

Team No. 464R

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 RESPONDENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES	iv
STATEMENT OF JURISDICTION	xi
STATEMENT OF FACTS	xii
QUESTIONS PRESENTED	xvii
SUMMARY OF PLEADINGS	xviii
PLEADINGS AND AUTHORITIES	1
I. AS A NEWLY INDEPENDENT STATE, FRONTERA DID NOT SUCCEED TO THE BILATERAL INVESTMENT TREATY.	1
A. As a Newly Independent, Self-Governing State, Frontera Claims Economic as well as Political Sovereignty.	1
1. The present nation of Frontera is a newly independent, self-governing State.	1
2. In conjunction with its political sovereignty, Frontera assumes its economic freedom.	3
B. Under the Vienna Convention on Succession of States to Treaties, Frontera is not Bound by the Treaty.	4
C. State Practice does not Support Universal Succession.	5
1. In cases of revolutionary secession, the new state is unaffected by its predecessor's treaties, except those of a dispositive character.	5
2. New states considered bound by their predecessors' treaties have become so by means of devolution agreements or by provisional consent.	6

D.	New Frontera did not Consent to be Bound by the Bilateral Investment Treaty.	7
E.	The Treaty is Inapplicable to Frontera under the Principle of <i>Pacta Tertiiis Ne Nocent Nec Prosunt</i> .	8
F.	The Treaty Terminates under the Principle of <i>Rebus Sic Stantibus</i> .	9
G.	Requiring New Frontera to be Bound by the Treaty Would Violate U.N. Principles and a <i>Jus Cogens</i> Norm of International Law.	10
II.	IPC LACKS STANDING TO ASSERT A CLAIM AGAINST FRONTERA UNDER MUNICIPAL OR INTERNATIONAL LAW.	11
A.	An Act that Infringes Only the Corporation's Rights does not Involve Responsibility towards the Shareholders.	11
B.	A State is not Guilty of a Breach of International Law for Economic Injury Done to its own National.	11
C.	Under International Law, Bastonia Cannot Assert a Claim for IPC's Losses as a PharmCo Shareholder.	12
III.	NEW FRONTERA IS NOT BOUND BY COLONIAL FRONTERA'S LEASE OBLIGATIONS.	13
IV.	NEW FRONTERA'S NATIONALIZATION OF PHARMCO IS IN ACCORDANCE WITH INTERNATIONAL LAW.	14
A.	New Frontera has the Right to Nationalize PharmCo as a Matter of Domestic Law.	14
B.	New Frontera's Nationalization of PharmCo is in Accordance with International Law.	15
1.	The right of a State to nationalize is well established in international law.	15
2.	New Frontera nationalized PharmCo pursuant to its right to self-determination and economic sovereignty.	16

3.	New Frontera's nationalization of PharmCo comported with international law.	17
V.	NEW FRONTERA INCURS NO OBLIGATION TO PROVIDE COMPENSATION FOR THE NATIONALIZATION OF PHARMCO.	21
A.	International Law Requires Appropriate Compensation for the Nationalization of Foreign Property.	21
B.	The Amount of Compensation Due would be Offset by the Extent to which the Original Foreign Investment has been Recovered.	23
C.	Due to the Extent of IPC's Undue Enrichment from its Excess Profits, New Frontera is Not Obligated to pay Compensation for the Nationalization of PharmCo.	24
	CONCLUSION AND PRAYER FOR RELIEF	25

INDEX OF AUTHORITIES

Treaties and Other International Agreements

<i>Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea, 15 August 1962, 437 U.N.T.S. 273.</i>	14
<i>The Andean Investment Code.</i>	21
<i>Asian-African Legal Consultative Committee's Draft Convention on Principles concerning Admission and Treatment of Aliens, Report of Fourth Session 49 (1961)</i>	21
<i>Convention on Rights and Duties of States, 26 December 1933, 165 L.N.T.S. 19</i>	1
<i>Declaration on International Investment and Multinational Enterprises, reprinted in 15 I.L.M. 967 (1976).</i>	19
<i>The Economic Declaration of the Algiers Conference on Non-Aligned Countries (September, 1973)</i>	21
<i>OPEC Res. XVI 90, reprinted in 11 Middle East Econ. Survey (26 July 1968)</i>	23
<i>Vienna Convention on Succession of States to Treaties, 22 August 1978, U.N. Doc. A/Conf.80/31</i>	4,5
<i>Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.</i>	7,8,9,10

United Nations Documents

<i>Charter of Economic Rights and Duties of States, 12 December 1974, U.N.G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. (No. 31) 50, U.N. Doc. A/9631 (1975).</i>	4,10,12,15,16,17,18,20,21,23,24
<i>Charter of the United Nations, 1976 Y.B.U.N. 1043</i>	3,10,16,21,24
<i>Declaration on Principles of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, 24 October 1970, U.N.G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. (No. 28) 121, U.N. Doc. A/8028</i>	

(1971)	10,16,17,24
<i>Declaration on the Establishment of a New International Economic Order</i> , 1 May 19874, U.N.G.A. Res. 3201, U.N. GAOR., 6th Sess. (Special), Supp. (No. 1) 3, U.N. Doc. A/9559 (1974)	4,16,17
<i>Declaration on the Granting of Independence to Colonial Countries and Peoples</i> , 14 December 1960, U.N.G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. (No. 16) 66, U.N. Doc. A/4684 (1961)	10
<i>Declaration on the Inadmissibility of Intervention in the Domestic Affairs of the States and the Protection of Their Independence and Sovereignty</i> , U.N.G.A. Res. U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1966)	16
<i>Letter from the Chairman of the Sixth Committee Addressed to the Chairman of the First Committee</i> , 11 October 1947, U.N. Doc. A/C.1/212	3
<i>Programme of Action on the Establishment of a New International Economic Order</i> , U.N.G.A. Res. 3202(S-VI), U.N. GAOR, 6th Sess. (Special), Supp. (No.1) 5, U.N. Doc. A/9559 (1975).	16
<i>Resolution on Permanent Sovereignty over Natural Resources</i> , 17 December 1973, U.N.G.A. Res. 1803, U.N. GAOR., 17th Sess., Supp (No. 17) 15, U.N. Doc. A/5217 (1963)	4,16,17,19
<i>UNCTAD Trade and Development Board Resolution 88 (XII)</i> , 11 I.L.M. 1474 (1972).	21
U.N.G.A. Res. 1710, U.N. GAOR, 16th Sess., Supp. 17, at 17, U.N. Doc. A/5100 (1962)	24

Cases and Arbitral Decisions

<i>Banco Nacional de Cuba v. Chase Manhattan Bank</i> , 658 F.2d 875 (2d Cir. 1981)	23
<i>Case Concerning Barcelona Traction Light and Power Company, Limited (Second Phase) (Belgium v. Spain)</i> , 1970 I.C.J. 3	10,11,12,13,15,22
<i>Case Concerning Certain Aspects of the Laws on the Use of Languages in Education in Belgium</i> , 45 I.L.R. 114 (Eur. Ct. H.R. 1968)	20

<i>Case Concerning Elettronica Sicula SpA (United States v. Italy)</i> , 1989 I.C.J. 16.	11,15
<i>The Case of the S.S. "Lotus"</i> , 1927 P.C.I.J. (ser. A) No. 9	10
<i>The Chilean Copper Tribunal</i> , 11 I.L.M. 1013 (1972).	23
<i>Customs Regime between Germany and Austria</i> (Advisory Opinion), 1931 P.C.I.J. (ser. A/B) No.41.	4,10
<i>Fisheries Jurisdiction (United Kingdom v. Iceland)</i> (Merits), 1974 I.C.J. 3	17
<i>Guinea - Guinea-Bissau Maritime Delimitation Case</i> , 14 February 1985, 77 I.L.R. 635.	4
<i>INA Corporation v. The Government of the Islamic Republic of Iran</i> , Case No. 161, Award No. 184-161-1), 1985 Iran-U.S. Claims Tribunal 374 (12 August 1985).	16
<i>Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania</i> , (Advisory Opinion), 1950 I.C.J. 65.	5
<i>Island of Palmas case</i> , 2 Reports of International Arbitral Awards 829 (1928).	1,8
<i>Jafari v. Islamic Republic of Iran</i> , 72 I.L.R. 124, 131 (1982)	15
<i>James and Others</i> , 75 I.L.R. 396 (Eur. Ct. H.R. 1986).	20
<i>Kuwait v. American Independent Oil Company</i> , 21 I.L.M. 976 (1982).	22,23
<i>Libyan American Oil Company v. Islamic Republic of Libya</i> , 20 I.L.M. 1 (1981)	20
<i>Lithgow and Others</i> , 75 I.L.R. 439 (Eur. Ct. H.R. 1986)	18,21
<i>Nationality Decrees Issued in Tunis and Morocco</i> , (Advisory Opinion), 1923 P.C.I.J. (ser. B) No. 4	11
<i>Nottebohm (Liechtenstein v. Guatemala)</i> , 1955 I.C.J. 4	11
<i>Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)</i> , 1939 P.C.I.J. (ser A/B) No. 76.	12
<i>Rasmussen Case</i> , 81 I.L.R. 59 (Eur. Ct. H.R. 1984)	21
<i>Reparation for Injuries Suffered in the Service of the United Nations</i> , (Advisory Opinion), 1949 I.C.J. 174	4

