

**IN THE  
INTERNATIONAL COURT OF JUSTICE AT THE PEACE PALACE  
THE HAGUE, THE NETHERLANDS 1993**

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**CASE CONCERNING THE NATIONALIZATION OF  
CERTAIN PROPERTY**

**BASTONIA**

*Applicant*

**V.**

**FRONTERA**

*Respondent*

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**MEMORIAL FOR THE APPLICANT**

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**STATEMENT OF JURISDICTION**

The Government of Bastonia and the Government of Frontera have submitted the following matter by special agreement to the International Court of Justice pursuant to paragraph 1 of Article 36 of the Statute of the International Court of Justice. Both States have accepted the jurisdiction of the Court without reservation.

## STATEMENT OF FACTS

Bastonia, a highly developed country, [Problem at 1] is home to the International Pharmaceutical Company, ("IPC") a large commercial enterprise which engages in the practice of exporting valuable technology and industry to developing countries.

In 1978, IPC established PharmCo as a pharmaceutical manufacturing operation in Frontera. [*id.* at 2] Pursuant to local law, PharmCo was incorporated in Frontera, although the company maintained a continuing connection with Bastonia. The initial investment in PharmCo of \$25 million was supplied by Bastonians who retained a substantial interest in the company. Between the years 1978 to 1989, the management of PharmCo consisted solely of Bastonian citizens and 60% of PharmCo's annual profits were returned to IPC in Bastonia. [*id.* at 2] PharmCo paid its taxes in Frontera and as a private corporation did not benefit from any particular subsidies or arrangements within that country. [Clarification no. 4] At the commencement of this relationship a 100 year contractual lease was signed by both parties. [Problem at 2] This demonstrated IPC's commitment to a long term investment and the Fronteran government's belief in the importance of the continued presence of IPC's investment.

To encourage and protect transfers of technology and expertise to the underdeveloped economy of Frontera, Bastonia concluded the Bilateral Investment Treaty (the "BIT") with Frontera. [*id.* at 1] This treaty was a reciprocal agreement aimed at protecting investments of the nationals of each State Party which were undertaken in the other Party's jurisdiction. Primarily, this treaty ensured the preservation and stability of the investments of citizens or companies of the other State Party. [Art. 10; *id.*] The BIT also explicitly provided for compensation in the event that either State Party failed to fulfil its obligations. [Art. 12; *id.*]

In 1990, during a period of civil unrest, the Fronteran government expropriated all manufacturing concerns situated in Frontera. Among those companies nationalized was PharmCo. [*id.* at 2]

As a result of this turmoil, the Revolutionary People's Government came to

power as the new government of Frontera. Many officials of the new government were former bureaucrats of the previous administration. [*id.*] The continuation of the previous legal order is explicitly recognized in General Law No. 1991/007 which provides that the laws enacted by the Colonial Government remain in force, subject to specific exceptions. [*id.* at 3]

The new Fronteran Ambassador to Bastonia recognized the importance of maintaining a harmonious economic and political environment between the two countries. In particular the Ambassador explicitly stated the desire of the Fronteran government that the co-operative relationship between Bastonia and Frontera would continue. [*id.* at 3]

Yet, despite these positive expressions of intent, the Revolutionary People's Government of Frontera failed to provide restitution or compensation for the expropriation of any company partly owned by aliens. PharmCo, as such a company, suffered this fate. [*id.*]

IPC pursued its claim through numerous administrative and judicial channels within Frontera. However, the merits of the claim were never heard due to the refusal of the Fronteran organs of ultimate jurisdiction to acknowledge the validity of the BIT. [*id.*] After exhausting all domestic remedies within Frontera, IPC then approached the Bastonian Foreign Ministry. The company highlighted the guarantee provisions of the BIT which had been breached by Frontera's actions. [*id.* at 3] The Foreign Minister of Bastonia formally protested to Frontera, and requested immediate compensation for the expropriation of PharmCo. The Fronteran government has continued to deny Bastonia's claims. [*id.* at 3-4]

After several months of negotiations the Bastonian government demonstrated its commitment to finding a peaceful, judicial and final settlement to the dispute by expressing its desire to submit the matter to this Court. [*id.* at 4] The Government of Frontera agreed to this course of action and on October 1, 1992 both governments filed a *compromis* pursuant to Article 36(1) of the Statute of the International Court of Justice.

**QUESTIONS PRESENTED**

1. Whether Frontera's expropriation of PharmCo without compensation or restitution is in breach of its treaty and customary international law obligations.

2. Whether Frontera is liable for the full value of losses accruing to the International Pharmaceutical Company as a result of these breaches.

## SUMMARY OF PLEADINGS

I Bastonia has standing to assert Frontera's breaches of the Bilateral Investment Treaty ("BIT") and customary international law in expropriating PharmCo, a manufacturing company located in Frontera. First, under the law of diplomatic protection, Bastonia as the state with which PharmCo has the closest connections, may provide protection for that company. Second, Bastonia may offer diplomatic protection to the International Pharmaceutical Company ("IPC") due to the loss of its investment in PharmCo and the interference with IPC's rights as a shareholder. Third, Bastonia has standing to bring this claim on behalf of IPC for its loss of rights in the lease signed by IPC and Frontera. The lease of Fronteran land constitutes an internationalized contract and as such is subject to international law. The denial of rights under the lease is also an international wrong. Fourth, both PharmCo and the lease constitute "investments" within the terms of the BIT, which has been breached by Frontera. As IPC has exhausted its local remedies in Frontera, Bastonia may institute these proceedings in accordance with international law. Alternatively, as Bastonia is a party to the BIT, Frontera's breach of that treaty by nationalizing IPC's interests provides an independent ground upon which Bastonia has standing to assert these claims.

II Frontera has expropriated PharmCo and the lease interest in breach of its treaty obligations. The BIT fulfilled the formal requirements for entry into force and both parties possessed the requisite capacity to conclude the treaty. Furthermore, as Frontera has always possessed the legal capacity to enter into arrangements with other nations, the assumption to power of the RPG is merely an instance of government succession. Customary international law establishes that treaties are attributable to states, not governments, and thus the RPG remains bound by the BIT. Further, the nature of the BIT and its express adoption by the RPG establishes Frontera's liability for the breaches of the treaty regardless of any question of state succession.

Frontera's expropriation of PharmCo represents a breach of Articles 10, 12 and 13 of the BIT. Frontera has failed to provide constant "protection and security" to the investments of IPC. Nor has Frontera compensated IPC for its

losses. Article 14 does not apply as the expropriation by Frontera was not an act of necessity and the loss and damage to IPC and PharmCo did not result from any civil disorder. Finally, the treaty has not been effectively terminated nor its obligations altered by the doctrine of *rebus sic stantibus*.

III Frontera has breached its customary international law obligations by illegally expropriating PharmCo and IPC's lease. The RPG is directly responsible for the expropriation of IPC's investments as the expropriatory act occurred when the failure to provide compensation became apparent. If the expropriation of PharmCo and the lease is characterized as the act of the Colonial Government, the RPG has inherited that liability by either the rules of government succession for international wrongs or through its express adoption of the act.

The expropriation of PharmCo has failed to comply with the requirements of customary international law. The expropriation was not for a public purpose. Further, the expropriation discriminated against Bastonian nationals. Frontera's failure to make provision for the payment of "appropriate" compensation is judged by the customary international law requirement of "prompt, adequate and effective" compensation. These actions rendered the expropriation of PharmCo by Frontera illegal.

Additionally, Frontera has breached the contract for the lease of Fronteran land and therefore must compensate IPC for this legal wrong.

Frontera is also liable under the doctrine of unjust enrichment for the benefit gained in the expropriation of a fully functional manufacturing concern at the expense of Bastonia.

IV Frontera must provide reparations for its illegal actions under the laws of state responsibility. An expropriation in breach of either custom or treaty imposes a duty to place IPC in a position that restores the value of its property rights, comprised of PharmCo and the lease. Reparations are calculated according to the Discounted Cash Flow method which represents the full losses suffered by IPC for the expropriation of its property in Bastonia.

