The Philip C. Jessup International Law Moot Court Competition

1993 PART I

BASTONIA

v.

FRONTERA

Case concerning
The Nationalization of Certain Properties

BEST OVERALL MEMORIAL - RESPONDENT

Best Overall Memorial - Respondent
(Richard R. Baxter Award - Respondent)

Dr. Ambedkar Government Law College
India

team #484 r

IN THE
INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE,
THE HAGUE, NETHERLANDS

BASTONIA
APPLICANT

FRONTERA
RESPONDENT

1993

ON SUBMISSION TO THE
INTERNATIONAL COURT OF JUSTICE

MEMORIAL FOR THE RESPONDENT

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LIST OF ABBREVIATIONS

AM. J. INT'L L.	American Journal of International Law.
AM. SOC. INT'L L. PROC.	Proceedings of the American Society of International Law.
A.D.	Annual Digest of Public International Law Cases (Lauterpacht. ed.) 1919-46.
Art.	Article
BR. YR BK INT'L L.	British Yearbook of International Law
BROOKLYN J. INT'L L.	Brooklyn Journal of International Law
CAL. W. INT'L L.J.	California Western International Law Journal
CASE W. RES. J. INT'L L.	Case Western Reserve Journal of International Law
COLUM. J. TRANSNAT'L L.	Columbia Journal of Transnational Law
Ch.	Chapter
Doc.	Document
ed (éd.)	edition (édition)
et seq.	et sequitur
FORD INT'L L.J.	Fordham International Law Journal
GAOR	General Assembly Official Records
GA Res.	General Assembly Resolution
GA. J. INT'L & COMP. L.	Georgia Journal of International and Comparative Law
HAG. REC.	Recueil des Cours de l'Academic de droit International
ICJ Rep	Reports of Judgements, Advisory Opinions and Orders of the International Court of Justice
I.L.M.	International Legal Materials
I.L.R.	International Law Reports
IMS	International Minimum Standard
INT'L & COMP L.Q.	International and Comparative Law Quarterly
INT'L LAW.	International Lawyer
J. WORLD TRADE L.	Journal of World Trade Law
NETH. YR BK INT'L L.	Netherlands Year Book of International Law
N.Y.U. J. INT'L L. & POL.	New York University Journal of International Law and Politics.
PCIJ	Permanent Court of International Justice, Reports. Series A: Judgements and Orders (1922-30). Series A/B : Advisory Opinions, Judgements and Orders (1931-40). Series B: Advisory Opinions (1922-30).
R.I.A.A	United Nations, Reports of International Arbitral Awards.
SYR. J. INT'L L. & COM.	Syracuse Journal of International Law and Commerce.
VA. J. INT'L L.	Virginia Journal of International Law
VAND. J. TRANSNAT'L L.	Vanderbilt Journal of Transnational Law

FORM OF CITATION: The Bluebook, A Uniform System of Citation, 15th Edition (1991).

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JURISDICTION OF THE COURT

The Applicant Bastonia and the Respondent Frontera submit their dispute to the Court by agreement, in pursuance of Art.36(1) of the Statute of the International Court of Justice, which grants Jurisdiction to the Court to decide any legal or factual questions presented before it for adjudication. Accordingly, the Court has jurisdiction to decide any question submitted by the parties before it.

QUESTIONS PRESENTED

I. Whether Bastonia's claim is premature due to the Non-exhaustion of Local Remedies.

Whether Frontera acted in accordance with International Law in Nationalizing Pharmco?

a) Whether Pharmco is a domestic corporation?

b) Whether the principle of non-retroactivity applies to the B.I.T?

c) Whether the Nationalization of Pharmco is violative of the B.I.T?

II. Whether the current Fronteran Government (R.P.G) is liable for losses to the Investment of IPC?

a) Whether the R.P.G. is bound by the Bilateral Investment Treaty?

b) Whether the R.P.G. has inherited the obligations of the previous Colonial Government?

STATEMENT OF FACTS

I

Bastonia, a highly developed nation with a strong Industrial base and Frontera, an Empiran Colony from early 1700's to 1990, with substantial autonomy from the 1900's, signed a Bilateral investment treaty ("Treaty") in 1980 which entered into force on Jan. 1, 1981. The Treaty provided in relevant part, that:

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

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

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

Art 14) Not withstanding any other provision herein a State Party shall not be required to provide compensation under Art 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. (Compromis at 1)

II

In 1978 International Pharmaceutical Company (IPC) a MNC incorporated in Bastonia established in Frontera a pharmaceutical manufacturing operation 'Pharmco' 49% of which was owned by IPC and 51% owned by individuals in Frontera with an initial investment of 25 million. A 100 year lease for a 1,000 acre property was also signed. Pharmco was managed by Bastonia citizens living and working in Frontera and 60% of its enormous annual profits of $50 million were repatriated to IPC in Bastonia. Pharmco paid taxes in Frontera and held its Board of Director's meeting there.

In 1989 the People's Revolutionary Coalition, began a popular uprising in Frontera and in early 1990 the Fronteran Government nationalized all manufacturing concerns including Pharmco for the stated purpose of putting down the revolution. In late 1990 the government fled to Empira and on 1 Jan. 1991, the Revolutionary people's Government (RPG) of Frontera comprised primarily of former mid-level bureaucrats of the colonial government took over.

III

By March 1991 RPG was seated at the U.N. and had been recognized by over 50 nations. In June 1991 RPG by General Law No.1991/007 repudiated all laws enacted by the former colonial government which were inconsistent with RPG's goals. However treaties concluded by the former government were not repudiated. Later RPG repudiated all acts of the former colonial government which were inconsistent with RPG's aims.

Although RPG restored ownership for companies that were 100% owned by Fronteran nationals, no restitution or compensation was provided for any company partially owned by foreign nationals.

IV

While IPC had exhausted all local remedies, the judicial and administrative organs of Frontera did not go into the merits of IPC's claim as the Treaty did not provide a private cause of action for IPC. The Bastonia foreign minister sent a diplomatic note of protest to Frontera and requested immediate compensation for IPC pursuant to Arts 10,12 & 13.

Frontera responded that it was not required to provide compensation as nationalizing a domestic company is within the Sovereign right of any State and they were not liable for any obligation undertaken or acts committed, by the former Colonial Government and even if the terms of the treaty are binding on the RPG Art 14 provides for an act of necessity.

After negotiating for several months without result the government of Bastonia and Frontera on Oct. 1, 1992 field a compromis pursuant to Art.36(1) of the Statute of the ICJ and submitted their dispute before this Hon'ble Court.