<i>Roberts Claim, American-Mexican Claims Commission: AD, 3 (1925-26)</i>	20
<i>Syrian State Concession (Haifa Leases) Case, 3 Ann. Dig. 92 (1925)</i>	14
<i>Territorial Jurisdiction of the International Commission of the River Oder, 1929 P.C.I.J. (ser. A) No. 23</i>	8
<i>Texas Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic, (International Arbitration, Award on the Merits), 17 I.L.M. 1 (1978)</i>	15,17,22
<i>Western Sahara, (Advisory Opinion), 1975 I.C.J. 12</i>	10
<i>Youngstown Tube and Steel Co. v. Sawyer, 343 U.S. 579 (1952)</i>	11

Treatises and Digests

Bokor-Szego, Hanna, <i>New States and International Law (1970)</i>	7,10
Brierly, J.L., <i>The Law of Nations (1963)</i>	1
Brownlie, Ian, <i>Principles of International Law (1990)</i>	1,5,11,13,15
de Bustamante, Antonio, <i>The World Court (1925)</i>	11
de Lupis, I., <i>Finance and Protection of Investments in Developing Countries (2d Ed. 1987)</i>	19,20
De Muralt, W.G., <i>The Problem of State Succession with Regard to Treaties (1954)</i>	8
Fawcett, <i>The Application of the European Convention on Human Rights (2d ed. 1987)</i>	21
Hackworth, Green, <i>Digest of International Law (1943)</i>	6,18
Higgins, R., <i>The Development of International Law through the Political Organizations of the United Nations (1963)</i>	1
Jennings, Robert, and Watts, Arthur, <i>Oppenheim's International Law (1992)</i>	1,2,5,6,8,15,17,19
Marek, Krystyna, <i>Identity and Continuity of States in Public International Law (1954)</i>	1
McNair, Arnold, <i>The Law of Treaties (1961)</i>	1,6,8

Menon, P.K., <i>The Succession of States in Respect to Treaties, State Property, Archives and Debts</i> (1991).	1,8
Mosler, Hermann, <i>Wirtschaftskonzessionen bei Änderungen der Statshoheit</i> (1948).	13
O'Connell, D.P., <i>State Succession in Municipal Law and International Law</i> (1967)	2,5,6,7,12,13,14
O'Connell, D.P., <i>The Law of State Succession</i> (1956).	6,11
Oppenheim, <i>International Law</i> (H. Lauterpacht, ed., 8th ed. 1955)	2
Rousseau, Ch., <i>Droit International Public</i> (1974).	1
Seidl-Hohenveldern, Ignaz, <i>Corporations in and under International Law</i> (1987)	12
Sornarajah, M., <i>The Pursuit of Nationalized Property</i> (1986)	16,17,18,19,20,22,23
Udokang, Ukon, <i>Succession of States to International Treaties</i> (1972)	9
Umozurike, Umozurike Oji, <i>Self-Determination in International Law</i> (1972)	3,23,24
Verzijl, J.H.W., <i>2 International Law in Historical Perspective</i> (1965)	1
White, G., <i>Nationalisation of Foreign Property</i> (1961)	17
Wilkinson, Herbert, <i>The American Doctrine of State Succession</i> (1934).	6
Zemanek, Karl, <i>State Succession after Decolonization</i> (1970)	7

Essays, Journals, and Periodicals

Asante, Samuel K.B., <i>International Law and Foreign Investment: A Reappraisal</i> , 37 Int'l. & Comp. L. Q. 588 (1988).	20,21,22
Baty, Thomas, <i>The Obligations of Extinct States</i> , 35 Yale L. J. 434 (1925).	13
Brierly, J.L., <i>Regles Generales du Droit de la Paix</i> , 58 Recueil des Cours 1 (1936 IV)	14
Bring, O. E., <i>The Impact of Developing States on</i>	

<i>International Customary Law concerning Protection of Foreign Property</i> , 24 <i>Scandinavian Studies on Law</i> 97 (1980)	18,19,21,22
Castren, Erik, <i>Obligations of States Arising from the Dismemberment of Another State</i> , 13 <i>Zeitschrift fur Auslandsches Offentliches Recht und Volkerrecht</i> 753 (1951)	8,9,14
Chaumont, Charles, <i>Cours General de Droit International Public</i> , 129 <i>Recueil des Cours</i> 333 (1970 III)	10
Crawford, James, <i>The Criteria for Statehood in International Law</i> , 48 <i>B.Y.I.L.</i> 93 (1978)	2
de Arechaga, Eduardo Jiminez <i>State Responsibility for the Nationalization of Foreign Owned Property</i> , 11 <i>N.Y.U. J. Int'l. L. & Pol.</i> 179 (1978)	23,24
Domke, M., <i>Foreign Nationalizations</i> , 55 <i>Am. J. Int'l. L.</i> 585 (1961)	18
Elias, T.O., <i>The Berlin Treaty and the River Niger Commission</i> , 57 <i>Am. J. Int'l. L.</i> 873 (1963)	9
Fatouros, A. A., <i>International Law and the Third World</i> , 50 <i>Va. L. Rev.</i> 783 (1964)	18,19,20,23
Guggenheim, Paul, <i>Les Principes de Droit International Public</i> , 80 <i>Recueil Des Cours</i> 83 (1952 I)	2
Herz, J.H., <i>Expropriation of Foreign Property</i> , 35 <i>Am. J. Int'l. L.</i> 243 (1941)	18
Huerta, John E., <i>Peruvian Nationalization and the Peruvian-American Compensation Agreements</i> , 10 <i>N.Y.U. J. Int'l. L. & Pol.</i> 1 (1977)	22
Johnston, D. M., <i>The Foundations of Justice in International Law in International Law and Policy of Human Welfare</i> 111 (R.St.J. MacDonald et al. eds., 1978)	19,20
Kaeckenbeeck, G., <i>The Protection of Vested Rights in International Law</i> , 17 <i>B.Y.I.L.</i> 1 (1936)	14
Lester, A.P., <i>State Succession to Treaties in the Commonwealth</i> , 12 <i>Int'l. & Comp. L. Q.</i> 475 (1963)	9
O'Connell, D. P., <i>Independence and the Law of State Succession</i> , in <i>The New Nations in International Law and Diplomacy</i> 7 (William O'Brien ed., 1965)	9

O'Connell, D.P., <i>Recent Problems of State Succession in Relation to New States</i> , 130 <i>Recueil des Cours</i> 95 (1970 II)	2,7
Rao, T.S. Rama, <i>Some Problems of International Law in India</i> , 6 <i>Indian Yearbook of International Affairs</i> 9 (1957)	3
Sacerdoti, Giorgio, <i>Barcelona Traction Revisited: Foreign-Owned and Controlled Companies in International Law in International Law at a Time of Perplexity</i> , 699 (Y. Dinstein, ed. 1989)	19
Schwarzenberger, George, <i>The Principles of International Economic Law</i> , 117 <i>Recueil des Cours</i> 1 (1966)	3
Udina, Manlio, <i>La Succession des Etats quant aux Obligations Internationales autre que les Dettes Publiques</i> , 44 <i>Recueil des Cours</i> 665 (1933 II)	1,14
Verbit, Gilbert, <i>State Succession in the New Nations</i> , <i>Proceedings</i> , A.S.I.L. 119 (1966)	6,9
<i>Yearbook of the International Law Commission</i> (1962 II)	7

Miscellaneous

British note of April 8, 1939, Command Paper 5758/38	18
<i>Declaration faite par le President de la Republique de Rwanda</i> , 4 September 1963	7
<i>Foreign Office Confidential Paper (6113)</i> , No. 5, 10 February 1890.	11
League of Nations Economic Committee, <i>Survey of International Affairs</i> (1937)	3
<i>Letter of the Guatemalan Permanent Mission to the United Nations</i> ,	2
<i>Note verbale du Ministere des Affaires etrangeres de la Republique Centrafricaine</i> , 25 October 1962.	7
<i>Note Verbale of the Israeli Permanent Mission to the United Nations</i> , 29 July 1963	6,14
Statement of Prime Minister of the Irish Free State, Eamon De Valera, <i>Parliamentary Debates, Dail Eireann</i> , 49 Off. Rep. cols. 2058-2059/1933	7
U.S. notes of July 21, 1938, and April 3, 1940	18

STATEMENT OF JURISDICTION

The Governments of the State of Frontera and the State of Bastonia have submitted the following matter by special agreement to the International Court of Justice pursuant to Article 36(1) of the Statute of the International Court of Justice. Article 36(1) 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

Empira colonized Frontera in the early 1700's. (Clarifications ["Cl."]) Until the Colonial Government fled to Empira (Compromis ["Com."] at 2), the Empiran parliament appointed Frontera's highest governmental officials (Cl.), including its Governor General. These officials were generally from among the Fronteran population. (Cl.) By the early 1900's Empira had granted the Colonial Government substantial autonomy (Com. at 1) and allowed it to conduct its own foreign policy. (Cl.) Frontera was admitted as an original member of the United Nations, although she remained an Empiran colony at the time. (Id.)