## I. BASTONIA HAS STANDING TO ASSERT FRONTERA'S BREACHES OF INTERNATIONAL LAW

### A. Bastonia is Entitled to Offer Diplomatic Protection to PharmCo

A state is entitled to protect its nationals when injured by acts contrary to international law,<sup>1</sup> thus Bastonia may offer diplomatic protection to PharmCo. Although PharmCo was incorporated in Frontera, this is not decisive when determining nationality.<sup>2</sup> Where the choice of incorporation is dictated by circumstances (such as the requirements of Fronteran law), the economic control test,<sup>3</sup> or the "genuine" connection test which examines the factual links with a particular country,<sup>4</sup> provide a more accurate determination of PharmCo's nationality.

PharmCo's "close and permanent connection"<sup>5</sup> with Bastonia is demonstrated by the management's nationality, the provision of the initial investment, the retention of 49% ownership, and the repatriation of 60% of the profits to the International Pharmaceutical Company<sup>6</sup> in Bastonia.<sup>7</sup> As PharmCo's management is exclusively Bastonian, this is where real control is exercised.<sup>8</sup> Furthermore, the object of a rule governing the protection of companies should be to ensure that a company such as PharmCo has a chance to

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<sup>1</sup> Mavrommatis Palestine Concessions Case (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30); R. Lillich, *The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack*, 69 AM. J. INT'L L. 358, 360 (1975).

<sup>2</sup> E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 617-18 (1970); D. Harris, *The Protection of Companies in International Law in the Light of the Nottebohm Case*, 18 INT'L & COMP L.Q. 275, 314-17 (1969).

<sup>3</sup> I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 486 (4th ed. 1990); 1 G. SCHWARZENBERGER, *INTERNATIONAL LAW* 402-05 (3rd ed. 1957).

<sup>4</sup> Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 23-24 (April 6); Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5), 79 (separate opinion of Judge Fitzmaurice), 186 (separate opinion of Judge Jessup), 281 (separate opinion of Judge Gros).

<sup>5</sup> Barcelona Traction, Light and Power Co. Ltd., 1970 I.C.J. at 42.

<sup>6</sup> Hereinafter IPC.

<sup>7</sup> Problem at 3.

<sup>8</sup> Brownlie, *supra* note 3, at 486; Schwarzenberger, *supra* note 3, at 402-05.

rectify any damage suffered.<sup>9</sup> This can only be accomplished by recognizing Bastonia's right of diplomatic protection.

**B. Bastonia has Standing to Assert IPC's Claim**

**1. Customary international law establishes Bastonia's right of diplomatic protection for IPC as a shareholder in PharmCo**

The nationalization of PharmCo has directly resulted in damage to IPC as a Bastonian national. In such circumstances Bastonia may grant diplomatic protection to IPC as a shareholder in PharmCo.<sup>10</sup> First, shareholders have a right to diplomatic protection when the state whose responsibility has been invoked is the national state of the company.<sup>11</sup> IPC is at the mercy of Frontera and has suffered serious loss without the opportunity of redress.<sup>12</sup> Consequently, Bastonia may intervene to protect IPC's shareholding in PharmCo.

Secondly, where a shareholder's "direct" rights have been infringed the national state of the shareholder may intervene.<sup>13</sup> The expropriation of IPC's shares has removed its rights as a shareholder. This Court has included the right to declared dividends, the right to attend and vote at general meetings and the right to share in the residual assets of the corporation on liquidation as direct rights of the shareholder.<sup>14</sup> The expropriation of IPC's shares not only caused pecuniary damage, but it also led to the loss of capacity to enjoy those rights recognized by this Court.

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<sup>9</sup> Harris, *supra* note 2, at 310.

<sup>10</sup> Barcelona Traction, Light and Power Co. Ltd., (Belg. v. Spain) 1970 I.C.J. 3, 38-39 (Feb. 5); C. Staker, *Diplomatic Protection of Private Business Companies Determining Corporate Personality for International Law Purposes*, 62 BRIT. Y.B. INT'L L. 155, 171-72 (1990).

<sup>11</sup> Barcelona Traction, Light and Power Co. Ltd. 1970 I.C.J. at 72-73 (separate opinion of Judge Fitzmaurice); M. Jones, *Claims on Behalf of Nationals Who are Shareholders in Foreign Companies*, 26 BRIT. Y.B. INT'L L. 225, 236 (1949); G. van Hecke, *Nationality of Companies Analyzed*, 8 NETH. INT'L L. REV. 223, 237 (1961); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 713, cmt. e (1987) [hereinafter RESTATEMENT].

<sup>12</sup> Jones, *supra* note 11, at 236.

<sup>13</sup> Barcelona Traction, Light and Power Co. Ltd., 1970 I.C.J. at 48.

<sup>14</sup> Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain) 1972 I.C.J. 3, 36 (Feb. 5); Elettronica Sicula S.p.A (U.S. v. Italy), 1989 I.C.J. 15, 84 (July 20) (separate opinion of Judge Oda).

Alternatively, as Frontera's actions have destroyed PharmCo's ability to function as an independent legal person, IPC has a separate remedy.<sup>15</sup> When an expropriation takes place the corporation continues to exist, but only as a matter of form.<sup>16</sup> Diplomatic assistance is necessary to safeguard IPC as PharmCo can no longer protect itself.

**2. Bastonia is entitled to assert IPC's claim as lessee**

**a. The lease constitutes an internationalized contract**

The lease signed by the Fronteran Minister for the Interior and IPC, an alien corporation, is an internationalized contract. The proper law of that contract is international rather than domestic law.<sup>17</sup> The international legal principle of *pacta sunt servanda* provides that contractual obligations must be respected.<sup>18</sup> The act of expropriation derogates from IPC's expectations under the lease and therefore is a breach of this precept. In any event expropriation cannot nullify contracts that are internationalized.<sup>19</sup> As Frontera's acts lack conformity with the conduct expected of it under the lease there has been a breach of an international legal obligation.<sup>20</sup> Bastonia has standing to assert a claim for this breach on behalf of IPC.<sup>21</sup>

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<sup>15</sup> Barcelona Traction, Light and Power Co. Ltd., 1970 I.C.J at 40.

<sup>16</sup> J. Radnay, *Piercing the Corporate Veil Under International Law*, 16 SYRACUSE L. REV. 779, 794 (1964-65).

<sup>17</sup> <sup>17</sup> Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. Libya 53 I.L.R. 389, 447 (1979) [hereinafter TOPCO]; R. Jennings, *State Contracts in International Law*, 37 BRIT. Y.B. INT'L L. 156, 181 (1961); S. Schwebel, *International Protection of Contractual Arrangements*, 53 PROC. AM. SOC. INT'L L. 266, 273 (1959).

<sup>18</sup> H. Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775, 786 (1959); H. Shawcross, *The Problems of Foreign Investment in International Law*, 102 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAGUE [hereinafter RECUEIL DES COURS] 339, 352 (1961).

<sup>19</sup> Topco., 53 I.L.R. 389, 470-71, 477 (1977).

<sup>20</sup> Draft Articles on State Responsibility, art. 16 in *Report of the International Law Commission to the General Assembly on the Work of its 28th Session*, U.N.Doc. A/31/10 (1976), reprinted in [1976] 2 Y.B. Int'l L. Comm'n 1, 47-49, U.N.Doc. A/CN.4/SER.4/1976/Add.1 (Part 2).

<sup>21</sup> Shawcross, *supra* note 18, at 351.

**b. The lease is an acquired right under Fronteran Law**

The lease was an acquired right under Fronteran domestic law.<sup>22</sup> Acquired rights cannot be deprived of international legal significance by Acts of local law.<sup>23</sup> Thus Frontera cannot rely on the expropriatory decree to limit its international obligations owed to IPC.<sup>24</sup> Indeed, by passing a decree which effectively nullifies IPC's acquired rights, Frontera is guilty of a delict<sup>25</sup> for which Bastonia may bring an action.

**3. The Bilateral Investment Treaty creates a separate right upon which Bastonia may bring this action on behalf of IPC**

Article 10 of the Bilateral Investment Treaty,<sup>26</sup> concluded between Frontera and Bastonia, obligates each state "to provide the most constant protection and security ... to citizens or companies of the other State party." This explicitly enables Bastonia to protect IPC's rights as a shareholder of PharmCo.<sup>27</sup> Such treaty provisions are broadly interpreted to enhance the protection of foreign investors in locally incorporated subsidiaries.<sup>28</sup> Additionally, whether the lease is characterized as an internationalized contract or an acquired right, it constitutes an "investment" within the terms of the BIT. The derogation from the interests under the lease without compensation constitutes a breach of the BIT. In this context Article 10 provides an independent and substantive basis for

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<sup>22</sup> De Salba (U.S. v. Pan.), 7 Ann. Dig. 243 (June 29, 1933).