TREATIES AND CONVENTIONS TO WHICH THE STATES ARE PARTIES

U.N.Charter	Signed	Ratified
Statute of ICJ	Signed	Ratified
Vienna Convention on Law of Treaties	Signed	Ratified
Bilateral Investment Treaty	Signed	Ratified

CHRONOLOGICAL ORDER OF EVENTS

1978	:	Frontera is a Colony of Empira. The International Pharmaceutical Company (IPC) a multinational company incorporated in Bastonia, establishes 'Pharmco' as a Fronteran Corporation.
1980	:	The Foreign Trade Minister of Bastonia and the Governor General of Frontera sign a Bilateral Investment Treaty.
1980	:	The Governments of Bastonia and Frontera ratify the Treaty.
1981 Jan. 1	:	The Bilateral Treaty enters into force, by its terms.
1978-1989	:	The company 'Pharmco' carries on business, under the management of Bastonian citizens, paying taxes in Frontera.
1989	:	The People's Revolutionary Coalition begins a popular uprising in Frontera.
Early 1990	:	The Fronteran Government nationalizes all manufacturing concerns, including Pharmco, for the stated purpose of putting down the revolution.
Late 1990	:	The Revolutionary forces over run Frontera. The Colonial Government flees to Empira.
1991, Jan.1	:	The Revolutionary People's government of Frontera (RPG) declares itself in control over Fronteran territory.
1991, March	:	The RPG Government is recognized by 50 nations, including the Government of Bastonia. An RPG representative is seated at the United Nations as Frontera's official representative. The Fronteran Ambassador expresses her Government's hope of continued political and economic cooperation with Bastonia.
1991, June	:	General Law No.1991/007 is passed by the new Fronteran Parliament.
1991	:	The RPG Government denationalizes companies 100% owned by Fronteran nationals.
1991, Aug.	:	The IPC, seeks compensation for Pharmco's nationalization in Fronteran Courts.
1992, Feb.10	:	Bastonia requests compensation for IPC's loss.

SUMMARY OF ARGUMENTS

Bastonia's claim is pre-mature as the International Pharmaceutical Company ('IPC') has not exhausted all its local remedies in Frontera. IPC is required to have submitted its claim under Fronteran Municipal Law. Pharmco satisfies the 'Test of Nationality' laid down in numerous cases and is a domestic corporation and the nationalization of a domestic company (even without compensation) is always within the Sovereign right of any State. Nationalization of a domestic corporation is within the exclusive domain of domestic jurisdiction and is an Act of State.

Assuming *Arguendo* that Pharmco is an International Corporation, an emerging norm of International Law permits States on some occasions to nationalize foreign property without compensation. This norm has developed gradually with the passing of the G.A.Resolutions such as permanent sovereignty over Natural Resources, Charter of Economic Rights and Duties of States and is further strengthened by State practice. The standard of 'appropriate compensation' as laid down in the Resolution 1803(XVII) has been diluted by the Charter, NIEO & 18 other G.A.Resolutions. The importance of G.A.Resolutions stems from the fact that they are now regarded as having a formative influence on the development of International Law and legal effect may be given to the collective pronouncement of the General Assembly.

The change in the Law of Nationalization is that the developing countries accept the payment of 'appropriate compensation' but only after taking into account all relevant circumstances that the State considers pertinent. Therefore, if the circumstances, as in the present dispute are such as to make the payment of compensation impossible, then compensation need not be paid. Many of the lesser developed countries by their State Practice, diplomatic notes, protests etc have made it clear that they see no requirement in International Law to pay compensation at all times.

Without prejudice to the earlier argument, there is no norm in International Law proscribing nationalization without compensation. This is due to an absence of *Opinio Juris Communis*, mainly due to the repudiation of Res.1803(XVII) as the *Opinio Juris Communis* and the inability of the Charter, NIEO & Res.3171 to receive the assent of the generality of States and become the *Opinio Juris Communis*. The many BITs concluded between developing and developed nations are treaties of convenience and do not reflect State Practice as the same countries have voted against the principles enunciated in these treaties in International Forums. Using the *Lotus Case* Principle Frontera is free to nationalize without compensation when there is no norm proscribing it.

The principle of non-retroactivity does not apply to the Investments made in 1978 before the BIT came into force as they are within the exceptions to the rules embodied in Art.28 of the Vienna Convention on the Law of Treaties. Frontera's nationalization of Pharmco is therefore justified under Art.14 of the BIT. Also, there is no

discernible judicial basis for Art.10 of the BIT. In the *Ethiopian Spice Extraction Case* it was held that the phrase 'property and companies of either country shall receive the most constant protection and security' is inherently general, doubtful and susceptible of multiple interpretation as to be judicially useless.

Even if the previous Fronteran Government were liable for losses to IPC, RPG is not liable by virtue of established principles of State Succession. RPG has expressly repudiated all laws and acts of the previous colonial government and is not bound by the BIT as principles of State Succession state that new States can inherit the treaty obligations of the older State only by express declarations or devolution agreements.

Art.(16) of the Vienna Convention on the Law of State Succession codifies the Customary International Law in this regard. Art.9, 10, 24 & 28 of the same convention also strengthen this principle. Further, Frontera was not a fully Autonomous State and the term substantial Autonomy is distinct from complete or full Autonomy. Also, being an original member of the United Nations does not signify the attainment of full statehood. Byelorussia, Ukraine, Philippines, India, Syria and Lebanon were independent States when they became members of the U.N.

If *Arguendo*, the BIT creates binding obligations for the RPG, Art.13 of the treaty is not violated as the term 'any other State' is distinct from 'the other State'. Also, Art.13 is invoked only when compensation is paid under Art.12 of the BIT and in this case RPG has restituted its nationals under its domestic laws. There is sufficient authority to back the proposition that discrimination between Alien and National property is not *prima facie* illegal. Also, RPG is not obliged to compensate for the revocation of the lease as the value of contractual sub soil rights is vested in the State and created by the State itself and therefore is not subject to any compensation requirement.

ARGUMENTS

I. BASTONIA'S CLAIM IS PRE-MATURE DUE TO THE NON-EXHAUSTION OF LOCAL REMEDIES

The Respondent submits that the International Pharmaceutical Company ('IPC') has not exhausted all its local remedies in Frontera. The principle that a claim will not be admissible on the International plane unless the Corporation concerned has exhausted all available legal remedies in the State which is alleged to be the author of Injury,[1] has been affirmed in numerous International decisions.[2] When, in August 1991 IPC, sought compensation for the Nationalization of Pharmco, the judicial and administrative organs in Frontera, only held that the Bilateral Investment Treaty ('B.I.T') did not provide a private cause of action for IPC.[3] This is because the term "States Parties" as used in the B.I.T. means only the official organs of each government and IPC is not an official organ of Bastonia.[4] Consequently, no Fronteran Court or administrative agency reached the merits of IPC's claim.[5] IPC, after realizing that the B.I.T. did not provide it a private cause of action is required to have submitted its claim under Fronteran Municipal law. Only a procedural change was required to enable the judicial organs of Frontera reach the merits of IPC's claim. IPC, without exhausting this remedy invoked the diplomatic intervention of the Bastonian Foreign Ministry. This indicates that IPC, has not exhausted all Local Remedies and Bastonia's claim is premature.

II. FRONTERA ACTED IN ACCORDANCE WITH INTERNATIONAL LAW IN NATIONALIZING PHARMCO

Without prejudice to the earlier submission, the Fronteran government's act of Nationalizing Pharmco is in accordance with International Law as it is within the

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1 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 494-95, (4th Ed. 1990).

2 *See Ambatielos Case* (Greece V U.K.), 1952 ICJ 28 (Prelim. Objection); The *Inter Handel Case* (Switzerland V U.S.A.), 1959 ICJ 6. For list of relevant cases *See* A.A. Cancado Trindade, *Domestic Jurisdiction and exhaustion of Local remedies,* 16 INDIAN J. INT'L L. 187, 196 (1976).

3 *See* 1993 Philip. C. Jessup International Law Moot Court Problem [herein after *compromis*], at 3.

4 *Id.* at 1.

5 *Id.* at 3.

Sovereign right of a State to Nationalize a domestic corporation (such as Pharmco) without compensation.

