|
| <i>Bokor-Szego, Hanna, New States and International Law</i><br>(1970) . . . . .          | 19    |
| <i>Brierly, J.L., The Law of Nations</i> (6th ed. 1963) . . . . .                        | 24    |
| <i>Brownlie, Ian, Principles of Public International Law</i><br>(4th ed. 1990) . . . . . | 1, 24 |

|  |           |                                       |
|--|-----------|---------------------------------------|
| De Lupis, Ingrid Detter, <i>Finance and Protection of Investments in Developing Countries</i> (2d ed. 1987)  | . . . . . | 6, 12                                 |
| de Visscher, Charles, <i>Theory and Reality in Public International Law</i> (1957)   | . . . . . | 20                                    |
| Freeman, Alwyn V., <i>The International Responsibility of State for Denial of Justice</i> (Kraus reprint 1970)   | . . . . . | 22                                    |
| Hyde, Charles Cheney, <i>I International Law</i> (1983)  | . . . . . | 4, 22, 23                             |
| Jennings, Robert, & Watts, Arthur I <i>Oppenheim's International Law</i> (1992)  | . . . . . | 4, 5,<br>11, 12,<br>13, 18,<br>22, 23 |
| Lauterpacht, Sir Hersch, <i>The Development of International Law by the International Court</i> (1958)   | . . . . . | 7                                     |
| Lillich, Richard B., & Weston, Burns H. <i>Int'l Claims: Their Settlement by Lump Sum Agreements</i> (1975)  | . . . . . | 11, 12                                |
| Lillich, Richard B., <i>International Law of State Responsibility for INJURIES to ALIENS</i> (1984)  | . . . . . | 22, 24                                |
| O'Connell, D.P., <i>State Succession in Municipal Law and International Law</i> (1967)   | . . . . . | 6                                     |
| Poulouse, T.T., <i>Succession in International Law</i> (1974)  | . . . . . | 14, 15                                |
| Schwarzenberger, Georg, <i>Foreign Investments and International Law</i> (1969)  | . . . . . | 4                                     |
| Von Mehren, Robert B., & Kourides, Nicholas, P., <i>International Arbitration Between States and Foreign Private Parties: The Libyan Nationalization Cases</i> , 75 Am. J. Int'l L. 476 (1981) | . . . . . | 16                                    |
| Weston, Burns H., et. al, <i>International Law and World Order</i> (1990)  | . . . . . | 6, 11                                 |

**ARTICLES**

|  |           |                  |
|--|-----------|------------------|
| Asante, Samuel K.B., <i>International Law and Foreign Investment: A Reappraisal</i> , 37 Int'l & Comp. L.Q. 588 (1988) | . . . . . | 6, 11,<br>21, 22 |
|--|-----------|------------------|

|  |                    |
|--|--------------------|
| Bring, O.E., <i>The Impact of Developing States on International Customary Law Concerning Protection of Foreign Property</i> , (1980) . . . . .  | 6, 7,<br>8, 11, 21 |
| Cotran, Eugene, <i>Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States</i> , 8 Int'l & Comp. L.Q. 346 (1959) . . . . .                              | 17                 |
| Crook, John R., <i>Applicable Law in International Arbitration</i> , 83 Am. J. Int'l L. 278, 286 (1989) . . . . .  | 9, 21              |
| Dickstein, Micheal E., <i>Revitalizing the International Law Governing Concession Agreements</i> , 6 Int'l Tax & Bus. Lawyer 54, (1988). . . . .   | 16                 |
| Domke, Martin, <i>Foreign Nationalization</i> , 55 Am. J. Int'l L. 585 (1961) . . . . .  | 17                 |
| Harding, John G., <i>Nationalization of Canadian Property in Cuba under International Law</i> , 2 West. Ont. L. Rev. 50 (1963) . . . . .   | 5, 11, 21          |
| Salacuse, Jeswald W., <i>BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries</i> , 24 Int'l Lawyer 655 (1990) . . . . . | 17                 |
| Lester, A.P., <i>State Succession to Treaties in the Commonwealth</i> , 12 Int'l Comp. L.Q. 475 (1963) . . . . .   | 15                 |
| Mann, F.A., <i>State Contracts and State Responsibility</i> , 54 Am. J. Int'l L. 572 (1960) . . . . .  | 19                 |
| Noonan, Philip, <i>Revolutions and Treaty Termination</i> , 2 Dick. J. Int'l L. 301, 309-15 (1984). . . . .  | 16                 |
| Note, <i>Revolutions, Treaties, and State Succession</i> 76 Yale L.J. 1669 (1967) . . . . .  | 15                 |
| O'Connell, D.P., <i>Independence and Problems of State Succession, in The New Nations in International Law and Diplomacy</i> (William V. O'Brien, ed., 1965) . . . . .                     | 18                 |
| O'Connell, D.P., <i>Recent Problems of State Succession in Relation to New States</i> , 130 Recuil des Cours 95, (1970 II) . . . . .   | 16, 17,<br>18, 19  |
| Schwarzenberger, Georg & Brown, E.D., <i>A Manual of International Law</i> 68 (6th ed. 1976) . . . . .   | 15                 |

|  |       |
|--|-------|
| Umzurike, Umzurike Oji, <i>Self-Determination in International Law</i> (1972) . . . . .  | 17    |
| Weston, Burns H., <i>The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth</i> 75 Am. J. Int'l L. 437, 455 (1981) . . . . .                  | 9, 13 |
| Weston, Burns H., <i>"Constructive Takings" Under International Law: A Modest Foray into the Problem of "Creeping Expropriation"</i> , 16 Va. J. Int'l L. 103, 113-70 (1975) . . . . . | 22    |
| White, Gillian, <i>A New International Order?</i> , 16 Va. J. Int'l L. (1976) . . . . .  | 8, 9  |

**MISCELLANEOUS**

|  |           |
|--|-----------|
| Draft Convention on the International Responsibility of States for Injuries to Aliens, <i>reprinted in Louis Sohn &amp; R.R. Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens</i> , 55 Am. J. Int'l L. 548 (1961) . . . . . | 2, 21, 24 |
| <i>The Effect of Independence on Treaties</i> (International Law Association, 1965). . . . .   | 14, 19    |
| Note of Secretary of State Cordell Hull of August 22, 1938, Press Releases, U.S. Dep't of State, vol. 19, No. 465, at 138, 5 Foreign Rel. U.S. 647, 677 (1938) . . . . .   | 6         |
| Report of the Commission of Jurists on the Aaland Islands, League of Nations O.J. Spec. Supp. 3, 22-23 (1920) . . . . .  | 14        |
| Statment by Vladimr Lenin, 8 November 1917, <i>translated in G. Tunkin, Theory of International Law</i> 29 (1974) . . . . .  | 18        |
| Weston, Burns H., et. al., <i>Basic Documents in International Law and World Order</i> (1990) . . . . .  | 18        |

## STATEMENT OF JURISDICTION

The governments of Bastonia and Frontera have submitted the following matter by special agreement to the International Court of Justice pursuant to Article 36(1) of the Statute of International Court of Justice. Article 38 places all cases which the parties refer to the Court within the Court's jurisdiction.

Article 38 further provides that the function of the Court is to decide disputes submitted to it.

By virtue of Articles 36(1) and 38, the Court may settle questions presented by the parties.

## STATEMENT OF FACTS

After negotiating directly with Frontera's Minister of the Interior, the International Pharmaceutical Company ("IPC") signed a 100-year lease for 1000 acres of land in Frontera. Compromis at 2 [hereinafter Comp.]. IPC then established a pharmaceutical manufacturing operation ("PharmCo") on that property, with an initial infusion of \$25 million in capital, *id.*, into the underdeveloped Frontera. *id.* at 1. Although IPC is incorporated in Bastonia and owns the lease and 49% of PharmCo, the majority of PharmCo is owned by Fronteran individuals. *id.* at 2. PharmCo is headquartered in Frontera and pays Fronteran taxes. *id.* For eleven years, without the benefit of special treatment from Frontera, Clarifications at 2 [hereinafter Clar.], PharmCo grossed on average \$50 million, *id.*, and earned substantial profits for both the Fronteran investors and IPC. Comp. at 2.

Two years after the founding of PharmCo, the Fronteran and Bastonian governments signed and ratified a bilateral investment treaty. *id.* at 1. The treaty requires each government to provide constant protection and security for the others' citizens and companies. *id.*; Treaty, art. 10. It further requires that each state provide compensation for failing to provide protection, Comp. at 1; Treaty, art. 12, and that the compensation must be equal or better than that accorded to other states. Comp. at 1; Treaty, art. 13. Under the treaty, the only condition where compensation is not required is that of necessity while a state

of war, national emergency, or revolt exists. Comp. at 1; Treaty, art. 14.

