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

CASE CONCERNING THE NATIONALIZATION OF

CERTAIN PROPERTY

BASTONIA

Applicant

V.

FRONTERA

Respondent

MEMORIAL FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

The Government of Frontera and the Government of Bastonia 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

For over two centuries the Colony of Frontera had been subjected to the domination of Empira. [Clarification no. 1] As a colony, Frontera was ruled by the Colonial Government appointed by the Empirian parliament. [Problem at 1] Frontera has suffered from an underdeveloped economy, although recently it has maintained some economic growth. [*id.*]

In 1978 the International Pharmaceutical Company ("IPC"), a multinational corporation, established PharmCo as a pharmaceutical manufacturer operating within Frontera's jurisdiction. [*id.* at 2] Meetings of PharmCo's board of directors were held in Frontera and the company paid taxes pursuant to Fronteran law. Despite the fact that Fronteran nationals had the majority interest in PharmCo, the major proportion of the company's large financial gains were removed from Frontera and sent to IPC in Bastonia. [*id.*]

Two years after IPC's investment, the Governor-General of the Colony of Frontera concluded the Bilateral Investment Treaty (the "BIT") with Bastonia, a highly-developed nation with a strong industrial base. [*id.* at 1] This treaty provided for a qualified right of compensation in the event that there was a breach of its provisions. [Articles 12 and 13; *id.*] However, no compensation was payable in the event of damage resulting from an act of necessity during circumstances which constituted a state of emergency or revolt. [Article 14; *id.*]

In 1989 a popular uprising achieved the independence of Frontera. [*id.* at 2] During this revolution the Colonial Government nationalized all manufacturing concerns within Frontera, including PharmCo. [*id.*]

The Colonial Government retreated to Empira and the Revolutionary Coalition took control of the country. On January 1, 1991, the Revolutionary Coalition was established as the Revolutionary People's Government (the "RPG") of Frontera. [*id.*] By March of that year, Frontera had been recognized by 50 nations and the RPG's representative for the new independent state of Frontera established their rightful place in the United Nations. [*id.* at 3]

One of the first tasks of the new Fronteran Parliament was to pass

General Law No. 1991/007 which proclaimed that the new legal system would not recognize goals inconsistent with the RPG's mandate of economic and political freedom. [*id.*] Following the enactment of this law, the Fronteran Foreign Minister declared that the independent state of Frontera repudiated all acts of the former Colonial regime which did not fulfil the aims of the RPG. [*id.*]

IPC sought compensation for the nationalization of PharmCo before the Fronteran judicial and administrative organs. These organs determined that the BIT did not provide a cause of action for IPC. [*id.*] IPC persevered with its claim for compensation, engaging Bastonia to represent its claim at the international level. [*id.*] Frontera responded to Bastonia's diplomatic note by asserting that Frontera's domestic jurisdiction must prevail in the instance of the nationalization of a local company. Therefore IPC was unable to claim compensation. [*id.* at 4]

After continued negotiations with Bastonia, the Fronteran government agreed to submit the proceedings to this Court pursuant to Article 36(1) of the Statute of the International Court of Justice.

QUESTIONS PRESENTED

1. Whether Frontera has acted in accordance with international law in nationalizing PharmCo.

2. Whether the current Fronteran government is liable for losses to the investments of the International Pharmaceutical Company.

SUMMARY OF PLEADINGS

I The issue before this Court, the nationalization of IPC's investments in Frontera, is concerned solely with Frontera's sovereign jurisdiction. Therefore, as a domestic matter, there has been no breach of international law. First, as incorporation is the predominant test of corporate nationality in international law, Bastonia cannot offer PharmCo the benefit of its diplomatic protection as PharmCo is a Fronteran company. Second, Bastonia cannot bring an action on behalf of the International Pharmaceutical Company ("IPC") in its role as shareholder or lessee. Under customary international law shareholders have no separate right to protection beyond that offered by the company. As a contractual arrangement, the lease is subject to the principles of Fronteran municipal law. The Bilateral Investment Treaty ("BIT"), even if binding upon Frontera, does not provide any further opportunity to bring this action on behalf of IPC as it does not provide protection for shareholders. Third, Bastonia has no separate right to institute these proceedings as it has not been affected directly by the actions of Frontera.

II If Bastonia does establish standing, Frontera has not inherited the liability for any possible losses to IPC. None of the actions of the former Colonial Government can be attributed to the state of Frontera. The independent state of Frontera was established when the Fronteran people exercised their right to self-determination by the 1990 revolution. As a result, this case is governed by the principles of state succession. These rules provide that as a new state, Frontera is not liable for any wrongs committed under customary international law. If the nationalization were classified as an international wrong, it was performed by the Colonial Government and therefore responsibility cannot be attributed to the independent state of Frontera. Furthermore, customary international law provides that new states are free from the agreements entered into by their predecessors. According to this rule, Frontera is not bound by the BIT and cannot be held responsible for any breach of its provisions.

III Alternatively, if Frontera did inherit the BIT it is not liable to pay compensation under the terms of that treaty. IPC's investments in Frontera were established prior to the BIT's entry into force. Therefore it is inapplicable to those investments as treaties are presumed not to operate retrospectively.

Further, if the independent state of Frontera is bound by the BIT it is able to terminate its operation under the principle of *rebus sic stantibus* and the doctrine of unequal treaties. Where there has been a fundamental change in circumstances, Fronteran is entitled to terminate its obligations under the BIT. Moreover, the BIT, by its very nature, creates an unequal situation in which Frontera as the weaker state carries most of the obligations, while the benefits accrue to Bastonia.

Regardless of a ruling as to the binding nature of the BIT, its provisions have not been breached when interpreted in light of customary international law. Frontera has not breached the required standard of protection outlined in Article 10. Thus no compensation is payable under Articles 12 and 13. In any event Article 14 clearly permits derogation from the treaty's provisions in the circumstances which surrounded the nationalization of PharmCo.

IV If responsibility for the act of nationalization is attributed to the independent state of Frontera, it has not breached international law by refusing to pay compensation. Customary international law recognizes a sovereign right to nationalize corporate enterprises. The nationalization of PharmCo was in accordance with these principles. According to customary international law, the amount of compensation to be payed to IPC, if any, is subject to the determination of the nationalizing state, Frontera.

However, if international legal principles are applicable then Frontera's conduct is in accordance with these rules. International law requires that all the circumstances of the case be considered when determining the standard of "appropriate" compensation. Such circumstances include the undeveloped nature of Frontera's economy and the repatriation of a large percentage of PharmCo's profits to IPC in Bastonia. State practice demonstrates that the standard of full compensation, if ever

considered relevant, is no longer applicable.

The principle of unjust enrichment also provides that Frontera's needs as a developing state and PharmCo's history of excess profits must be taken into account in determining appropriate compensation. When considering these circumstances, international legal principles preclude IPC's entitlement to any compensation for the lawful resumption of Frontera's sovereignty over the investments situated within its territory.