Frontera remains a relatively undeveloped country. (Com. at 1) Bastonia, by contrast, is a highly-developed nation with a strong industrial base. (Id.) In 1978, the International Pharmaceutical Company ("IPC"), a Bastonian multinational corporation, established PharmCo as a pharmaceutical manufacturing concern in Frontera. (Com. at 2) PharmCo was set up as a private corporation under Fronteran law, which provides that a corporation may not have majority foreign ownership. (Id.) Forty-nine percent of PharmCo was owned by IPC, and the remaining 51% was owned by individuals in Frontera. (Id.)

From 1978 to 1989, PharmCo's management was entirely comprised of Bastonian citizens living and working in Frontera, its board of directors held semi-annual meetings at PharmCo's headquarters in Frontera, and it paid Fronteran taxes. (Com. at 2) It benefitted

from no special government subsidies, leases or other arrangements available only to PharmCo. (Cl.)

IPC initially invested \$25 million in PharmCo's plant, machinery and packaging equipment. (Com. at 2) IPC also signed a 100-year lease with the Fronteran Minister of the Interior for the 1000-acre property on which PharmCo was to be located. (Id.) PharmCo's annual gross profits have averaged \$50 million, (Cl.) 60% of which went to IPC in Bastonia. (Com. at 2)

In 1980, the Bastonian Foreign Trade Minister and the Frontera's Colonial Governor-General signed a bilateral investment treaty ("Treaty"), which was ratified by both governments and entered into on January 1, 1981. (Com. at 1) The relevant provisions of the Treaty were:

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.

(Com. at 1)

In 1989, the People's Revolutionary Coalition, assisted by a portion of the Fronteran Government and led by the Fronteran Deputy Governor, Patrick Darwin, began a popular uprising in Frontera. (Com. at 2) Mr. Darwin was not appointed by the Empiran parliament. (Cl.) When the revolution was at its height in early 1990, the Colonial Government nationalized all manufacturing concerns, including PharmCo, for the stated purpose of putting down the revolution. (Com. at 2)

In late 1990, as Revolutionary forces were prepared to overrun the Fronteran capitol, the Colonial Government fled to Empira. (Id.) The Revolutionary Coalition subsequently gained control of all Fronteran territory and on January 1, 1991, and declared itself the Revolutionary People's Government ("RPG") of Frontera. (Id.) Composed largely of mid-level bureaucrats who formerly served the Colonial Government, (Id.) the RPG had by March 1991 been recognized by 50 nations, including Bastonia, and an RPG representative had been seated as Fronteran representative to the United Nations. (Com. at 3) When the new Fronteran Ambassador to Bastonia presented her credentials, she expressed Frontera's hope that the two countries' tradition of economic and political cooperation would continue. (Id.)

In June 1991, the new Fronteran Parliament passed General Law 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." (Id.) This legislative act was

"inapplicable to any treaty that Frontera has concluded." (Com. at 3) A few days later the new Fronteran Foreign Minister informed the United Nations that his government repudiated all acts of the Colonial Government which were inconsistent with the aims of the new government. (Id.)

The RPG restored ownership of all wholly Fronteran-owned companies nationalized by the Colonial Government during the revolution, but corporations, including PharmCo, which were partially owned by foreign nationals remained under the management of agencies of the new government. (Com. at 3; Cl.) No restitution or compensation was provided. (Com. at 3) In August 1991, through Fronteran administrative and judicial channels, IPC sought compensation for PharmCo's nationalization. (Com. at 1) Frontera's ultimate administrative and judicial organs held that IPC was afforded no private cause of action Under the Treaty and did not reach the merits of IPC's claim. (Com. at 3)

Having exhausted its remedies in Frontera, IPC raised the issue of compensation with the Bastonian Foreign Ministry, indicating the Treaty's guarantee provisions. (Id.) On February 10, 1992, Bastonia's Foreign Minister, by diplomatic note to Frontera, protested PharmCo's nationalization and requested compensation for IPC pursuant to the Articles 10, 12 and 13 of the Treaty. (Com. at 3-4) Frontera replied that it was not required to provide compensation because:

- 1) Nationalization of a domestic company, without compensation, was within its sovereign right;

- 2) The RPG was not accountable for the acts or obligations of the Colonial Government; and
- 3) Even under the Treaty, no compensation was required if the loss was occasioned by necessity during a revolt.

(Com. at 4)

After several months of negotiations without result, Bastonia sought to submit the dispute to this Court, and Frontera agreed. (Id.) The governments filed a compromis pursuant to Article 36(1) of the ICJ Statute on October 1, 1992. (Id.)

QUESTIONS PRESENTED

1. Whether Frontera acted in accordance with international law in nationalizing PharmCo;
2. Whether Frontera is responsible for any compensation to IPC for losses resulting from the nationalization of Pharmco.

SUMMARY OF PLEADINGS

In 1990, Frontera emerged from Empiran colonial status to become a sovereign independent State. For more than two hundred years, Frontera's affairs were dominated by Empira, whose parliament appointed the highest officials of the government which ruled over the territory of Frontera. Concomitant with its emergence as a sovereign subject of international law, the new independent State of Frontera now asserts its right to command its own economic, as well as political, destiny.

The new nation of Frontera disavows those treaties and concession agreements of the Colonial Government which do not accord with its goals and its economic and political sovereignty. Agreements made by Frontera's predecessor are *res inter alios acta*: matters which do not prejudice those who were not parties to them. Agreements concluded with foreign parties by the Empiran-appointed colonial officials in Frontera have no binding effect upon the new nation, unless fully empowered officials of the new Fronteran State have expressed their nation's consent to be bound.

As a result of the Fronteran popular uprising, the Colonial Government abandoned its Empiran-assigned duties and fled to its true Empiran homeland, clearly severing the ties between Empira and Frontera. The break between the former order and the new Fronteran nation was clear. In contrast to evolutionary transitions from colonial to independent status, Frontera experienced neither a

smooth transition to independence, nor did it enjoy the participation of its former ruler in the creation of the new State.

Neither treaties, leases, nor concessions entered into by Empira's colonial officials are binding on the new State of Frontera. There has been neither express consent to nor acquiescence in the continuation of the bilateral investment treaty, as required under the Vienna Convention on the Law of Treaties. Furthermore, nonconsensual accession to a predecessor's obligations is not supported by state practice. As a nascent international State, Frontera is a third party to such contracts and is not thereby bound. When a contracting party ceases to exist, as did the former Empiran Colonial Government, its contractual obligations vanish with it under the doctrine of *rebus sic stantibus*, a fundamental change of circumstances. The new Fronteran State is not a party to the investment treaty or IPC's lease of Fronteran State property.

To require a newly-formed nation to adhere to the contracts of its predecessor would violate to most fundamental principles of the U. N. Charter and of contemporary international law: the sovereign equality of nations and the self-determination of nations and peoples.

Should a nation engage in actions which deprive its own nationals of their economic rights, that nation has breached no international law. A foreign investor, such as IPC, in a Fronteran domestic corporation may claim no legal rights or recourse beyond those available to the corporation under its own domestic law. Nor

may an investor's nation assert the right to afford diplomatic protection to an investor whose risk in another nation has not proven fruitful.

The newly independent State of Frontera acknowledges that its decision not to restore ownership of PharmCo is tantamount to a nationalization. However, as an independent and sovereign State, Frontera has the right under both municipal and international law to nationalize its own domestic industries.

Pursuant to its rights of self-determination and economic independence, Frontera exercised its power to nationalize property within its sovereign territory. As a newly independent and developing State seeking to break the oppressive ties of colonial domination, Frontera has taken actions necessary to restore to the Fronteran people the economic life of their State. This goal of economic sovereignty is of paramount importance in international law, and outweighs Frontera's obligation to treat aliens in the same manner as it treats its own citizens. In observing minimum international standards, Frontera's treatment of IPC accorded with its obligations under international law.