Frontera, as well as Bastonia are original members of the United Nations and have both signed and ratified the U.N. Charter and the Vienna Convention on the Law of Treaties. Comp. at introductory page. Although Frontera's colonial arrangements with Empira technically or formally end until 1990, Clar. at 1, Frontera had maintained substantial autonomy since the early 1900's. Comp. at 1; Clar. at 1. Frontera conducted its own foreign policy, Clar. at 1, and had the power to sign and ratify its own treaties. Comp. at 1. The Empiran parliament appointed only the highest members of the Fronteran colonial government, *id.*, but this did not include the Deputy Governor. Clar. at 2.

In 1989 the Deputy Governor and a portion of the Fronteran government created the People's Revolutionary Coalition (PRC), which began an uprising. Comp. at 2. In early 1990, the government nationalized all manufacturing concerns, including PharmCo, for the express purpose of putting down the revolt. *id.* However, by late 1990, the PRC gained control of the capital and declared itself the Revolutionary People's Government of Frontera (RPG). *id.* Despite the revolutionary declaration, the new government was comprised primarily of former mid-level bureaucrats of the old government. *id.*

The new government was soon recognized by 50 nations and retained the old United Nations seat. *id.* at 3. In presenting its credentials the new Fronteran government, informed Bastonia

that it expected the long-standing tradition of economic and political cooperation between the countries to continue. Comp. at 3. Frontera affirmed this wish by enacting a new law, *id.*; Fronteran General Law No. 1991/007, that made null and void the acts of the previous government that were inconsistent with freedom of the Fronteran people, but did not expressly nullify existing foreign treaties. *id.*. A few days later, the Fronteran Foreign Minister unilaterally announced to the U.N. that acts of the old government would be repudiated if they were not consistent with the new government's aims. *id.* The stated goals of the new government are political and economic freedom of Fronteran citizens, *id.*; General Law No. 1991/007; however, no clarification of the goals was given. Comp. at 3.

Despite the goal of economic freedom for its citizens, the RPG reprivatized only the companies that were 100% owned by Fronteran nationals. *id.* Companies with any foreign investors, such as PharmCo, were kept nationalized by the RPG, *id.*, and run by government management agencies. Clar. at 2. No compensation was provided to foreign investors or their domestic business partners. Comp. at 3.

In August of 1991, IPC sought, through all appropriate Fronteran administrative and judicial channels, compensation for the nationalization. *id.* IPC was told by the highest administrative and judicial bodies that it had no private cause of action. *id.* Despite exhausting all its domestic remedies in Frontera, IPC did not receive consideration on the merits of its

claim. Comp. at 3. Consequently, IPC sought the help of the Bastonian Foreign Ministry for protection under the Bilateral Investment Treaty. *id.*

Bastonia sent a diplomatic note to Frontera, *id.*, protesting the nationalization of PharmCo and requesting compensation pursuant to Articles 10, 12, and 13 of the Treaty. Comp., at 4. Frontera responded by refusing to provide compensation for taking PharmCo. *id.* Bastonia entered into negotiations with Frontera, but after several months, no settlement was reached. *id.*

Pursuant to Article 36(1) of the Statute of the International Court of Justice, the two governments submitted the case to the jurisdiction of the Court and filed a *compromis*. *id.*

## QUESTIONS PRESENTED

1. Whether Frontera acted illegally in expropriating PharmCo without compensation or restitution;
2. Whether the current government of Frontera is liable for losses to the investment of IPC resulting from its expropriation.

## SUMMARY OF PLEADINGS

Acting within its sphere of autonomous sovereign power, Frontera willingly ratified a bilateral investment treaty ("Bilateral Treaty") with Bastonia in order to provide balanced protection of the countries' respective interests. After twelve productive years of cooperation apparently without a single complaint, however, Frontera breached its good faith duty to uphold the treaty's terms.

Frontera also failed to notify Bastonia of any claims challenging the Bilateral Treaty's validity, and induced Bastonian reliance upon its continuation in force. Having declared to Bastonia its intention to continue economic cooperation, Frontera is estopped from denying its obligations under the treaty.

In privatizing only those companies wholly-owned by its own citizens, Frontera arbitrarily discriminated against foreign investors. That Frontera's domestic privatization policy also affects its own citizen's investments, does not mask the fact that the state is in violation of international law. Moreover, this action implies an absence of necessity under the terms of the Bilateral Treaty. After the end of the revolution, Frontera refused to either privatize PharmCo or provide adequate compensation, thereby extending the loss or damage beyond what was caused during the revolt. Compensation is, therefore, required under the Bilateral Treaty.

Frontera's expropriation of PharmCo violated the basic principle of international law requiring compensation for the taking of private property. A state's right to nationalize is always subject to the universally recognized obligation of just compensation. In fact, under the guise of nationalization, Frontera confiscated the property of Bastonian citizens whose interests are protected from complete and arbitrary destruction by international law, as well as by a valid lease and the Bilateral Treaty.

Traditional rules governing nationalization require prompt, adequate, and effective compensation. If there is any direct and unreasonable interference with property rights for an unreasonable period of time, compensation is due. Although these principles may have been softened with time, the basic requirement of adequate compensation, made in a timely fashion, has prevailed. Frontera has made no sincere effort to provide compensation. Given that international law condemns illusory promises of compensation and that some tribunals have awarded lost profits and damages for unlawful takings, it would be outrageous and incomprehensible for Frontera to be permitted to avoid its international obligations.

The recent policy prescriptions of the New International Economic Order, suggesting that the amount of compensation be determined by domestic law, are not applicable in this investment dispute. Provisions of the Charter of Economic Rights and Duties purporting to authorize this expropriation, are not binding upon

Bastonia because the Charter was not supported by countries with market based industrialized economies.

In any event, international courts and tribunals, the practice of states, noted publicists, and U.N. General Assembly Resolutions representing all types of states, all maintain that international law governs the determination of compensation due when one country expropriates the property held by another country's citizens. Precedents including the settlement of investment disputes through lump sum arrangements and the proliferation of bilateral investment agreements between developed and developing nations, reflect customary international law. As a result, Frontera is obligated to provide compensation for the expropriation of PharmCo.

Frontera's arbitrary privatization policy also violates peremptory norms of international law prohibiting discrimination against aliens. Expropriations must be general, and cannot be substantively or effectively aimed at foreigners. At the very least, where relevant municipal law provisions conflict with international law, the latter will prevail.

The denial of responsibility by Frontera offends many long-standing precedents in the jurisprudential field of "continuity-of-states." Frontera's pre-existing, autonomous right to negotiate commercial treaties reveals that the revolution did not change Frontera's basic identity. World history demonstrates further that Frontera should continue to be subject to the same liabilities as before independence. Even though Frontera now

exercises all foreign relations matters directly, rather than through the medium of a metropolitan country, this change did not affect its prior authority to negotiate commercial treaties. Both Frontera's own actions and the circumstances under which the Revolutionary Peoples Government ("RPG") achieved recognition in the international community, indicate the continuity of the state. It is axiomatic that mere changes in the form of government do not absolve new governments of the responsibilities of their predecessors.

Frontera's exercise of self-control over commercial relations with Bastonia prior to independence defeats any claim seeking to invalidate the Bilateral Treaty because of fundamentally changed circumstances. The type of state in Frontera, with regard to the economic form of society existing under the treaty, was not changed in any way that would justify treaty termination. This truth is revealed by the fact that Frontera embraced a policy of privatizing domestic property. The international economic reality is interdependence. As discussed earlier, the fundamental principle of compensation under international law has not been supplanted by the policy prescriptions of the New International Economic Order.

International courts and arbitral tribunals have applied ordinary rules respecting alien property to successor states, holding that countries do succeed to the contractual and treaty obligations of their predecessor governments. The practice of states is also to guarantee international economic obligations.

When Frontera and Bastonia ratified the Bilateral Treaty, their intention was to provide a secure environment for economic development through reasonable protection of foreign investors. The RPG's subsequent refusal to negotiate in good faith with IPC or Bastonian threatens the stability of international economic relations.

Frontera has flaunted sound economic principles, ignoring available means for pursuing economic development in place of the expediency of nationalizing foreign investment without compensation. Most newly independent states have pursued devolution agreements that carefully outlines the obligations each party will account for. The exceptions have preserved treaty continuity on a provisional basis, which allows foreign investors to evaluate their options. It is clear that the practice of states, particularly in settling disputes so as to effect minimal disruption of the world economy, demonstrates respect for the realities of international economic relations. Correspondingly, Frontera should not be permitted to avoid responsibility for its actions.