<sup>23</sup> Shawcross, *supra* note 18, at 351.

<sup>24</sup> Free Zones of Upper Savoy and District of Gex (Fr. v. Switz.) (1930) P.C.I.J. (ser. A) No. 24, at 12 (Dec. 12); BROWNIE, *supra* note 3, at 35.

<sup>25</sup> F. Mann, *State Contracts and State Responsibility*, 54 AM. J. INT'L L. 572, 575 (1960).

<sup>26</sup> Hereinafter BIT.

<sup>27</sup> Problem at 1.

<sup>28</sup> Elettronica Sicula S.p.A. (U.S. v. Italy), 1989 I.C.J. 15, 51, 79-80 (July 20), 95 (dissenting opinion of Judge Schwebel); S. Kubiawski, *The Case of Elettronica Sicula S.p.A.: Toward Greater Protection of Shareholders' Rights in Foreign Investments*, 29 COLUM. J. TRANSNAT'L L. 215, 244 (1991); S. Murphy, *The ELSI Case: An Investment Dispute at the International Court of Justice*, 16 YALE J. INT'L L. 391, 445 (1991).

Bastonia's right to bring this claim on behalf of IPC as either a lessee or a shareholder in PharmCo.

**C. IPC has Exhausted all Effective Domestic Remedies Available in Frontera**

IPC has pursued its domestic remedies through the appropriate organs of ultimate jurisdiction in Frontera.<sup>29</sup> While all local remedies must be exhausted before a claim is brought,<sup>30</sup> the rule only relates to "effective"<sup>31</sup> remedies which are "available and sufficient".<sup>32</sup> The burden is on the Respondent to show that IPC has failed to take advantage of all remedies;<sup>33</sup> a burden which Frontera has not discharged. IPC was denied the opportunity to plead the merits of the BIT due to the initial ruling of the Fronteran organs. In these circumstances IPC has exhausted the inadequate domestic remedies available in Frontera.

**D. Bastonia, as a Party to the Bilateral Investment Treaty Breached by Frontera, has Standing to Bring this Action in its Own Right**

It is indisputable that a state has a real legal interest in its international commerce involving the establishment of undertakings in foreign nations.<sup>34</sup> Consequently, Bastonia, as a party to the BIT which has been violated by Frontera, has suffered damage and thus has standing to bring an

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<sup>29</sup> Problem at 3.

<sup>30</sup> *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 5, 27 (Mar. 21); *Panevezys-Saldutiskis Railway (Est. v. Lith.)*, 1939 P.C.I.J. (ser. A/B) No. 76, at 18 (Feb. 28); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 5, 1950, art. 26, 213 U.N.T.S. 221.

<sup>31</sup> *Certain Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. 8, 39 (July 6) (separate opinion of Judge Lauterpacht).

<sup>32</sup> *Van Oosterwijk v. Belgium*, Ser A, No. 40, 3 Eur. H.R. Rep. 557, 566-567 (1981); *Campbell and Fell v. U.K.*, App. Nos. 7819/77, 7878/77, 7 Eur. H.R. Rep. 165, 191 (1985).

<sup>33</sup> *Elettronica Sicula S.p.A. (U.S. v. Italy)*, 1989 I.C.J. 15, 46 (July 20); *De Jong, Baljet & Van den Brink v. The Netherlands*, App. Nos. 8805/79; 8806/79; 9242/81, 8 Eur. H.R. Rep. 20, 32-33 (1986).

<sup>34</sup> *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 336 (Feb. 5) (dissenting opinion of Judge Riphagen).

action in its own right.<sup>35</sup> In this situation Bastonia is not required to exhaust domestic remedies.<sup>36</sup> Although Bastonia requested compensation for IPC, Bastonia is not espousing this claim purely on behalf of PharmCo or IPC. The diplomatic note presented to Frontera places the emphasis on the violation of specific articles of the BIT.<sup>37</sup> In these circumstances Bastonia may bring an action against Frontera in this Court.

## II. FRONTERA HAS BREACHED THE TREATY OBLIGATIONS OWED TO BASTONIA BY EXPROPRIATING PHARMCO

A treaty is binding upon its parties and must be performed in good faith.<sup>38</sup> The maxim *pacta sunt servanda* is to be applied when considering Frontera's actions derogating from the BIT.<sup>39</sup>

### A. The Bilateral Investment Treaty was Validly Concluded

Frontera and Bastonia are parties to the Vienna Convention on the Law of Treaties.<sup>40</sup> As the VCLT entered into force<sup>41</sup> prior to the conclusion of the treaty between Frontera and Bastonia<sup>42</sup> the validity of the BIT may only be impeached on the grounds provided within the VCLT.<sup>43</sup> The BIT satisfies

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<sup>35</sup> Mann, *supra* note 25, at 249; A. Bagge, *Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders*, 34 BRIT. Y.B. INT'L L. 162, 163 (1958).

<sup>36</sup> *Elettronica Sicula S.p.A. (U.S. v. Italy)*, 1989 I.C.J. 15, 42-43 (July 20); Bagge, *supra* note 35, at 163.

<sup>37</sup> Problem at 4.

<sup>38</sup> Vienna Convention on the Law of Treaties, *opened for signature* May 22, 1969, art. 26, 8 I.L.M. 679, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); RESTATEMENT, *supra* note 11, §321.

<sup>39</sup> LORD MCNAIR, THE LAW OF TREATIES 493 (1961) [hereinafter MCNAIR (1961)].

<sup>40</sup> Vienna Convention on the Law of Treaties, *opened for signature* May 22, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331, (entered into force Jan. 27, 1980) [hereinafter VCLT].

<sup>41</sup> *Id.*

<sup>42</sup> Jan. 1, 1981. Problem at 1.

<sup>43</sup> VCLT, *supra* note 40, art. 4, art. 42 para.(2); Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES 8 (1984).

the preliminary requirements of form, signature, and ratification.<sup>44</sup> Furthermore, Frontera had been granted capacity to enter the BIT.<sup>45</sup> It is established that even states under colonial arrangements may have this capability.<sup>46</sup> International recognition of treaty-making power is the criterion for this legal capacity.<sup>47</sup> Frontera's capacity was well recognized by the international community.<sup>48</sup>

## **B. Frontera is Bound by the Bilateral Investment Treaty**

Frontera remains bound by the BIT as its personality since ratification has not changed.

### **1. Frontera's international personality was not altered by the rise to power of the Revolutionary People's Government**<sup>49</sup>

#### **a. Frontera was a state before the RPG assumed government**

International law determines objectively whether or not an entity is in fact a state.<sup>50</sup> The Montevideo Convention,<sup>51</sup> which reflects the requirements of customary international law,<sup>52</sup> sets out the four criteria of statehood: a permanent population, a defined territory, a government and the capacity to enter into relations with other states. Accordingly, Frontera achieved

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<sup>44</sup> VCLT, *supra* note 40, art. 2 para.(1)(a), art. 7 para. (2), art. 12; Problem at 1.

<sup>45</sup> Clarification no. 2.

<sup>46</sup> Advisory Opinion No. 4, *Tunis and Morocco Nationality Decrees*, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7); K. Keith, *Succession to Bilateral Treaties by Seceding States*, 61 AM. J. INT'L LAW 521, 522 n. 3 (1967).

<sup>47</sup> A. MCNAIR, *THE LAW OF TREATIES: BRITISH PRACTICE AND OPINIONS* 75-6 (1938) [hereinafter MCNAIR (1938)]; MCNAIR (1961), *supra* note 39, at 43; 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 925 (H. Lauterpacht ed., 8th ed. 1955); O. UDOKANG, *SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES* 170-172 (1972).

<sup>48</sup> Problem at 1.

<sup>49</sup> Hereinafter RPG.

<sup>50</sup> K. MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 2 (1968).

<sup>51</sup> *Montevideo Convention on Rights and Duties of States*, opened for signature Dec. 26, 1933, 165 L.N.T.S. 19.