A. Pharmco is a Domestic Corporation

The Nationality of a Corporate entity (such as Pharmco) is attributed to the State under whose laws it is incorporated and in whose territory it has its registered office.[6] In the **Standard Oil Company Tankers Case**[7] the United States-German Mixed Arbitral Tribunal accepted the **'Test of incorporation'** as decisive. This has been confirmed by long practice and by numerous International agreements. In addition to this criteria, the payment of taxes and the State where the Board meetings are held are crucial to the determination of the Nationality of a Company.[8] Further, the domicile of the management is also a relevant factor in determining the Nationality of a Corporation.[9] That Pharmco satisfies these criteria is evident from the Compromis which states that Pharmco was established as a Fronteran Corporation, 51% of which was owned by individuals in Frontera.[10] Eventhough the Management of Pharmco comprised of Bastonian Citizens who lived and worked entirely in Frontera, the meetings of Pharmco's Board of Directors were held semi-annually in Frontera with the Company paying its Taxes in Frontera.[11] Also, it is a general rule that Corporate Stock is located in the State under whose Laws the Corporation has been organized. It is the Respondent's submission that Pharmco satisfies the 'Test of Nationality' and is therefore a domestic Corporation of Frontera.

A State is not responsible to another State under International Law for its act towards its own nationals, including its own Corporations and States must be permitted over their Nationals, a discretion which cannot be restricted by virtue of the

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6 *Barcelona Traction, Light and Power Company Ltd.* (Belgium V. Spain) Second Phase 1970 ICJ 3 ¶ 70.

7 U.N. Rep. Vol.VII 302 (1926).

8 *Supra* note 6 ¶ 71.

9 *See* 2 D.P. O'CONNELL, INTERNATIONAL LAW, 1041 (2d. ed. 1970).

10 *See Compromis* at 2.

11 *Id.*

accidental fact of foreign financial interest also being involved.[12] In fact, when the right to Nationalize foreign property is an inherent attribute of National Sovereignty[13] [Even without compensation when the circumstances warrant] it *a fortiori* follows that the right to Nationalize a domestic company without compensation is the inalienable right of every Sovereign State.

1. Nationalization of a Domestic Corporation is an Act of State

The Respondent submits that the Nationalizing of Pharmco is within the range of acts contemplated by the "act of State" doctrine.[14] In ***D'Angelo V. Petroloes Mexicanos***[15] the Court stated that expropriations of the property of an alien within the boundaries of the Sovereign State are traditionally considered to be public acts of the Sovereign.[16] In *Lithgow & others*[17] the European Court of Human rights held that general principles of International law do not apply to the expropriation by a Nation of the property of its Nationals.[18] Consequently, the State of Frontera is free to Nationalize Pharmco even without Compensation and it has not violated its obligations under International law.

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12 *Supra* note 9 at 1043.

13 *See* Samuel K.B. Asante, *International Law and Foreign Investment, A. Reappraisal*, 37 INT'L & COMP. L.Q. 595 (1988); P.J. O'KEEFE, *The United Nations and Permanent Sovereignty over Natural Resources*, 8 J. WORLD TRADE L. 239, 240-1 (1974); Francisco Orrega Vicuna, *Some International Law problems posed by the Nationalization of the Copper Industry by Chile*, 67 AM. J. INT'L L. 711, 712 (1967).

14 *See* Lysette Hamilton, *Act of State Doctrine*, 10 BROOKLYN J. INT'L. L. 243, 245 (1984).

15 422 F. Supp. 1280 (D.Del. 1976).

16 George Kahale, iii, *Characterizing Nationalizations for purposes of the Foreign Sovereign Immunities Act and the Act of State Doctrine*, 6 FORD. INT'L. L.J. 391, 409 (1983).

17 102, Eur. Ct. H.R. (Ser.A) (1986), *discussed in* 81. AM. J. INTL'L L. 425-27 (1987).

18 Brice M. Clagett & Daniel B. Poneman, *The treatment of Economic Injury to Aliens in the Revised Restatement of Foreign relations law*, 22 INT'L LAW. 35, 58 (1988).

B. Customary International Law is not violated even if Pharmco is an International Corporation

Assuming *Arguendo* that Pharmco is an International Corporation, Frontera's act of Nationalizing Pharmco is justifiable under General Principles of International Law and under Article 14 of the Bilateral Investment Treaty.

1. Hull formula is not part of Customary International Law

The Traditional norms of prompt, just & efficient compensation [Hull formula][19] has never been unanimously regarded as an accepted rule of Customary International law.[20] The traditional decisions which have been cited in support of this formula have no reference to the prompt, adequate and effective standard.[21] The *Chorzow case*[22] refers only to a duty of paying *fair* compensation. The *Norwegian Ship Owners Claims Arbitration* only stated that Just compensation should be determined in view of all the relevant circumstances.[23] In fact, after an examination of all relevant cases cited in support of the Traditional formula Oscar Schachter has concluded that there is not a single decision expressing the prompt, adequate and effective compensation formula.[24] The traditional norm of full compensation had been diluted further with the emphasis shifting from the concept of full compensation to that of "appropriate

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19 Secretary of State C. Hull, in his diplomatic exchange with the Mexican Government in respect of Mexican Nationalizations. *See also,* C.F.AMEERSINGHE, STATE RESPONSIBILTY FOR INJURIES TO ALIENS, 121 to 168 (1967); Frank G. Dawson & Burns H. Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation?* 30 FORD. L.R. 727, 734 (1962).

20 *See* Oscar Schacter, *Compensation for Expropriation*, 78 AM. J. INTL. L. 122-130 (1984). *See also* Clagett & Poneman, *Supra* note 18 at 41. [The 'prompt, adequate and effective' formula is regarded as not reflecting Customary International Law].

21 Schachter, *Supra* note 20 at 122-23.

22 *Case concerning the Factory at Chorzow* (Merits), 1928. P.C.I.J. Ser. A, No.17, at 46.

23 *Norwegian Ship Owners' Claims* (Nor. V.U.S.) 1R, Int'l Arb. Awards 307, 339-41 (1922).

24 Schachter *Supra* note 20 at 123.

compensation".[25] This was reinforced in the G.A. Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources ¶4 of which States that appropriate compensation shall be paid in accordance with the rules in force in the State exercising such Sovereignty.[26]

In the ***Aminoil Case***, it was stated that the Standard of Compensation was appropriate Compensation having regard to all the pertinent circumstances.[27] This Sovereign right of a State to expropriate foreign property with the payment of appropriate Compensation was recognized as law in the ***Topco Calasiatic Arbitrations.***[28]

2. <u>The standard of 'appropriate compensation' as laid down in the Resolution 1803 (XVII) has been diluted by the Charter, NIEO & 18 other GA resolutions</u>

The Standard laid down in the Resolution 1803 (XVII) has been changed further[29] by the Charter of Economic Rights and Duties of States, NIEO and 18 other resolutions.[30] Art.2(C) of the Charter of Economic Rights and Duties of States reads: "Each State has the right... To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into consideration all circumstances that the State considers pertinent.[31]

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25 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, 448 (1981). *See also* Cornelius Murphy, *Limitations upon the power of a State to determine the amount of compensation payable to an alien upon nationalization, in* 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 49, 52 (1975).

26 G.A.Res. 1803, (XXVII) U.N.GAOR, SUPP. 17,15, U.N.Doc A/5217 (1962).

27 *Kuwait American Independent Oil Company (Aminoil)* 21 I.L.M. 976 (1982). *See also* Samuel K.B. Asante, *Restructuring Transnational Mineral Agreements,* 73 AM. J. INT'L L. 335 (1979).

28 17 I.L.M. 3, 29 (1978).

