Team #515A

IN THE

INTERNATIONAL COURT OF JUSTICE

AT THE

PEACE PALACE, THE HAGUE, THE NETHERLANDS

SPRING TERM 1993

BASTONIA,

Applicant,

v.

FRONTERA,

Respondent.

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

The sovereign states of Bastonia and Frontera agreed to submit the present dispute to the International Court of Justice (ICJ) without reservation. Article 36, paragraph 1 of the ICJ Statute provides that this Court's jurisdiction "comprises all cases which the parties refer to it." This Court, therefore, has jurisdiction to adjudicate all issues presented by the parties in this dispute.

STATEMENT OF FACTS

The sovereign states of Bastonia and Frontera are original members of the United Nations and parties to the Statute of the International Court of Justice. The two states have complementary economies for Bastonia's industrialized economy exports capital and Frontera's developing economy imports capital. Bastonia and Frontera sought to capitalize on their mutually beneficial economic relationship by concluding a Bilateral Investment Treaty (Treaty) in 1980. Although a colony of Empira at the time, Frontera had complete autonomy over its foreign relations. The Treaty provided that the official representatives of Frontera and Bastonia would guarantee protection against expropriation without compensation of investments of the citizens and corporations of the other party. If either party failed to do so, the Treaty obligated the parties to compensate one another on a non-discriminatory basis. The Treaty allowed for an exception only when, national emergency or revolt necessitated damage to the investments. From 1980 to 1991, the Treaty safeguarded Bastonian investments and fueled economic development in Frontera.

The operation of PharmCo exemplified the mutual benefits of the Treaty. The International Pharmaceutical Company (IPC), a Bastonian company, incorporated PharmCo in Frontera as a pharmaceutical manufacturing operation and initially capitalized it with a $25 million investment. Although IPC held only a 49% interest in PharmCo, because Fronteran law required that Fronteran nationals own a majority interest in locally incorporated companies, IPC retained exclusive control over PharmCo through Bastonian managers. As evidence of each state's commitment to economic cooperation, the parties provided for a 100-year lease of the PharmCo property site. PharmCo became an enormously successful venture, earning $50 million a year in profits, of which IPC received 60% and Fronteran shareholders 40%. PharmCo provided jobs for Fronteran citizens and taxes for the Fronteran government. However, in 1989, Frontera expropriated PharmCo and all other

manufacturing concerns, ostensibly for the purpose of quelling an incipient revolt by the People's Revolutionary Coalition. After nationalization, colonial Frontera refused to restore PharmCo or compensate IPC.

The Fronteran government changed hands when the People's Revolutionary Coalition established the Revolutionary People's Government of Frontera on January 1, 1991. Led by the former Deputy Governor, and comprised primarily of mid-level bureaucrats from the former government, the RPG quickly assumed Frontera's international obligations. By March 1991, the RPG ambassador took Frontera's seat in the United Nations, without seeking readmittance, as Frontera's official representative. Fifty nations, including Bastonia, recognized the RPG as the new government of Frontera.

At first, the RPG appeared committed to honoring the treaty obligations of the former government of Frontera. The new Fronteran ambassador to Bastonia expressed her government's desire to continue the long-standing tradition of economic and political cooperation between the two states. Although the new Fronteran parliament passed General Law 1991/007, nullifying all laws of the former Fronteran government which did not comport with the RPG's political and economic goals, it expressly excluded application of the law to any treaty of Frontera. The RPG never expressly repudiated its earlier consent to be bound by the treaty obligations of the former government.

However, the RPG failed to honor Fronteran treaty obligations. It has steadfastly refused to restore PharmCo or to compensate PharmCo despite repeated requests to do so by both IPC and the Bastonian government. In marked contrast, the RPG denationalized companies which had only Fronteran shareholders within months of assuming power. IPC brought its claim for compensation before Frontera's highest judicial and administrative bodies, which dismissed the case without judgment on the merits. After IPC exhausted local Fronteran remedies, it sought the diplomatic protection of Bastonia. Bastonia ardently protested Frontera's

expropriation of PharmCo without compensation through diplomatic channels, but the RPG refused to admit any liability for the unlawful act.

After months of negotiations and Fronteran refusals, Bastonia expressed its desire to have the International Court of Justice adjudicate its claim. Frontera agreed. The two governments filed a compromis pursuant to Article 36(1) of the Statute of the ICJ.

ISSUES PRESENTED

I.

Whether the 1980 Bilateral Investment Treaty Between Bastonia and Frontera legally binds the Revolutionary Peoples Government.

II.

Whether nationalization of PharmCo without compensation violates the Bilateral Investment Treaty.

III.