I. BASTONIA HAS NO STANDING TO ASSERT THIS CLAIM

Bastonia has no right to bring this claim at international law as the action involves matters concerned with the domestic jurisdiction and sovereign rights of the independent Fronteran state.

A. Bastonia cannot Offer PharmCo the Benefit of its Diplomatic Protection

Corporations have no international legal personality,[1] thus PharmCo must rely on the diplomatic protection of a state to bring this action. However, a state's right of diplomatic protection is limited by the bond of nationality.[2] Pursuant to the predominant test in customary international law, which bestows nationality on corporate entities according to their place of incorporation,[3] Bastonia cannot assert the right of diplomatic protection on behalf of PharmCo, a company incorporated in Frontera.

Even according to other views of corporate nationality, which are not generally accepted in international law,[4] such as the place of central administration[5] or the control test, PharmCo retains its Fronteran nationality, placing it outside the ambit of Bastonia's diplomatic protection. PharmCo's Board of Directors meet in Frontera and the majority Fronteran ownership exercised control in the general meeting.[6]

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[1] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 67 (4th ed. 1990); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §213 cmt. f (1987) [hereinafter RESTATEMENT]; D. Kokkini-Iatridou & P. de Waart, *Foreign Investments in Developing Countries - Legal Personality of Multinationals in International Law,* 14 NETH. Y.B. INT'L L. 87, 89 (1983).

[2] Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30); Panevezys-Saldutiskis Railway (Estonia v. Lithuania), 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28).

[3] Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 42 (Feb. 5); RESTATEMENT, *supra* note 1, §213, §713 cmt. e; G. van Hecke, *Nationality of Companies Analyzed,* 8 NETH. INT'L L.R. 223, 238 (1961).

[4] Barcelona Traction, Light and Power Co., 1970 I.C.J. at 42.

[5] D. Harris, *The Protection of Companies in International Law in the Light of the Nottebohm Case,* 18 INT'L & COMP. L.Q. 275, 295 (1969); E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW RELATING TO INTERNATIONAL CLAIMS 618 (1970).

[6] Sedco Int'l, Inc. v. Nat'l Iranian Oil Co. & Iran, 9 Iran-U.S. Cl. Trib. Rep. 248, 259 (1985).

Furthermore, the fact that PharmCo conducts its activities solely within Frontera's jurisdiction and pays taxes in Frontera[7] demonstrates a "genuine"[8] or "close and permanent"[9] connection with Frontera. Bastonia, by asserting this claim before an international forum, is seeking to interfere in a matter which is purely within Frontera's domestic jurisdiction.

B. Bastonia cannot Offer Diplomatic Protection to the International Pharmaceutical Company

It is "unacceptable" to require that international law offer protection to shareholders' interests.[10] It is not the shareholders in large corporations that are in need of protection but rather poorer states who must be protected against the encroachment of powerful financial groups.[11] In the present case the International Pharmaceutical Company[12] has no right of diplomatic protection in respect of PharmCo.

1. Bastonia may not assert this claim on behalf of IPC as a shareholder in PharmCo

a. Incorporation in Bastonia does not provide a basis for the protection of IPC

A state may not present a claim on behalf of a company on the sole basis of its incorporation under domestic law.[13] State practice, supported by the United States and the United Kingdom, requires the existence of a substantial interest owned by the nationals in the

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[7] Problem at 2.

[8] Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6).

[9] Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 42 (Feb. 5).

[10] Barcelona Traction, Light and Power Co., 1970 I.C.J. at 239 (separate opinion of Judge Morelli).

[11] Barcelona Traction, Light and Power Co., 1970 I.C.J. at 248 (separate opinion of Judge Padilla Nervo).

[12] Hereinafter IPC.

[13] BROWNLIE, *supra* note 1, at 485; C. Staker, *Diplomatic Protection of Private Business Companies: Determining Corporate Personality for International Law Purposes* 62 BRIT. Y.B. INT'L L. 155, 159 (1990).

corporation.[14] IPC, as a multinational corporation,[15] has not established any link with Bastonia beyond the fact of incorporation so as to entitle that country to afford diplomatic protection.

b. IPC as a shareholder in PharmCo has no separate right to diplomatic protection

IPC's rights in PharmCo remain limited as a corollary of the limited nature of a shareholder's liability.[16] International law necessitates that whenever a shareholder's interests are harmed by an act done to the company, it is to the company that the shareholder must look to institute appropriate action.[17] Bastonia's ability to claim on IPC's behalf is subject to this principle. There are no circumstances which demand the implementation of any of the strict exceptions to the rule.

First, Bastonia may intervene only if IPC's "direct rights" rather than interests have been affected.[18] These rights are limited to the right to declared dividends, the right to surplus assets and the right to transfer shares; the right to vote constitutes a mere interest.[19] The nationalization of PharmCo relates only to IPC's economic interest rather than any of its direct rights.

Secondly, although a state might intervene on behalf of shareholders in a defunct company, this exception is only applicable if PharmCo has ceased to exist legally.[20] However, PharmCo was merely placed under

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[14] BROWNLIE, *supra* note 1, at 485; BORCHARD, *supra* note 5, at 621.

[15] Problem at 2.

[16] Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 35 (Feb. 5); Elettronica Sicula S.p.A. (U.S. v. Italy), 1989 I.C.J. 15, 84 (July 20) (separate opinion of Judge Oda).

[17] Barcelona Traction, Light and Power Co., 1970 I.C.J. at 35.

[18] *Id.* at 36.

[19] Barcelona Traction, Light and Power Co., 1970 I.C.J. at 125 (separate opinion of Judge Tanaka); Elettronica Sicula, 1989 I.C.J. at 85 (separate opinion of Judge Oda).

[20] Barcelona Traction, Light and Power Co., 1970 I.C.J. at 41 (separate opinion of Judge Tanaka); F. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 227 (1990).

government management[21] and consequently retains full legal personality under Fronteran law.

Thirdly, there is no exception in favour of the protection of shareholders where the company has the nationality of the respondent state. Indeed such a principle is a "wholly illogical and arbitrary deduction"[22] and detracts from the traditional rule that "a state is not guilty for a breach of international law for injuring one of its own nationals."[23]

2. Bastonia cannot institute this action on behalf of IPC as a lessee of Fronteran land

The lease concluded between the Minister of the Interior on behalf of Frontera and IPC[24] is not an international agreement and is therefore governed by the law of Frontera as the host state.[25] As the proper law of this contract includes Frontera's expropriatory decree, any action which constitutes an alleged breach of the lease is fully justified.[26] If the concept of an "internationalized contract" does exist it is limited to particular types of contracts[27] and does not apply to an ordinary lease. Therefore, the lease does not constitute a basis for the protection of IPC.

3. The Bilateral Investment Treaty does not provide an opportunity for Bastonia to bring this claim on behalf of IPC

Frontera rejects any contention that it is bound by the Bilateral Investment Treaty[28] which was concluded while Frontera was subject to

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[21] Clarification no. 4.