29 Wil D. verwey and Nico J. Schrijver, *The taking of foreign property under International law : A New Legal Perspective?*, NETH. YR BK INT'L L. 3,27 (1989).

30 GA Res.523 (VI), 626 (VII), 824 (IX), 1314 (XII), 1515 (XV), 1966 (XVIII), 2158 (XXI), 2218 (XXI)A, 2386 (XXIII), 2532 (XXV), 2625 (XXV), 2626 (XXV), 2692 (XXV), 3016 (XXVII), 3041 (XXVII), 3171 (XXVIII), 3175 (XXVIII), 3185 (XXVIII), 3201 (S-VI), 3202 (S-VI), 3218 (XXIX) & 3362 (S-VII).

31 Edwardo Jiménez de Aréchega, *State Responsibility for the Nationalization of foreign owned property.*, N.Y.U.J. INT'L L. & POL. 183 (1978)..

Thus, a State may decide the quantum of compensation to be paid only from its relevant laws and regulations and all circumstances that the State considers pertinent. The determination of the amount due, in light of the particular circumstances is flexible enough to allow a decision maker to take into account elements of unjust enrichment in the background of the investment in determining, 'what under the circumstances constitutes appropriate compensation'.[32] It requires that account must be taken of the entire past relationship between the parties, the profits made by the investor and the harm, if any, suffered by the host economy as a result of the investment.[33] Thus, if the circumstances are so grave and exigent as to make the payment of compensation impossible, then compensation need not be paid. By using this principle, Courts in Italy and Japan have upheld the validity of expropriation without adequate compensation.[34] Infact, *dependencia* school of economists like Girvan, after referring to the past exploitation of the Third World have asserted that it is the Third World which has to be paid compensation.[35] It has been opined that even the classical International Law Standard of a duty to give "appropriate" compensation for expropriation has been repudiated by the developing Nations[36] in their overwhelming assent[37] to the Charter of Economic Rights and Duties.

The only obligation imposed upon States by Art.2(C) of CERDS, prefaced with the precatory 'should' rather than the mandatory 'shall' is, to grant such compensation,

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32 *Id.* at 185.

33 M. Sornarajah, *Compensation for expropriation, The emergence of New Standards*, 13 J. WORLD TRADE L. 108, 119 (1978).

34 *See Id.* at 117.

35 *See* N. Girvan. *The Question of Compensation : A third world perspective.* 3 VAND. J. TRADE L. 340 (1972). Chile by a constitutional amendment of 1971 nationalized the properties of the copper mining corporations, Kennecott & Anaconda after deducting the excess profits the company had made since 1955.

36 Kevin P. Carroll, *Creating a framework for the Re-introduction of International Law to controversies over compensation for expropriation of foreign investments*, 9 SYR. J. INT'L L. & COM. 163, 163 (1982).

37 The Charter was passed by an overwhelming majority of 120 Nations in favour, 6 against and with 10 abstentions.

if any, as is subjectively thought to be 'appropriate', considering only local law and circumstances to which international law is not necessarily pertinent.[38] The developing nations intended that the Charter, although not legally binding, would incorporate legal norms which would gradually acquire a certain force in its regulation of economic interaction.[39] Though the developing countries unanimously supported the Charter, several OECD countries also voted in favour of the Charter.[40] Hence, it is submitted that the Charter alongwith its sister resolutions which preceded it indicate a dilution and change in the standards laid down in Res.1803 (XVII) of 1962.

3. The possible compensation standard in Res.3171

The majority of Nation's support for the G.A.Res. 1803 (XVII) waned by the early seventies because the classical international standard of compensation is not responsive to the developing countries needs and goals.[41] Resolution 3171 (XXVII) on Permanent Sovereignty over Natural Resources[42] states that "each State is entitled to determine the amount of ***possible*** compensation and the mode

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38 Charles N. Brower & John N. Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International law,* 9 INT'L LAW. 295, 305 (1975).

39 Andres Rozental, *The Charter of Economic Rights and Duties of States and the New International Economic Order,* 16 VA. J. INT'L L. 309, 331 (1976). *See also* G.W.Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States,* 9 INT'L LAW. 591, 595 (1975). For a detailed study of this question *See* J. CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS. (A. Amoia transl. 1969).

40 Vicki A. Breman, *An International Legal Obligation to assist in energy development arises from the Charter of Economic Rights & Duties of States,* 12 GA. J. INT'L & COMP. L. 401, 417 (1982). (For eg. Australia, New Zealand and Sweden voted in favour of the Charter).

41 *See* Venkata Raman, *Transnational Corporations, International Law and the New International Economic Order,* 6 SYR. J. INT'L L. & COM. 17,18 (1978); J.Castaneda *The Underdeveloped Nations and the development of International Law,* 15 INT'L ORG. 38 (1961). (An important changed complexion of the International order is the existence today of nearly three times as many Independent States as existed at the termination of World War II).

42 G.A. Res. 3171, 28 U.N. GAOR, SUPP. (No.30) 52, U.N. Doc. A/9030 (1973).

of payment and that any disputes that might arise should be settled in accordance with the National legislation of each State carrying on expropriation".[43]

This Resolution implies that compensation need be paid only if it is warranted by the surrounding circumstances. Res. 3171 was passed by a vote of 108 in favour, only 1 against and 16 abstentions. In a separate vote on the paragraph referring to expropriations 86 Countries voted in favour.[44] This indicates that the consensus of world Nations is against the mandatory payment of compensation for all Nationalizations. For these reasons, it is submitted that Res.3171 has undermined and weakened the substantive norms of Res.1803 (XVII) and effectively dealt a death blow to these norms.[45]

4. Absence of 'any standard of compensation' in the NIEO

The General Assembly Resolution 3201 on the establishment of a New International Economic Order further affirmed the Sovereign right of a nation to expropriate or Nationalize.[46] The NIEO is an instrument for the economic and legal transformation of International relations whose basic aim is to promote equity and to compensate the developing countries for their disadvantaged position *vis-a-vis* developed States.[47] ¶4(e) of the NIEO[48] deals with nationalizations, and in relevant part states that in

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43 *Id.* ¶ 3 (emphasis added).

44 *Supra* note 36 at 172.

45 *See* Robert B. Lillich, *The valuation of Nationalized Property in International Law: Towards a consensus or more "Rich Chaos"?*, in 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW, 183, 184 (R.LILLICH ed. 1975) [Hereinafter 3 valuation]; *Cf* C.F. Amerasinghe, *The quantum of compensation for nationalized property, in* 3 VALUATION 91-130 (1975); C.F. Amerasinghe, *Issues of compensation for the taking of alien property in the light of recent cases and practice*, 41 INT'L & COMP. L.Q. 22, 35 (1992). [The author, after an extensive examination of National legislation and Practice, concludes that subsequent U.N. actions have not changed the "Law" stated in Res.1803 (XVII)].

46 *See* Subrato Roy Chaudhury, *Legal Status of the Charter of Economic Rights and Duties of States, in* LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER, 87-88 (KAMAL HUSSAIN ed. 1980).

47 Edward Kwakwa, *Emerging International development law and traditional International Law - Congruence or Cleavage?*, 17 GA. J. INT'L & COMP. L. 431,433 (1987).