<sup>52</sup> J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 36 (1979).

statehood in the early 1900s when it gained both the power to conduct foreign policy and the capacity to make treaties.<sup>53</sup> Frontera's statehood before 1990 is further evidenced by the fact that it was admitted as an original member of the United Nations<sup>54</sup> and was thus recognized as a state by the international community. Although recognition is generally regarded as declaratory, it tends to consolidate general legal status.<sup>55</sup>

**b. The rise to power of the RPG constituted government succession**

As Frontera was already a state, the RPG's attainment of power is merely an example of government succession. State practice and judicial decisions<sup>56</sup> establish that changes in government, including revolutions, do not affect the continuity of a state.<sup>57</sup> Even following major revolutions, the question of the continuity of a state has not been doubted.<sup>58</sup> Thus the 1990 seizure of power by the RPG did not affect the continuity of the state of Frontera.

International law requires that a former colony, such as Frontera, with substantial internal autonomy and international personality be treated as a continuation of the former state rather than the creation of a new one.<sup>59</sup> Like India and the older Dominions of the British Commonwealth, Frontera's power over its foreign relations conferred upon it international legal personality.<sup>60</sup> Therefore it must be treated as a continuation of the

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<sup>53</sup> Clarification no. 1.

<sup>54</sup> U.N. CHARTER, art. 3; Clarification no. 1.

<sup>55</sup> CRAWFORD, *supra* note 52, at 23-4, 74; MCNAIR (1938), *supra* note 47, at 75-76; OPPENHEIM, *supra* note 47, at 925.

<sup>56</sup> Tinoco Arbitration (Gr. Brit. v. Costa Rica), 1 R.I.A.A. 369 (1923); *The Sapphire v. Napoleon III*, 78 U.S. (11 Wall.) 164 (U.S. 1871); *Russian Government v. Lehigh Valley Railroad Co.*, 293 F. 133 (1919), *affd.* 21 F.2d. 396 (1927); *Lazard Brothers and Co. v. Midland Bank Ltd.*, App. Cas. 289 [1933].

<sup>57</sup> 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 759 (1963); MAREK, *supra* note 50, at 24-73; CRAWFORD, *supra* note 52, at 405-56; RESTATEMENT, *supra* note 11, §208.

<sup>58</sup> *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 24 (May 24); MAREK, *supra* note 50, at 31-38; P. Noonan, *Revolutions and Treaty Termination*, 2 DICK. J. INT'L L. 301, 309-15 (1984).

<sup>59</sup> CRAWFORD, *supra* note 52, at 392; A. Lester, *State Succession to Treaties in the Commonwealth*, 12 INT'L & COMP. L.Q. 480-8, 506 (1963).

<sup>60</sup> MCNAIR (1961), *supra* note 39, at 111-6; D. O'Connell, *Independence and Succession to Treaties*, 38 BRIT. Y.B. INT'L L. 84, 97-101 (1962).

previous entity, necessitating the maintenance of all treaties.<sup>61</sup> As Frontera had already gained statehood, the events of 1990 were merely the final stage in Frontera's evolution to full independence.<sup>62</sup> Their effect was purely domestic and did not alter Frontera's international personality. While fifty states recognized the RPG as the successor government, there is no evidence that any nations purported to recognize Frontera as a new state. Additionally, the United Nations did not require Frontera to apply for membership as a new state,<sup>63</sup> and in fact allowed the RPG representative to take up Frontera's U.N. seat.<sup>64</sup> This consolidates the view that the takeover by Patrick Darwin did not amount to the creation of a new state.

c. Frontera remains bound by the Bilateral Investment Treaty

It is a fundamental principle of international law that treaties bind states, not governments.<sup>65</sup> Changes in government, or the form of government, of one of the parties have no influence upon the binding force of treaties.<sup>66</sup> When Frontera validly signed and ratified the BIT in 1980<sup>67</sup> it became bound as a state.

2. Under the laws of state succession Frontera remains bound by the Bilateral Investment Treaty

Customary international law requires that treaties of a "civil"

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<sup>61</sup> Lester, *supra* note 59, at 480-481; *The Succession of States in Relation to Membership in the United Nations: Memorandum Prepared by the Secretariat*, in [1962] 2 Y.B. INT'L L. COMM'N 101, U.N. Doc. A/CN.4/149 and Add 1.

<sup>62</sup> Keith, *supra* note 46, at 544.

<sup>63</sup> Problem at 3.

<sup>64</sup> Problem at 3; *cf* U.N. CHARTER, art 4, ¶ 2.

<sup>65</sup> MCNAIR (1961), *supra* note 39, at 17-18, 20, 668.

<sup>66</sup> OPPENHEIM, *supra* note 47, at 925; 1 J. MOORE, A DIGEST OF INTERNATIONAL LAW 249 (1906); MCNAIR (1961), *supra* note 39, at 668; 2 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1528 (2d ed. 1951); UDOKANG, *supra* note 47, at 118, 405 (1972).

<sup>67</sup> Problem at 1.

nature, such as commercial and economic treaties, remain in force.<sup>68</sup> In order for a rule of custom to be established state practice must be "extensive and virtually uniform,"<sup>69</sup> but does not have to be in rigorous conformity with the rule.<sup>70</sup> This level of state practice is established by the older British Dominions<sup>71</sup> and the vast majority of new states which gained independence since 1945.<sup>72</sup> These states have acknowledged their succession to treaties as a general rule.<sup>73</sup> Zambia, Guyana, Barbados and Mauritius expressly recognized that all treaties continued to apply to their territory after independence by operation of customary international law.<sup>74</sup> This rule is also recognized in the writings of eminent publicists<sup>75</sup> and the reports of the International Law Association.<sup>76</sup> Consequently, under the laws of state succession Frontera remains bound by the BIT due to its economic nature.

The "clean slate" approach to treaty succession referred to in Article

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<sup>68</sup> H. WILKINSON, *THE AMERICAN DOCTRINE OF STATE SUCCESSION* 115-24 (1934) discussed in UDOKANG, *supra* note 47, at 130; Keith, *supra* note 46, at 545-46.

<sup>69</sup> North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20).

<sup>70</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27).

<sup>71</sup> O'Connell, *supra* note 60, at 103; UDOKANG, *supra* note 47, at 181-85.

<sup>72</sup> 2 D. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 3 (1967).

<sup>73</sup> Cameroon, Ghana, Guinea, Ivory Coast, Malaya, Niger, Nigeria, Sierra Leone, Jamaica, Trinidad and Tobago, Congo, Malagasy Republic, Senegal, Central African Republic, Laos, Cambodia, Vietnam, Indonesia, Jordan, Pakistan, Sudan, Tunisia, Morocco, Cyprus, Dahomey, Togo, Syria, Iraq, Burma, Ceylon, Western Samoa and the Philippines. See O'CONNELL, *supra* note 72, at 114-15, 225, 359-60; UDOKANG, *supra* note 47, at 209-11; Keith, *supra* note 59, at 521.

<sup>74</sup> O'CONNELL, *supra* note 72, at 115.

<sup>75</sup> O'CONNELL, *supra* note 72, at 4; O'Connell, *supra* note 60, at 86; D. O'Connell, *Independence and Problems of State Succession*, in *THE NEW NATIONS IN INTERNATIONAL LAW AND DIPLOMACY* 7 (O'Brien ed. 1965); Keith, *supra* note 59, at 545; C. Jenks, *State Succession in Respect of Law-Making Treaties*, 29 BRIT. Y.B. INT'L L. 105, 142 (1952); G. La Forest, *Towards a Reformulation of the Law of State Succession*, PROC. AM. SOC'Y INT'L L. 103 (1966).

<sup>76</sup> INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-THIRD CONFERENCE - BUENOS AIRES 589-632 (1968); INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-SECOND CONFERENCE - HELSINKI 557-95 (1966); D. O'Connell, *The Present State of the Law on State Succession*, in *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS* 331-338 (Prof. Dr. M. Bos ed. 1973) [hereinafter O'Connell in Bos].

16 of the Vienna Convention on Succession of States in Respect of Treaties<sup>77</sup> is not a codification of existing custom.<sup>78</sup> Additionally as it has not been signed by Frontera or Bastonia it can be disregarded.