The IPC's 100 year property lease from Frontera was in essence an internationalized agreement for economic development; this relationship undoubtedly contributed to local economic growth. The long-term contractual relationship designed to realize the economic and social progress of the host country, as well as appropriate profits to the foreign investor, under terms producing equilibrium between the parties. Frontera clearly

breach its duty of good faith under this internationalized investment agreement when it nationalized PharmCo. When considered in the context of the Bilateral Treaty protections, this breach is even more invidious.

Frontera exacerbated its arbitrary and discriminatory abuse of PharmCo's rights by denying justice under its administrative and judicial processes. The denial of justice principle is not narrowly defined to include only refusal of access, but incorporates any failure to conform its organs of justice to international duties. Where no satisfaction has been obtained through ordinary channels, Bastonia has a right to ensure respect for international law. This affront to Bastonian sovereignty escalated when Frontera refused to consider compensation, in good faith, during negotiations with Bastonia.

After admitting foreign investors on the condition that they hold only minority interests in domestic corporations, Frontera has turned on these aliens without due process of law. In such circumstances Bastonia, as IPC's national state, has a sovereign right to ensure respect for international law.

Finally, international economic law recognizes Bastonia's right to exercise diplomatic protection on behalf of IPC's shareholders. Unlike analogous cases previously considered by the International Court of Justice, IPC has suffered cognizable legal injury at the hands of a foreign government. The nationalization of its investment, followed by exhaustion of domestic remedies, entitles Bastonia to bring forth this claim.

Frontera's discriminatory expropriation of PharmCo, and failure to provide just compensation as defined by international law should be condemned. States must not be allowed to escape the international commitments into which they have freely entered. Under international law, Frontera must be held accountable for its actions.

PLEADINGS AND AUTHORITIES

**I. UNDER THE BILATERAL INVESTMENT TREATY, FRONTERA MUST COMPENSATE THE INTERNATIONAL PETROLEUM COMPANY FOR ITS INVESTMENT LOSSES.**

**A. Frontera Had the Power and Authority to Conduct its Own Foreign Policy When it Entered Into the Treaty.**

The autonomous government of Frontera<sup>1</sup> had the power and authority to limit its sovereignty by ratifying the Bilateral Investment Treaty with Bastonia ("Bilateral Treaty").<sup>2</sup> Implementation of this treaty ultimately contributed to economic growth in Frontera over the last several years.<sup>3</sup>

**B. Frontera Must Abide by its International Treaty Obligations, *Pacta Sunt Servanda*.**

The rule that treaties are binding on their parties and must be performed in good faith<sup>4</sup> is a "fundamental principal of the law of treaties."<sup>5</sup> Its importance is emphasized in the preamble to the United Nations ("U.N.") Charter.<sup>6</sup> Frontera's decision to

---

<sup>1</sup> Compromis at 1; Clarification Nos. 1 and 2.

<sup>2</sup> *Id.* See also Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, arts. 2(1)(b) & 6, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969) [hereinafter Vienna Convention on Treaties]; Ian Brownlie, *Principles of Public International Law* 288 (4th ed. 1990) (citing the *Wimbledon* 1923 P.C.I.J. (ser. A) No. 1, at 25).

<sup>3</sup> Compromis at 1.

<sup>4</sup> Vienna Convention, *supra* note 2, art. 26.

<sup>5</sup> *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 21st Sess., Supp. No. 9, U.N. Doc. A/6309/Rev.1 (1966), reprinted in 61 Am. J. Int'l L. 248, 334 (1967).

<sup>6</sup> United Nations Charter [hereinafter U.N. Charter], preamble.

expropriate has international consequences affecting its treaty, contract, and practice with Bastonia.<sup>7</sup>

**C. Expropriations May Not Conflict With the Bilateral Treaty.**

Expropriation proceedings that conflict with previous commitments, including treaties, are wrongful takings.<sup>8</sup>

**1. Existing domestic law and the Revolutionary Peoples Government's representations to Bastonia preserve Frontera's Bilateral Treaty obligations.**

Fronteran General Law No. 1991/007 declaring laws inconsistent with the Revolutionary Peoples Government's ("RPG") economic goals to be null and void; this law does not apply to treaties.<sup>9</sup> A nation's domestic laws may not be invoked to justify failure to perform a treaty.<sup>10</sup> Here, continued economic cooperation under the treaty is consistent with RPG's goals, as was demonstrated by the Fronteran Ambassador's declaration affirming the RPG's hope that its long-standing economic relationship with Bastonia would continue.<sup>11</sup> Nor does the mere statement that all

---

<sup>7</sup> *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic (Int'l Arbitration, Award on the Merits)*, Jan. 19, 1977, reprinted in 17 I.L.M. 1, 31-37 (1978) [hereinafter *TOPCO*].

<sup>8</sup> Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 10, reprinted in Louis Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 Am. J. Int'l L. 548, 543 (1961).

<sup>9</sup> *Compromis* at 3.

<sup>10</sup> Vienna Convention, *supra* note 2, art. 27.

<sup>11</sup> *Compromis* at 3; cf. *Legal Status of Eastern Greenland* (Den. v. Nor.) 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (Apr. 5).

acts inconsistent with RPG's aims are repudiated<sup>12</sup> invalidate the Bilateral Treaty. Under the Vienna Convention on Treaties, Frontera (1) must notify Bastonia of any challenge to the validity of the Bilateral Treaty, and (2) loses its right to invalidate the treaty by engaging in conduct acquiescing in its validity.<sup>13</sup> Although Frontera's judicial and administrative organs denied IPC a private cause of action under the Bilateral Treaty, they apparently did not deny the treaty's validity.<sup>14</sup> Consequently, Frontera is estopped from denying compensation under the treaty.<sup>15</sup>

2. Frontera violated the terms of the Bilateral Treaty when it expropriated PharmCo.

Frontera failed to ensure the most constant protection against loss of investments by Bastonian citizens or companies.<sup>16</sup> Frontera actually discriminated against Bastonians by privatizing

---

<sup>12</sup> Compromis at 3.

<sup>13</sup> Vienna Convention on Treaties, *supra* note 2, arts. 65(1) and 45(b).

<sup>14</sup> Compromis at 3.

<sup>15</sup> See *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 1, 120-21 (sep. op. J. Ammoun), see also, 1969 I.C.J., at 27 (maj. opinion) (Feb. 20) [hereinafter *North Sea Cases*]; cf. *Case Concerning Chilean Nationalization of El Teniente Mine* (Superior Ct. of Hamburg 1973), reprinted in 12 I.L.M. 251, 277 (1973) [hereinafter *Kennecott Copper* (Hamburg)].

<sup>16</sup> Frontera-Bastonia Bilateral Investment Treaty [hereinafter *Bilateral Treaty*], art. 10, reprinted in Compromis at 1. Compare treaty provisions in *Concerning Elettronica Sicula S.p.A.* (U.S. v. Italy), 1989 I.C.J. 15, 63 (July 20) [hereinafter *Elettronica Sicula*]; *Libyan American Oil Company v. Islamic Republic of Libya*, 20 I.L.M. 1, 31 (1981) [hereinafter *LIAMCO*]; cf. *Concerning the Barcelona Traction, Light and Power Company, Limited* (Belg. v. Spain) (Second Phase), 1970 I.C.J. Rep. 3, 46-47 (noting the absence of such a treaty) (Feb. 5) [hereinafter *Barcelona Traction*].

only those manufacturing interests wholly-owned by Fronterans.<sup>17</sup> This treatment did not pursue a legitimate aim, nor was it proportionate to the aim sought to be realized.<sup>18</sup> Once foreign investment has been admitted, the host country must treat such investments fairly;<sup>19</sup> the fact that Fronteran citizens were also deprived of investments in partially foreign-owned companies does not excuse differential treatment of legitimately formed Fronteran companies.<sup>20</sup> Since PharmCo was no different than any other private corporation in Frontera,<sup>21</sup> the government's action was arbitrary.

3. Frontera's expropriation cannot be justified on grounds of necessity.

Although temporary nationalization may be an acceptable

---

<sup>17</sup> Bilateral Treaty, *supra* note 16, art. 13; Compromis at 3.

<sup>18</sup> I Robert Jennings & Arthur Watts, *Oppenheim's International Law* [hereinafter Jennings & Watts] 932 (9th ed. 1992).

<sup>19</sup> *Id.* See generally Charles Cheney Hyde, *I International Law* 491-92 (1983) and *supra* Section III(C) (considering Frontera's failure to provide an effective domestic remedy to be a denial of justice).