[22] Barcelona Traction, Light and Power Co., 1970 I.C.J. at 241 (separate opinion of Judge Morelli).

[23] *Id.* at 192 (separate opinion of Judge Jessup).

[24] Problem at 1.

[25] Serbian Loans (Fr. v. Serbia), 1929 P.C.I.J. (ser. A) No. 20, at 41 (July 12); S. FRIEDMANN, EXPROPRIATION IN INTERNATIONAL LAW 156 (1953); S. Asante, *Stability of Contractual Relations in the Transnational Investment Process*, 28 INT'L & COMP. L.Q. 401, 406 (1979).

[26] P. Tschanz, *The Contributions of the Aminoil Award to the Law of State Contracts*, 18 INT'L LAW. 245, 258 (1984).

[27] Texaco Overseas Petroleum Co. & California Asiatic Oil Co. [hereinafter TOPCO] v. Libya, 53 I.L.R. 389, 452-56 (1977).

[28] Hereinafter BIT.

Empira's power.[29] However, if the BIT is held to be applicable, it must expressly modify IPC's status or rights in order to override customary international law.[30] The protection offered to "companies" as separate entities under Article 10 does not extend to shareholders who must rely on the protection offered by PharmCo. The phrase "investments of citizens"[31] fails to connote the necessary degree of specificity to displace the customary international rules relating to shareholders' rights.[32] Therefore Article 10 does not justify Bastonia's claim of diplomatic protection.

C. Bastonia has no Separate Right to Bring an Action

In order for Bastonia to assert a separate right of action for a breach of the BIT the dispute over the alleged breach must result in direct damage which is both distinct from and independent of the dispute over the possible harm to IPC.[33] No separate damage has been caused to Bastonia. Furthermore, the diplomatic note presented by Bastonia to Frontera refers to the nationalization of IPC. Thus it is merely an espousal by Bastonia of IPC's claim.[34] A Chamber of this Court has held in these circumstances there is no separate right to bring an action.[35]

D. Bastonia has not Exhausted the Local Remedies Available in Frontera

A state must exhaust all available domestic remedies before

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[29] Problem at 3. *See* pp. 9-10.

[30] Elettronica Sicula S.p.A. (U.S. v. Italy), 1989 I.C.J. 15, 86 (July 20) (separate opinion of Judge Oda).

[31] BIT art. 10.

[32] Elettronica Sicula, 1989 I.C.J. at 92 (separate opinion of Judge Oda).

[33] *Id.* at 42-43.

[34] *Id.*

[35] *Id.*

instituting an international action.[36] This requires that the substance of the claims raised in the international forum have been considered by the local courts.[37] The Fronteran courts have not ruled upon the merits of the BIT nor the claim for the alleged breach of the lease.[38] Therefore IPC has not sufficiently exhausted local remedies.

II. THE INDEPENDENT STATE OF FRONTERA DOES NOT INHERIT RESPONSIBILITY FROM THE COLONY OF FRONTERA

The new state of Frontera is not responsible for any acts committed by the former Colony of Frontera, nor is it bound by the BIT.

A. The Independent State of Frontera was Created when the Revolutionary Peoples Government Came to Power

1. Prior to 1990 the Colony of Frontera was not a state

Prior to 1990, Frontera was not a state as it did not possess the central criterion of statehood: independence.[39] It was a dependent colony ruled by the Colonial Government appointed by the Empiran parliament.[40] The power of appointment and removal necessarily required the Colonial Government to make decisions which served the interests of Empira.

Original membership of the United Nations did not confer statehood on Frontera while it was subject to the power of Empira.[41] Certain nations, such as India, the Philippines, Syria, Lebanon, Byelorussia and the

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[36] Interhandel (Switz. v. U.S.) 1959 I.C.J. 6, 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, *opened for signature* Nov. 5, 1950, art. 26, 213 U.N.T.S. 221; Mexican Union Railway (Limited) (Great Britain) v. United Mexican States, 5 R.I.A.A. 115, 122 (Brit.-Mex. Cl. Comm'n 1930); RESTATEMENT, *supra* note 1, §713 cmt. f, §902 cmt. k.

[37] Cardot v. France, App. No. 11069/84, 13 Eur. H.R. Rep. 853, 874-75 (1991).

[38] Problem at 3.

[39] J. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 48 (1979); BROWNLIE, *supra* note 1, at 73-77.

[40] Problem at 1.

[41] E. Dolan, *The Member Republics of the United Nations as Subjects of the Law of Nations*, 4 INT'L & COMP. L.Q. 629, 635 (1955).

Ukraine, although not states, were nevertheless admitted as original members of the organization.[42] Recognition is declaratory not constitutive;[43] although countries recognized Frontera before 1900, this did not affect Frontera's objective status as a colony.[44] The colony possessed a degree of international personality on the basis of its participation in the international community, but this personality did not amount to statehood.[45]

2. The exercise of the right to self-determination in 1990 resulted in the creation of a new state

The people of Frontera had a right to self-determination to gain their independence from Empira.[46] The right to self-determination in the colonial context is clearly recognized at international law[47] and is a norm of *jus cogens*.[48] The right is recognized expressly[49] and implicitly[50] in the Charter of the United Nations, is further elaborated

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[42] CRAWFORD, *supra* note 39, at 132; J. DUGARD, RECOGNITION AND THE UNITED NATIONS 53-54 (1987).

[43] CRAWFORD, *supra* note 39, at 23-24; R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 41-42 (1963).

[44] 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 544 (H. Lauterpacht ed., 8th ed. 1955); KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 2 (1968).

[45] CRAWFORD, *supra* note 39, at 132; DUGARD, *supra* note 42, at 53-54.

[46] J. Crawford, *The Rights of Peoples: Some Conclusions, in* THE RIGHTS OF PEOPLES 164 (J. Crawford ed. 1988).

[47] CRAWFORD, *supra* note 39, at 84-106; HIGGINS, *supra* note 43, at 103-05; BROWNLIE, *supra* note 1, at 595-98; DUGARD, *supra* note 42, at 71-72.

[48] Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 312 (Feb. 5) (separate opinion of Judge Ammoun); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 89-90 (June 21) (separate opinion of Judge Ammoun); BROWNLIE *supra* note 1, at 513, 515; A. SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION 353 (1973); H. ESPIELL, THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF U.N. RESOLUTIONS 11-13 (1980).

[49] U.N. CHARTER art. 1, ¶ 2, art. 2, art. 55, art. 56.

[50] U.N. CHARTER art. 73.

in a number of General Assembly resolutions,[51] and is reaffirmed in the 1966 International Covenants on human rights.[52] The right has also been confirmed by this Court in the cases of Namibia[53] and Western Sahara.[54] Under customary international law a colony retains a distinct international status "until the people of the colony...have exercised their right of self-determination".[55]

In 1990 the people of Frontera exercised their right to self-determination and freely determined their political status and government without external interference.[56] This attainment of independence through self-determination resulted in the formation of the new independent state of Frontera.[57] Thus, the solution to the dispute which has arisen between Frontera and Bastonia is governed by the rules of state succession.