### 3. Frontera has adopted the Bilateral Investment Treaty

Alternatively, if the BIT was not inherited under the rules of state succession, Frontera's conduct amounts to an adoption of its provisions. The Fronteran Ambassador to Bastonia stated that the tradition of economic co-operation with Bastonia would continue.<sup>79</sup> Although General Law No. 1991/007 repudiated certain acts of the former government, it explicitly exempted treaties.<sup>80</sup> As a result of these affirmative actions, Frontera is precluded from denying the obligations under the BIT.<sup>81</sup>

### C. Frontera has Failed to Fulfil its Obligations Under the Bilateral Investment Treaty

Frontera's failure to fulfil its obligations under Articles 10, 12 and 13 amount to a "material breach" of the BIT.<sup>82</sup>

#### 1. The Bilateral Investment Treaty applies to IPC's investments in Frontera

The BIT applies to "investments of citizens or companies of the other

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<sup>77</sup> Vienna Convention on Succession of States in Respect of Treaties, opened for signature Aug. 22, 1978, 17 I.L.M. 1488 [hereinafter VCSSRT].

<sup>78</sup> O'Connell in Bos, *supra* note 76, at 331-388; M. Maloney, *Succession of States in Respect of Treaties: The Vienna Convention of 1978*, 19 VA. J. INT'L L. 885, 902 (1979); R. Klein, *Consensual Merger as a Means of State Succession and its Relation to Treaty Obligations*, 13 CASE W. RES. J. INT'L L. 413, 429 (1981).

<sup>79</sup> Problem at 3; Nuclear Tests (Austl. v. Fr., N.Z. v. Fr.), 1974 I.C.J. 253, 265-70 (Dec. 20).

<sup>80</sup> Problem at 3.

<sup>81</sup> Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, 32 (June 15); VCSSRT, *supra* note 77, art. 24, para. (1)(b); Keith, *supra* note 46, at 544.

<sup>82</sup> VCLT, *supra* note 40, art. 60.

State Party".<sup>83</sup> Unlike other bilateral investment treaties,<sup>84</sup> there is no indication in the BIT that the protection was intended to apply only to investments made after it came into force. Although treaties are non-retroactive,<sup>85</sup> the relevant temporality is the time of loss or damage, not the date of investment. Thus both the lease and PharmCo are protected under the provisions of the BIT.

## **2. Frontera has breached the Bilateral Investment Treaty**

### **a. Frontera has failed to provide protection to IPC**

Frontera's primary obligation under the BIT<sup>86</sup> is "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". The clear meaning of these words<sup>87</sup> precludes Frontera from deliberately causing damage by expropriating the investments of Bastonians. The additional phrase "against loss of, or damage to" incorporates an absolute prohibition against expropriation. The expropriation of PharmCo and IPC's lease is a breach of this obligation.

### **b. Frontera has failed to provide compensation**

As Frontera has failed to comply with its primary obligation in Article 10, there arises a secondary obligation to provide compensation<sup>88</sup> on terms no less favourable than those accorded to "the citizens or companies of any other state".<sup>89</sup> The expression "any other state" includes the Respondent. It clearly incorporates both the "most-favoured-nation" standard and the

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<sup>83</sup> BIT, art. 10.

<sup>84</sup> UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES 29 (1988) [hereinafter UNCTC], see eg. the treaties between France and Chile, Ethiopia, Sri Lanka and Syria.

<sup>85</sup> VCLT, *supra* note 40, art. 28.

<sup>86</sup> BIT, art. 10.

<sup>87</sup> VCLT, *supra* note 40, art. 31, para (1).

<sup>88</sup> BIT, art. 12.

<sup>89</sup> BIT, art. 13.

"national" standard as discussed by a Chamber of this Court.<sup>90</sup> A failure to fulfil both standards constitutes a breach. The "national" standard imposes an obligation on Frontera not to discriminate between its own nationals and those of any other state.<sup>91</sup> Frontera, by providing restitution to some of its own nationals, but not to foreign nationals has failed to perform the BIT in good faith.<sup>92</sup>

**3. Article 14 of the Bilateral Investment Treaty does not permit Frontera to escape its obligation to pay compensation**

**a. Article 14 of the BIT does not apply as the loss did not result from the 1990 taking**

Article 14 states that compensation is not payable in the event that the loss or damage "results from" an act of necessity during a time of "war, national emergency, or revolt". Even if the act of the previous government is so described, the loss occasioned was not caused by that act. IPC's loss resulted from the new government's failure to provide restitution or full compensation. Thus Frontera cannot rely on Article 14 to relieve it of the consequences of its breach.

**b. Article 14 does not apply because the taking was not an act of necessity**

The rules relevant to determining the meaning of the phrase "act of necessity" are contained in Article 33 of the Draft Articles on State Responsibility. These rules are consistent with state practice.<sup>93</sup> The expropriation was not a "necessity" as Frontera has failed to show that its actions were the only means<sup>94</sup> of protecting Frontera's essential interests

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<sup>90</sup> *Elettronica Sicula S.p.A. (U.S. v. Italy)*, 1989 I.C.J. 15, 53 (July 20).

<sup>91</sup> UNCTC *supra* note 84, at 46.

<sup>92</sup> VCLT, *supra* note 40, art. 26.

<sup>93</sup> O. Schacter, *Recent Trends in International Law Making*, 12 AUSTL. Y.B. INT'L L. 1, 6 (1990).

<sup>94</sup> *Oscar Chinn (U.K. v. Belg.)* 1934 P.C.I.J. (ser. A/B) No. 63, at 114 (Dec. 12).

against a grave and imminent peril.<sup>95</sup>

**c. Article 14, at most, only applies to a small proportion of the compensation to which Bastonia is entitled**

If Article 14 is held to apply, its scope is limited to the loss resulting from the act of necessity. This restriction refers to the short-term removal of company profits to provide funding for the action to restore order. Any conduct going beyond what is strictly necessary for this purpose constitutes a wrongful act *per se*, even if it excuses the remainder of Frontera's conduct.<sup>96</sup> In particular, compliance with the international obligation must be forthcoming once the peril has been averted.<sup>97</sup> Therefore, Article 14 at most is only applicable to the loss of PharmCo's earnings during the revolution. IPC's continuing loss of profits and loss of any indirect rights to participate in PharmCo are beyond the scope of the BIT's excusatory provision.

**4. The doctrine of *rebus sic stantibus* does not justify Frontera's failure to honour the Bilateral Investment Treaty**

**a. Frontera has not fulfilled the substantive conditions limiting the doctrine**

There is a presumption against the existence of any right to unilaterally terminate a treaty.<sup>98</sup> Although Article 62 of the VCLT allows an exception to this general rule where there has been a fundamental change of circumstances, it must be restrictively interpreted.<sup>99</sup> The "revolution"

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<sup>95</sup> Draft Articles on State Responsibility, art. 33, para. (1)(a) in *Report of the International Law Commission on the Work of its 32nd Session*, U.N. Doc A/35/10, reprinted in [1980] 2 Y.B. INT'L L. COMM'N 351, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2); Reply of the Law Officer, Mr Jenner, November 22, 1832, in the Anglo-Portugese dispute of 1832, quoted in 2 INTERNATIONAL LAW OPINIONS 231 (A. McNair ed. 1956).

<sup>96</sup> Draft Articles on State Responsibility, in *Report of the International Law Commission on the Work of its 32nd Session*, U.N. Doc A/35/10, reprinted in [1980] 2 Y.B. INT'L L. COMM'N 366, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2).

<sup>97</sup> *Id.* at 366-67.

<sup>98</sup> MCNAIR (1961), *supra* note 39, at 493.

<sup>99</sup> H. Koeck, *The "Changed Circumstances" Clause After the United Nations Conference on the Law of Treaties*, 4 GA. J. INT'L & COMP. L. 93, 103 (1974).

in Frontera did not constitute a fundamental change. This is highlighted by the fact that the RPG is comprised primarily of former bureaucrats of the Colonial Government.<sup>100</sup> Neither the nature, content, nor the facts surrounding the conclusion of the BIT indicate that the circumstances which have changed constitute an essential basis of the BIT.<sup>101</sup>

The change of circumstances did not radically transform the extent of Frontera's obligations under the BIT.<sup>102</sup> Those obligations did not become "inequitably heavy",<sup>103</sup> nor was the performance rendered "essentially different from that originally undertaken."<sup>104</sup> The obligation remained unaltered.

The "revolution" was clearly foreseeable.<sup>105</sup> Indeed, the inclusion of Article 14 of the BIT suggests that both parties foresaw the possibility of future civil strife. Thus Frontera may not terminate its obligations under the BIT according to the doctrine of *rebus sic stantibus*.