<sup>20</sup> *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 867-68 (2d. Cir. 1962), *rev'd on other grounds* 376 U.S. 398 (1964) [hereinafter *Sabbatino*]; *Oscar Chinn* 1934 P.C.I.J. (ser. A/B) No. 63, at 87 (Dec. 12); *Peter Pazmany University (Czech. v. Hung.)* 1933 P.C.I.J. (Ser. A/B) No. 61, at 241-43 (Appeal from Mixed Arbitral Tribunal Award, Dec. 15) [hereinafter *Peter Pazmany*]; *Certain German Interests in Upper Silesia* 1926 P.C.I.J. (Ser. A) No. 7, at 32-33 (May 25) [hereinafter *Upper Silesia*]; *German Settlers in Poland* 1923 P.C.I.J. (Ser. B) No. 6, at 36-37 (Aug. 17) [hereinafter *German Settlers*]; see also Georg Schwarzenberger, *Foreign Investments and International Law* 5-6 (1969).

<sup>21</sup> Clarification No. 4.

act of necessity during the height of a revolution,<sup>22</sup> the treaty implicitly contemplates restoration of corporate assets once that event has run its course. In order to retain government control over PharmCo, Frontera must show that its action is necessary<sup>23</sup> to prevent destruction of the state.<sup>24</sup> In other words:

once that peril has been averted, . . . the conduct will immediately become wrongful if persisted in, even though it has not been wrongful up to that point. Compliance with the international obligation affected must, if still materially possible, begin again without delay.<sup>25</sup>

The uprising has ended and there is no threat to Frontera's existence. Both the Bilateral Treaty and correlative principles of international law require either restitution or compensation.<sup>26</sup>

## II. FRONTERA'S FAILURE TO COMPENSATE FOR A TAKING OF PRIVATE PROPERTY VIOLATES INTERNATIONAL LAW.

Taking property without compensation is not nationalization, but a confiscation of private property not affecting legal title.<sup>27</sup>

---

<sup>22</sup> Bilateral Treaty, *supra* note 16, art. 14; Compromis at 1.

<sup>23</sup> Draft Articles on State Responsibility [1980] 2 Y.B. Int'l L. Comm'n 34, U.N. Doc. A/CN.4/Ser. A/1980/Add. 1 (Part 2), art. 33(1)(a) [hereinafter State Responsibility Articles]; *cf.* Oscar Chinn, 1934 P.C.I.J. (Ser. A/B) No. 63, at 112-114.

<sup>24</sup> *Id.*, Commentary, at 36, 49; Jennings & Watts, *supra* note 18, at 416-27; *Russian Indemnity Case*, 11 U.N.R.I.A.A. 421, 443 (1912) (holding that financial difficulties did not justify a state of necessity).

<sup>25</sup> State Responsibility Articles, *supra* note 23, at 49-50.

<sup>26</sup> State Responsibility Articles, *supra* note 23, at 51.

<sup>27</sup> Jennings & Watts, *supra* note 18, at 916; *see also* John G. Harding, *Nationalization of Canadian Property in Cuba under International Law*, 2 West. Ont. L. Rev. 50 (1963).

**A. Bastonian Citizens have Acquired a Vested Right in their Investment, therefore, Compensation is Required.**

Expropriation of vested rights violates international law,<sup>28</sup> which recognizes the protection of acquired rights against arbitrary destruction.<sup>29</sup> IPC's rights, protected by lease and treaty, may not be divested without compensation.<sup>30</sup>

**B. Compensation is required under international law.<sup>31</sup>**

Traditional jurisprudence requires that expropriation be for a public purpose, be non-discriminatory, comply with due process, and afford prompt, adequate and effective compensation.<sup>32</sup> Restitution, or money damages, must wipe out the consequences of

---

<sup>28</sup> *Chorzów Factory* (Germany v. Pol.) 1928 P.C.I.J. (Ser. A) No. 17, at 46 (Sept. 13, 1927).

<sup>29</sup> Burns H. Weston, Richard A. Falk & Anthony D'Amato, *International Law and World Order* [hereinafter Weston, Falk & D'Amato], 449 (1990) (citing I D.P. O'Connell, *State Succession in Municipal Law and International Law* 266 (1967)). See also Ingrid Detter DeLupis, *Finance and Protection of Investments in Developing Countries* 105-113 (2d ed. 1987).

<sup>30</sup> O.E. Bring, *The Impact of Developing States on International Customary Law Concerning Protection of Foreign Property*, 1980 Scandinavian Studies in Law 99, 104; *Sapphire International Petroleum, Ltd. v. National Iranian Oil Co.* (Mar. 15 Arbitral Award) [hereinafter *Sapphire Arbitration*], 35 I.L.R. 136 (1963); *Saudi Arabia v. Arabian American Oil Co. (Aramco)* (Aug. 23 Arbitral Tribunal decision), 27 I.L.R., 117, 168 (1958); *Expropriated Portuguese Religious Property Case* (Fr., Gr. Brit. & Spain v. Port.) Hague Ct. Rep. (Scott) 166 (Perm. Ct. of Arb. 1914).

<sup>31</sup> See *Chorzów Factory*, 1928 P.C.I.J. (Ser. A) No. 17; see also, *TOPCO*, 17 I.L.M. 1 (1978).

<sup>32</sup> Samuel K.B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 Int'l & Comp. L.Q. 588, 596 (1988); Note of Secretary of State Cordell Hull of Aug. 22, 1938, Press Releases, U.S. Dep't of State, vol. 19, No. 465, at 138, 5 Foreign Rel. U.S. 647, 677 (1938).

expropriation, and must reestablish the position that would likely have existed absent the unlawful act.<sup>33</sup> Interference that unreasonably impairs the use, enjoyment or disposal of property for an unreasonable period of time calls for compensation.<sup>34</sup>

Traditional prompt, adequate, and effective compensation rules have yielded to adequate compensation, but the basic requirement of compensation continues to be upheld in judgments<sup>35</sup> and in practice.<sup>36</sup> The duty to provide compensation is universally recognized;<sup>37</sup> compensations cannot be illusory.<sup>38</sup> In practice, parties agree to provide reasonable and timely compensation.<sup>39</sup> If the expropriation is deemed "unlawful," lost profits and damages

---

<sup>33</sup> *Chorzów Factory*, 1928 P.C.I.J. (Ser. A) No. 17, at 47, cited with approval in *TOPCO*, 17 I.L.M., at 32; see Sir Hersch Lauterpacht, *The Development of International Law by the International Court* 316 (1958).

<sup>34</sup> *Chorzów Factory*, 1928 P.C.I.J. (Ser. A) No. 17, at 47.

<sup>35</sup> *INA Corp. v. Islamic Republic of Iran*, (Interlocutory Award), 8 Iran-U.S. Cl. Trib. Rep. 373, 401 (1985-I) [hereinafter *INA v. Iran*]; *LIAMCO*, 20 I.L.M., at 49; *TOPCO*, at 36; see also, *Sedco, Inc. v. National Iranian Oil Company*, 10 Iran-U.S. Cl. Trib. Rep. 180 (1986-I); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981); *Benvenuti and Bonfant Srl v. Government of the Popular Republic of the Congo*, 67 I.L.R. 345 (1980).

<sup>36</sup> See *infra* Section II(E).

<sup>37</sup> O.E. Bring, *supra* note 30, at 129.

<sup>38</sup> *Wyman Claim*, U.S. Foreign Claims Settlement Comm'n, 17th Report, 249 (1962) reprinted in 40 I.L.R. 97, 101 (1962); see also *Amoco International Finance Corp v. Islamic Republic of Iran* [hereinafter *Amoco Arbitration*], 15 Iran-U.S. Cl. Trib. Rep. 189, 229-231 (1987-II).

<sup>39</sup> Bring, *supra* note 30, at 118-121.

sustained are considered as part of the compensation requirement.<sup>40</sup>

**C. Compensation is Governed by International Law Standards.**

The New International Economic Order (NIEO)<sup>41</sup> and the Charter of Economic Rights and Duties of States (CERDS)<sup>42</sup>, which claim that compensation should be made under domestic law,<sup>43</sup> are not supported by state practice or judicial decisions. They have not altered the traditional rules that compensation must be made in accordance with international law. Article 2(2)(c) of the CERDS, a non-binding resolution,<sup>44</sup> "was voted by 104 to 16, with 6 abstentions, all of the industrialized countries with market economies having abstained or having voted against it."<sup>45</sup> To reflect customary international law, U.N. resolutions must represent the full range of nations, including those with developed market economies.<sup>46</sup> The CERDS is based on equity; if only developing nations' views are represented,

---

<sup>40</sup> *LIAMCO*, 20 I.L.M., at 69 (citing *Sapphire Arbitration* (15 Mar. 1963), *Greek Telephone Company Award* (3 Jan. 1935), and *Delagoa Bay and East African Railway Company Arbitration* (3 May 1900)); see also, *Amoco Arbitration*, 15 Iran-U.S. Cl. Trib. Rep. 189; Bring, *supra* note 30, at 109.