B. The Independent State of Frontera Inherited no Liability at Customary International Law

1. The nationalization by the old colonial government was lawful

The nationalization was an instantaneous act which occurred at the moment of the Colonial Government's decree. The ongoing deprivation of possession was merely a consequence and did not extend the duration of the

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[51] G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960); G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

[52] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 1, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 1, 993 U.N.T.S. 3.

[53] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21).

[54] Western Sahara, 1975 I.C.J. 12 (Oct. 16).

[55] G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

[56] *Id.*

[57] CRAWFORD, *supra* note 39, at 84, 102; HIGGINS, *supra* note 43, at 23; BROWNLIE, *supra* note 1, at 595-98; DUGARD, *supra* note 42, at 79; J. FAWCETT, THE LAW OF NATIONS 38-39 (1968).

act.[58] Legality must be determined at the moment of the decree.[59] Due to the customary doctrine of state of necessity, the nationalization was not illegal.[60] The nationalization of critical manufacturing concerns during a time of civil unrest is a reasonable and legitimate measure.[61]

2. If the nationalization by the old colonial government were unlawful, the independent state of Frontera does not inherit any liablity

Customary international law does not require that a successor state be held responsible for the unlawful acts of its predecessor.[62] State practice[63] and international arbitral awards[64] support the principle that liability to compensate for a delict is not inherited. Thus the new independent state of Frontera is not liable for any international wrongs committed by the Colonial Government.

C. The Independent State of Frontera is not Bound by the Bilateral Investment Treaty

1. The independent state of Frontera begins life with a "clean slate"

The "clean slate" rule allows a new state to choose which of the

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[58] Draft Articles on State Responsibility, Commentary to art. 24, *in Report of the International Law Commission on the Work of its Thirtieth Session, reprinted in* [1978] 2 (Pt 2) Y.B. Int'l L. Comm'n 88, U.N. Doc. A/33/10.

[59] Draft Articles on State Responsibility, art. 24, *in Report of the International Law Commission on the Work of its Thirtieth Session, reprinted in* [1978] 2 (Pt 2) Y.B. Int'l L. Comm'n 86, U.N. Doc. A/33/10.

[60] *See infra* pp. 15-16.

[61] Sea-Land Service, Inc. v. Iran, 6 Iran-U.S. Cl. Trib. Rep. 149, 165 (1984); Dickson Car Wheel Co. v. United Mexican States, 4 R.I.A.A. 669, 681-82 (Mexican-U.S. Gen. Cl. Comm'n 1931).

[62] OPPENHEIM, *supra* note 44, at 162; MAREK, *supra* note 44, at 11; G. SCHWARZENBERGER & E. BROWN, A MANUAL OF INTERNATIONAL LAW 70 (6th ed. 1976); C. Hurst, *State Succession in Matters of Tort* 5 BRIT. Y.B. INT'L L. 163 (1924).

[63] W. Czaplinski, *State Succession and State Responsibility*, 28 CAN. Y.B. INT'L L. 339, 342-43 (1990).

[64] Robert E. Brown (U.S. v. Gr. Brit.), 6 R.I.A.A. 120 (Gr. Brit.-U.S. Arb. Trib. 1923); Hawaiian Claims (Gr. Brit. v. U.S.), 6 R.I.A.A. 157 (Gr. Brit.-U.S. Arb. Trib. 1925).

treaty obligations of its predecessor it wishes to continue.[65] A rule of absolute non-inheritance of treaties was applied by Israel, Upper Volta and Algeria.[66] Other post-colonial states, although they kept a number of treaties in force, chose to remain bound by those treaties according to their political, economic and administrative needs.[67] Their actions did not constitute the *opinio juris* required to support a rule of compulsory inheritance of treaties.[68] This practice is exemplified by the "Nyerere doctrine", applied by five East African states, which involves temporizing all treaties for a time while the new state decides which of them will continue in force.[69] The customary rule whereby states are under no obligation but may continue to apply treaties if they wish has also been recognized by numerous eminent publicists.[70] This principle is codified[71] in Article 16 of the Vienna Convention on Succession of States in Respect of Treaties.[72] Frontera and Bastonia are bound by this customary rule, although they are not signatories to the convention.

Even if customary international law requires new states to inherit

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[65] A. MCNAIR, THE LAW OF TREATIES 601 (1961); RESTATEMENT, *supra* note 1, §210(3), cmt. f, Rep. note 4.

[66] O. UDOKANG, SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES 160 (1972).

[67] *Id.* 136-8, 164-6, 186-98; P. Contini, *Panel Discussion: State Succession in the New Nations* 1966 PROC. AM. SOC'Y INT'L L. 102, 127.

[68] *Report of the International Law Commission to the General Assembly, reprinted in* [1974] 2 Y.B. Int'l L. Comm'n 157, 210-4, U.N. Doc. A/9610/Rev.1.

[69] J. Nyerere, *Problems of State Succession in Africa: A Statement of the Prime Minister of Tanganyika*, 11 INT'L & COMP. L.Q. 1210 (1962).

[70] OPPENHEIM, *supra* note 44, at 159; BROWNLIE, *supra* note 1, at 668; J. BRIERLY, THE LAW OF NATIONS 153 (H. Waldock ed., 6th ed. 1963); UDOKANG, *supra* note 66, at 162; A. Lester, *State Succession to Treaties in the Commonwealth* 12 INT'L & COMP. L.Q. 475, 488 (1963); G. Verbit, *State Succession in the New Nations* 1966 PROC. AM. SOC'Y INT'L L. 119; P. Fitzgerald, *State Succession and Personal Treaties* 11 INT'L & COMP. L.Q. 843, 847 (1962).

[71] *Report of the International Law Commission to the General Assembly*, [1974] 2 (Pt 1) Y.B. Int'l L. Comm'n 157, 210-4, U.N. Doc. A/9610/Rev.1.

[72] Vienna Convention on Succession of States in Respect of Treaties, *opened for signature* Aug. 22, 1978, 17 I.L.M. 1488.

dispositive treaties, which create or affect territorial rights,[73] it is clear that new states are not obliged to continue other types of treaties. The BIT is not a dispositive treaty and it does not bind the independent state of Frontera.

III. THERE IS NO OBLIGATION ON THE INDEPENDENT STATE OF FRONTERA TO PAY COMPENSATION UNDER THE BILATERAL INVESTMENT TREATY

A. The Bilateral Investment Treaty is Inapplicable to the Nationalization of PharmCo and the Lease

IPC's "investments", if they can be so categorised, were established prior to the entry into force of the BIT.[74] If bilateral investment treaties are intended to apply to prior investments they explicitly state this.[75] As the BIT is silent[76] on the question of retrospective application,[77] it does not apply to IPC's investment. The object and purpose[78] of the treaty was to attract future investment.[79] In light of this, the BIT's coverage cannot be extended to prior investments.