**b. Frontera has not fulfilled the procedural conditions limiting the doctrine.**

Articles 65 and 66 of the VCLT prescribe the procedures for dealing with unilateral claims to terminate treaties and are an essential part of the VCLT and the doctrine of *rebus sic stantibus*.<sup>106</sup> Frontera has failed to give any notice of its intention not to be bound and any purported termination of the BIT is therefore ineffective.<sup>107</sup>

**c. Frontera is prevented from terminating the Bilateral Investment Treaty due to its earlier acquiescence to the treaty**

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<sup>100</sup> Problem at 2.

<sup>101</sup> VCLT, *supra* note 40, art. 62, para. (1)(a).

<sup>102</sup> *Id.* at art. 62, para. (1)(b).

<sup>103</sup> Koeck, *supra* note 99, at 105; See also Fisheries Jurisdiction (U.K. v. Ice., F.R.G. v. Ice.), 1973 I.C.J. 3, 21, 65 (July 25).

<sup>104</sup> Fisheries Jurisdiction (U.K. v. Ice., F.R.G. v. Ice.), 1973 I.C.J. 3, 21, 65 (July 25).

<sup>105</sup> See VCLT, *supra* note 40, art. 62, para. (1).

<sup>106</sup> *Id.*

<sup>107</sup> American International Group, Inc. v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 96, 112 n.3 (concurring opinion of Judge Mosk) (1983).

The actions of the Fronteran Ambassador and the Parliament do not only constitute an adoption of the BIT.<sup>108</sup> Additionally this conduct amounts to acquiescence by conduct in accordance with Article 45 of the VCLT.<sup>109</sup> This article does not incorporate the technical criteria of estoppel found in municipal law.<sup>110</sup> Therefore detriment is not required. Having acquiesced to the BIT following the civil disruption, Frontera cannot now invoke *rebus sic stantibus* as a ground for terminating the BIT.

### III. FRONTERA'S EXPROPRIATION OF PHARMCO AND THE LEASE CONSTITUTES A VIOLATION OF CUSTOMARY INTERNATIONAL LAW

#### A. The Act of Expropriating Pharmco is Attributable to Frontera

##### 1. The RPG expropriated PharmCo

The expropriation of PharmCo was executed by the present Fronteran government. "Expropriation" describes a taking of private property by a state without appropriate compensation.<sup>111</sup> A breach of an obligation to protect the property of foreigners does not occur merely because the state has failed to protect property.<sup>112</sup> The state must also have failed to provide compensation. Frontera's initial conduct created a situation incompatible with the required obligation. However, the breach was only completed when the government refrained from correcting the situation, or, confirmed it by further action.<sup>113</sup> This occurred at the date of Frontera's reply to

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<sup>108</sup>See *Supra*, at 11.

<sup>109</sup> VCLT, *supra* note 40, art. 45 para (b).

<sup>110</sup> Draft Articles on the Law of the Treaties in Reports of the International Law Commission on the work of its 18th Session, UN Doc. A/6309/Rev.1 reprinted in [1966] 2. Y.B. INT'L L. COMM'N. 239-250, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

<sup>111</sup> J. WESTBERG, INTERNATIONAL TRANSACTIONS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-U.S. CLAIMS TRIBUNAL. 1, n.1 (1991).

<sup>112</sup> Draft Articles on State Responsibility, art. 21(2) in Report of the International Law Commission on its 29th Session, U.N.Doc. A/32/10, reprinted in [1977] 2 Y.B. INT'L L. COMM'N. 28, A/CN.4/SER.A/1977/Add 1.

<sup>113</sup> *Id.*

Bastonia's diplomatic note,<sup>114</sup> or when the wholly-owned Fronteran corporations were returned to their owners.

**2. If the expropriation is characterized as the act of the Colonial Government, Frontera remains liable**

**a. Frontera remains responsible for the expropriation despite the change in government**

Responsibility for an international wrong is attributed to the state, not a government.<sup>115</sup> As Frontera's statehood was not affected by the events of 1990, the RPG, as the current Fronteran government, is liable to pay compensation for the expropriation.

**b. Frontera is liable to pay compensation through its adoption of the act of expropriation**

If state succession did occur the RPG is still liable to compensate due to its adoption of the act of expropriation. The Colonial Government removed PharmCo from its shareholders and placed it under government management. The RPG unequivocally adopted that act when it assumed the management of PharmCo through its own organs.<sup>116</sup> It further strengthened this adoption by returning some companies to their shareholders while explicitly deciding to retain ownership of PharmCo.<sup>117</sup>

Furthermore, it is clear that the decree expropriating companies with foreign ownership accords with the RPG's economic goals within the terms of General Law No. 1991/007. The approval given by the RPG to the expropriation and the decision to perpetuate that act by failing to return PharmCo

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<sup>114</sup> Feb. 10, 1992. Problem at 3.

<sup>115</sup> Draft Articles on State Responsibility, art. 1 in Report of the International Law Commission to the General Assembly, U.N. Doc. A/90101/Rev.1, reprinted in [1973] 2 Y.B. Int'l L. Comm'n 173, U.N. Doc. A/CN.4/SER.A/1973/Add.1; BROWNLIE, *supra* note 3, at 432; HYDE, *supra* note 67, at 158; C. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 37-8 (1967); W. Czaplinski, *State Succession and State Responsibility*, 28 CAN. Y.B. INT'L L. 339 (1990).

<sup>116</sup> Clarification no. 4.

<sup>117</sup> Problem at 3.

translated that proceeding into the action of the RPG.<sup>118</sup> Therefore Frontera, even if regarded as a new state, is responsible.

**B. Frontera's Expropriation of PharmCo is in Breach of International Law**

**1. Frontera has breached the international minimum standard of respect for acquired rights**

Frontera is bound to observe an international minimum standard in the treatment of Bastonian nationals and their property.<sup>119</sup> This standard results from Frontera's obligation to display fair and equitable treatment to nationals of other states.<sup>120</sup> The standard is objective<sup>121</sup> and is to be judged by international law.<sup>122</sup> It applies regardless of the treatment of Fronteran nationals.<sup>123</sup>

The Bastonian property situated within Frontera is subject to the international minimum standard which requires respect for acquired rights.<sup>124</sup> Acquired rights comprise those rights which Frontera has granted Bastonian nationals through the admittance and acquisition of property in Fronteran territory.<sup>125</sup>

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<sup>118</sup> United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 35 (May 24); Lighthouses Concession (Fr. v. Greece) 12 R.I.A.A. 155, (Perm. Ct. Arb. 1956).

<sup>119</sup> M. McDougal, H. Lasswell, L. Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AM. J. INT'L L. 432, 446 (1976); E. Borchard, *The Minimum Standard in the Protection of Aliens*, 33 PROC. AM. SOC. INT'L L. 51, 53 (1933).

<sup>120</sup> S. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 INT'L & COMP. L.Q. 588, 590 (1988).

<sup>121</sup> C. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 514-15 (1964).

<sup>122</sup> *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 22 (May 25); E. Root, *The Basis of Protection to Citizens Residing Abroad*, 4 PROC. AM. SOC. INT'L L. 16, 20-21 (1910).

<sup>123</sup> McDougal, Lasswell, Chen, *supra* note 119, 446.

<sup>124</sup> F. Garcia Amador, *Responsibility of the State For Injuries Casued in its Territory to the Person or Property of Aliens - Measures Affecting Acquired Rights*, [1959] Y.B. INT'L L. COMM'N 1, 5, U.N. Doc. A/CN.4/SER.A/1959; S. Asante, *supra* note 120, at 595.

<sup>125</sup> *Barcelona Traction, Light and Power Co. Ltd.* (U.S. v. Italy) 1970 I.C.J. 3, 32 (Feb. 5); *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.) 1926 P.C.I.J. (ser. A) No. 7, at 42 (May 25).