<sup>41</sup> *Declaration on the Establishment of a New Economic Order*, G.A. Res. 3201, May 1, 1974, U.N. GAOR, 6th Sess., Special, Supp. No. 1, at 3, U.N. Doc A/9559 (1974).

<sup>42</sup> G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975), reprinted in 14 I.L.M. 251 (1975).

<sup>43</sup> *Id.* art. 2(2).

<sup>44</sup> U.N. Charter, art. 10; Gillian White, *A New International Order?*, 16 Va. J. Int'l L. 323-45 (1976).

<sup>45</sup> *TOPCO*, 17 I.L.M., at 29.

<sup>46</sup> *TOPCO*, 17 I.L.M., at 30.

it cannot be truly equitable.<sup>47</sup> Article 2(2)(c) is not, therefore, an authoritative statement of existing international law.<sup>48</sup>

The *TOPCO* arbitrator rejected the application of national law to determine compensation, under the CERDS and NIEO, in favor of international law.<sup>49</sup> The Resolution on Permanent Sovereignty Over Natural Resources,<sup>50</sup> representing a broad range of developed and underdeveloped countries, states that compensation must be paid in accordance with international law.<sup>51</sup> Furthermore, in hundreds of cases, the Iran-U.S. Claims Tribunal has applied international law, or Iranian law where it comported with international law.<sup>52</sup>

**D. Effective Compensation Under International Law has the Support of International Tribunals.**

Recent international arbitral decisions support effective compensation. The Iran-U.S. Claims Tribunal awards substantial compensation for expropriations in Iran after the 1980 revolution,<sup>53</sup> and often stated that the appropriate standard was

---

<sup>47</sup> White, *supra* note 44, at 332.

<sup>48</sup> *TOPCO*, 17 I.L.M., at 30; see also, Burns H. Weston, The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth, 75 Am. J. Int'l L. 437, 455 (1981).

<sup>49</sup> *TOPCO*, 17 I.L.M., at 31-36.

<sup>50</sup> *Resolution on Permanent Sovereignty over Natural Resources*, G.A. Res. 1803, De. 14, 1962, U.N. GAOR, 17th Sess., Supp. No. 17, art. I(8), at 15, U.N. Doc. A/5217 (1963) [hereinafter U.N.G.A. Res. 1803].

<sup>51</sup> *Id.* art. I(4).

<sup>52</sup> John R. Crook, *Applicable Law in International Arbitration*, 83 Am. J. Int'l L. 278, 286 (1989).

<sup>53</sup> Crook, *supra* note 52, at 301.

the going concern value, including net book value, goodwill and likely future profitability.<sup>54</sup> Under Article IV(2) of the 1955 treaty,<sup>55</sup> which all Tribunal chambers have applied, "just compensation" is defined as "the full equivalent of the property taken."<sup>56</sup> The standard under the 1955 treaty and international law is the same.<sup>57</sup> The *TOPCO* arbitration declared that appropriate compensation reflected *opinion juris communis* and the state of customary law, and held the affected foreign companies were entitled to *restitutio ad integrum*, and awarded substantial compensation.<sup>58</sup> The *LIAMCO* arbitration awarded no equitable remedies but granted substantial money damages using "equitable compensation" as a formula.<sup>59</sup> The view expressed in *Chorzów Factory*, requiring "payment of a sum corresponding to the value which a restitution in kind would bear"<sup>60</sup> retains its viability in both *TOPCO*<sup>61</sup> and the U.S.-Iran Claims Tribunal.<sup>62</sup> Many other

---

<sup>54</sup> See, e.g., *American International Group Inc. v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 96, 109 (1983-III).

<sup>55</sup> Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, U.S.-Iran, art. IV(2), 8 U.S.T. 899, 903.

<sup>56</sup> See, e.g., *INA v. Iran*, 8 Iran-U.S. Cl. Trib. Rep. 373, 401 (1985-I).

<sup>57</sup> *Amoco Arbitration*, 15 Iran-U.S. Cl. Trib., at 252.

<sup>58</sup> *TOPCO*, 17 I.L.M., at 29.

<sup>59</sup> *LIAMCO*, 20 I.L.M., at 76.

<sup>60</sup> *Chorzów Factory*, 1934 P.C.I.J. (Ser. A) No. 17, at 47.

<sup>61</sup> *TOPCO*, 17 I.L.M., at 32.

<sup>62</sup> *Amoco Arbitration*, 15 Iran-U.S. Cl. Trib., at 247.

recent cases have also awarded just compensation in accordance with international law.<sup>63</sup>

**E. State Practice Supports Just, and, in Many Cases, Full Compensation.**

Arbitral practice within and outside<sup>64</sup> the Iran-U.S. Claims Tribunal, squares with post-World War II lump sum settlement practice.<sup>65</sup> Lump sum and bilateral settlement agreements reflect an acceptance of state responsibility.<sup>66</sup> These agreements tend to award just compensation, and fall squarely under Article 38 of the ICJ Statute as evidence of state practice.<sup>67</sup> In at least 30 since 1951, settlements have been based upon the market value of nationalized property.<sup>68</sup> Three of these have granted compensation at full market value, including lost earnings.<sup>69</sup> Other settlement

---

<sup>63</sup> For example, *Government of the State of Kuwait v. Independent Oil Co. (AMINOIL)*, 21 I.L.M. 976 (1982); *LIAMCO*, 20 I.L.M. 1 (1981); *BP Exploration Co. (Libya) Ltd. v. The Government of the Libyan Arab Republic, BP/Libya Concession Tribunal Award (Merits)*, (Oct. 10, 1973), 53 I.L.R. 297 (1979).

<sup>64</sup> *Asante*, *supra* note 32, at 598; *Bring*, *supra* note 30, at 129.

<sup>65</sup> *Weston, Falk & D'Amato*, *supra* note 29, at 459.

<sup>66</sup> *Jennings & Watts*, *supra* note 18, at 538.

<sup>67</sup> *Richard B. Lillich & Burns Weston, Int'l Claims: Their Settlement by Lump Sum Agreements* 5, 34 (1975); see also, *Harding*, *supra* note 27, at 58.

<sup>68</sup> *Bring*, *supra* note 33, at 109, 117.

<sup>69</sup> *Id.* at 117, 121 (citing *Zambian Anglo American Corp., Roan Selection Trust v. Zambia* (1969); *ITT and American & Foreign Power Co v. Brazil* (1964); *Marcona Mining Co. v. Peru* (1975)).

agreements also acknowledged full compensation,<sup>70</sup> and those that did not arrive at the claimed full compensation are in reality close to that amount because of claimants' tendency to inflate their claims.<sup>71</sup> Over 200 bilateral investment treaties with a total of 65 developing countries, most from Africa and South East Asia, have protected investments under the traditional prompt, adequate and effective compensation standard.<sup>72</sup>

**F. Frontera's Discriminatory Privatization Policy Violates International Law<sup>73</sup>**

Expropriations must be general and cannot be aimed solely at foreigners.<sup>74</sup> International law takes precedence over municipal

---

<sup>70</sup> See the following Agreements: Aus.-Rom., art. 1, 588 U.N.T.S. 3 (1965); Braz.-Italy, ¶ 1, 362 U.N.T.S. 237 (1958); Den.-Pol., art. 1(b) & (c), 186 U.N.T.S. 301 (1954); Fr.-Aus., ¶ III(a), unpublished (1955); Greece-Rom., Art. 5(2), 299 U.N.T.S. 231 (1958); Lombardo Agreement (U.S. v. Italy), 36 U.N.T.S. 105 (1949); U.S.-Yugo., 89 U.N.T.S. 43 (1948).

<sup>71</sup> Lillich & Weston, *supra* note 67, at 220-221.

<sup>72</sup> Jennings & Watts, *supra* note 18, at 925-26 (citing treaties between the following countries: Egypt-Japan, 18 I.L.M. 44 (1979); Switz.-Sri Lanka, 21 I.L.M. 399 (1982); P.R.C.-Swed., 21 I.L.M. 477; U.S.-Egypt, 21 I.L.M. 927; Japan-Sri Lanka, 21 I.L.M. 963; U.S.-Pan., 21 I.L.M. 1227; Switz.-Pan., 21 I.L.M. 1255; Belg./Lux.-P.R.C., 24 I.L.M. 538 (1985); Fr.-P.R.C., 24 I.L.M. 550; U.S.-Turk., 25 I.L.M. 1 (1986); Austl.-P.R.C., 28 I.L.M. 121 (1989); P.R.C.-Japan, 28 I.L.M. 575; F.R.G.-U.S.S.R., 29 I.L.M. 351 (1990)).