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[73] 2 D. O'CONNELL, STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW 12-23 (1967); MCNAIR, *supra* note 65, at 256, 655-64.

[74] Problem at 1-2.

[75] *See* UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES 27-29 (1988) [hereinafter UNCTC]; *see* treaties between: U.K and Jordan; Sweden and Yugoslavia, Sri Lanka and Egypt; France with Romania, Malta, El Salvador, Paraguay and Jordan; treaties by: G.D.R., Switzerland, the Netherlands and the U.S.

[76] BIT, art. 10.

[77] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 28, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

[78] *Id.* art. 31, para. (1).

[79] UNCTC, *supra* note 75, at 104.

B. Frontera is Entitled to Terminate the Bilateral Investment Treaty

1. Frontera is entitled to terminate the Bilateral Investment Treaty due to a fundamental change in circumstances

a. Frontera has fulfilled the criteria of rebus sic stantibus

Frontera may unilaterally terminate the BIT due to the fundamental change in circumstances. The requirements of the doctrine are that unforeseen changes[80] occured in circumstances which constituted an essential basis of the parties' consent[81] and radically transformed the obligations to be performed under the BIT.[82]

First, there is no evidence that the radical change in the political and economic structure of Frontera was foreseen by the parties to the BIT. Article 14 merely reflects the doctrine of state of necessity[83] and does not imply that the revolution was foreseeable.

Secondly, the colonial government entered the BIT to encourage foreign investment. Protection of foreign investment was the basis of the consent for this, as for other, bilateral investment treaties.[84] The independent state of Frontera has a profoundly different social, political and economic agenda. It seeks the control of its natural resources and economic freedom for all Fronteran citizens.[85] Thus the essential basis of the parties' consent has changed.

Finally, to evaluate the extent of an obligation, it is necessary to consider both the quantum of the obligation and the burden of fulfilment. While the revolution may not have affected the quantum of the obligation under the BIT, the burden of paying that sum is impossibly heavy while restructuring an economy which had formerly been subordinate to an imperial

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[80] VCLT, *supra* note 77, art. 62, para. (1).

[81] VCLT, *supra* note 77, art. 62, para. (1)(a).

[82] VCLT, *supra* note 77, art. 62, para. (1)(b).

[83] Draft Articles on State Responsibility, art. 33, *in Report of the International Law Commission to the General Assembly on the Work of its 32nd Session, reprinted in* [1980] 2 (Pt 2) Y.B. Int'l L. Comm'n 34, U.N. Doc. A/35/10 (1980); Sea-Land Service, Inc. v. Iran, 6 Iran-U.S. Cl. Trib. Rep. 149, 165 (1984).

[84] UNCTC *supra* note 75, at 1-2.

[85] Problem at 3.

power.[86]

As the BIT is so dependent on specific economic conditions, the radical change in those conditions enables Frontera to legally repudiate its obligations. The failure to give prior notification will not prevent Frontera from unilaterally terminating the BIT under the doctrine of *rebus sic stantibus*.[87]

b. Article 45 of the VCLT does not prevent Frontera from invoking the principle of rebus sic stantibus

Article 45 will prevent Frontera from invoking *rebus sic stantibus* if it has acquiesced to the validity of the BIT. Neither the Fronteran Ambassador's statement to Bastonia, nor General Law No. 1991/007 amount to the required acquiescence.[88] The meaning of "acquiescence" is ambiguous, therefore it may be interpreted[89] in light of the *travaux preparatoires* to the VCLT which indicate that Article 45 was intended to give effect to the principle of estoppel.[90] Bastonia has failed to show detriment, an essential element of estoppel.[91] Thus Frontera is not prevented from raising *rebus sic stantibus*.

2. Frontera is entitled to avoid the BIT under the doctrine of unequal treaties

Frontera is entitled to avoid the BIT due to the unequal nature of the rights and obligations under the treaty.[92] While the obligations and

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[86] U. Umozurike, *Nationalization of Foreign Owned Property and Economic Self-Determination*, 6 E. AFR. L. J. 79, 96 (1970).

[87] VCLT, *supra* note 77, art. 65, para. (5).

[88] VCLT, *supra* note 77, art. 45, paras. (a) & (b).

[89] VCLT, *supra* note 77, art. 32, para. (a).

[90] *Sir Humphrey Waldock, Special Rapporteur, Fifth Report on the Law of Treaties,* [1966] 2 Y.B. Int'l L. Comm'n 1, 6, U.N. Doc. A/CN.4/183 and Add.1-4.

[91] MCNAIR, *supra* note 65, at 485.

[92] *Summary Records of the 684th Meeting*, [1963] 1 Y.B. Int'l L. Comm'n 69, U.N. Doc. A/CN.4/SER.A/1963; Umozurike, *supra* note 86, at 97; I. Detter, *The Problem of Unequal Treaties*, 15 INT'L & COMP. L.Q. 1069, 1088 (1966); A. Talayayev, *Unequal Treaties as a Mode of Prolonging the Colonial Dependence of the New States of Asia and Africa*, 1961 SOVIET Y.B. INT'L L. 156, 170.

benefits of Article 10 appear to be reciprocal, Frontera, as a developing country,[93] is not in a position to export capital and therefore cannot take advantage of this provision.[94] As the BIT concentrates on the treatment to be accorded to investments, the benefits will accrue exclusively to Bastonia[95] as a highly industrialized nation.[96] The doctrine of unequal treaties is supported by the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties[97] which acknowledges that economic pressure is a form of force.[98]

Furthermore, unequal treaties imply unequal relationships,[99] a concept which is directly opposed to the Charter of the United Nations[100] and the Declaration on the Granting of Independence to Colonial Peoples,[101] which stress the fundamental equality of states. Frontera, the weaker state, bears the burden of protecting Bastonian investments, but any rights under the BIT devolve to Bastonia, the stronger state.[102] The inequality is further suggested by evidence that the majority of developing countries merely accept the wording proposed by the developed state

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[93] Problem at 1.

[94] G. Gallins, *Bilateral Investment Treaties*, 2 J. ENERGY & NAT. RESOURCES L. 77, 80 (1984).

[95] UNCTC, *supra* note 75, at 110.

[96] Problem at 1.

[97] Final Act of the United Nations Conference on the Law of Treaties, May 23, 1969, *reprinted in* 8 I.L.M. 728, 732, U.N. Doc. A/CONF.39/26.

[98] C. Murphy, *Economic Duress and Unequal Treaties*, 11 VA. J. INT'L L. 51, 69 (1970).

[99] UDOKANG, *supra* note 66, at 93.

[100] U.N. CHARTER, art. 2, ¶ 1; G. Osnitskaya, *Colonialist Concepts of the Equal and Unequal Subjects of International Law in the Theory and Practice of the Imperialist States*, 1962 SOVIET Y.B. INT'L L. 49, 60 (English summary).