Frontera does not deny its obligation under international law to provide appropriate compensation for the nationalization of PharmCo. The nationalizing State is to determine appropriate compensation on a case by case basis, carefully considering the pertinent circumstances of each case. Frontera has carefully considered the colonial situation under which IPC's initial investment was made and the extent to which IPC took excess

profits. Accordingly, Frontera has determined that the appropriate compensation now due to IPC for the nationalization of PharmCo is no compensation. Any compensation now paid to IPC would constitute additional unjust enrichment and would further deprive the Fronteran people of wealth which is rightfully theirs.

PLEADINGS AND AUTHORITIES

I. AS A NEWLY INDEPENDENT STATE, FRONTERA DID NOT SUCCEED TO THE BILATERAL INVESTMENT TREATY.

The traditional view in international law is that a new state is not bound by treaties entered into by its predecessor.¹

A. As a Newly Independent, Self-Governing State, Frontera Claims Economic as well as Political Sovereignty.

1. The present nation of Frontera is a newly independent, self-governing State.

Issues of state succession in international law address the very notion of what constitutes a state.² Independence, "the exclusive competence of the State in regard to its own territory",³ is the decisive criterion of statehood.⁴ A true state exists "when a people is settled in a territory under its own sovereign government,"⁵ acting as a "legal authority which is not in law

¹ P.K. Menon, *The Succession of States in Respect to Treaties, State Property, Archives and Debts* v (1991); J.L. Brierly, *The Law of Nations* 153 (1963); Ian Brownlie, *Principles of International Law* 601 (1990); Arnold McNair, *The Law of Treaties* 601 (1961).

² Manlio Udina, *La Succession des Etats quant aux Obligations Internationales autre que les Dettes Publiques*, 44 *Recueil des Cours* 665, 669 (1933 II).

³ *Island of Palmas* case, 2 *Reports of International Arbitral Awards* 829, 838 (1928)

⁴ 2 Ch. Rousseau, *Droit International Public* 68 et seq. (1974); Krystyna Marek, *Identity and Continuity of States in Public International Law* 161-190 (1954). See also R. Higgins, *The Development of International Law through the Political Organizations of the United Nations* 25-42 (1963); 2 J.H.W. Verzijl, *International Law in Historical Perspective* 455-90 (1965).

⁵ 1 Robert Jennings & Arthur Watts, *Oppenheim's International Law* 120 (1992) [hereinafter Jennings & Watts]. See also *Convention on Rights and Duties of States*, 26 December 1933, 165 L.N.T.S. 19, art. 1.

dependent on any other earthly authority."⁶ Prior to the revolution,⁷ Empira appointed Frontera's highest officials, who were thus accountable to Empira, not to the people of Frontera. This ultimate control over Fronteran affairs was wholly inconsistent with Fronteran independence.⁸ As long as Empira held this control, Frontera "could not be regarded as a sovereign State and a normal subject of International Law."⁹

The new state of Frontera was formed by a popular uprising which resulted in a clear break in legal continuity¹⁰ when the Colonial Government fled to Empira. The People's Revolutionary Coalition ultimately gained control of all Fronteran territory,¹¹ extending its own sovereignty over Frontera and displacing that of its predecessor.¹² With the establishment of the Revolutionary

⁶ 1 Jennings & Watts *supra* note 1, at 122; see also Paul Guggenheim, *Les Principes de Droit International Public*, 80 *Recueil des Cours* 1, 83-84, 96 (1952 I); *Letter of the Guatemalan Permanent Mission to the U.N.*, United Nations Legislative Series: Materials on Succession of States [hereinafter U.N. Succession Materials], U.N. Doc. St/Leg/Ser.B/14 at 33-34 (1967).

⁷ *Compromis* at 2.

⁸ James Crawford, *The Criteria for Statehood in International Law*, 48 *B.Y.I.L.* 93, 126 (1978).

⁹ Oppenheim, *International Law* 209 n.4 (H. Lauterpacht, ed., 8th ed. 1955)

¹⁰ See 2 D.P. O'Connell, *State Succession in Municipal Law and International Law* 88 (1967) [hereinafter O'Connell, *State Succession*].

¹¹ *Compromis* at 2.

¹² See D.P. O'Connell, *Recent Problems of State Succession in Relation to New States*, 130 *Recueil des Cours* 95, 113 (1970 II) [hereinafter O'Connell, *New States*].

People's Government (RPG), Frontera then became a sovereign and independent state, "a new international person."¹³ The RPG was subsequently recognized by 50 nations and was seated at the United Nations¹⁴ in acknowledgement of New Frontera's¹⁵ membership. This indicates that New Frontera was "formally admitted as such in conformity with the provisions of the Charter," in accordance with the rule enunciated by the Sixth Committee¹⁶

2. In conjunction with its political sovereignty, Frontera assumes its economic freedom.

Every country rightly seeks to protect its own economy.¹⁷ Without *de facto* economic independence, Frontera's *de jure* independence would be meaningless.¹⁸ Sovereignty must encompass the right to determine one's economic system, a right recognized in

¹³ T.S. Rama Rao, *Some Problems of International Law in India*, 6 Indian Yearbook of International Affairs 9 (1957). (describing the change in India's status upon achieving independence.)

¹⁴ Compromis at 3.

¹⁵ The terms "Colonial Frontera" and "New Frontera" will be used to distinguish pre-revolution Frontera from post-revolution Frontera.

¹⁶ *Letter from the Chairman of the Sixth Committee Addressed to the Chairman of the First Committee*, 11 October 1947, U.N. Doc. A/C.1/212. See also Charter of the United Nations, 1976 Y.B.U.N. 1043, art. 4 [hereinafter U.N. Charter].

¹⁷ See League of Nations Economic Committee, *Survey of International Affairs* 73 (1937).

¹⁸ See Georg Schwarzenberger, *The Principles of International Economic Law*, 117 *Recueil des Cours* 1, 31 (1966); Umozurike Oji Umozurike, *Self-Determination in International Law* 208 (1972).

international law.¹⁹ For this reason, New Frontera claims "the sole right of decision in all matters economic, political, financial or other."²⁰

B. Under the Vienna Convention on Succession of States to Treaties, Frontera is not Bound by the Treaty.

The Vienna Convention on Succession of States to Treaties,²¹ reflecting customary rules of international law,²² provides that a newly independent state is not bound to maintain in force any treaty applicable to its territory at the time of the new state's succession.²³ This convention recognizes that treaties are political obligations which "attach to the element of sovereignty

¹⁹ *Charter of Economic Rights and Duties of States*, 12 December 1974, U.N.G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. (No. 31) 50, U.N. Doc. A/9631 (1975) [hereinafter *Charter of Economic Rights*]; *Resolution on Permanent Sovereignty over Natural Resources*, 17 December 1973, U.N.G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. (No. 17) 15, U.N. Doc. A/5217 (1963) [hereinafter *Resolution on Permanent Sovereignty*]; *Declaration on the Establishment of a New International Economic Order*, 1 May, 1974, U.N.G.A. Res. 3201, U.N. GAOR, 6th Sess. (Special), Supp. (No. 1) 3, U.N. Doc. A/9559 (1974) [hereinafter *NIEO Declaration*].

²⁰ *Customs Regime between Germany and Austria* (Advisory Opinion), 1931 P.C.I.J. (Ser. A/B) No. 41, at 45 [hereinafter *Customs Regime*]; see also *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), 1949 I.C.J. 174, 180.

²¹ *Vienna Convention on Succession of States to Treaties*, 22 August 1978, U.N. Doc. A/Conf.80/31 [hereinafter *Convention on Treaty Succession*].

²² *Guinea - Guinea-Bissau Maritime Delimitation Case*, 14 February 1985, 77 I.L.R. 635, 637 (tribunal consisting of ICJ judges Lachs, Mbaya and Bedjaoui).

²³ *Convention on Treaty Succession*, supra note 21, art. 16; see also U.N. Succession Materials supra note 6.

and lapse with it."²⁴ In the case before the Court, the requirement of either express agreement between the parties that the Treaty remain in force, or conduct demonstrating their mutual intent to be bound²⁵ has not been met.

New Frontera is not bound by any treaty signed by the Colonial Governor-General, whose appointment by the Empiran parliament suggests that Bastonia might in fact realistically look to Empira for performance.²⁶ However, because Empira is not presently before the Court, this issue cannot be fully addressed, as it might involve a "question of fact which could not be elucidated without hearing both parties."²⁷

C. State Practice does not Support Universal Succession.

In neither revolutionary nor evolutionary secession does state practice support universal succession to treaties by new states.²⁸

1. In cases of revolutionary secession, the new state is unaffected by its predecessor's treaties, except those of a dispositive character.