48 G.A. Res. 3201 Sixth Special Sess., U.N. GAOR, SUPP (No.1) at 3, U.N. Doc. A/9559 (1974), *reprinted in* 13. I.L.M. at 717 (1974).

order to safeguard the full permanent Sovereignty of every State over its natural resources and all economic activities, each State is entitled to exercise effective control over them and their exploitations with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent Sovereignty of the State.[49]

Thus, in NIEO, there is mention of a State's inalienable right to expropriate but there is an absence of any reference to a corresponding duty to compensate even under a *possible* compensation standard.[50] Despite the formally non-binding character of the General Assembly Resolutions they are now regarded as having a formative influence on the development of International Law and legal effect may be given to the collective pronouncements of the General Assembly.[51] General Assembly resolutions such as the Charter etc. which are declaratory of International Law have an important effect in codifying and progressively developing International Law.[52] In fact even if the NIEO and Resolution 3171 are regarded as soft law the relevant soft law instruments may have a catalytic effect in creating new norms of Customary International Law since soft law is used in the International Economic Relations precisely where there is an intention to develop and change the law.[53]

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49 EDWIN P. REUBENS, THE CHALLENGE OF THE NEW INTERNATIONAL ECONOMIC ORDER, 22 (1981).

50 *See* Lillich, *Supra* note 45 at 189 (Emphasis added).

51 *See* Kwakwa, *Supra* note 47 at 445. *See also* III OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE (1985); ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963); Y.O.ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS (1966).

52 Stephen M. Schwebel, *The effects of Resolutions of the U.N. General Assembly on Customary International Law.* AM. SOC. INT'L L. PROC. 304 (1979); *See also* Rosalyn Higgins, *The United Nations and Law Making : The Political Organs,* 64 AM. J. INT'L L. 37, 38-39 (1970); Christopher C. Joyner, *U.N. General Assembly Resolutions and International Law : Rethinking the Contemporary Dynamics of norm-creation,* 11 CAL. WES. INT'L L.J. 445, 458 (1981).

53 C.M. Chinkin, *The challenge of soft law : Development and change in International Law,* 38 INT'L & COMP. L.Q. 850, 857 (1989).

Further, the evolving International Law of development[54] requires that such declarations be given binding legal effect.

The mere inability to pay compensation cannot prevent a State from exercising its right of Sovereignty.[55] Art.2 of UNCTAD Resolution 88(II) states that it is for each State to fix the amount of compensation.[56] The Afro-Asian legal consultative committee adopted in 1961 a declaration of Principles concerning Admission and Treatment of Aliens, which recognized the National Standard and stated that payment of compensation is subject only to local laws, regulations and orders.[57] This is further reiterated by the Lima declaration at the second UNIDO Conference which stated that every State has the inalienable right to Nationalize in accordance with its domestic laws as an expression of its right to Permanent Sovereignty over its Natural Resources.[58]

Based on the authorities cited above, the Respondent submits that there has been a change in the Law laid down in the General Assembly Res. 1803. The change is that the developing Countries accept the payment of "appropriate compensation", but only after taking into account all relevant circumstances that the State considers pertinent. Thus, if the circumstances, as in the present dispute are such as to make the payment of compensation impossible then compensation need not be paid. The Respondent submits that the Fronteran regime nationalized all manufacturing concerns, only to put down a revolution. Paying compensation then, would have defeated the purpose and object of the nationalization. In fact, the obligation to safeguard the National Security of a State has been recognized as an exceptional circumstances where

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54 *See* Oscar Schachter, *The evolving International Law of development,* 15 COLUM. J. TRANSNAT'L L. 1,5 (1976).

55 *See* Gracia - Amador, *The proposed new International Economic Order: A New Approach to the law governing nationalization and compensation,* 12 U.MIAMI J. INT'L L. 1,49 (1980). *See also.* Marten H. Muller, *Compensation for Nationalization: A North-South dialogue,* 19 COLUM. J. TRANSNAT'L L. 35,54 (1981).

56 *Supra* note 33 at 128.

57 *Supra* note 29 at 27.

58 *Id.* at 44.

a partial or no compensation rule may apply.[59] Wherefore, in conclusion to the above argument the Respondent submits that Frontera's act of Nationalizing Pharmco is consistent with customary International Law as International Law recognizes the right of a State to nationalize without compensation in some exigent situations.

C. There is no rule of Customary International Law which mandates the payment of compensation upon nationalization

The Respondent submits **without prejudice** to the above argument that there exists currently, no rule of customary International Law with regard to nationalizations and a State has full and complete jurisdiction to determine its conduct so long as there is no proscribing norm in International Law. A nation possesses and exercises within its own territory an absolute and exclusive jurisdiction and any exception to this right must be traced to the consent of the nation, express or implied.[60] There is a wide measure of discretion accorded to States which is only limited in certain cases by prohibitive rules.[61] There is no norm in International Law proscribing Nationalization without compensation.[62]

1. Absence of *Opinio Juris Communis*

This legal void is the result of two factors: first, the Repudiation of Resolution 1803 (XVII) as the *Opinio Juris Communis* by the developing States; and second, the inability of the Charter, NIEO, or Resolution 3171 (XXVII) to receive the assent of the generality of States and thus become the *Opinio Juris Communis.*[63] For a rule of customary law to be formed there must be consistent and concordant State practice and *Opinio Juris.*[64] The ICJ emphasized in the ***North Sea Continental Shelf***

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59 *See* Christopher P. Bauman, *An International Standard of partial compensation upon the expropriation of Alien property,* 19 CASE W. RES. J. INT'L L. 103, 110 (1987).

60 *Lotus Case* P.C.I.J. Ser. A., N.10., 68, 88 (1927).

61 *Id.* at 18-19.

62 *See* Miriam A. Kadrigich, *United States Liability for expropriations in foreign territory: setting the standard for responsibility,* 10 FORD. INT'L L.J. 22,23 (1986).

63 *Supra* note 36 at 185.

64 *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 6 to 9 (4th ed. 1990).

Cases that for a [C]ustomary rule to be formed, not only must the acts concerned 'amount to a settled practice' but they must be accompanied by the *Opinio Juris sive necessitatis.* Either the States taking such action, or other States in a position to react to it, must have behaved in a manner that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.[65] The Respondent submits that even if the Resolution 1803 (XVII) had once been supported by the generality of States and represented the *Opinio Juris Communis*, the majority of nations no longer accept it as a standard.[66] The only States still supporting the Resolution are the Western developed Countries.[67] The support of the generality of States is deemed necessary before a General Assembly resolution can be given legal effect.[68] Since a General Assembly resolution achieves the status of *Opinio Juris communis* through the acceptance of it by the generality of States, then logically, if support for the legal principle of that resolution is repudiated by most of the States, that resolution no longer possesses the assent of the generality of States. Thus, it can no longer be viewed as representing *opinio juris communis.* Res.1803 (XVII) must be viewed as having no legal effect due to its present lack of general acceptance. The Respondent consequently submits that Res.1803 (XVII) can no longer be viewed, consistent with International realities, as expressing the *Opinio Juris Communis.*

2. <u>The Bilateral Investment Treaties concluded between developing and developed nations do not represent State practice</u>

The many Bilateral Investment Treaties concluded between developing and capital exporting Countries that incorporate some variant of the traditional formulations

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65 *Northsea Continental Shelf Cases* (F.R.G. V Denmark) (F.R.G. V Netherlands), 1969 ICJ 44 ¶ 77.

66 *See Supra* note 36 at 173.

67 The Western Nations voted for Resolutions 1803 (XVII) but refused to give their assent to the expropriation principles in the Charter.