[101] Declaration on the Granting of Independence to Colonial Peoples, ¶7, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960).

[102] Talalayev, *supra* note 92, at 170.

contracting party when negotiating such arrangments.[103]

C. Frontera is not Bound to Pay Compensation under the Terms of the Bilateral Investment Treaty

1. Frontera has not breached the provisions of the Bilateral Investment Treaty

a. Frontera provided constant protection and security

Frontera has provided "constant protection and security" to IPC's investments thereby satisfying its primary obligation under the BIT.[104] As no standard is specified in the BIT this phrase must be interpreted according to customary international law.[105] A Chamber of this Court has held that reference to "constant security and protection" cannot be construed as a warranty that property shall never be occupied or disturbed.[106] The phrase was interpreted according to the "most-favoured-nation" standard and the "national" standard.[107]

As all manufacturing concerns, regardless of the nationality of their owners, were nationalized, both standards have been satisfied and there has been no breach of the primary obligation of the BIT. Therefore compensation is not payable under the secondary obligations embodied in articles 12 and 13 of the BIT.

b. Compensation was "no less favourable" than that accorded to the citizens or companies of any other state

Frontera has provided compensation to Bastonia which is no less favourable than that provided to any other state.[108] According to its ordinary meaning,[109] "any other state" refers to any state other than the

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[103] UNCTC, *supra* note 75, at 18.

[104] BIT, art. 10.

[105] VCLT, *supra* note 77, art. 31, para. (3)(c).

[106] Elettronica Sicula S.p.A. (U.S. v. Italy), 1989 I.C.J. 15, 65 (July 20).

[107] Elettronica Sicula, 1989 I.C.J. at 53.

[108] BIT, art. 13.

[109] VCLT, *supra* note 77, art. 31, para. (1).

parties to the BIT. Frontera treated all foreigners equally.[110] The restitution provided to some Fronterans is not relevant to a determination of a breach of the secondary obligation, and in any event, payment of compensation was too inconsistent for Bastonia to rely upon.

2. Any Fronteran obligations under the Bilateral Investment Treaty have been expunged by Article 14

The popular uprising which freed Frontera from Empira falls within the ordinary meaning of the words[111] in Article 14 "national emergency, or revolt".[112] Furthermore, the resumption of all rights connected to PharmCo without compensation was necessary. It satisfies Article 33 of the Draft Articles on State Responsibility which embody the relevant customary international law.[113] The nationalization of PharmCo was part of the general programme of nationalization of manufacturing concerns by the colony of Frontera which safeguarded the essential interests of that state against an undeniably grave and imminent peril.[114] Furthermore, the nationalization of PharmCo did not seriously impair an essential interest of Bastonia.[115]

IV. THE INDEPENDENT STATE OF FRONTERA ACTED IN ACCORDANCE WITH CUSTOMARY INTERNATIONAL LAW

If responsibility for the nationalization is attributed to the current Fronteran government, then the legality of the nationalization must be judged at the time the RPG returned wholly-owned national companies but retained control of PharmCo.

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[110] Problem at 3.

[111] VCLT, *supra* note 77, art. 31, para. (1).

[112] BIT, art. 14.

[113] O. Schacter, *Recent Trends in International Law Making*, 12 AUSTL. Y.B. INT'L L. 1, 6 (1992).

[114] Draft Articles on State Responsibility, *supra* note 83, art. 33, para. (1)(a).

[115] Draft Articles on State Responsibility, *supra* note 83, art. 33, para. (1)(a).

A. Frontera Exercised its Sovereign Right to Nationalize

Frontera exercised its basic right to political self determination in accordance with customary international law.[116] Economic self determination is a necessary corollary of political independence.[117] Frontera experienced limited economic growth under the colonial regime and remains undeveloped. Nationalization is a recognised means of regaining control over wealth, natural resources and economic activities in the pursuit of development.[118] Frontera has joined the body of developing countries in adopting a practice of large-scale nationalization of domestic industry.[119] By retaining government management of Pharmco, Frontera has lawfully reclaimed sovereign control over its economic affairs.

B. Nationalization is Solely within Frontera's Domestic Jurisdiction

The Charter of Economic Rights and Duties[120] establishes Frontera's sovereign and inalienable right to nationalize Pharmco in fulfilment of its

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[116] U.N. CHARTER art. 1, ¶ 2, art. 55; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council 276 (1970), 1970 I.C.J. 16 (June 21); Western Sahara, 1975 I.C.J. 12 (Oct. 16); G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1966); G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8208 (1971).

[117] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 1(1), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 1(1), 993 U.N.T.S. 3; G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); Umozurike, *supra* note 86, at 79.

[118] Libyan American Oil Co. v. Libyan Arab Republic, 20 I.L.M. 1, 97-99 (1977); Kuwait v. American Independent Oil Co., 21 I.L.M. 976, 1019 (1982); INA Corp. v. Iran, 8 Iran-U.S. Cl. Trib. Rep. 373, 378 (1985); Amoco International Finance Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 222 (1987); G.A. Res 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 19, U.N. Doc. A/5217 (1962); G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1973); G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974); G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 24, U.N. Doc. A/9631 (1974).

[119] Iran in 1951, Egypt in 1956, Indonesia in 1957, Iraq, Ceylon and Cuba in 1961, Algeria from 1963, Syria in 1964, Tanzania in 1967, Peru in 1968, Bolivia and Zambia in 1969, Chile in 1970, Libya from 1970, Saudi Arabia in 1972, Kuwait from 1973, Venezuela in 1976, *see* Libyan American Oil Co. v. Libyan Arab Republic, 20 I.L.M. 1, 50 (1977).

[120] Hereinafter The Charter.

economic policy, free from outside interference.[121]

The Charter fulfills the traditional requirement for the creation of customary international law of "constant and uniform usage, accepted as law".[122] The consistent re-citation of the principles expressed in the Charter[123] by an overwhelming majority of states from diverse geographic regions amounts to substantially uniform state practice.[124] *Opinio juris* can be deduced from its drafting history[125] and the debates in the General Assembly,[126] which indicate approval of the binding nature of the rights and duties of states in the economic sphere. The substantial consensus achieved on the Charter amounts to an acceptance of the validity of the set of rules declared by the resolution itself.[127] General Assembly resolutions are significant expressions of the collective will of

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[121] G.A. Res. 3281, art. 1, U.N. GAOR, 28th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975); B. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Alien Owned Property*, 75 AM. J. INT'L L. 437, 453-4 (1981); K. KATZAROV, THE THEORY OF NATIONALIZATION 305 (1964); F. Francioni, *Compensation for Nationalization of Foreign Property: The Borderland between Law and Equity*, 24 INT'L & COMP. L.Q. 264, 266 (1975).

[122] Asylum (Colom. v. Peru), 1950 I.C.J. 266, 276 (Nov. 20); Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 29 (June 3).

[123] G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9400 (1974); G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974).