Although it may be bound by, or entitled to accede to, treaties of a law-making, humanitarian or dispositive nature, a new

²⁴ 1 O'Connell, *State Succession*, supra note 10, at 11 (citing Gabba, *Successione di Stato a Stato in Quistioni di diritto civile* (1885)).

²⁵ See *Convention on Treaty Succession*, supra note 21, arts. 24, 28.

²⁶ See 1 O'Connell, *State Succession* supra note 10, at 44-45.

²⁷ *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion), 1950 I.C.J. 65, 72.

²⁸ 1 Jennings & Watts supra note 5 at 210; Brownlie, supra note 1 at 668.

state generally does not inherit its predecessor's treaties.²⁹ Neither the colonies which formed the United States nor the South American colonies which seceded from Spain considered themselves bound by their colonial sovereigns' treaties.³⁰ Similar examples are provided by Panama,³¹ Texas,³² Cuba,³³ Poland and Czechoslovakia,³⁴ and by Finland, Estonia, Latvia and Lithuania.³⁵ In those cases, as in the instant case, there was a revolutionary disruption of the legal order and no orderly transfer of power and authority.³⁶

2. New states considered bound by their predecessors' treaties have become so by means of devolution agreements or by provisional consent.

The majority of new States which have succeeded to their

²⁹ 2 O'Connell, *State Succession*, supra note 10 at 88; Gilbert Verbit, *State Succession in the New Nations*, Proceedings, A.S.I.L. 119 (1966); 1 Jennings & Watts, supra note 5, at 222.

³⁰ D.P. O'Connell, *The Law of State Succession* 34 (1956) [hereinafter O'Connell, *Succession Law*]; McNair, supra note 1, at 601.

³¹ 5 Green Hackworth, *Digest of International Law* 363 (1943).

³² *Id.* at 343.

³³ Herbert Wilkinson, *The American Doctrine of State Succession* 111 (1934).

³⁴ McNair, supra note 1, at 604.

³⁵ *Id.* at 605.

³⁶ See 1 O'Connell, *State Succession*, supra note 10, at 15 (citing, *inter alia*, Cavaglieri, *La dottrina della successione di stato a stato e il suo valore quiridico* (1910)). See also Note Verbale of the Israeli Permanent Mission to the United Nations, 29 July 1963, in U.N. Succession Materials, supra note 6, at 39.

former rulers' treaties have done so through devolution agreements,³⁷ although many expressly retained the right to denounce international agreements which do not comport with their new sovereignty.³⁸ Others have declared existing treaties to be provisionally applicable for limited periods of time.³⁹ These examples have been evolutionary transitions⁴⁰ involving grants of independence to colonial territories.⁴¹ In the instant case, there was neither grant of independence, nor devolution agreement, nor declaration of provisional applicability.

D. New Frontera did not Consent to be Bound by the Bilateral Investment Treaty.

A new State accepts its predecessor's treaties only "by express declaration or by conduct [for each individual treaty] as consideration of policy may require."⁴² This is particularly true

³⁷ Examples include Ceylon, 86 U.N.T.S. 25; Cyprus, 382 U.N.T.S. 8; Nigeria, 384 U.N.T.S. 207; Western Samoa, 476 U.N.T.S. 3. See also *Yearbook of the International Law Commission* 113-119 (1962 II); Karl Zemanek, *State Succession after Decolonization*, 116 *Recueil des Cours* 181, 214-15 (1965 III).

³⁸ See e.g., *Note verbale du Ministere des Affaires Etrangeres de la Republique Centrafricaine*, 25 October 1962; *Declaration faite par le President de la Republique de Rwanda*, 4 September 1963, U.N. Succession Materials, *supra* note 6 at 145-146.

³⁹ Tanganyika, Uganda, Kenya, Malawi, Botswana, Lesotho, and Burundi. Hanna Bokor-Szego, *New States and International Law* 96 (1970).

⁴⁰ See 2 O'Connell, *State Succession*, *supra* note 10, at 88.

⁴¹ See 1 O'Connell, *State Succession*, *supra* note 10, at 6.

⁴² Eamon De Valera, *Parliamentary Debates, Dail Eireann*, 49 *Off. Rep. cols.* 2058-2059/1933. See also *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, art. 34 [hereinafter *Vienna Law of Treaties*]; O'Connell, *New States*, *supra* note 13 at 110 (citing von Holtzendorff, II *Handbuch des*

of bilateral treaties, in which the relationship is more personal for each of the parties.⁴³ In the instant case, no official empowered to express the New Fronteran government's consent has done so.⁴⁴ Nor did the Fronteran ambassador to Bastonia present "letters patent signed by the Head of State"⁴⁵ evidencing such powers.

E. The Treaty is Inapplicable to Frontera under the Principle of *Pacta Tertiis Ne Nocent Nec Prosunt*

A treaty does not create rights or obligations for a third State without its consent.⁴⁶ The Treaty was signed by the Colonial Governor General, whose authority is that of the Empiran parliament.⁴⁷ The government of New Frontera derives its authority from the Fronteran people,⁴⁸ the investment treaty concluded by Colonial Frontera is *res inter alios acta*.⁴⁹

Volkerrechts 33 et seq. (1885-1889)).

⁴³ Menon, *supra* note 1, at 34.

⁴⁴ See Vienna Law of Treaties, *supra* note 42, art. 7.

⁴⁵ 1 Jennings & Watts, *supra* note 5, at 1063.

⁴⁶ Vienna Law of Treaties, *supra* note 42, art. 34; *Territorial Jurisdiction of the International Commission of the River Oder*, 1929 P.C.I.J. (ser. A) No. 23, at 19-22; *Island of Palmas Case*; W.G. De Muralt, *The Problem of State Succession with Regard to Treaties* 40 (1954); McNair, *supra* note 1, at 309.

⁴⁷ *Compromis* at 1.

⁴⁸ See 1 Jennings & Watts, *supra* note 5, at 122; *Compromis* at 2.

⁴⁹ Erik Castren, *Obligations of States Arising from the Dismemberment of Another State*, 13 *Zeitschrift fur Auslandsches Offentliches Recht und Volkerrecht* 753, 754 (1951).

F. The Treaty Terminates under the Principle of *Rebus Sic Stantibus*.

A treaty may be terminated due to a fundamental change of those circumstances which constitute an essential basis of the parties' consent to be bound, if that change radically transforms the obligations under the treaty.⁵⁰ The Treaty's "continued validity depends upon the continued existence of the contracting parties."⁵¹ It "presupposes the existence of a certain sovereign."⁵² Colonial Frontera, and its relationship to its Empiran sovereign, ceased to exist when Frontera became independent.⁵³

Succession to a treaty can only take place where succession is compatible with the parties' intentions,⁵⁴ intentions are "ordinarily frustrated by a change in sovereignty."⁵⁵ The parties must furthermore be able to discharge their treaty obligations in fulfillment of these intentions.⁵⁶ Because Frontera's economy is

⁵⁰ Vienna Law of Treaties, *supra* note 42, art. 62; see Verbit, *supra* note 30 at 119.

⁵¹ Okon Udokang, *Succession of States to International Treaties* 404 (1972).

⁵² Castren, *supra* note 49, at 753.

⁵³ See T.O. Elias, *The Berlin Treaty and the River Niger Commission*, 57 Am. J. Int'l. L. 873, 880 (1963).

⁵⁴ A.P. Lester, *State Succession to Treaties in the Commonwealth*, 12 Int'l. & Comp. L. Q. 475, 490 (1963).

⁵⁵ D.P. O'Connell, *Independence and the Law of State Succession*, in *The New Nations in International Law and Diplomacy* 7, 15 (William O'Brien, ed. 1965).

⁵⁶ Udokang, *supra* note 53, at 141.

relatively undeveloped,⁵⁷ the severance of her ties to Empira has radically transformed her intention as well as her ability to protect and compensate foreign investors.

G. Requiring New Frontera to be Bound by the Treaty Would Violate U.N. Principles and a *Jus Cogens* Norm of International Law.

There is a general presumption in international law against the limitation of sovereignty or independence.⁵⁸ To require New Frontera to be nonconsensually bound by this treaty would "threaten [her] economic independence"⁵⁹ in violation her sovereign equality⁶⁰ and in "conflict with [her] right of self-determination, a *jus cogens* norm of modern international law."⁶¹

⁵⁷ Compromis at 1.

⁵⁸ *The Case of the S.S. "Lotus"*, 1927 P.C.I.J. (ser. A) No. 9, at 18. See also Charles Chaumont, *Cours General de Droit International Public*, 129 Recueil des Cours 333, 384-387 (1970 III).