The right to private property is a fundamental human right and a principle of social organisation.<sup>126</sup> Customary international law recognizes the sovereign power of Frontera to derogate from the doctrine of acquired rights when a superior interest so requires.<sup>127</sup> Frontera has, at the most, a conditional right to expropriate.<sup>128</sup> Expropriation is only compatible with the doctrine of acquired rights, and thus legal, if it is justified by a public purpose, is non discriminatory and accompanied by appropriate compensation.<sup>129</sup>

**2. Frontera has breached the conditions required for lawful expropriation**

**a. Frontera's expropriation of PharmCo was not for a public purpose**

Customary international law requires that expropriation be for a recognized public purpose.<sup>130</sup> The nationalization of PharmCo was solely for the financial purpose of obtaining an ongoing manufacturing enterprise. This is not a recognized public purpose.<sup>131</sup> The only possible exception to this requirement involves the expropriation of revenue from petroleum resources.<sup>132</sup> Pharmco has clearly not been involved in any exploitation of

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<sup>126</sup> *Universal Declaration of Human Rights, Resolution 217A (III)*, 3 U.N. G.A.O.R. at 71, U.N. Doc A/811 (1948), art 17. [hereinafter *Universal Declaration*].

<sup>127</sup> F. Garcia Amador, *supra* note 124, at 5; B. WORTLEY, *EXPROPRIATION IN PUBLIC INTERNATIONAL LAW* 23 (1959).

<sup>128</sup> *Libyan American Oil Company v. Libya*, 20 I.L.M. 1, 50 (1981); *Texaco Overseas Petroleum & California Asiatic Oil Co v. Libya* 53 I.L.R. 389, 469 (1977); G.A. Res 1803, 17 U.N. GAOR, Supp (No. 17) 19, para. 4, U.N. Doc A/5217 (1962).

<sup>129</sup> G.A. Res 1803, 17 U.N. GAOR, Supp (No. 17) 19, para. 4, U.N. Doc A/5217 (1962), paragraph 4; *RESTATEMENT, supra* note 11, § 712.

<sup>130</sup> *Certain German Interests in Polish Upper Silesia (Ger. v. Pol)* 1926 P.C.I.J. (ser. A) No. 7, at 22 (May 25); *Walter Fletcher Smith Claim (U.S. v. Cuba)* 6 R.I.A.A. 913, 917; L. Sohn & R. Baxter, *Draft Convention on the International Responsibility of States For Injuries to Aliens*, 55 AM. J. INT'L L. 545, 553, 555 (1961) [hereinafter *Harvard Draft*].

<sup>131</sup> *Amoco International Finance Corp. v Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, 233 (1987).

<sup>132</sup> *Id.*

natural resources and therefore this exception is inapplicable.

**b. Frontera has discriminated between Bastonians and Fronterans in the expropriation of PharmCo**

Discrimination between Fronterans and Bastonians on the grounds of nationality in the expropriation of property is a breach of customary international law.<sup>133</sup> This is supported by judicial and arbitral decisions<sup>134</sup> and state practice.<sup>135</sup> Discrimination on the grounds of nationality in the expropriation of foreign owned property is also a breach of human rights.<sup>136</sup> Frontera has breached this requirement by providing restitution to some of its nationals but not to Bastonians.

**c. Frontera has failed to provide compensation in accordance with customary international law**

At customary international law Frontera must pay "appropriate" compensation to IPC for the expropriation of PharmCo.<sup>137</sup> "Appropriate" compensation is to be determined by standards of international law.<sup>138</sup> The use of municipal tribunals to determine the relevant standard, based on the The Charter of Economic Rights and Duties of States,<sup>139</sup> is contrary to

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<sup>133</sup> B. Weston, *The New International Economic Order and the Deprivation of Foreign Proprietary Wealth: Some Reflections upon Contemporary International Law Debate*, 75 AM. J. INT'L L. 437, 447 (1981); C. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 139 (1967).

<sup>134</sup> The Oscar Chinn Case 1934 P.C.I.J. (ser. A/B) No. 63, at 87 (Dec 12th); *Amoco International Finance Corp. v. Iran*, 15 Iran - U.S. Cl. Trib. Rep. 189, 231 (1987).

<sup>135</sup> *Netherlands Note of 18 December 1959 Regarding Nationalisation of Dutch owned Enterprises*, 54 AM. J. INT'L L. 484, 486-7 (1960); *US Department of State Statement on Foreign Investment and Nationalization of 30 November 1975*, 15 I.L.M. 186 (1976).

<sup>136</sup> *Universal Declaration*, *supra* note 126, art. 2, in conjunction with art. 7 & art. 17; McDougal, Lasswell, Cheng, *supra* note 119, at 464.

<sup>137</sup> *Harvard Draft*, *supra* note 130, art. 10 para (2); F. Garcia - Amador, *supra* note 124, at 17; RESTATEMENT, *supra* note 11.

<sup>138</sup> E. Lauterpacht, *Issues of Compensation and Nationality in the Taking of Energy Investments*, 8 J. ENERGY & NAT. RESOURCES L. 241, 243 (1990); RESTATEMENT, *supra* note 11.

<sup>139</sup> *The Charter of Economic Rights and Duties of States*, G.A. Res. 3281, U.N. GAOR, 28th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 1975.

customary international law.<sup>140</sup> General Assembly Resolutions are not legally binding. At the most, they are only of moral or political force.<sup>141</sup> The standard of "appropriate" compensation or its counterparts,<sup>142</sup> "fair" or "just" compensation, are well established principles of customary international law.<sup>143</sup> The requirement of "appropriate" compensation is supported by bilateral treaty practice,<sup>144</sup> international arbitral awards<sup>145</sup> and the writings of eminent publicists.<sup>146</sup> Frontera's obligation to provide "appropriate compensation" is expressed as the requirement to pay "prompt, adequate and effective" compensation.<sup>147</sup> This standard is a well accepted norm of international law.<sup>148</sup>

Frontera has not paid "prompt" compensation as no compensation has been

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<sup>140</sup> *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. Libya* 53 I.L.R 389, 489 (1977).

<sup>141</sup> J. BRIERLY, *THE LAW OF NATIONS* 110 (6th ed. 1963)

<sup>142</sup> D. Robinson, *Expropriation in the Restatement Revised*, 78 AM. J. INT'L L. 176, 176 (1984); *RESTATEMENT*, *supra* note 11.

<sup>143</sup> *Amoco International Finance Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, 252 (1987); *RESTATEMENT*, *supra* note 11; S. Schwebel, *The Story of the United Nations on Permanent Sovereignty Over Natural Resources*, 49 A.B.A.J. 463, 465-66 (1963).

<sup>144</sup> Treaty Concerning the Reciprocal Encouragement and Protection of Investments, art III, Sept 29, 1982, U.S.- Egypt, *reprinted in* 21 I.L.M. 927; Agreement Concerning the Reciprocal Encouragement and Protection of Investment, Art 4, Mar 10, 1984, P.R.C.- France, *reprinted in* 24 I.L.M. 550 (1985); W. Verwey & N. Schrijver, *The Taking of Foreign Property Under International Law: A New Legal Perspective*, 15 NETH. Y.B. INT'L L. 3, 71 (1984).

<sup>145</sup> *American International Group v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 96, 109 (1983); *Amoco International Finance Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, 252 (1987).

<sup>146</sup> WORTLEY, *supra* note 127, at 24. A. McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 NETH. INT'L L REV. 218 (1959); B. Claggett, *Just Compensation in International Law: The Issues before the Iran - United States Claim Tribunal*, in 4 *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* (R. Lillich ed. 1987) 31, 42.

<sup>147</sup> *Norwegian Ships* (1921) 1 R.I.A.A. 307, 338; *Shufeldts Claim* (1930) 2 R.I.A.A. 1079, 1095; *American International Group Inc. v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 96, 105-6; D. Robinson, *Expropriation in the Restatement Revised*, 78 AM. J. INT'L L. 176, 176. (1986); Note from the US Secretary of State, Cordell Hull, to Mexican Government dated 21 July 1938 quoted in H.STEINER & D.VAGTS, *TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT* 488-92 (3rd. ed. 1986).

<sup>148</sup> Clagget, *supra* note 146, at 42; *RESTATEMENT*, *supra* note 11.

paid to date.<sup>149</sup> Moreover, Frontera has no intention to compensate as is evidenced by its diplomatic note.<sup>150</sup>

Frontera has not paid "effective" compensation. For compensation to be "effective" it must be in Bastonian currency, or property readily convertible into Bastonian currency.<sup>151</sup>

Frontera's obligation to pay "adequate" compensation requires the payment of the "full value" for expropriated property.<sup>152</sup> Where a market for the property exists, the "full value" constitutes the "fair market" value. This is the amount that a willing seller would sell to a willing buyer.<sup>153</sup> As there is no obvious market for the property of PharmCo the standard of full or adequate valuation is based on the "going concern value" of the enterprise.<sup>154</sup> Frontera has not fulfilled this obligation.