Whether nationalization of PharmCo without full compensation violates principles of customary international law.

SUMMARY OF ARGUMENTS

The 1980 Bilateral Investment Treaty legally binds the RPG. Colonial Frontera possessed legal capacity to conclude a binding treaty with Bastonia. The RPG represents only a new Fronteran government that is bound by the Treaty ratified by the prior government. Even if the RPG were a newly independent state, its actions and proclamations upon assuming power indicate its consent to abide by the Treaty. Moreover, the RPG cannot use a fundamental change of circumstances to excuse Frontera's adherence to the Treaty.

Fronteran expressly violated the Treaty when it expropriated PharmCo without full compensation. Article 10 requires Frontera to protect Bastonian investments against unjustified expropriation. If Frontera fails in its obligation to protect, Article 12 provides compensation must be paid. Frontera breached its duty and in accordance with the national treatment standard of Article 13, must either restore PharmCo or pay full compensation . The RPG cannot, in good faith, invoke necessity under Article 14 to justify the non-compensatory taking of PharmCo. Finally, the principle of non retroactivity does not reach IPC's investment.

Frontera's expropriation of PharmCo,in violation of customary international law, and consistent refusal to provide IPC with a meaningful route to remedies makes Bastonia's claim on behalf of IPC admissible and gives Bastonia standing before the International Court of Justice. Frontera violated customary international law by expropriating PharmCo without compensation. Furthermore, the RPG's consistent refusal to compensate indicates the expropriation both lacks a public purpose and discriminates againts aliens. However, even if the expropriation were otherwise lawful, customary international law requires compensation must be paid.

ARGUMENT AND AUTHORITIES

I. THE 1980 BILATERAL INVESTMENT TREATY BETWEEN BASTONIA AND FRONTERA BINDS THE REVOLUTIONARY PEOPLE'S GOVERNMENT.

The Bilateral Investment Treaty (Treaty) between Bastonia and Frontera legally binds the Revolutionary People's Government (RPG) of Frontera.[1] Colonial Frontera had the legal capacity to conclude the Treaty. The Treaty remains valid and binds both state parties because a mere change of government, even one resulting from a revolution, cannot release Frontera from its responsibilities. Moreover, the RPG has consented to abide by the Treaty and cannot now withdraw its consent. Finally, it cannot terminate the Treaty based on a fundamental change of circumstances.

A. Frontera had the legal capacity to conclude a valid Treaty with Bastonia.

Colonial Frontera had the power to conclude binding treaties. An entity need not be a fully sovereign state to have the capacity to enter into international agreements.[2] In fact, dependent states have long had the ability to be parties to such agreements on a status equal to that of independent states.[3] Only two

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[1] Case Concerning the Nationalization of Certain Property, (Bastonia v. Frontera) (1993) Philip C. Jessup International Moot Court Competition [hereinafter the Problem], cover page.

[2] Vienna Convention on the Law of Treaties, May 23, 1969, art. 3, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 [hereinafter Vienna Convention on Treaties]. In the nineteenth century, the British colonies of Canada, Australia and New Zealand entered into their own binding commercial treaties with foreign powers. Oliver J. Lissitzyn, Territorial Entities Other Than States in the Law of Treaties, 125 R.C.A.D.I. 5 (1968). In the twentieth century, all states, with the exception of Cuba, have acknowledged the treaty-making capacity of dependent entities. See also Alfred D. McNair, The Law of Treaties, 668 (1961); Kenneth J. Keith, Succession to Bilateral Treaties by Seceding States, 61 Am. J. Int'l L. 521 (1967).

[3] Prior to formal independence, dependent entities, such as the Philippines and Colonial India, signed treaties and conventions with status equal to independent states. Furthermore, dependent states, such as India and the Philippines, were members of the United Nations even though Articles 3 and 4 of the U.N. Charter limit membership to States only. Publicists support the existence of dependent states, because "it is incorrect to exclude subordinate entities like colonies . . . from the conception of Statehood." D.P. O'Connell, 1 International

conditions are necessary for dependent states to conclude valid treaties: 1) the dominant state must expressly or tacitly consent to the dependent state's power to enter into treaties in its own name, and 2) the other party to the treaty must be aware that the dependent entity possesses treaty-making power.[4] When Frontera and Bastonia concluded the Treaty in 1980, Empira, the dominant state, had granted Frontera total autonomy over its own foreign policy and complete authority over its international obligations.[5] Moreover, the international community had already recognized Frontera as a dependent state with capacity to enter into international agreements: Colonial Frontera was a member of the United Nations and a party to the ICJ Statute.[6] Bastonia demonstrated its awareness of Frontera's power to make treaties by negotiating directly with Frontera without seeking ratification or approval from Empira.[7] By exercising the power thus conferred on it by international law, Frontera concluded a binding treaty with Bastonia.