⁵⁹ *Customs Regime*, 1931 P.C.I.J. (ser. A/B) at 52 (sep. op. of Judge Anzilotti).

⁶⁰ U.N. Charter, *supra* note 16, art. 2(1).

⁶¹ Bokor-Szego, *supra* note 39, at 113. See also, *inter alia*, U.N. Charter, *supra* note 16, arts. 1(2), 2(1), 55, 73(b), 76; Vienna Law of Treaties, *supra* note 42, Preamble; *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960, U.N.G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. (No. 16) 66, U.N. Doc. A/4684 (1961); *Charter of Economic Rights*, *supra*; *Declaration on Principles of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, 24 October, 1970, U.N.G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. (No. 28) 121, U.N. Doc. A/8028 (1971) [hereinafter *Declaration on Friendly Relations*]; *Case Concerning Barcelona Traction Light and Power Company, Limited (Second Phase)* (Belgium v. Spain), 1970 I.C.J. 3, 304 [hereinafter *Barcelona Traction*] (sep. op. of J. Ammoun); *Western Sahara (Advisory Opinion)*, 1975 I.C.J. 12, 31-3.

II. IPC LACKS STANDING TO ASSERT A CLAIM AGAINST FRONTERA UNDER MUNICIPAL OR INTERNATIONAL LAW.

A. An Act that Infringes Only the Corporation's Rights does not Involve Responsibility towards the Shareholders.

IPC's rights as a PharmCo shareholder are rights vis-a-vis the corporate entity and do not connote any right to act on behalf of the corporation.⁶² PharmCo continues to exist and can pursue domestic administrative and judicial remedies on its own behalf.⁶³

B. A State is not Guilty of a Breach of International Law for Economic Injury Done to its own National.

Frontera's determination that PharmCo is a Fronteran national is a matter within its exclusive national competence.⁶⁴ PharmCo is incorporated and domiciled in Frontera, 51% Fronteran-owned, and subject to Fronteran taxes.⁶⁵ According to criteria enunciated by this Court,⁶⁶ PharmCo is a Fronteran national. Injury to the economic interests of a nation's own national is a domestic matter

⁶² *Case Concerning Elettronica Sicula SpA (United States v. Italy)*, 1989 I.C.J. 16, 85 (separate opinion of Judge Oda); *Barcelona Traction*, 1970 I.C.J. at 34-36, paras. 40-42, 46; Brownlie, *supra* note 1 at 491.

⁶³ *Barcelona Traction*, 1970 I.C.J. at 41, para.66. See, e.g., *Youngstown Tube and Steel Co. v. Sawyer*, 343 U.S. 579 (1952); see also F.O. Confidential Paper (6113), No. 5, 10 February 1890, in O'Connell, *Succession Law*, *supra* note 32, Appendix, no. 53.

⁶⁴ Antonio de Bustamante, *The World Court* 275 (1925); *Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion)*, 1923 P.C.I.J. (ser. B) No. 4, at 7.

⁶⁵ *Compromis* at 2.

⁶⁶ *Barcelona Traction*, 1970 I.C.J. at 42, paras. 70-71; *Nottebohm (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4, 22-23.

and not a breach of international law.⁶⁷

C. Under International Law, Bastonia Cannot Assert a Claim for IPC's Losses as a PharmCo Shareholder.

Diplomatic protection may be afforded only where injury is done to a state's own nationals.⁶⁸ The injury here is to PharmCo, a Fronteran corporation, and precedents do not support lifting the veil to allow diplomatic protection of the shareholders⁶⁹ unless recourse can "be had to treaty stipulations."⁷⁰ Because New Frontera is not a party to the treaty under which IPC has asserted its claim,⁷¹ Fronteran judicial and administrative organs recognized no private cause of action for IPC under that treaty.⁷² Nor does international law require a state to insure investments made therein by another state's nationals.⁷³ Although some new states have enacted provisions guaranteeing foreign investment, none have guaranteed investments made before independence.⁷⁴

The Court in *Barcelona Traction* mentioned the theory "that the

⁶⁷ *Barcelona Traction*, 1970 I.C.J. at 192 (sep. op. of Judge Jessup).

⁶⁸ *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, 1939 P.C.I.J. (ser. A/B) No. 76, at 16; *Barcelona Traction* 1970 I.C.J. at 33, para.36.

⁶⁹ *Barcelona Traction*, 1970 I.C.J. 3, *passim*; Ignaz Seidl-Hohenveldern, *Corporations in and under International Law* 7 (1987).

⁷⁰ *Barcelona Traction*, 1970 I.C.J. at 47, para. 90.

⁷¹ See *supra* part I.B-G .

⁷² *Compromis* at 3.

⁷³ *Barcelona Traction*, 1970 I.C.J. at 46, para. 87.

⁷⁴ 1 O'Connell, *State Succession*, *supra* note 10, at 280.

State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company."⁷⁵ The Court rejected this view; Judge Morelli considered it "wholly illogical" to say that a corporation's shareholders would be unable to benefit from the protections afforded the company under domestic law.⁷⁶

The Court was concerned that competing diplomatic claims "could create an atmosphere of confusion and insecurity in international economic relations . . . [especially where shares] are widely scattered and frequently change hands."⁷⁷ If one accepts these policy considerations, the theory is defeated.⁷⁸

III. NEW FRONTERA IS NOT BOUND BY COLONIAL FRONTERA'S LEASE OBLIGATIONS.

International law acknowledges neither the absolute inheritance of a predecessor state's obligations⁷⁹ nor the protection of private rights acquired in connection with political sovereignty,⁸⁰ if that sovereignty should subsequently be displaced. Continuation of those rights would restriction the

⁷⁵ *Barcelona Traction*, 1970 I.C.J. at 48, para. 92.

⁷⁶ *Id.* at 240-41 (sep. op. of Judge Morelli); see also separate opinions of Judges Padilla Nervo and Ammoun; Brownlie, *supra* note 1, at 493.

⁷⁷ *Id.* at 49, para. 96.

⁷⁸ Brownlie, *supra* note 1, at 493.

⁷⁹ 1 O'Connell, *State Succession*, *supra* note 10, at 238.

⁸⁰ Hermann Mosler, *Wirtschaftskonzessionen bei Änderungen der Statshoheit* 35 (1948); see also Thomas Baty, *The Obligations of Extinct States*, 35 Yale L. J. 434 (1925).

sovereignty of the new State⁸¹ and is not guaranteed by international law.⁸² Contracts such as leases become subject to the laws of the successor state,⁸³ which "should have the right . . . to decide which of them conforms to its own economic, social, and political policies"⁸⁴ in the exercise of its own independent rights.⁸⁵

IV. NEW FRONTERA'S NATIONALIZATION OF PHARMCO IS IN ACCORDANCE WITH INTERNATIONAL LAW.

New Frontera acknowledges that its decision not to restore ownership to PharmCo and other partially foreign-owned corporations, in effect, amounted to a decision to nationalize those corporations.

A. New Frontera has the Right to Nationalize PharmCo as a Matter of Domestic Law.

The right to nationalize domestic property is not a matter of international law but of the domestic law designating the relation

⁸¹ Udina, *supra* note 2, at 734.

⁸² J.L. Brierly, *Regles Generales du Droit de la Paix*, 58 *Recueil des Cours* 1, 65 (1936 IV).

⁸³ 1 O'Connell, *State Succession*, *supra* note 11 at 264; see *Syrian State Concession (Haifa Leases) Case*, 3 *Ann. Dig.* 92 (1925) (holding that, after the separation of Palestine from Syria, Syrian court could not retain jurisdiction over leases of Palestinian land); see also G. Kaeckenbeek, *The Protection of Vested Rights in International Law*; 17 *B.Y.I.L.* 1 (1936).

⁸⁴ 1 O'Connell, *State Succession*, *supra* note 10 at 299. See, e.g. *Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea*, 15 August 1962, 437 *U.N.T.S.* 273; *Note Verbale of the Israeli Permanent Mission to the U.N.*, para. 17, 29 July 1963 in *U.N. Succession Materials*, *supra* note 6, at 44.

⁸⁵ Castren, *supra* note 49, at 753.

between a state and its citizens.⁸⁶ New Frontera has the right to nationalize PharmCo, a domestic corporation,⁸⁷ pursuant to its own domestic law.⁸⁸

B. New Frontera's Nationalization of PharmCo is in Accordance with International Law.

1. The right of a State to nationalize is well established in international law.

The power to expropriation is recognized as a characteristic feature of the sovereignty of all States.⁸⁹ The practice of States and diplomatic precedents demonstrate the right of States to nationalize foreign property under customary international law.⁹⁰ Even treaties providing for "constant protection and security" to property "cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed."⁹¹

⁸⁶ *Jafari v. Islamic Republic of Iran*, 72 I.L.R. 124, 131 (1982); *Barcelona Traction*, *supra* note 67, at 192 (Separate Opinion of Justice Jessup); *Brownlie*, *supra* note 1, at 494; 1 Jennings & Watts, *supra* note 5, at 918. See also *Charter of Economic Rights*, *supra* note 19, art. 2(1).