68 *Texaco Overseas Petroleum Company V. The Government of the Libyan Arab Republic* (1975) (Dupuy, arb.) (award on the merits) reprinted in, 17 I.L.M. 1 at 30 (1978).

regarding expropriation do not represent anything beyond the special bundle of benefits and impositions in the circumstances of a purely bilateral relationship, and cannot be regarded as an example of State practice. Many of these States have declared in International forums that the obligations they have assumed under bilateral agreements do not represent their views on general International Law, and have accordingly adopted a different posture on the same issues in the context of multilateral negotiations towards the promulgation of general International Legal Standards.[69] Also, the fact that the standards stipulated in the bilateral agreements have hardly been adhered to, further strengthens the absence of *Opinio Juris*, and demonstrates the lack of any norm in International Law requiring compensation to be paid at all times.[70]

In fact, when Cuba in 1959 Nationalized 450 firms no compensation was paid.[71] When Ethiopia Nationalized all Industries as part of a policy of Socialization in 1974 compensation though promised was not paid. This principle was followed by Algeria and Venezuela in their Nationalization of the Oil Sector.[72]

Infact, even if laws with regard to nationalization have developed, recently freed Colonial countries are excluded from them. A joint U.S.A./U.K. amendment to the Permanent Sovereignty of 1962 dealing with the applicability of International rules to expropriations by Colonies shows that even in the 1960's the basic idea of excluding Colonial property from the rules normally applicable to expropriations did enjoy substantial western support.[73]

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69 Asante, *Supra* note 13 at 601.

70 *Id.*

71 F.N.Burton & Hisashi Inove, *Expropriations of foreign owned firms in developing countries*, J. WORLD TRADE L. 396, 413-14 (1984).

72 *See Id.*

73 *Supra* note 29 at 42. The Amendments reads: "A state which, during the colonial period, had been dispossessed of its property could not be obliged to pay compensation or to comply with International Law".

3. In the absence of a rule mandating the payment of compensation for nationalization, a State is free to nationalize alien property without compensation

The International community has not established any rules in the past decade which proscribes expropriation without compensation[74] and in the absence of such rules a State is free to Nationalize alien property without paying compensation. This opinion has been articulated by many publicists after extensive, detailed studies on the law of Expropriation.[75] The absence of a customary rule of law requiring compensation upon nationalization is indicated by the statute of the International Centre for the Settlement of Investment Disputes [ICSID]. Article 42 of the convention which deal with the applicable law states that in the absence of agreement between the parties as to the applicable law, the law of the contracting State Party to the dispute and such rules of International law as may be applicable will apply.[76] Thus, the convention makes applicable to disputes over expropriations, the national, domestic law of the contracting States. Though the article refers to 'such rules of International Law as may be applicable' it does not state the rules and thus leaves in doubt the existence and effect of the rules.[77]

Further, there is no norm in International Law requiring expropriations to be made only for a public purpose. In fact, the doctrine of public purpose never has been sanctioned as a rule of International Law whose violation independently engages International responsibility.[78] The respondent submits in light of the above submissions that the Fronteran governments action of nationalizing pharmco without compensation is not violative of its obligations under Customary International Law.

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74 OSWALDO DE RIVERO, NEW ECONOMIC ORDER AND INTERNATIONAL DEVELOPMENT LAW, 106 (1980).

75 *See* WILLIAM W. BISHOP, Jr., INTERNATIONAL LAW CASES AND MATERIALS, 866 (3d ed. 1971).

76 Gita Gopal, *International Centre for Settlement of Investment disputes* 14 CASE. WES. RES. J. INT'L L. 591, 597 (1982).

77 *See Id.*

78 Weston, *Supra* note 25 at 474.

d. *Communidad De Fortunas* Doctrine

The previous Fronteran Government's nationalizing Pharmco without compensation is justifiable under the *communidad de fortunas* doctrine. This doctrine indicates that the foreign investors, by the very fact of acquiring property or establishing business in the host country merge their own economic destiny with that of the Nationals of that country. "Just as they may enjoy greater profits and economic success than in their own country in return for their investment, so they may have to bear the burden of greater risks in view of the possible changes of social, political or economic character which may take place in the host country".[79] In view of the above arguments the respondent submits that Frontera has not violated principles of International law.

E. Frontera's Nationalization of Pharmco is Justified Under Art.14 of the Bilateral Investment Treaty

Art.14 of the B.I.T. reads: "Not withstanding any other provision herein, a State party shall not be required to provide compensation under Art.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".[80]

It is submitted that the then Fronteran regime's nationalization of Pharmco was an Act of necessity as envisaged in Art.14 of the B.I.T. The facts of the dispute bear testimony to the proposition that the Fronteran Government nationalized all assets only to put down a revolution. Also, Pharmco was repatriating 60% of its enormous profits[81] which might be detrimental in case of such emergencies. The urgency of the situation is further evidenced by the fact that soon after the nationalization the revolutionary forces were prepared to overrun the Fronteran capital and the Colonial Government fled to Empira. The fact that a change, in favour of the present Government

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79 Francesco Francioni, *Compensation for nationalisation of foreign property: The borderland between law and equity*, 24 INT'L & COMP L.Q. 255,271 (1975). This theory has been advanced as a legal doctrine in Latin America by authors such as Alfonsin and Podesta Costa.

80 *Compromis* at 1.

81 *Id.* at 2.

did occur within a year of the nationalization does indicate that the 'Act of Nationalization' satisfies the requirement of 'necessity' as used in Art.14.

The term "not withstanding any other provision" in Art.14 of the B.I.T. indicates that Art.14 provides for emergencies and has to be interpreted by itself without the aid of any other provision of the treaty. The principle is lent credence by Art.31(4) of the Vienna Convention on the Law of Treaties which reads: "A special meaning shall be given to a term if it is established that the parties so intended.[82]

The principle that a State may nationalize property to safeguard its security has been realized in Art.(4) of the Permanent Sovereignty over Natural Resources.[83] This resolution was passed by 87 votes to 2 with 12 abstentions, voted for by both developing and developed Countries and represented agreement among States in all Geographical Areas and of all economic levels and is recognized as reflecting the existing customary law.[84]

1. There is no discernible judicial basis for Article 10 of the B.I.T.

The B.I.T. does not present clear legal standards for judicial deliberations. In the Ethiopian Spice Extraction Case[85] the argument of the people's Military Government of Socialist Ethiopia (PMGSE) was on interpretation of a Treaty with similar clause for protection of property. The Treaty of Amity and Economic Relations, between the United States and Ethiopia stated in Art.VIII §2 that property and companies of either country shall receive the most constant protection and security within the territories of the other (country). The PMGSE argued that the Treaty does not demonstrate the unambiguous agreement on controlling legal standards which is necessary for judicial decision making. The Court agreed, finding the language in clause 2 so

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82 D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 600 (1983).

83 FAWCETT & PARRY, LAW AND INTERNATIONAL RESOURCE CONFLICTS, 11 (1981).

84 Mehren and Kurides, *International arbitrations between states and foreign private parties: The Libyan Nationalization Cases,* 75 AM. J. INT'L L. 523 (1981).

85 *Ethiopian Spice Extraction Share Co. Vs. Kalamazoo Spice Extraction Co.* 543, F. Supp. 1223 (W.D. Mich. 1982).

inherently general, doubtful and susceptible of multiple interpretation[86] as to be judicially useless. The lack of clear controlling legal principles in this and similar treaties show that there is little or no guidance for the Judiciary and moreover the policy considerations which underlie the 'act of state' doctrine cannot be led to derogate through judicial scrutiny of treaty interpretations.

In conclusion to the above argument it is submitted that the Nationalization of Pharmco was consistent with Frontera's obligations under the B.I.T.