B. Frontera's obligations under the Treaty remain unaffected by the RPG's ascent to power.

Having validly concluded the Treaty, Frontera remains bound by it even though the new Fronteran government came to power through a revolution. Revolutions are merely changes in government, and even though they occur through means that are not legal according to a state's internal laws, that illegality is of no consequence

Law 303-304 (2d ed. 1970). See also Ian Brownlie, Principles of Public International Law 53-60, 69-71 (3d ed. 1979); Lissitzyn, supra note 2, at 9.

[4] Law of Treaties, [1962] 2 Y.B. Int'l L. Comm'n 35-36, U.N. Doc. A/CN.4/SER.A/1962. See also Lissitzyn, supra note 2, at 84; McNair, supra note 2, at 42; Keith, supra note 2, at 522.

[5] Clarifications of Philip C. Jessup Moot Court Competition [hereinafter Clarifications].

[6] Id. Similarly, India, the Philippines, the Ukraine and Byelorussia were all original members to the U.N. and had power to conclude treaties while under the rule of another state. Keith, supra note 2, at 521.

[7] The Problem, supra note 1, at 1.

under international law.[8] International law continues to regard a state headed by a new revolutionary government as the same entity, bound by all its previous obligations[9] and responsible for all its previous acts.[10] Since the revolution does not create a new state, there is no question of a succession to treaties.[11]

The People's Revolutionary Coalition, led by a colonial Fronteran Deputy Governor and assisted members of the existing colonial government, instigated the Fronteran revolution.[12] The Coalition ultimately gained control of all Fronteran territory and declared itself the rightful government on January 1, 1991.[13] Leaders of the new government were primarily mid-level bureaucrats from the former

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[8] Krystyna Marek, Identity and Continuity of States in Public International Law 24-30 (1968).

[9] Id. State practice over more than three centuries demonstrates this rule. After the English Revolutions of 1649 and 1688, the new rulers of England fully acknowledged the international obligations incurred by their predecessors. Similar acceptance of continuity of obligation occurred after the French Revolutions of 1789 and 1848. Even the 1917 Bolshevik Revolution, cited as an example of a successor government which repudiated prior obligations, fits this rule because the new Soviet government ultimately acknowledged its responsibility for the debts of Russian Tsarist government. Id. at 31-38. The ICJ and the Iran-U.S. Claims Tribunal both ruled that the U.S.-Iran Treaty of Amity remained in force after Iran's violent revolution. Case Concerning U.S. Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 1, 28, reprinted in 19 I.L.M. 653 (1980); Amoco Int'l Finance Corp. v. Iran, 15 Iran-U.S. C.T.R. 189, 216-17 (1987). For additional examples of state practice in the last three centuries, see J.B. Moore, 5 Digest of International Law 336 (1906); McNair, supra note 2, at 383-84.

[10] Report of the International Law Commission on the work of its 32nd Session, Draft Articles on State Responsibility, [1980] 2 Y.B. Int'l L. Comm'n 31, art. 15, para. 1, U.N. Doc. A/CN.4/SER.A/1980. See also Tinoco Arbitration (Gr. Brit. v. Costa Rica) 18 Am. J. Int'l L. 147 (1924) (constitutional regime restored to power was unable to declare null and void the acts of the usurping revolutionary government during its two-year existence).

[11] The general rule provides that in the classic type of revolution, where the intent is to gain control of the entire territory of the existing state, no new state is created even if the revolution is successful. The only exception to the general rule exists when the revolution seeks to control only a portion of the territory of the existing state; in that case, the revolution is a secessionist movement. An entity which successfully causes the secession of territory will be treated as a new state. Marek, supra note 8, at 61-62.

[12] The Problem, supra note 1, at 2.

[13] Id.

government.[14] Within three months of the revolution, fifty states, including Bastonia, had recognized the RPG.[15] At the same time, the international community allowed the RPG representative to take the Fronteran seat in the United Nations without having to seek admittance as a new member state.[16] Moreover, Frontera recognized the continuity of its international obligations when the RPG declared itself to be the Revolutionary People's Government of Frontera, not a new state.[17] The Fronteran Parliament also explicitly reaffirmed the continuity of Frontera's international obligations in General Law No. 1991/007 by leaving intact treaties concluded by the former government.[18] Finally, the Fronteran Ambassador to Bastonia expressed Frontera's desire for continuity in its economic and political relations with Bastonia.[19] Actions by the international community and Frontera itself demonstrate that the RPG's ascent to power did not sever the continuity of Frontera's international rights and obligations. Therefore, Frontera's obligations

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[14] Id.