⁸⁷ See *supra*, part II.B.

⁸⁸ See authorities in note 86, *supra*.

⁸⁹ *Texas Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, (International Arbitration, Award on the Merits), 17 I.L.M. 1, 22 para. 59, 60 (1978) [hereinafter TOPCO].

⁹⁰ *Id.* (citing the Joint Expert Commission report of 17 April 1942; United States Government note to Ministry of Foreign Affairs in Havana (1959) (recognizing the right to nationalize); French Government Memorandum of 9 March 1971 (recognizing the right of Algeria to nationalize)).

⁹¹ *Elettronica Siculo Case*, 1989 I.C.J. 16, 65.

2. New Frontera nationalized PharmCo pursuant to its right to self-determination and economic sovereignty.

As an independent state, New Frontera enjoys the rights of self-determination⁹² and economic sovereignty.⁹³ These rights are enunciated in the U.N. Charter⁹⁴ and in "fully probative"⁹⁵ U.N. General Assembly resolutions⁹⁶ adopted to "encourag[e] the progressive development of international law and its codification."⁹⁷ Among these resolutions are those establishing a New International Economic Order⁹⁸ (NIEO), adopted by the U.N. General Assembly by consensus votes.⁹⁹

⁹² U.N. Charter, *supra* note 16, art. 1(2); *Declaration on Friendly Relations*, *supra* note 61.

⁹³ *Charter of Economic Rights*, *supra* note 19, arts. 1, 2(1), 7, and 32.

⁹⁴ U.N. Charter, *supra* note 16, art. 1(2), 2(1).

⁹⁵ *INA Corporation v. The Government of the Islamic Republic of Iran* (Case No. 161, Award No. 184-161-1), 1985 Iran-U.S. Claims Tribunal 374, at 408 (12 August 1985) (quoting J. Castaneda, *Legal Effects of United Nations Resolutions* 172).

⁹⁶ *Declaration on Friendly Relations*, *supra* note 61, at 121; *accord Declaration on the Inadmissibility of Intervention in the Domestic Affairs of the States and the Protection of Their Independence and Sovereignty*, 24 October 1970, U.N.G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1966); see also *Resolution on Permanent Sovereignty*, *supra* note 19, Preamble.

⁹⁷ U.N. Charter, *supra* note 16, art. 13, para. 1(a).

⁹⁸ *NIEO Declaration*, *supra* note 19; *Programme of Action on the Establishment of a New International Economic Order*, 1 May 1974, U.N.G.A. Res. 3202, U.N. GAOR, 6th Sess. (Special), Supp. (No.1) 5, U.N. Doc. A/9559 (1975).

⁹⁹ M. Sornarajah, *The Pursuit of Nationalized Property* 14 (1986).

The NIEO is founded, *inter alia*, on the principles of "sovereign equality of States, self-determination of all peoples, . . . non-interference in the internal affairs of other States" and "full permanent sovereignty of every State over its natural resources and all economic activities."¹⁰⁰ These principles were further articulated by the Charter of Economic Rights,¹⁰¹ adopted by "a large majority of states with the intention of creating a new binding rule of law."¹⁰²

Nationalization of property is regarded as the expression of State's territorial sovereignty.¹⁰³ By nationalizing PharmCo and other manufacturing interests, New Frontera exercised sovereignty over its resources and economic activities.¹⁰⁴

3. New Frontera's nationalization of PharmCo comported with international law.

Nationalization of foreign property accords with international law when it is non-discriminatory,¹⁰⁵ for a public purpose,¹⁰⁶ and

¹⁰⁰ *NIEO Declaration*, *supra* note 19, at declaration 4(a), (e).

¹⁰¹ *Supra* note 19. See also *Declaration on Friendly Relations*, *supra* note 61.

¹⁰² *Fisheries Jurisdiction* (United Kingdom v. Iceland) (Merits), 1974 I.C.J. 3, 163 (Judge Petren). The *Charter of Economic Rights* was adopted with a vote of 120 votes for, 6 against, and 10 abstentions. Sornarajah, *supra* note 99, at 16.

¹⁰³ *TOPCO*, 17 I.L.M. at 22, para. 59.

¹⁰⁴ *Id.*; *Charter of Economic Rights*, *supra* note 19, art. 2(2)(c); *Resolution on Permanent Sovereignty*, *supra* note 19. See 1 Jennings & Watts, *supra* note 5, at 918-19.

¹⁰⁵ G. White, *Nationalisation of Foreign Property* 144 (1961).

accompanied by compensation.¹⁰⁷ However, the economic and social exigencies of a newly independent and developing State necessitate relaxation of these principles.¹⁰⁸

"The determination made by the state that its act of nationalization had a public purpose should be regarded as conclusive."¹⁰⁹ States are given a "wide margin of appreciation"¹¹⁰ in assessing the public interest. New Frontera's nationalization of PharmCo facilitated its economic reorganization, enacted for the public purpose of achieving economic independence¹¹¹ and in accordance with New Frontera's "sovereign and inalienable right to choose its economic system".¹¹²

The principle of non-discrimination is not absolute in

¹⁰⁶ See British note of April 8, 1938, Command Paper 5758/38, p.11; U.S. notes of July 21, 1938, and April 3, 1940, 3 Hackworth, *supra* note 31, at 657, 662 (1942).

¹⁰⁷ *Charter of Economic Rights*, *supra* note 19, art. 2(2)(c). The issue of compensation will be discussed in part V, *infra*.

¹⁰⁸ See A. A. Fatouros, *International Law and the Third World*, 50 Va. L. Rev. 783, 812-13 (1964); Sornarajah, *supra* note 99, at 13-15, 174-76, 183-87.

¹⁰⁹ Sornarajah, *supra* note 99, at 175; J.H. Herz, *Expropriation of Foreign Property*, 35 Am. J. Int'l. L. 243, 251-52 (1941); O.E. Bring, *The Impact of Developing States on International Customary Law concerning Protection of Foreign Property*, 24 Scandinavian Studies on Law 97, 107 (1980); M. Domke, *Foreign Nationalizations*, 55 Am. J. Int'l. L. 585, 598 (1961).

¹¹⁰ *Lithgow and Others*, 75 I.L.R. 439, 486-87 (Eur. Ct. H.R. 1986).

¹¹¹ See *supra* part I.A.2.

¹¹² *Charter of Economic Rights*, *supra* note 19, art. 1.

international law.¹¹³ The 1976 Organization for Economic Cooperation and Development (OECD) Declaration on International Investment and Multinational Enterprises¹¹⁴ does not recognize a rule of international law requiring that domestic corporations controlled by foreign investors be afforded the same treatment in all instances as domestically controlled corporations.¹¹⁵ "A strict prohibition against discrimination may conflict with reasons of public utility, security or the national interest[.]"¹¹⁶ When such a conflict occurs, the demands of state sovereignty¹¹⁷ are of "paramount importance and . . . outweigh the necessity of non-discrimination."¹¹⁸

Actions taken against a specific group or groups of aliens, motivated by the undoing of past injustices¹¹⁹ have been suggested

¹¹³ Sornarajah, *supra* note 99, at 185.

¹¹⁴ OECD, *The Guidelines for Multinational Enterprises* 9 (1986), reprinted in 15 I.L.M. 967 (1976).

¹¹⁵ *Id.*, declaration II(1). See Giorgio Sacerdoti, *Barcelona Traction Revisited: Foreign-Owned and Controlled Companies in International Law in International Law at a Time of Perplexity*, 699, 708 (Y. Dinstein, ed. 1989).

¹¹⁶ Bring, *supra* note 109, at 129; see *Resolution on Permanent Sovereignty*, *supra* note 19, declaration 4.

¹¹⁷ Bring, *supra* note 109, at 129.

¹¹⁸ I. de Lupis, *Finance and Protection of Investments in Developing Countries* 71 (2d ed. 1987). See also A.A. Fatouros, *supra* note 108, at 812-13; Bring, *supra* note 109, at 129; 1 Jennings & Watts, *supra* note 5, at 933.