[124] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 100 (June 27); North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.) 1969 I.C.J. 3, 229 (Feb. 20) (dissenting opinion of Judge Lachs); B. Sloan, *General Assembly Resolutions Revisited* 58 BRIT. Y.B. INT'L L. 39 (1987).

[125] United Nations Trade and Development Committee [hereinafter UNCTAD], 3rd Sess., 92nd mtg., at 184, 186, U.N. Doc. TD/180 (1972) (the Honourable Luis Echeverria Alvarez); UNCTAD Res. 45, UNCTAD Proceedings, 3rd Sess., at 58, U.N. Doc. TD/180 (1972); UNCTAD Working Group, Statement of Chairman, at 2, U.N. Doc. TD/B/AC.12/R.4 (Ambassador Castaneda); Report of the Second Committee, U.N. GAOR Supp. No. 29, at 3, U.N. Doc. A/9946 (1974).

[126] R. Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553, 563 (1981); M. SORNARAJAH, THE PURSUIT OF NATIONALIZED PROPERTY 19 (1986).

[127] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 100 (June 27).

the community of nations.[128] The Charter has been treated by states as embodying binding principles of customary law.[129]

Under Article 2(2)(c) of the Charter, Frontera is entitled to determine the appropriate compensation, according to its domestic laws and regulations and the circumstances that it considers pertinent. Interference with Frontera's dealings with property within its territory is a violation of its sovereignty.[130] Frontera is best equipped to assess the political, economic and social benefits and detriments of the nationalization.[131] State practice confirms the exclusive jurisdiction of national courts to determine the amount of compensation.[132]

C. The Nationalization of Pharmco Conformed to International Legal Standards

If international standards are applicable, they have not been breached by Frontera. Public purpose[133] and non-discrimination[134] were traditionally cited as requirements for lawful expropriation.[135]

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[128] INA Corp. v. Iran, 8 Iran-U.S. Cl. Trib. Rep. 373, 408 (1985) (dissenting opinion of Judge Ameli); C. JENKS, LAW, WELFARE AND FREEDOM 83-100 (1958); J. De Arechaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 34 (1978).

[129] I. Brownlie, *Legal Status of Natural Resources in International Law*, 162 R.C.A.D.I. 255, 268 (1979).

[130] S. Guha-Roy, *Is the Law of Responsbility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 862, 888 (1961).

[131] Lithgow & Others v. United Kingdom, App. No. 9006/80, 8 Eur. H.R. Rep. 329, 373 (1986).

[132] Proposal of Soviet bloc in formulation of resolution 1803, U.N. GAOR 2d Comm., 17th Sess., 846th mtg, at 4, U.N. Doc. A/C.2/SR.846 (1972); Calvo doctrine in Latin America; Andean Foreign Investments Code, s. 51; Afro-Asian Legal Consultative Committee's Draft Convention on Principles concerning the Admission and Treatment of Aliens, art. 12 (1961) Report of Fourth Session (1961) 49.

[133] H. GROTIUS, ON THE RIGHTS OF WAR AND PEACE 179 (1628).

[134] 3 E. VATTEL, LE DROIT DES GENS 139 (1834).

[135] D. O'CONNELL, INTERNATIONAL LAW 768-69 (1970).

However, the restriction as to public purpose is now irrelevant.[136] A state's assessment of its own national interest has not been questioned.[137] Similarly, the injunction against discrimination in nationalization is no longer part of the law.[138]

Even if public purpose is necessary in international law, Frontera's economic aim of eradicating dependence on foreign capital is entirely consistent with the requirement.[139] Nor has Frontera offended any possible prohibition against discrimination since distinctions based on degrees of economic development are permitted.[140] Measures need not be discriminatory even if they are directed exclusively against aliens.[141] Discrimination did not occur as both national and foreign shareholders of Pharmco were affected by the nationalization.

D. The International Standard of Compensation is "Appropriate Compensation"

1. Frontera has paid "appropriate compensation" according to all the circumstances of the case

Customary international law requires that all relevant circumstances be considered.[142] Frontera's underdeveloped economy and its espoused aim of economic progress must be weighed against the profit-making interests of the multinational IPC. PharmCo's gains were excessive; it recouped its

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[136] Libyan American Oil Co. v. Iran, 20 I.L.M. 1, 114 (1981); C. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 138 (1967); RESTATEMENT, *supra* note 1, §712, cmt. e.

[137] Weston, *supra* note 121, at 440.

[138] G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 19, U.N. Doc. A/5217 (1962).

[139] Amoco Int'l Finance Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 233 (1987); Libyan American Oil Co. v. Libyan Arab Republic, 20 I.L.M. 1, 118 (1977).

[140] G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 3, para. 4(n), U.N. Doc. A/9559 (1976).

[141] Amoco Int'l Finance Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 232 (1987).

[142] Kuwait v. American Independent Oil Co. 21 I.L.M. 976, 1033 (1982); Oil Field of Texas, Inc. v. Iran, 1 Iran-U.S. Cl. Trib. Rep. 347, 356, 362 (Interlocutory Award, Dec. 9, 1982).

initial investment in the first year with 200% profit.[143] The repatriation to IPC in Bastonia of more than half of those profits indicates that IPC operated in Frontera with little concern for local development. Moreover, with an ownership of 49%, the removal of 60% of the profits by IPC to Bastonia[144] is unconscionable. The domination of the management by Bastonians also demonstrates a lack of local representation. The 100 year lease of 1000 acres is presumptively exploitative.[145] An award for full compensation would impose an overwhelming financial burden[146] on Frontera, a state newly-emergent from its colonial past. IPC is more capable of bearing the financial burden of nationalization. It is recognised that less than full compensation is due when post colonial, developing nations exercise economic self determination.[147] Due to these circumstances, the quantum of compensation for the nationalization of Pharmco is nil.

2. Frontera is not liable to pay "prompt, adequate and effective" or full compensation

a. This standard never represented international law

As a standard claimed by Western nations, "prompt, adequate and effective" has no universal support.[148] Early judicial[149] and arbitral[150] authority, socialist nationalizations,[151] Latin American

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[143]Clarification no. 4.

[144] Problem at 2.

[145] Problem at 2.

[146] L. Sohn & R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens* 55 AM. J. INT'L L. 545, 560 (1961).

[147] C. Amerasinghe, *Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Principle*, 41 INT'L & COMP. L.Q. 22, 48 (1992).

[148] O. Schachter, *Editorial Comment: Compensation for Expropriation*, 78 AM. J. INT'L L. 121, 123 (1985).

[149] Chorzow Factory (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 46 (Sept. 13).

[150] Norwegian Shipowners' Claims (Nor. v. U.S.), 1 R.I.A.A. 307, 332 (1922).

[151] KATZAROV, *supra* note 121, at 348-9; Francioni, *supra* note 121, at 266-67.

practice,[152] lump sum agreements after World War II,[153] and the practice of developed countries inconsistent with full compensation,[154] indicate that a lesser standard is legal.