[15] Id. Although formal recognition of a new government is not a requirement of international law, recognition is appropriate as a formal acknowledgement that a specific regime is the effective government. Restatement (Third) of the Foreign Relations Law of the United States, §203, cmt. a (1987) [hereinafter Restatement].

[16] The Problem, supra note 1, at 3. When the international community allowed India to retain its U.N. seat after gaining independence, the U.N. Assistant Secretary General for Legal Affairs stated that "there is no change in the international status of India; it continues as a state with all the treaty rights and obligations, and consequently, with all the rights and obligations of membership in the United Nations." U.N. Press Release, P.M. 473, reprinted in [1962] 2 Y.B. Int'l. L. Comm'n. 101, U.N. Doc. A/CN.4/SER.A/1962 (emphasis added). The fact that a state is seated without reapplying for membership is evidence that the international community recognises its continuity of statehood. In fact, the U.N. recently affirmed the principle that when a breach in international continuity occurs, a new state does not succeed to the U.N. seat of its predecessor. On September 22, 1992, the Security Council ruled that federal Yugoslavia had ceased to exist and that the new state of Yugoslavia would have to reapply for U.N. membership. Facts on File World News Digest, Sept. 25, 1992, Int'l Affairs 708-716.

[17] The Problem, supra note 1, at 3.

[18] Id.

[19] Id.

under the Treaty continue even under the present regime.

C. **If Frontera were a new state, the RPG's statements and actions would constitute consent to be bound by the Treaty.**

Frontera would remain bound by the Treaty even if the RPG's ascent to power created a new state. A new state may expressly or tacitly accept the treaties of the former state[20] by unilateral declaration of intent or domestic legislation.[21] If a state indicates it accepts rights appurtenant to a treaty, it must also accept the correlating obligations and duties.[22] A state may be estopped from denying the validity of obligations in a treaty if its actions manifest consent to accept rights under the treaty.[23] The RPG expressed its consent to be bound by the Treaty when the new Fronteran parliament passed General Law 1991/007, which explicitly left intact treaties "concluded by [Colonial] Frontera" while declaring null and void all domestic laws "enacted by the former Colonial Government" inconsistent

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[20] McNair, supra note 2, at 655. Most new states, including Burma, Laos, the Ivory Coast, Mali, Morocco, the Philippines and Jamaica, considered themselves bound by the treaty obligations of the preceding colonial regimes. Keith, supra note 2, at 544-545. Only Upper Volta, Algeria and Israel declared that they began with a "clean slate," that is, with no succession of treaty rights or obligations. Id. See also Laws of State Succession, 2 Whiteman Digest at 976-998 [hereinafter Whiteman].

[21] Devolution agreements and diplomatic notes in response to specific inquiries also convey the consent of the state to be bound by past treaty obligations. For examples of state practice, see Karl Zemanek, State Succession After Decolonization, 116 R.C.A.D.I. 187, 190-221 (1965); Keith, supra note 2, at 539-544.

[22] Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States, U.N. Doc. A/CN.4/2/1948.

[23] In France-United States Air Transport Arbitration, 3 I.L.M. 668 (1964), 58 Am. J. Int'l L. 1016 (1964), France was estopped from prohibiting American airlines from operating along certain routes because France had allowed such flights in the past. Support for the continuation of obligations associated with rights of newly independent entities appears in United Nation's practice concerning technical and economic assistance between specialized U.N. agencies and dependent territories. Keith, supra note 2, at 528-531. Territorial governments obtain and retain the obligations and assistance of these agreements regardless of their internal state of affairs or continued existence. If the territorial entity becomes a new state and indicates its willingness to retain the benefit of these arrangements, it is estopped from denying its obligations and duties concerning the agreement. Id. See also Restatement, supra note 15, at §209, cmt. f.

with the RPG's goals.[24] At the same time, the Fronteran Ambassador to Bastonia announced the RPG's intention to continue economic cooperation between Frontera and Bastonia.[25] This announcement, interpreted in light of Fronteran legislation leaving intact all treaties, indicates Frontera's consent to remain bound by the treaty.

Furthermore, international economic policy considerations argue for Frontera's adherence to the Treaty in light of its consent. Treaty continuity ensures the economic and technical survival not only of the individual parties to those agreements, but for the entire world economic community as well.[26] The continuity of investment treaties is especially vital to ensure the continued flow of investment from industrialized nations into the developing world.[27] A decision allowing Frontera to avoid its obligations under the Treaty will jeopardize future Bastonian investments in Frontera. Furthermore, such a decision might have a chilling effect on investments in the developing world by other industrialized nations.