¹¹⁹ D.M. Johnston, *The Foundations of Justice in International Law in International Law and Policy of Human Welfare* 111, 116 (R.St.J. MacDonald et al., eds. 1978); Sornarajah, *supra* note 99, at 25, 185.

in international law.¹²⁰ This notion is similar to the well-established idea of reverse discrimination in domestic law.¹²¹

[A] nationalization measure directed at a dominant alien group, particularly one holding dominance from colonial times, is a measure justifiable as reverse discrimination in that it restores the other groups into the economic life of the State by ending the dominance of the alien groups.¹²²

In nationalizing PharmCo, New Frontera sought restore to the Fronteran people the economic life of their State. New Frontera's economic independence¹²³ is of "paramount importance"¹²⁴ and outweighs the necessity of non-discrimination.

New Frontera acted in accordance with international law when nationalizing PharmCo by observing minimum international standards,¹²⁵ maintaining reasonable "proportionality between the means employed and the aim sought to be realised".¹²⁶

¹²⁰ See *Libyan American Oil Company v. Islamic Republic of Libya*, 20 I.L.M. 1 (1981); Sornarajah, *supra* note 99, at 185; de Lupis, *supra* note 118, at 71.

¹²¹ D.M. Johnston, *supra* note 119, at 116; Sornarajah, *supra* note 99, at 25, 185.

¹²² Sornarajah, *supra* note 99, at 185; see also Fatouros, *supra* note 108, at 812.

¹²³ *Charter of Economic Rights*, *supra* note 19, art. 1.

¹²⁴ de Lupis, *supra* note 118, at 71.

¹²⁵ See *Robert's Claim* before the American-Mexican Claims Commission: AD, 3(1925-26), No. 166; Samuel K.B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 Int'l. & Comp. L. Q. 588, 590 (1988).

¹²⁶ *James and Others*, 75 I.L.R. 396, 429-30 (Eur. Ct. H.R. 1986). See also *Case Concerning Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, 45 I.L.R. 114, 164-65 (Eur. Ct. H.R. 1968); *Rasmussen Case*, 81 I.L.R. 59, 69-71 (Eur. Ct. H.R. 1984); *Lithgow and Others*, 75 I.L.R. 438, 500-501, 525-6, 542-

V. NEW FRONTERA INCURS NO OBLIGATION TO PROVIDE COMPENSATION FOR THE NATIONALIZATION OF PHARMCO.

A. International Law Requires Appropriate Compensation for the Nationalization of Foreign Property.

The Charter of Economic Rights¹²⁷ provides that in the case of a nationalization of foreign property, "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."¹²⁸ Any controversy over the amount of compensation to be paid is to be resolved "under the domestic law of the nationalizing State and by its tribunals" unless the parties agree otherwise.¹²⁹

Diplomatic precedents support the national standard of appropriate compensation.¹³⁰ State practice further demonstrates that there is no international standard of compensation.¹³¹ A study by O.E. Bring of thirty nationalization compensation settlements found that state practice supported only the

7 (Eur. Ct. H.R. 1986); Fawcett, *The Application of the European Convention on Human Rights* 294-306 (2d ed. 1987).

¹²⁷ *Charter of Economic Rights*, *supra* note 19, art. 2(2)(c).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *The Economic Declaration of the Algiers Conference on Non-Aligned Countries* (September, 1973); *The Andean Investment Code*, art. 51; *Asian-African Legal Consultative Committee's Draft Convention on Principles concerning Admission and Treatment of Aliens*, art. 12, Report of Fourth Session 49 (1961); UNCTAD Trade and Development Board Resolution 88 (XII), 11 I.L.M. 1474 (1972). See generally Asante, *supra* note 125, at 596-97.

¹³¹ Bring, *supra* note 109, at 130; Asante, *supra* note 125, at 605.

requirement of "effective" compensation¹³² and that "no generally recognized international standard or formula with regard to the quantum of compensation can be inferred from State practice."¹³³ The Peruvian-American compensation agreements were reached not as a result of applying an international standard but as a result of the threat of economic sanctions.¹³⁴

The Court in *Barcelona Traction*¹³⁵ stated that lump sum agreements, which make up a large percentage of international claims practice,¹³⁶ could not be regarded as sources of international law because the "terms have varied from case to case".¹³⁷ The Arbitration Tribunal in *Kuwait v. American Independent Oil Company*¹³⁸ ("Aminoil") held that the standard of compensation was "appropriate compensation", considering all pertinent circumstances.¹³⁹

New Frontera thus incurs responsibility to provide "appropriate compensation", considering New Fronteran laws and

¹³² Bring, *supra* note 109, at 129-30; Asante, *supra* note 125, at 605.

¹³³ Asante, *supra* note 125, at 605.

¹³⁴ John E. Huerta, *Peruvian Nationalization and the Peruvian-American Compensation Agreements*, 10 N.Y.U. J. Int'l. L. & Pol. 1, 46-47 (1977).

¹³⁵ 1970 I.C.J. 3.

¹³⁶ Sornarajah, *supra* note 99, at 214-15.

¹³⁷ *Barcelona Traction*, 1970 I.C.J. at 39, para. 61.

¹³⁸ 21 I.L.M. 976 (1982).

¹³⁹ *Id.* at 1033, para. 144.

regulations and all other pertinent factors.¹⁴⁰ Pertinent factors include: the amount of the initial investment in the enterprise, the extent of undue enrichment as a result of a colonial situation, the extent of excessive profits taken by the foreign national, and the contribution of the enterprise to the development of the country.¹⁴¹ Determining the amount of appropriate compensation using these factors takes into consideration the complex circumstances of each case.¹⁴²

B. The Amount of Compensation Due would be Offset by the Extent to which the Original Foreign Investment has been Recovered.

State practice indicates that the amount of excess profits taken by a foreign investor may be used to offset the amount of compensation due for the nationalization of the foreign-owned property.¹⁴³ This principle is further supported by a U.N. General Assembly resolution urging member nations "[t]o pursue policies designed to ensure to the developing countries an

¹⁴⁰ *Charter of Economic Rights*, supra note 19, art. 2(2)(c); *Aminoil*, 21 I.L.M. at 1033, para 144; *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981).

¹⁴¹ Eduardo Jimenez de Arechaga, *State Responsibility for the Nationalization of Foreign Owned Property*, 11 N.Y.U. J. Int'l. L. & Pol. 179, 185 (1978); see Fatouros, supra note 108, 814; Umozurike, supra note 18, at 209.

¹⁴² de Arechaga, supra note 141, at 185; see *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d at 892-93, 893 n.22.

¹⁴³ See *The Chilean Copper Tribunal*, 11 I.L.M. 1013 (1972) (nationalization of Kennecott Copper Corporation); OPEC Res. XVI 90, reprinted in 11 Middle East Econ. Survey (26 July 1968). See also *Aminoil*, 1982 I.L.M. at 1033 (implies that excess profits could be counterclaimed by nationalizing state); Sornarajah, supra note 99, at 218.

equitable share of earnings from the extraction and marketing of their natural resources by foreign capital in accordance with the generally accepted reasonable earnings on invested capital."¹⁴⁴

IPC's original investment of twenty-five million dollars¹⁴⁵ has been recovered many times over since IPC established PharmCo in 1978. From an initial investment of twenty-five million dollars, IPC took a total gross profit of 360 million dollars between 1978 and 1990, amounting to more than a fourteen-fold return on its investment.

C. Due to the Extent of IPC's Undue Enrichment from its Excess Profits, New Frontera is Not Obligated to pay Compensation for the Nationalization of PharmCo.

IPC's excessive profits indicate that if either domestic or international law requires New Frontera to compensate IPC for the nationalization of PharmCo, the appropriate compensation would be no compensation.¹⁴⁶ Any compensation paid to IPC would result in further unjust enrichment of IPC and further deprivation of the wealth which rightly belongs the people of New Frontera.¹⁴⁷

¹⁴⁴ U.N.G.A. Res. 1710, U.N. GAOR, 16th Sess., Supp. 17, at 17, U.N. Doc. A/5100 (1962).

¹⁴⁵ *Compromis* at 2.

¹⁴⁶ See de Arechaga, *supra* note 141, at 185.

¹⁴⁷ *Charter of Economic Rights*, *supra* note 19, art. 2(1); Umozurike, *supra* note 18, at 209-10.

CONCLUSION AND PRAYER FOR RELIEF

1. Whereas Frontera, as a newly independent state, does not succeed to its predecessor's obligations;

2. Whereas the right to nationalize property is recognized in international law; and

3. Whereas the amount of compensation is to be determined by the specific circumstances of each instance of nationalization;

Frontera submits to the Court that it is entitled to a declaration and judgment that:

- (a) Frontera acted in accordance with international law in nationalizing PharmCo; and
- (b) Frontera is not responsible for compensation to IPC for losses resulting from the nationalization of PharmCo.

Respectfully submitted,

Agents for Frontera