2. The principle of non-retroactivity does not apply to the B.I.T.

The principle of non-retroactivity does not prejudice the B.I.T's application to the dispute. The I.C.J. in the ***Namibia Case*** emphasized on the evolutionary nature of the principle of non-retroactivity and stated: "The Court is bound to take into account the fact that the concept of non-retroactivity is not static, but is by definition evolutionary.[87]

In the *Debecker Case*[88] the European commission of Human Rights while dealing with an allegation of violation by Belgium of Art.10 of the European Convention of Human Rights rejected the argument put forth by Belgium that the application was inadmissible *ratione temporis*[89] because the sentence had been imposed before Belgium became a party to the Convention. The Court laid down that the Convention would be applicable as the applicant in the dispute was in a continuing situation.

The Resolution of the *Institute de Droit International* in its Weisbaden Session dealt with the Inter-temporal[90] problem in International law and it states that any rule which relates to the continuous effects of the legal act shall apply to effects produced while the rule is in force, even if the act has been performed prior to the

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86 *Id.* at 1230.

87 1971 ICJ Rep. at 16.

88 2 Yr Bk Eur. Conv. Hum. Rts at 214 (1958-59).

89 Non-Retroactivity. *See also* DAVID H. OTT. PUBLIC INTERNATIONAL LAW IN THE MODERN WORLD, 194-95 (1987).

90 This principle has also been affirmed by Judge Huber in the *Island of Palmas Case.* HAGUE COURT REP. II 83 at 100.

entry into force of the rule".[91] Hence, the principle of non-retroactivity when read with the doctrine of inter-temporal laws admits of some exceptions to the rule of non-retroactivity. They are (1) a continuing situation and (2) a situation which is existing while the rule is in force. Though Pharmco came into existence in 1978 it was a continuing situation and an existing entity when the B.I.T. came into force on Jan. 1, 1981.[92] Therefore, it satisfies the two criteria stated above and the Fronteran Government's act of Nationalizing Pharmco without compensation is Justifiable under International Law as it is justified under Art.14 of the B.I.T.

III. THE CURRENT REVOLUTIONARY PEOPLE'S GOVERNMENT (RPG) IS NOT LIABLE FOR LOSSES TO THE INVESTMENT OF IPC

The respondent states that as submitted earlier, in the absence of a violation of an international norm regarding expropriation no obligations for the loss occasioned to IPC distills to the current Fronteran regime. However, ***assuming arguendo*** that the previous Fronteran regime was liable for losses to IPC the current Fronteran Government by virtue of established principles of State Succession is not liable.[93]

1. The RPG has expressly repudiated all laws and acts of the previous regime

The respondent avers that the revolution changed not only the government but also the identity of the State from a Former Empiran Colony to an Independent State. The RPG has also repudiated all laws enacted and acts committed by the former regime which were inconsistent with RPG'S aims and goals. That the succession was not a mere succession of Governments is evident from the fact that soon after the revolution the former colonial government had to flee to Empira.[94]

In fact dependent States and colonial dependencies including self governing colonies though possessing a degree of International personality to participate in

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91 LOUIS HENKIN, PUGH, SCHACHTER, SMIT, INTERNATIONAL LAW CASES AND MATERIALS, 620 (1980).

92 *See Compromis* at 1.

93 *See* D.P. O'CONNELL, THE LAW OF STATE SUCCESSION 41 (1956).

94 *Compromis* at 2.

treaty relation can only be described as dependent States.[95] These indicate that the decolonization process which culminated in the removal of the previous colonial regime also resulted in State Succession.

In the **Sealand Service Inc. V. Iran**[96] the Tribunal confirmed the principle that 'Loss occurring through revolutionary turmoil and violence is not *ipso facto* one that may be recoverable against a successor government on an expropriation theory: rather, a claimant must establish that such government intentionally took action to assert control over the property.[97] Thus, the RPG is not liable for the acts and obligations of the previous colonial government especially when it has expressly disclaimed them.

2. RPG is not bound by the B.I.T.

The B.I.T. is a treaty between Bastonia and the then Fronteran colonial Government. The current government is not bound by the treaty unless it affirms its obligations by an express declaration or act.[98] The 1978 Vienna Convention on the Law of State Succession which is declaratory of established principles of International Law relating to Succession of States [hereinafter Vienna Convention] has affirmed this principle.

Article 16 of the Vienna Convention which deals with this principle reads: "A Newly independent State is not bound to maintain in force, or to become a party to any treaty, by reason only of the fact that at the date of the Succession, the treaty was in force in respect of the territory to which the Succession of States relates".[99]

The traditional cleavage between the Universality Succession principle and the *tabula rosa* (Clean Slate Theory) Principle has been resolved by this Convention with

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95 *See Supra* note 91 at 202.

96 Award No. 135-33-1 (June 22, 1984), 6 Iran-U.S., C.T.R. 149 (1984).

97 Charles N. Brower, *Current developments in the Law of expropriation and compensation: A preliminary survey of Awards of the Iran-U.S. Claims Tribunal* 27 INT'L LAW. 639, 652 (1987).

98 *See* Mervyn Jones, *State Succession in the matter of Treaties*, BRIT. YR BK INT'L L. 360-375 (1952).

99 Encyclopedia of the U.N. at 996 (1989)

primacy being given to the latter as the operative principle for Succession in newly independent States, whether ex-colonial or formed from two or more territories.[100] The Clean-Slate theory embodied in Article 16 is a Metaphor for the principle that newly independent States are not obliged to succeed to treaties of a predecessor state.[101]

3. Devolution agreements alone are not sufficient for States to inherit the obligations of the previous regime

The only occasions of bilateral treaties devolving on the Successor States is where specific devolution agreements or unilateral declarations have been made.[102] There is ample State practice especially among the African countries that newly independent States do not regard themselves as the automatic Successors to the treaty obligations of their erstwhile colonial Master States.[103] Infact, even if there are devolution agreements between predecessor and Successor States Art.8(1) of the Vienna Convention States that it is not enough to create a binding legal obligation. Art.8(1) reads: "The obligations or rights of a predecessor State under treaties in force... do not become the obligations or rights of the Successor States towards other State parties to the treaties by reason only of the fact that the predecessor State and the Successor State have concluded an agreement providing that such obligations or rights shall devolve upon the Successor State".[104] Thus, there must, in addition, be some other act on the part of the Successor State which proves its intention to abide by the terms of the devolution agreement and to succeed to treaties. These reflect the extent of proof necessary before a bilateral treaty may be regarded as binding on a Successor

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100 Schaffer Rosalie, *Succession to Treaties: South African Practice in the light of current developments in International law,* 30 INT'L & COMP. L.Q. 593, 597 (1981).

101 *Id.*

102 *Supra* note 98 at 373.

103 *Supra* note 100 at 596.

104 *Id* at 599.

State. Thus, a new State remains free, as a Sovereign State to decide whether or not to succeed to the treaty obligations of its predecessor.[105]

4. State Practice

Sufficient State practice backs this principle. In 1776, the U.S. did not consider itself bound by previous British treaties affecting its territory, nor did Great Britain consider it to be bound by any such treaties.[106] This principle was reaffirmed by Panama, Finland, Colombia, most African Nations, Czechoslovakia, Belgium etc. after their independence.[107] Notification or a unilateral declaration is also considered essential to determine a Successor States Obligations in a treaty.[108]

Article 10 of the Vienna Convention further strengthens this rule. Article 10 reads: "... If a treaty provides that, on the occurrence of a Succession of States, a Successor State shall be considered as a party to the treaty, only if the Successor State expressly accepts in writing to be so considered".[109]

Thus, even when there is an express provision in a treaty regarding the Successor State's obligation to be bound by the treaty such an obligation will take effect only by an express affirmative declaration by the Successor State. Art.24 deals with the conditions under which a treaty is considered being in force in the case of Succession of States. Art. 24 in relevant part reads, "A bilateral treaty which at the date of a Succession of States was in force in respect of the territory to which the Succession of States relates is considered as being in force between a newly Independent State and the other party when:

(a) they expressly so agree; or

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105 OKON UDOKANG, SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES 407 (1972).