Full compensation provisions in bilateral investment treaties do not create customary international law because the treaty provisions are not of fundamentally norm-creating character.[155] Nor do the treaties exhibit sufficient uniformity.[156] Treaties involve concessionary negotiations[157] and such economic pressure on developing states diminishes their significance as *opinio juris*.[158]

There is insufficient uniformity amongst arbitral awards to amount to state practice.[159] Those decisions which awarded full compensation dealt with illegal nationalizations,[160] whereas the nationalization of Pharmco was legal.

b. Even if "prompt, adequate and effective" or full compensation once represented the relevant standard, that standard has been displaced by state practice

The changing nature of expropriation from isolated, individualized takings to large-scale economic restructuring has altered the previous

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[152] F. Garcia-Amador, *The Proposed N.I.E.O: A New Approach to the Law Governing Nationalizations* 12 Law. Am. 1, 2-5 (1980); C. CALVO, LE DROIT INTERNATIONAL 231 (5th ed. 1885); O. Vicuna, *The International Regulation of Valuation Standards and Processes: A Reexamination of Third World Perspectives, in* 1 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW (R. Lillich ed., 1974).

[153] R. LILLICH & B. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 9-43 (1975).

[154] G. Schwarzenberger, *The Protection of British Property Abroad*, 5 CURRENT LEGAL PROBS. 295, 307 (1952).

[155] North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 41 (Feb. 20).

[156] Dolzer, *supra* note 126, at 565-66.

[157] Amerasinghe, *supra* note 147, at 30.

[158] Kuwait v. American Independent Oil Co., 21 I.L.M. 976, 1036 (1982).

[159] Amerasinghe, *supra* note 147, at 45.

[160] B.P. Exploration Co. v. Libyan Arab Republic, 53 I.L.R. 298, 329 (1974); TOPCO v. Libya, 52 I.L.R. 389, 483 (1977); Sapphire Int'l Petroleum Ltd. v. NIOC, 35 I.L.R. 136 (1963).

rules of compensation.[161] The requirement of "prompt, adequate and effective" compensation is not applicable to the comprehensive nationalization of all foreign-owned manufacturing concerns in Frontera. The consistency of the compensation awards immediately following World War II demonstrates that full compensation is not required.[162] Furthermore, the adoption of General Assembly Resolution 1803 by consensus and the passage of subsequent resolutions represent state practice supporting the view that "appropriate" is not synonymous with "prompt, adequate and effective".[163]

c. The "prompt, adequate and effective" or full standard of compensation is not binding on developing states

As post-colonial countries did not participate in the formulation of traditional standards, they are not bound by them.[164] Moreover, developing countries have consistently rejected the full compensation standard.[165] States cannot be bound by principles to which they persistently object.[166]

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[161] INA Corp. v. Iran, 8 Iran-US Cl. Trib. Rep. 373, 378 (1985); INA Corp. v. Iran, 8 Iran-U.S. Cl. Trib. Rep. 373, 385-6 (separate opinion of Judge Lagergren); FRIEDMAN, *supra* note 25, at 207; OPPENHEIM, *supra* note 44, at 352; F. Dawson and B. Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation,* 30 FORDHAM L. REV. 728, 736 (1962); Dolzer, *supra* note 126, at 561-562; L. Rood, *Compensation for Takeovers in Africa*, J. INT'L L.& ECON. 521, 525 (1977).

[162] LILLICH & WESTON, *supra* note 153, at 35.

[163] G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 19, U.N. Doc. A/5217 (1962); G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9400 (1974); G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974); G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975).

[164] S. SINHA, NEW NATIONS AND THE LAW OF NATIONS 26 (1967); R. ANAND, NEW STATES AND INTERNATIONAL LAW 57 (1972); J. Castaneda, *The Underdeveloped Nations and the Development of International Law*, 15 INT'L ORG. 39 (1961).

[165] G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 19, U.N. Doc. A/5217 (1962); G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9400 (1974); G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974); G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975).

[166] Anglo-Norwegian Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18); Nuclear Tests (Austl. v. Fr, N.Z. v. Fr.), 1974 I.C.J. 253, 286-93 (Dec. 20) (separate opinion of Judge Gros); Asylum (Colom. v. Peru), 1950 I.C.J. 266, 277-78 (Nov. 20).

3. If this court accepts the doctrine of unjust enrichment, its operation will not impose liability on Frontera

As an equitable doctrine,[167] unjust enrichment requires a thorough consideration of the relationship between Frontera and Pharmco.[168] The excess profits, the repatriation practices, the foreign management control, combined with Frontera's status as a developing state, undermine any claim of unjust enrichment.[169] Furthermore, the doctrine of unjust enrichment permits Frontera to deduct any excess profits Pharmco made.[170]

IPC could not legitimately expect to receive full compensation for the nationalization of Pharmco. As an investor in a capitalist venture, IPC voluntarily subjected itself to market risks.[171]

E. WHERE INTERNATIONAL LAW IS UNCERTAIN, DISPUTES SHOULD BE RESOLVED ACCORDING TO COMMUNITY OBJECTIVES

Given the absence of unanimity in applicable compensation standards for nationalization, this court must resolve the matter consistently with present and future policy objectives articulated within the international community.[172] The community of nations has affirmed a New International Economic Order, based on equity, sovereign equality, interdependence, common interest and cooperation,[173] in which development has been identified as an important goal.[174] The Charter of the United Nations

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[167] Francioni, *supra* note 121, at 272-83.

[168] Sea-Land Service v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 149, 169 (1984).

[169] Francioni, *supra* note 121, at 279.

[170] A. Heibein, *The Chilean Copper Nationalization: The Foundation for a Standard of "Appropriate" Compensation*, 23 BUFF. L. REV. 765, 772-74 (1973-4).

[171] INA Corp. v. Iran, 8 Iran-U.S. Cl. Trib. Rep. 373, 404 (1985) (dissenting opinion of Judge Ameli).

[172] SORNARAJAH, *supra* note 126, at 188.

[173] The Charter, Chapter I.

[174] G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53 at 186.

obliges states to pursue economic progress and development.[175] Frontera's history of colonialism and future of development compel this Court to recognize the concept of redistributive justice and the right of sovereign states to determine the incidents of nationalization.

V. PRAYER FOR RELIEF

The Government of Frontera respectfully requests that this Honourable Court;

1. **Declare** that the nationalization of PharmCo without compensation is a matter for the domestic jurisdiction of Frontera;

2. **Declare** that the RPG is not liable for any obligations undertaken or acts committed by the Colonial Government;

3. **Declare** that, if the terms of the Bilateral Investment Treaty bind the RPG, it is not liable for any loss to IPC;

4. **Declare** that Frontera acted in accordance with customary international law in nationalizing IPC's investments;

5. **Declare** that IPC and Bastonia have engaged in practices which do not accord with the precepts of the New International Economic Order recognized by the international community.

Respectfully submitted,

Agents for Frontera.

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[175] U.N. CHARTER art. 56.