D. Frontera cannot assert a fundamental change in circumstances to terminate the Treaty.

The RPG cannot use a fundamental change in circumstances to excuse Frontera's adherence to the Treaty. A party may only terminate or withdraw from a treaty

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[24] The Problem, supra note 1, at 3. A government cannot unilaterally declare all treaties of a former government null and void through a legislative act. See Tinoco Arbitration, supra note 11.

[25] The Problem, supra note 1, at 3.

[26] Adeoye Akinsanya, International Protection of Direct Foreign Investments in the Third World, 36 Int'l Comp. L.Q. 58, 63 (1987); Mark S. Bergman, Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty, 16 N.Y.U. J. Int'l L. & Pol. 1, 43 (1983).

[27] Technical and economic development agreements from the United Nations on behalf of dependent entities devolve upon independence because of the need for international continuity and stability. See Keith, supra note 2, at 528.

under a fundamental change of circumstances if three conditions are met.[28] First, the change must be unforeseen by the parties.[29] Second, the existence of those circumstances must constitute an essential basis of the consent of the parties to be bound by the treaty.[30] Third, the change must radically transform the extent of obligations yet to be performed under the treaty.[31] The party invoking the principle of fundamental change in circumstances bears the burden of proof on all three elements.[32]

Both Bastonia and Frontera foresaw the possibility of a change in Frontera's status by including in Article 14 a specific provision for nonperformance in certain circumstances resulting from a rebellion.[33] The Fronteran Ambassador proclaimed Frontera's intention to continue the longstanding tradition of economic and political cooperation with Bastonia,[34] thus indicating that the basis for consent -- mutually beneficial economic development and cooperation -- remained unchanged. Finally, the extent of Fronteran treaty obligations -- protecting foreign investment against loss or damage -- remains the same no matter which government rules Frontera. Since Frontera cannot establish the existence of all

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[28] Vienna Convention on Treaties, supra note 2, art. 62. Eduardo Jimenez de Arechaga, International Law in the Past Third of a Century, 159 R.C.A.D.I. 73, 79 (1978) (stating that a fundamental change in circumstances does not automatically terminate the treaty).

[29] Vienna Convention on Treaties, supra note 2, art. 62, para. 1; Fisheries Jurisdiction (U.K. v. Iceland; F.R.G. v. Iceland) 1974 I.C.J. 3, 20 (July 25).

[30] Vienna Convention on Treaties, supra note 2, art. 62, para. 1(a). This condition requires that adherence to the treaty must "imperil the existence or vital development of one of the parties." Fisheries Jurisdiction case, supra note 29, at 21. To meet its burden on the second element, the party invoking the doctrine of fundamental change must prove that if the situation which later arose had existed when the treaty was negotiated, the consent of the parties would not have been given. Jimenez de Arechaga, supra note 28, at 75.

[31] Vienna Convention on Treaties, supra note 2, art. 62.

[32] Jimenez de Arechaga, supra note 28, at 73.

[33] The Problem, supra note 1, at 1.

[34] The Problem, supra note 1, at 3.

three conditions, there has not been a fundamental change in circumstances sufficient to justify Frontera's breach.

II. FRONTERA'S TAKING OF PHARMCO CONSTITUTES AN EXPROPRIATION WITHOUT COMPENSATION IN VIOLATION OF THE TREATY.

Bastonia has standing before the Court under the Treaty because Frontera's expropriation of PharmCo without compensation breaches the Treaty and thus constitutes an injury per se to Bastonia. Frontera breached Articles 10 and 12 by failing to protect IPC's investment in PharmCo from expropriation without compensation. Frontera violated Article 13 by discriminating against Bastonia when it refused to compensate IPC on the same terms as Fronteran nationals. Frontera cannot invoke the defense of necessity under Article 14. The Treaty encompasses Frontera's expropriation of PharmCo so the principle of non-retroactivity does not apply.

A. Frontera's breach of the Treaty provides Bastonia with a basis for standing before this Court.

Bastonia has standing because Frontera's expropriation of PharmCo without compensation violated the Treaty and injured Bastonia. A treaty binds the parties and creates international legal obligations.[33] A state that breaches a treaty injures the other state.[34] To confer standing before this Court the alleged breach must be within the treaty's scope of application.[35] Bastonia alleges Frontera violated Articles 10, 12 and 13 of the Treaty. Article 10 obligates Frontera and Bastonia to provide the most constant protection and security to "investments of

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[33] Vienna Convention on Treaties, supra note 2, art. 26.

[34] Chorzow Factory Case (Ger. v. Pol.) 1928 P.C.I.J. (Ser. A) No. 17 (Sept. 13). See also Eduardo Jimenez de Arechaga, The Invalidity and Termination of Treaties, 159 R.C.A.D.I. 267 (1978).