<sup>73</sup> See *supra* Section I(C)(2) (discussing discrimination in the context of Frontera's obligations under the Bilateral Treaty).

<sup>74</sup> *Anglo-Iranian Oil Co. Case*, 1952 I.C.J. Pleadings 96-98; *Phosphates in Morocco Case (Italy v. France)*, 1938 P.C.I.J. (Ser. A/B) No. 74, at 10; *Oscar Chinn*, 1934 P.C.I.J. (Ser. A/B) No. 63, at 65; *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers Case*, 1926 R.I.A.A. 777 (1949); DeLupis, *supra* note 29, at 113.

law<sup>75</sup> where a discriminatory expropriation has occurred,<sup>76</sup> such as privatizing only those companies without foreign investors and not providing compensation to foreign investors. State practice following the U.N. Charter and the Universal Declaration of Human Rights reveals that "the doctrine of alien nondiscrimination has achieved *jus cogens* stature, . . . of such general acceptance as to challenge even the most zealous advocate of the NIEO Charter."<sup>77</sup>

### III. THE RPG CAN BE HELD RESPONSIBLE FOR THE COLONIAL GOVERNMENT'S OBLIGATIONS UNDER THE CONTINUITY OF STATES PRINCIPLE.

#### A. Mere Changes of Government Do Not Protect New Governments from Responsibility for their Predecessor's Actions.<sup>78</sup>

The Treaty should remain in force in spite of changes in the form of Frontera's government, because the revolution did not change the nation's basic identity.<sup>79</sup> Continuity between the

---

<sup>75</sup> *The Case of the Free Zones Case of Upper Savoy and the District of Gex* (Fr. v. Switz), 1932 P.C.I.J. (Ser. A/B) No. 46, at 167 (June 7) [hereinafter *Free Zones*]; *Treatment of Polish Nationals in Danzig*, 1932 P.C.I.J. (Ser. A/B) No. 44, at 24 (Advisory Opinion of Dec. 11); *Greco-Bulgarian Communities*, 1930 P.C.I.J. (Ser. B) No. 17, at 32 (Advisory Opinion of July 31); *Chorzów Factory*, 1928 P.C.I.J. (Ser. A) No. 17, at 33-34 (Sept. 13, 1927); *Jurisdiction of the Courts of Danzig*, 1928 P.C.I.J. (Ser. B) No. 15 (1928), at 27 (Advisory Opinion of Mar. 3); *Upper Silesia*, 1926 P.C.I.J. (Ser. A) No. 7, at 19 (May 25); *S.S. Wimbledon*, 1923 P.C.I.J. (Ser. A) No. 1, at 29 (Aug. 17); *TOPCO*, 17 I.L.M., at 8, 26. See also, *supra* Section I(C)(2) (discussing discrimination as a violation of the Bilateral Treaty).

<sup>76</sup> *Compromis* at 3.

<sup>77</sup> Weston, *supra* note 48, at 446-47.

<sup>78</sup> Jennings & Watts, *supra* note 18, at 234-35.

<sup>79</sup> *U.S. Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. Rep. 3, 28; *Lighthouses Case* (Fr. v. Greece) 1934 P.C.I.J. (Ser. A/B) No. 62, at 25 (Mar. 17); *Peter Pazmany*, 1933 P.C.I.J. (Ser. A) No. 7, at 237; *Free Zones*, 1932 P.C.I.J.

Colonial Government and the RPG is demonstrated by the lack of any significant change in population or territory or in the conduct of foreign affairs relevant to this dispute. Frontera's substantial autonomy prior to the revolution is analogous to the former dominions of the British Commonwealth, including Canada, Australia, New Zealand, South Africa and the Irish Free State. Although the United Kingdom managed most of their foreign affairs, these dominions had autonomous rights to negotiate their own commercial treaties.<sup>80</sup> The special case of India's evolving independence<sup>81</sup> provides a useful precedent for determining the succession principle that should be applied to Frontera. Like India, Frontera (i) is an original member of the United Nations,<sup>82</sup> (ii) has maintained a separate identity despite its colonial status, and (iii) upon achieving full independence, covers "exactly the same geographical area inhabited by the same people and governed by

---

(Ser. A/B) No. 46, at 145; *Free Zones*, 1932 P.C.I.J. (Ser. B) No. 46, at 17; *Upper Silesia*, 1926 P.C.I.J. (Ser. A) No. 7, at 22, 32-33, 42; *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (Ser. A) No. 2, at 28 (Aug. 30); *German Settlers in Poland*, 1923 P.C.I.J. (Ser. B) No. 6, at 36; *Report of the Commission of Jurists on the Aaland Islands*, League of Nations O.J. Spec. Supp. 3, at 16-19, 22-23 (1920). Consider also, *TOPCO*, 17 I.L.M., at 31-37; *LIAMCO*, 20 I.L.M., at 34; *EAP v. Republic of Surinam*, 87 I.L.R. 79 (Court of Appeal of Amsterdam 1992). See also, Iran-U.S. Claims Tribunal decisions cited *supra* at notes 54, 56-57, 61 & 63.

<sup>80</sup> *The Effect of Independence on Treaties* 22, 24, 33, 46 & 51-57 (International Law Association, 1965).

<sup>81</sup> T.T. Poulouse, *Succession in International Law* 27 n. 60 (1974).

<sup>82</sup> Statement of the Problem; Compromis at 3.

substantially the same government."<sup>83</sup> Frontera should also, therefore, "continue to be subject to the same liabilities as before independence though" it now exercises all foreign relations matters directly, rather than "through the medium of a metropolitan country."<sup>84</sup> Finally, the RPG apparently did not seek formal admission to the United Nations under U.N. Charter procedures;<sup>85</sup> continuity is suggested by the fact that the RPG's representative merely assumed Frontera's existing seat in the U.N.<sup>86</sup>

**B. The *Rebus Sic Stantibus* Principle<sup>87</sup> Does Not Apply to the Investment Treaty Between Frontera and Bastonia.**

Since Frontera exercised "some degree of self-control" over commercial relations with Bastonia prior to independence, its obligations under the Bilateral Treaty continue even after the revolution.<sup>88</sup> There is no evidence that Frontera's change in government reflects a fundamental change of circumstances relevant

---

<sup>83</sup> A.P. Lester, *State Succession to Treaties in the Commonwealth*, 12 Int'l Comp. L.Q. 475, 482 (1963).

<sup>84</sup> Poulouse, *supra* note 81, at 29.

<sup>85</sup> Letter dated 8 October 1947 from the Chairman of the Sixth Committee Addressed to the Chairman of the First Committee, U.N. Doc.A/C.1/212, 11 October 1947. See also U.N. Charter, article 4(2).

<sup>86</sup> Compromis at 3.

<sup>87</sup> Vienna Convention, *supra* note 2, art. 62.

<sup>88</sup> Note, *Revolutions, Treaties, and State Succession*, 76 Yale L.J. 1669, 1672 n.16 (1967); see also, *id.* at 1669; Georg Schwarzenberger & E. D. Brown, *A Manual of International Law* 68 (6th ed. 1976).

to the investment Treaty.<sup>89</sup> Since Frontera restored private domestic ownership,<sup>90</sup> there was no change in the type of state, as was the case with the communist revolutions in China<sup>91</sup> and the Soviet Union.<sup>92</sup> The theoretical arguments of developing nations for a New International Economic Order (NIEO) have generally been rejected on a structural level.<sup>93</sup> The NIEO "may be a valid aspiration and a relevant goal for the future, but in economic relationships, rhetoric should not replace reality."<sup>94</sup>

**C. Both the RPG's Representations, and the Treaty Itself, Must be Interpreted to Preserve Fundamental Principles of International Economic Law.**

Continuity is the cornerstone of state succession in financial and economic matters.<sup>95</sup> Although public law, as a concomitant of political authority, lapses with a change of

---

<sup>89</sup> See, e.g., Philip Noonan, *Revolutions and Treaty Termination*, 2 Dick. J. Int'l L. 301, 309-15 (1984).

<sup>90</sup> *Compromis* at 3.

<sup>91</sup> Noonan, *supra* note 89, at 313 (citing H. Chiu, *The People's Republic of China and the Law of Treaties* 92 n. 18 (1972)).

<sup>92</sup> See *id.* at 310-11 (citing K. Gryzbowski, *Soviet Public International Law: Doctrines and Diplomatic Practice* 98 (1970)).

<sup>93</sup> See *supra* Section II(C); see also Michael E. Dickstein, *Revitalizing the International Law Governing Concession Agreements*, 6 Int'l Tax & Bus. Lawyer 54, 86 (1988).

<sup>94</sup> Robert B. von Mehren & P. Nicholas Kourides, *International Arbitration Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 Am. J. Int'l L. 476, 551 (1981).