#### **C. Frontera has Illegally Expropriated the Lease of IPC**

Frontera has validly signed a contract granting IPC rights by way of a lease in Fronteran land. The enforceability of the lease as an acquired right<sup>155</sup> is unaffected by any change of sovereignty and must be respected by successive governments and states.<sup>156</sup>

Frontera has rendered the rights under the lease worthless to IPC by the

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<sup>149</sup> F. Dawson & B. Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation?*, 30 *FORDHAM L. REV.* 727, 736-40 (1962).

<sup>150</sup> Problem at 4.

<sup>151</sup> Dawson & Weston, *supra* note 149, at 738; *RESTATEMENT, supra* note 11, § 189.

<sup>152</sup> Claggett, *supra* note 146, at 48-49; P. Gann, *Compensation Standard for Expropriation*, 23 *COLUM. J. TRANSNAT'L L.* 615, 616 (1985); C. Amerasinghe, *Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases*, 41 *INT'L AND COMP. L.Q.* 22, 22 (1922).

<sup>153</sup> Claggett, *supra* note 146, at 49.

<sup>154</sup> *American International Group v. Iran*, 4 *Iran-U.S. Cl. Trib. Rep.* 96, 109 (1983); *Amoco Int'l Finance Corp. v. Iran*, 15 *Iran-U.S. Cl. Trib. Rep.* 189, 270; *Banco Nacional de Cuba v. First National City Bank of New York*, 270 *F. Supp.* 1004, 1008 (S.D.N.Y.).

<sup>155</sup> *Supra* note 22.

<sup>156</sup> *Certain German Interests in Polish Upper Silesia (Ger. v. Pol.)* 1926 *P.C.I.J. (ser. A) No. 7*, at 21 (May 25).

expropriation of Pharmco. IPC will no longer be able to enjoy any property rights under the lease, effectively rendering the value of the rights worthless to IPC. This constitutes an expropriation of the lease property.<sup>157</sup> Seizure of property<sup>158</sup> or title<sup>159</sup> is unnecessary. Expropriation is not dependent on a state's intention to actually expropriate.<sup>160</sup>

**D. Bastonia is Able to Claim Under the Doctrine of Unjust Enrichment**

The doctrine of unjust enrichment, having gained acceptance in a majority of municipal legal systems, is a recognised general principle of international law.<sup>161</sup> As such it is a source of law to be applied by this Court when deciding an international legal dispute.<sup>162</sup> Frontera has become unjustly enriched as a result of the expropriation of IPC's property.<sup>163</sup> The losses to Bastonia were those profits to which IPC, a Bastonian national, was entitled, and for which no compensation was paid. The enrichment to Frontera is the acquisition at no cost of a fully functional and profitable manufacturing concern. The compensation due is the value of the actual benefit gained equivalent to PharmCo's full going concern value.<sup>164</sup>

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<sup>157</sup> G. Christie, *What Constitutes a Taking of Property Under International Law?* 38 BRIT. Y.B. INT'L L. 307, 310 (1962).

<sup>158</sup> *Tippetts, Abbott, McCarthy, Stratton v. TAMS - AFFA*, 6 Iran-U.S. Cl. Trib. Rep. 219, 225, (1984); *ITT Industries v. Iran*, 2 Iran-U.S. Cl. Trib. Rep. 348, 351 (1983).

<sup>159</sup> *Supra* note 158.

<sup>160</sup> *ITT Industries Inc. v Iran*, 2 Iran-U.S. Cl. Trib. Rep. 348, 352 (1983); Christie, *supra* note 157, at 310.

<sup>161</sup> *Lena Goldfields Arbitration*, 4 Ann. Dig. 1, 4 (1929-30); A. McNair, *supra* note 146 at 240; WORTLEY, *supra* note 127, at 95.

<sup>162</sup> Statute of the International Court of Justice, art. 34, para c, 16 U.S.T. 1164, 59 Stat. 1031, T.S. No. 933.

<sup>163</sup> *Lena Goldfields Arbitration*, 4 Ann. Dig. 1, 4 (1929-30); McNair, *supra* note 146, at 241; W. Freidmann, *The Uses of "General Principle" In the Development of International Law*, 57 AM. J. INT'L L. 279, 296 (1963); WORTLEY, *supra* note 127, at 96.

<sup>164</sup> *Lena Goldfields Arbitration* 4 Ann. Dig. 1, 4 (1929-30); *Sea-Land Service v. Iran*, 6 Iran-U.S. Cl. Trib. Rep. 149, 213 (dissenting opinion of Judge Holtzman).

#### IV. FRONTERA MUST PROVIDE REPARATIONS FOR LOSSES TO IPC

Frontera, by unlawfully expropriating PharmCo and IPC's lease, is in breach of its obligations under the BIT and customary international law. To eliminate all the consequences of this illegality Frontera has a duty to pay reparations to compensate IPC for its losses.<sup>165</sup> This is achieved by an order for restitution (*restitutio in integrum*)<sup>166</sup> or an award of damages.<sup>167</sup> As the objective of this compensation is to restore IPC's lost property rights the award must be equivalent to the full value of PharmCo and the lease.<sup>168</sup> The monies representing the loss of rights under the lease must be paid as reparations to IPC. The calculation of PharmCo's going concern value includes the asset values of the company's expropriated property (*damnum emergens*) and the value of future or 'lost' profits that PharmCo would have made in the future (*lucrum cessans*).<sup>169</sup> The value of PharmCo's expropriated property is the net asset value plus an amount representing goodwill.<sup>170</sup> The amount of lost profits is calculated by forecasting future profits and discounting these potential profits to their present value.<sup>171</sup> This method of calculating the going concern value, the "Discounted Cash Flow" method, has been applied by international arbitral tribunals in determining the value of

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<sup>165</sup> The Factory at Chorzow (Ger. v. Pol.) 1928 P.C.I.J. (ser. A) No. 13, at 47 (Sept. 13).

<sup>166</sup> *Id.*

<sup>167</sup> The Factory at Chorzow 1928 P.C.I.J., at 48; B.P. v. Libya, 53 I.L.R. 297, 347 (1974).

<sup>168</sup> The Factory at Chorzow 1928 P.C.I.J., at 46-47; M. Cieplinska, *The Legal Basis for Compensation for Nationalised Property of Aliens*, 60 R. D. INT'L & D. COMP 112, 117 (1982).

<sup>169</sup> A.G.I.P. Co v. Congo 21 I.L.M. 726, 737 (1979); Benvenuti et Bonfant v. Congo 21 I.L.M. 740, 738 (1982); Libyan American Oil Co. v. Libya, 20 I.L.M. 1, 70 (1981); P.M. Norton, *A Law of the Future or a Law of the Past: Modern Tribunals and the International Law of Expropriations*, 85 AM. J. INT'L L. 474, 481 (1984).

<sup>170</sup> A.I.G. v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 96, 109 (1983); Amoco International Finance v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 270 (1987).

<sup>171</sup> D. Weigal & B. Weston, *Valuation upon the Deprivation of Foreign Enterprise: A Policy-Orientated Approach to the Problem of Compensation Under International Law* in 1 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW (R.Lillich ed., 1972); H. Hu, *Compensation in Expropriations: A Preliminary Economic Analysis*, 20 VA. J. INT'L L. 61, 68 (1979).

expropriated enterprises.<sup>172</sup> When added to the value of the lease this represents the amount payable to IPC for its losses.

**V. PRAYER FOR RELIEF**

The Government of Bastonia respectfully requests that this Honourable Court:

1. Declare that Frontera acted illegally in expropriating PharmCo without restitution or compensation by:

- a. violating its obligations under the Bilateral Investment Treaty,
- b. failing to act in accordance with customary international law;

2. Declare the current Fronteran Government liable for losses to the investments of the International Pharmaceutical Company;

3. Order that the Government of Frontera pay compensation to be calculated according to the full value of the loss suffered following Frontera's unlawful actions.

Respectfully submitted,  
Agents for Bastonia.

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<sup>172</sup> Amoco Asia Corp. v. Indonesia, 24 I.L.M. 1022, 1047 (1985); Claggett, *supra* note 146, at 96.