[35] McNair, supra note 2, at 573-74; Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 24 Int'l Law. 655 (1990).

citizens or companies of the other State Party."[38] PharmCo is an investment of the IPC, a Bastonian company.[39] By expropriating PharmCo and failing to protect IPC's investment, Frontera breached the Treaty and injured Bastonia. Applying standards of treaty interpretation,[40] this Court should find that Bastonia has standing under the Treaty.

B. Frontera breached its duty of protection under Article 10 by expropriating PharmCo without compensation.

Frontera's unlawful expropriation of PharmCo violates the duty of protection required by the Treaty. Article 10 creates a duty for each state to provide "the most constant protection[41] and security against loss of, or damage to, the investments of citizens or companies of the other state."[42] Article 10 must be interpreted according to the plain meaning of the text, in its context and in light of the Treaty's purpose and object.[43] Although Bastonia concedes that the general language in Article 10 does not specify the precise standard of protection for

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[38] The Problem, supra note 1, at 1.

[39] Id.

[40] This Court, in Elettronica Sicula S.p.A. (U.S. v. Italy) 1989 I.C.J. 15 (July 20) [hereinafter ELSI], interpreted the following language in the Protocol to the Friendship, Commerce and Navigation Treaty between the United States and Italy to give the United States standing: "1. The provisions . . . providing for the payment of compensation, shall extend to interests held directly or indirectly by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party." In contrast, the language in the Treaty between Bastonia and Frontera more clearly provides for coverage of expropriations.

[41] Since the Treaty does not define "most constant protection" the parties likely intended Frontera's obligation to protect Bastonia's investments to be measured by the customary international law standard of "due diligence." Due diligence is "the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances." Asian Agricultural Products, Ltd. v. Sri Lanka, Case No. ARB/87/3, reprinted in 30 I.L.M. 577 (1991) [hereinafter AAPL], at 613. The tribunal also described the lack of due diligence as "substantial negligence to take reasonable precautionary and preventative action." Id.

[42] The Problem, supra note 1, at 1.

[43] Vienna Convention on Treaties, supra note 2, art. 31(1).

investments,[44] it is unlikely Bastonian citizens and corporations would have invested in Frontera without a guarantee that Frontera would not expropriate. The purpose of the Treaty, fostering Bastonian capital investment and Fronteran development, supports a reading of Article 10 which includes protection against expropriation. Furthermore, Bastonia and Frontera negotiated the Treaty during the same period that many industrialized countries concluded bilateral investment treaties to counteract a series of expropriations by developing countries.[45] Frontera's expropriation of PharmCo violates its duty under Article 10 to protect Bastonian investments.

C. Frontera violated Articles 12 and 13 by failing to compensate IPC on terms equal to those provided Fronteran nationals.

Upon breaching Article 10, Frontera must compensate IPC on a "national treatment" standard, meaning that it must treat IPC at least as well as it has already treated Fronteran nationals. Article 12 requires compensation when a state breaches its obligation under Article 10.[46] Article 13 provides that such compensation shall be on terms no less favorable than those accorded citizens or companies of "any other state."[47] "Any other state" could mean any state other than Bastonia, including Frontera itself. Ambiguous compensation provisions in bilateral investment treaties must be interpreted in light of their purpose to

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[44] The Treaty calls for the "most constant protection and security" to be given by the state parties to investments. The Problem, supra note 1, at 1.

[45] Bergman, supra note 26, at 9; Akinsanya, supra note 26, at 62-63. The United States, following the success of European countries in concluding bilateral investment treaties (BITs) to stabilize the investment climate, prepared a model BIT explicitly stating that the BIT was designed to minimize the risk of loss in the event of expropriation. Bergman, supra note 26, at 21. Between 1959 and 1989 at least 309 BITS have been concluded. Athena J. Pappa, References on Bilateral Investment Treaties 4 ICSID Rev.-Foreign Investment L.J. 189, 194-203 (1989). All of the leading developed states and eighty of the developing states are parties to BITs. Salacuse, supra note 37, at 655.

[46] The Problem, supra note 1, at 1.

[47] Id.

provide the maximum amount of security and compensation for the investor.[48] Whether applying a most favored nation[49] or national treatment[50] standard of compensation, compensation has to reach at least an international minimum standard of full compensation.[51] Frontera resolved the ambiguity by adopting a national treatment standard when it restored domestic companies,[52] effectively providing Fronteran nationals with full compensation.