106 MCNAIR, LAW OF TREATIES 601 (1961). *See also* D.P.O'CONNEL, THE LAW OF STATE SUCCESSION 34 (1956).

107 *Supra* note 105, 412 - 39.

108 2 D.P.O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 129 (1967).

109 *Supra* note 99 at 996.

(b) by reason of their conduct they are to be considered as having so agreed."[110]

Thus, the Vienna convention codifies the existing Customary International Law of State Succession with regard to bilateral treaties and states that two conditions are to be satisfied before the obligations devolve on the Successor State, the conditions being: (1) An express agreement must have been made & (2) The conduct of the States should demonstrate such an acceptance.

The respondent submits that there exists no such agreement, between RPG and the old colonial government and RPG has not demonstrated its acquiescence by its conduct. Though the RPG has not expressly repudiated treaties entered into by the colonial government it has not signified its consent to be bound by them.

5. Frontera was not a fully Autonomous State

Further, the term ***Substantial*** autonomy is distinct from ***complete*** or ***full autonomy.*** It implies that there was a certain amount of control exercised by Empira over the affairs of Frontera. The mere fact of the former colonial government having entered into the B.I.T. and having had substantial autonomy does not indicate that Frontera was an independent entity. In fact capacity to enter into relations with States is not a criterion for the determination of Statehood.[111]

6. Being an original member of the United Nations is not indicative of the attainment of full statehood

The United Nations Charter makes a distinction between the original and subsequent members. While the original members of the united nations are governed by Article 3 of the U.N. Charter the entry of subsequent member States is authorized by Article 4 of the same. The respondent submits that, while only States capable of fulfilling their obligations in the U.N. can become subsequent members, even Nations which are yet to attain full Statehood may be original members.[112]

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110 *Id* at 997.

111 *See* James Crawford, *The Criteria of Statehood in International Law*, BRIT. YR BK INT'L L. 93, 119 (1976-77).

112 *See* HANS KELSEN, THE LAW OF THE UNITED NATIONS 58-61 (1950).

Infact, Byelorussia and the Ukraine (original members of the UN) were not States when joining the UN.[113] Philippines did not become fully independent until July 1946, India until August 1947 and Syria & Lebanon were not independent States when they became members of the U.N.[114] Thus, the mere fact of Frontera being an original member of the United Nations does not indicate that it is a fully independent State. The Respondent also submits that the 'continuity' was broken by the general law No.1991/007 which declared all laws enacted by the former colonial government which were inconsistent with RPG's goals of economic and political freedom, as null and void.[115] The RPG had also expressly repudiated all acts of the former Fronteran regime which were inconsistent with the aims of RPG. It is submitted that such express disclamations result in a break in the continuity.[116]

IV. RPG BY RESTORING OWNERSHIP OF CORPORATIONS ONLY TO ITS NATIONALS HAS NOT VIOLATED INTERNATIONAL LAW

Assuming ***Arguendo*** that the Bilateral Investment treaty creates binding obligations for the State of Frontera (RPG) the respondent submits that it has not violated the BIT in awarding compensation only to its subjects and not to other foreign subjects including those of Bastonia.

1. The term 'any other state' is distinct from 'the other state'

The relevant article of the BIT, Art.13 reads: "Each state party shall provide compensation Under Art.12 on terms no less favourable than such State party accords the citizens or Companies of any other State".[117] The term '*any other State*' as opposed to the term '*the other State*' in other parts of the treaty implies that in the given instance it applies to all countries except Frontera. Thus, the *Sine qua non* of this

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113 LELAND GOODRICH, EDWARD HAMBRO & ANNE P. SIMONS, CHARTER OF THE UNITED NATIONS 85 (3d rev. ed., 1969).

114 *Id.*

115 *Compromis* at 3.

116 *See Supra* note 1 654-675. [There will be a presumption against continuity in the case of a forcible secession or its equivalent].

117 *Compromis* at 1.

article is, compensation if paid, should be equal to *Citizens* or *Companies* of all Foreign States. The provision does not guarantee National treatment but only equality *vis-a-vis* other foreign investors. Hence, Frontera's act of restituting its nationals is not violative of Art.13 and consequently its obligations under the B.I.T.

2. Art.13 is invoked only when compensation is paid under Art.12 of the B.I.T. and not otherwise

The obligation to pay equal compensation under Art.13 is engendered only when the State party initiates the payment of compensation under Art.12 of the B.I.T.[118] The RPG restored ownership, only for companies that were 100% owned by Fronteran Nationals. This obviously has not been done under Art.12 of the B.I.T. as the act of restitution in this case is purely domestic and has been fulfilled pursuant to the domestic laws of Frontera. Further, Art.12 which deals with the payment of compensation is related to Art.10 wherein each state party undertakes to provide the most constant protection and security to the investments of citizens or companies of the other state party. These are provisions, essentially international in character which govern the conduct and relationship between Frontera and Bastonia and cannot be said to influence Frontera's relationship with its citizens. Thus, the Fronteran act of restituting its own nationals is within its domestic powers and is not under Art.12 of the B.I.T. and hence Art.13 does not come into effect.

3. Discrimination between alien and national property is not *primafacie* illegal

Foreign property rights are not invested with a "Sanctity" and "Permanence" greater than that which may be enjoyed by Nationals.[119] In Anglo-Iranian Oil Company V. SUPOR case it was held that discriminations between nationals and foreigners is not illegal when the measures are intended to serve an overriding public purpose and not to injure Foreigners.[120] Also, there was no discrimination during the

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118 *See Compromis* at 1. Art 13 reads: Each State party shall provide compensation under Art.12 on terms no less favourable than such party accords the citizens or companies of any other state.

119 *Supra* note 79 at 260.

120 *Supra* note 29 at 13.

Nationalization as all manufacturing concerns were Nationalized. A noted publicist has concluded that though non-discrimination is a basic ingredient of the pervasive norm of fair and equitable treatment customary international law does not appear to endorse an unqualified prohibition against discrimination.[121]

4. R.P.G. is not obliged to compensate for the revocation of the lease for the 1000 acre property

States are not required to compensate for any subsoil rights, since these are vested in the State and the value of the contract rights is created by the State itself and therefore is not subject to any compensation requirement.[122] The 1000 acre property in this case was only proposed to house Pharmco and it cannot be stated with certainty that Pharmco was indeed located on it.[123] Therefore, the State of Frontera is not under any legal obligation to compensate for the revocation of the lease for the 1000 acre property.

In view of the above argument it is submitted that the State of Frontera is not liable for losses to the investment of IPC.

CONCLUSION

Wherefore, it is respectfully prayed that this Hon'ble Court be pleased to declare that:

(1) Frontera acted in accordance with International Law in Nationalizing Pharmco; and

(2) The current Fronteran government is not liable for losses to the investments of IPC.

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121 *See Supra* note 13 at 616 & 617.

122 *See* Muller, *Supra* note 55 at 45.

123 *See Compromis* at 2.