<sup>95</sup> D.P. O'Connell, *Recent Problems of State Succession in Relation to New States*, 130 *Recueil des Cours* 95, 142, 145 (1970 II) [hereinafter O'Connell, *State Succession and New States*].

sovereignty, private law, as a concomitant of social relationships, survives a change of sovereignty.<sup>96</sup> The primary purpose of the Bastonia-Frontera Investment Treaty was, and is, to provide a secure environment for development, in other words, to protect foreign investors.<sup>97</sup> Considering the practice of states guaranteeing international economic obligations,<sup>98</sup> it would be unjust to interpret the Treaty's liability limitation provision as preserving an indefinite right to nationalize without providing compensation.<sup>99</sup> Furthermore, Bastonia's reliance on the Treaty warrants its claims for restoration or, at least, compensation.<sup>100</sup>

Nations are required to undertake good faith steps to achieve agreement before ending treaty obligations.<sup>101</sup> Frontera

---

<sup>96</sup> *Id.* at 128; see also, international judicial and arbitral decisions in note 79 *supra*; cf. *Italy v. Libya*, U.N. Tribunal for Libya (June 27, 1955), reprinted in 22 I.L.R. 103 (1955); Eugene Cotran, *Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States*, 8 Int'l & Comp. L.Q. 346, 365-67 (1959).

<sup>97</sup> Bilateral Treaty, *supra* note 16, art. 10; see also, cases containing comparable treaty provisions, *supra* note 16.

<sup>98</sup> *Id.*; see also Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 Int'l Lawyer 655, n. 2 (1990) (citing Pappas, *References on Bilateral Investment Treaties*, 4 ICSID Rev.-Foreign Investment L.J. 189, 194-203 (1989) and International Center for Settlement of Investment Disputes, *Investment Promotion and Protection Treaties* (1983)).

<sup>99</sup> Vienna Convention, art. 31; see also Umozurike Oji Umozurike, *Self-Determination in International Law* 215 (1972) (citing Bin Cheng, *The Rationale of Compensation for Expropriation*, 44 Grotius Transactions 267, at 297).

<sup>100</sup> Vienna Convention, art. 69(2)(a).

<sup>101</sup> *TOPCO*, 17 I.L.M., at para. 91; see also Martin Domke, *Foreign Nationalization*, 55 Am. J. Int'l L. 585 (1961).

should not be allowed to claim a clean slate with respect to international economic obligations arising under the investment Treaty.<sup>102</sup> Under the facts of the instant case, recognizing a legal vacuum subsequent to state succession would be inimical to the stability of international relations.<sup>103</sup> There is "no cogent economic argument to oppose against the application to successor states of the ordinary rules respecting alien property."<sup>104</sup>

**D. The RPG's Efforts Contravened Recognized Means of Achieving Economic and Political Self-sufficiency.**

The international community has machinery to aid developing countries based on sound economic principles.<sup>105</sup> Furthermore, the common practice of newly independent states has

---

<sup>102</sup> Jennings & Watts, *supra* note 18, at 228; O'Connell, *State Succession and New States*, *supra* note 95, at 175.

<sup>103</sup> Jennings & Watts, *supra* note 18, at 229 n. 10; *cf.* Statement made 8 November 1917 by Vladimir Lenin, translated in G. Tunkin, *Theory of International Law* 29 (1974), and cited with approval in Noonan, *supra* note 89, at 311 n. 50 (emphasis added).

<sup>104</sup> O'Connell, *State Succession and New States*, *supra* note 95, at 141; see also, *id.* at 140-44, 190 & 199; *cf.* D.P. O'Connell, *Independence and Problems of State Succession*, in William V. O'Brien, *The New Nations in International Law and Diplomacy* 7, 12 (1965).

<sup>105</sup> *Id.*; see, e.g., Weston, Falk & D'Amato, *Basic Documents in International Law and World Order* (citing the International Monetary Fund, at 513-25; the Int'l Bank for Reconstruction and Development, at 526-536; the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, at 539-547; the Declaration on International Investment and Multinational Enterprises, at 576-77; the U.N. Industrial Development Organization, at 578-84; the Multilateral Investment Guarantee Agency, at 598-607; the OECD Guidelines for Multinational Enterprises, at 609-13; and, the Draft Code of Conduct on Transnational Corporations, at 614-624); also consider the U.N. Development Programme, the Inter-American Development Bank, and the Asian Development Bank.

been to conclude devolution agreements providing for continuity of obligations.<sup>106</sup> States have also made unilateral declarations providing for provisional continuity of treaties pending a detailed evaluation of their implications.<sup>107</sup> These examples of state practice demonstrate a general recognition of the economic realities of international relations. The practice of states with regard to dispute settlement, effecting the minimum possible disruption of the world's economic system, is based on a belief that international economic stability should not be undermined by "emotional pretenses to financial self-determination."<sup>108</sup>

**IV. THE REVOLUTIONARY PEOPLE'S GOVERNMENT OF FRONTERA IS LIABLE FOR THE IPC'S LOST INVESTMENTS UNDER TRADITIONAL PRINCIPLES OF INTERNATIONAL LAW.**

**A. Frontera is Responsible to IPC for Breaching an Internationalized Contract.**

The 1978 lease of land to IPC for the PharmCo site<sup>109</sup> is an internationalized contract.<sup>110</sup> In *TOPCO*, Arbitrator René Jean

---

<sup>106</sup> *The Effect of Independence on Treaties*, supra note 80, at 161. Examples of states parties to devolution agreements include: Burma, Ceylon, Cyprus, Ghana, India, Indonesia, Iraq, Jamaica, Jordan, Laos, Federation of Malaya, Morocco, Federation of Nigeria, Pakistan, Sierra Leone, Somalia, Trinidad and Tobago, Vietnam and Western Samoa.

<sup>107</sup> Hanna Bokor-Szego, *New States and International Law* 96 (1970) (listing Tanganyika, Uganda, Kenya, Malawi, Botswana, Lesotho, and Burundi).

<sup>108</sup> O'Connell, *State Succession and New States*, supra note 95, at 148.

<sup>109</sup> F.A. Mann, *State Contracts and State Responsibility*, 54 Am. J. Int'l L. 572 (1960).

<sup>110</sup> See, e.g., *TOPCO*, 17 I.L.M., at 15-17.

Dupuy maintained that economic development agreements should be internationalized because: (i) the corporation is closely associated with the realization of the economic and social progress of the host country, (ii) the long duration of the contracts implies close cooperation, and (iii) the basic purpose of this type of contract is to produce an equilibrium.<sup>111</sup> The Arbitrator also refused to adopt an apparent tendency toward separating nationalization from the international law of state responsibility for injuries to aliens, stating that the development of international law should not be anticipated but applied as it exists at that time.<sup>112</sup>

Foreign investment agreements and internationalized contracts freely entered into between two states,<sup>113</sup> or a state and a private party, must be observed in good faith.<sup>114</sup> A state "cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty and cannot through measures belonging to its internal order, make null and void the rights of the contracting party which has performed its various obligations under the contract."<sup>115</sup> A nationalization cannot

---

<sup>111</sup> *Id.*

<sup>112</sup> See *id.*, at 27 (citing *The Fisheries Jurisdiction Case* (U.K. v. Ice.) 1974 I.C.J. Rep. 3, 23).

<sup>113</sup> U.N.G.A. Res. 1803, *supra* note 50.

<sup>114</sup> *TOPCO*, 17 I.L.M., at 24.

<sup>115</sup> *Id.*; see also Charles de Visscher, *Theory and Reality in Public International Law* 194 (1957).

prevail over an international contract with a stabilization clause.<sup>116</sup> Stabilization for the lease comes from the non-aggravation clause of the Bilateral Treaty.<sup>117</sup> Interpretation of international contracts is generally made in terms of general principles of commercial law and public international law<sup>118</sup> not that of one party.<sup>119</sup>

**B. Frontera is Liable under Fundamental Principles of International Economic Law Designed to Promote Economic Development.**

International law protects foreign investment<sup>120</sup> based on the inviolability of private property and the sanctity of contract.<sup>121</sup> Both developed and developing countries have accorded such protection to property.<sup>122</sup> Furthermore, international publicists

---

<sup>116</sup> *TOPCO*, 17 I.L.M., at 25.

<sup>117</sup> Bilateral Treaty, *supra* note 16, art. 10; *Compromis* at 1.

<sup>118</sup> Crook, *supra* note 52, at 288.

<sup>119</sup> *Mobil Oil Iran, et al., Inc., v. Islamic Republic of Iran* (Award of July 24, 1987), 16 Iran-U.S. Cl. Trib. Rep. 3, 25 (1987-III).