Moreover, Bastonians would have been less apt to invest in Frontera unless the Treaty mandated that they receive the same level of compensation afforded Fronterans and other foreign nationals. The trend in bilateral investment treaties concluded during the same period was toward providing for both a most favored nation and national treatment standard.[53] Frontera breached Article 13 by failing to fully compensate IPC under the national treatment standard.

D. Frontera cannot invoke necessity under Article 14 to justify its violation of Article 10.

Frontera's expropriation of PharmCo was not an act of necessity within the

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[48] Bergman, supra note 26, at 10; Pamela B. Gann, The U.S. Bilateral Investment Treaty Program, 21 Stan. J. Int'l L. 373, 374 (1985).

[49] Under the most favored nation standard, treatment by the host state must be no less favorable than that accorded to any other third state. Gann, supra note 48, at 384.

[50] National treatment means treatment of foreigners must be no less favorable than that accorded by the host government to its own nationals or companies. Id. This standard has long been applied under treaties of Friendship, Navigation and Commerce which preceeded bilateral investment treaties. Bergman, supra note 26, at 7.

[51] Bergman, supra note 26, at 20; Brownlie, supra note 3, at 533. The international minimum standard is full compensation. See infra notes 89-109 and accompanying text.

[52] The Problem, supra note 1, at 2. In 1990, Frontera nationalized all manufacturing industries, including PharmCo. By mid-1991, Frontera restored ownership of all these industries wholly owned by Fronteran nationals, but maintained control over any company partially owned by foreigners.

[53] Bergman, supra note 26, at 12. For example, the United Kingdom, Germany, Switzerland, and the Netherlands included these provisions in their BIT's with Singapore. Id. at 18.

meaning of Article 14. Article 14 provides an exception to the duty to compensate only when the "loss or damage results from an act of necessity during a state of war, national emergency or revolt."[54] Since Frontera and Bastonia did not provide in the Treaty a special meaning for the ambiguous term "necessity",[55] this Court must construe the term in light of its customary international law definition.[56] According to customary international law, a state may not justify an unlawful act as a necessity unless: 1) the act was the only means of safeguarding an essential interest of the state against a grave and imminent peril; and 2) the act did not seriously impair an essential interest of a state towards which the obligation existed."[57] These tests balance the interest of the state invoking the defense of necessity against the damage the act of necessity does to the international obligation infringed.[58]

Frontera fails part one of the necessity test because the expropriation of a pharmaceutical company[59] did not constitute the only means of preventing a revolutionary change of government.[60] Moreover, the rebels' rapid ascent to power

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[54] The Problem, supra note 1, at 1.

[55] See Vienna Convention on Treaties, supra note 2, art. 31.

[56] Vienna Convention on Treaties, supra note 2, art. 31, para. 3; Ian Sinclair, The Vienna Convention on the Law of Treaties 138-39 (2nd ed. 1984). All relevant rules of international law in force at the time of the conclusion of the treaty should be taken into account when interpreting it.

[57] Draft Articles on State Responsibility, supra note 10, art. 33. Article 33. The ILC's extensive discussion and final adoption of the state of necessity exception is evidence that the concept is considered customary international law. Comment, Jean Raby, The State of Necessity and the Use of Force to Protect Nationals, 26 Can. Y.B. Int'l L. 253, 260 (1988).

[58] Raby, supra note 57, at 263.

[59] Pharmaceutical companies manufacture products ranging from lip balm and diet pills to cancer-fighting drugs. No evidence indicates PharmCo produced medical supplies necessary for a war effort.

[60] The Problem, supra note 1, at 2. Frontera declared that it nationalized all manufacturing industries, including PharmCo, to "put down the revolution." However, only critical industries like television, radio, telecommunications, ammunitions, etc. need to be protected during a revolt of short duration.

seems to obviate any long-term reason for Frontera to continue governmental management of PharmCo, other than to confiscate all of PharmCo's annual profit of $50 million.[41] Frontera should have returned PharmCo immediately after the alleged necessity ended. Frontera also fails the second part of the test because not only was there relatively little, if any, strategic value gained from confiscating PharmCo, Frontera caused Bastonian investors to lose future profits of at least $30 million a year by seizing and maintaining control of PharmCo.[42] On balance, the damage to the economic interests of Bastonian shareholders outweighs any strategic benefit Frontera may have gained from expropriating PharmCo. Thus, Frontera cannot invoke necessity under Article 14 as a defense for expropriating PharmCo.[43]

E. Frontera cannot invoke the principle of non-retroactivity to justify its breach of the Treaty.

The occurrence of IPC's initial investment before the Treaty's enactment does not preclude protection against expropriation, based on the principle of non-retroactivity. The Vienna Convention on Treaties, which codified the customary international law principle of non-retroactivity, presumes treaties are not retroactive.[44] Article 28 provides that a contracting party will be bound by a treaty unless an act covered by the treaty took place prior to the date the treaty

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PharmCo's immense profitability suggests Frontera's motive of protecting it against the rebel movement was a pretext.