<sup>120</sup> *LIAMCO*, 20 I.L.M., at 46; *Portuguese-German Arbitration* (1919), 2 U.N. R.I.A.A. 1035, 1039 (Award 1930); Bring, *supra* note 30, at 37; Harding, *supra* note 27.

<sup>121</sup> *LIAMCO*, 20 I.L.M., at 34; Asante, *supra* note 32, at 595.

<sup>122</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol (No. 1), March 20, 1952, art.1, Europ.T.S. No. 9; American Convention on Human Rights, Nov. 22, 1969, art. 21, at 1, O.A.S. Treaty Series No. 36, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. 21 rev. 6 (1979), reprinted in 9 I.L.M. 673 (1970); Universal Declaration of Human Rights, U.N.G.A. Res. 217A, Dec. 10, 1948, 3rd Sess., U.N. Doc. A/810, at 71 (1948) (now viewed as an embodiment of customary international law); Convention for the Mutual Protection of Private Property Rights in Foreign Countries, 53 Am. J. Int'l L. 371-8 (1959); Draft Convention on the International Responsibility of States

have recognized that to achieve international peace, productivity, and equitable global economy, the following interdependent goals must be met: (a) reduction of the use of force, (b) promotion of the world wide economic development, and (c) preservation of human rights.<sup>123</sup> "International cooperation for development is the shared goal and common duty of all States."<sup>124</sup> Multinationals are major actors in the world, and instruments of meaningful and constructive development.<sup>125</sup> Thus, it is in the international interest to accord multinational investment protection.

**C. Failure of the Fronteran Courts and Administrative Agencies to Reach the Merits of IPC's Claim Represents a Denial of Justice.<sup>126</sup>**

A denial of justice occurs where there is a failure, by organs charged with administering justice to aliens, to conform to international duties.<sup>127</sup> Frontera failed to conform its actions to customary international law requiring non-discrimination in the

---

for Injuries to Aliens, art. 10, 55 Am. J. Int'l L. 553-63 (1961); OECD Draft Convention on the Protection of Foreign Property, 2 I.L.M. 241 (1963); Jennings & Watts, *supra* note 19, at 912-913, 1002-1004; Asante, *supra* note 32, at 609-610.

<sup>123</sup> Burns H. Weston, "Constructive Takings" Under International Law: A Modest Foray into the Problem of "Creeping Expropriation", 16 Va. J. Int'l L. 103, 113-70 (1975).

<sup>124</sup> G.A. Res. 3281, *supra* note 42.

<sup>125</sup> Asante, *supra* note 32, at 588.

<sup>126</sup> Richard B. Lillich, *International Law of State Responsibility for INJURIES to ALIENS* 9-29 (1984).

<sup>127</sup> Alwyn V. Freeman, *The International Responsibility of State for Denial of Justice* (Kraus reprint 1970), at 97 (citing Vattel, *Le Droit des Gens*, Book II, §350, p. 536); see also Hyde, *supra* note 19, at 492.

expropriation of property.<sup>128</sup> PharmCo's rights were abused in an arbitrary and discriminatory manner by Fronteran authorities.<sup>129</sup> In addition to the failure of Frontera's administrative and judicial organs to reach the merits of IPC's claim,<sup>130</sup> Frontera also refused to provide compensation pursuant to negotiations with Bastonia's government.<sup>131</sup> Arbitrators have found host states liable for at least partial compensation (including future profits) when they nationalized foreign investments.<sup>132</sup> Bastonia has the right to ensure respect for international law where no satisfaction has been obtained through ordinary channels.<sup>133</sup>

**V. BASTONIA HAS STANDING TO PRESENT A CLAIM FOR THE ILLEGAL NATIONALIZATION OF IPC'S INVESTMENTS.**

**A. Bastonia's Sovereign Rights were Violated.<sup>134</sup>**

A right of diplomatic protection exists where the state whose responsibility is invoked is the national state of the

---

<sup>128</sup> Jennings & Watts, *supra* note 18, at 932; see also, *supra* Section I(C)(2).

<sup>129</sup> Hyde, *supra* note 19, at 491.

<sup>130</sup> Compromis at 3.

<sup>131</sup> *Id.* at 3-4.

<sup>132</sup> See, e.g., *Delagoa Bay Railway Case* (U.S. v. Port.), II J. Moore, *International Arbitrations History* 1865 (1898); *Norwegian Shipowners' Claims* (Nor. v. U.S.), 1 R. Int'l Arb. Awards 307 (1922); *Goldenberg Claim* (Germany v. Rumania), 2 R. Int'l Arb. Awards 901 (1928); *Lena Goldfields Arbitration*, 5 Ann. Dig. 3 (Special Arbitral Tribunal 1930); *Sapphire Arbitration*, 35 I.L.R. 136 (1963); *AGIP v. Popular Republic of the Congo*, 21 I.L.M. 726 (1982); *AMINOIL Arbitration*, 21 I.L.M. 976 (1982).

<sup>133</sup> *Mavrommatis Case* 1924 P.C.I.J. (Ser. A) No. 2, at 12.

<sup>134</sup> Compromis at 4.

company.<sup>135</sup> Since Frontera admits foreign investment only through companies with majority Fronteran ownership, the equities justifying this right are particularly striking in this case.<sup>136</sup> Unlike the applicant in *Barcelona Traction*,<sup>137</sup> Bastonia seeks explicit recognition of this principle's existing status under customary international law.<sup>138</sup>

**B. Alternatively, Bastonia has a Right to Exercise Diplomatic Protection on Behalf of its Nationals' Direct Rights as Shareholders.<sup>139</sup>**

The Court in *Barcelona Traction* maintained that the corporate veil can be pierced for equitable reasons, such as the application of discriminatory enemy-property legislation or structural reordering of a host state's economy;<sup>140</sup> an equitable claim did not lie, however, where the corporation was simply placed

---

<sup>135</sup> *Barcelona Traction*, 1970 I.C.J. 3, 191-92 (sep. op. J. Jessup), see also *id.* at 48 (maj. op.); see generally Sohn & Baxter, *supra* note 8.

<sup>136</sup> *Compromis* at 2; *Barcelona Traction*, 1970 I.C.J. 3, 192.

<sup>137</sup> *Barcelona Traction*, 1970 I.C.J. 3, 37.

<sup>138</sup> See, e.g., Convention on the Settlement of International Investment Disputes Between States and Nationals of Other States, March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, article 25(2)(b); *Kennecott Copper (Germany)*, *supra* note 15, at 267-270; *Case Concerning the Chilean Nationalization of El Teniente Mine* (Court of Extended Jurisdiction of Paris 1972) 12 I.L.M. 182, 183-84; see also Lillich, *supra* note 126, at 180. Compare *North Sea Cases*, 1969 I.C.J. Rep. 1, 120-21 (sep. op. J. Ammoun), see also 1969 I.C.J. Rep. 1, 27, 48-52; *S.S. Lotus* (France v. Turkey), (1927) P.C.I.J., ser. A, No. 10, at 19; J.L. Brierly, *The Law of Nations* 62 (6th ed. 1963).

<sup>139</sup> *Barcelona Traction*, 1970 I.C.J. Rep. 3, 36; see also Ian Brownlie, *Principles of Public International Law* 485-86 (1990).

<sup>140</sup> *Barcelona Traction*, 1970 I.C.J. Rep. 3, 38-40.

in receivership (i.e., the corporate identity was not replaced).<sup>141</sup> Similarly, the applicant in *Elettronica Sicula* could not show legal injury proximately caused by the respondent's governmental action.<sup>142</sup> Placement of PharmCo under the management of government agencies, however, does more than empty IPC's shares "of all real economic content."<sup>143</sup> Instead, it reduces IPC to a position of impotence.<sup>144</sup> Significantly, the Court in *Elettronica Sicula* expressed support for protections comparable to the Bilateral Treaty, stating that broad protection is "more in accord with the general purpose of a FCN Treaty."<sup>145</sup>

#### CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated above, Bastonia respectfully asks this Honorable Court to adjudge and declare that:

- I. Frontera acted illegally in expropriating PharmCo without providing restitution or compensation;
- II. The current Fronteran government is liable for the consequential loss of investments suffered by IPC.

Respectfully submitted,

Agents for Bastonia

---

<sup>141</sup> *Id.* at 48-49.

<sup>142</sup> *Elettronica Sicula*, 1989 I.C.J. 15, 81.

<sup>143</sup> *Barcelona Traction*, 1970 I.C.J. 3, 36-37.

<sup>144</sup> *Id.* at 50; see also, *supra* Section IV(C).

<sup>145</sup> *Elettronica Sicula*, 1989 I.C.J. Rep. 15, 79.