[41] Clarifications, supra note 5, at 2.

[42] Clarifications, supra note 5, at 2.

[43] Furthermore, a state cannot invoke the defense of necessity if it has contributed to the occurrence of the state of necessity. Draft Articles on State Responsibility, supra note 10, art. 33, para. 2(c). An insurrectionist movement, which includes an anticolonial revolution, that replaces the old government is responsible for the internationally unlawful acts committed in the past by the defeated government. Id. at art. 15, para. 1. See also Hazem Atlam, National Liberation Movements and International Responsibility, in United Nations Codification of State Responsibility 37 (Marina Spinedi and Buirno Simma eds.).

[44] Vienna Convention on Treaties, supra note 2, art. 28.

entered into force.[45] The parties did not specify in the Treaty that the date of investment, or any other event, would trigger the principle of non-retroactivity. In the absence of a non-retroactivity provision, the intent of the parties should be interpreted in the context of other Treaty provisions. Article 10 of the Treaty provides the most constant protection against loss or damage to investments.[46] Since the Treaty does not define "investments" in Article 10 as limited to initial investments, the Court should construe Article 10 to cover the operation of PharmCo as an ongoing investment of IPC. The Treaty entered force on January 1, 1981 and IPC's investment in PharmCo continued until the dispositive act, Frontera's expropriation of PharmCo, occured in early 1990.[47] Frontera cannot invoke the principle of non-retroactivity as a defense since the expropriation took place nine years after the Treaty entered into force.

III. FRONTERA'S EXPROPRIATION OF PHARMCO VIOLATED CUSTOMARY INTERNATIONAL LAW.

Bastonia possesses standing to demonstrate that Frontera unlawfully expropriated PharmCo. Frontera violated customary international law by expropriating PharmCo because it failed to provide compensation, lacked a valid public purpose, and discriminated against Bastonia.

A. Bastonia has standing under customary international law to bring this claim before the Court.

Bastonia may extend diplomatic protection on behalf of IPC because IPC first exhausted local Fronteran remedies. Bastonia has standing on behalf of IPC, a Bastonian shareholder in PharmCo, and on behalf of PharmCo, a corporation with strong links to Bastonia.

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[45] Vienna Convention on Treaties, supra note 2, art. 28.

[46] See supra notes 41-45 and accompanying text.

[47] The Problem, supra note 1, at 2.

1. IPC exhausted local domestic remedies.

IPC exhausted local Fronteran remedies. According to customary international law, a foreign national injured by a State must first exhaust local remedies before seeking the diplomatic protection of its home state in international proceedings.[68] Frontera injured IPC, a Bastonian company, by causing a loss of IPC's initial investment, management rights, and future profits.[69] IPC sought redress before the Fronteran judicial and administrative organs of ultimate jurisdiction, which held that the Treaty did not provide for a private cause of action, thereby dismissing the case.[70] IPC exhausted local domestic remedies, allowing Bastonia to assert diplomatic protection for IPC before this Court.

2. Bastonia has standing on behalf of IPC as a shareholder in PharmCo.

Since IPC, a Bastonian national, is a substantial shareholder in PharmCo, Bastonia has standing under customary international law to bring this action on behalf of IPC. According to customary international law, a State has standing to assert diplomatic protection on behalf of its nationals who are shareholders of a company incorporated in a state which has injured the company.[71] The Court in

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[68] Interhandel Case (Switzerland v. U.S.) 1959 I.C.J. 6, 26-27 (Mar. 21).

[69] The Problem, supra note 1, at 3.

[70] The Problem, supra note 1, at 3. Fronteran judicial and administrative bodies held that the Treaty did not provide a private cause of action and dismissed the case.

[71] See Barcelona Traction, Light, and Power Co., Ltd, (Belg. v. Spain) 1970 I.C.J. 3, 63 (Feb. 5) [hereinafter Barcelona Traction] (concurring opinion of Judge Wellington Koo stating that a substantial body of evidence of state practice, treaty arrangements and international tribunal decisions supports this rule of international law). See also Id. (concurring opinion of Judge Philip Jessup stating that the rationale of the rule is that since the corporation cannot seek redress from the state which injured it, the state of the injured nationals may extend diplomatic protection); J. Mervyn Jones, Claims on Behalf of Nationals who are Shareholders in Foreign Companies, 26 Brit. Y.B. Int'l L. 231-54 (1949) (citing customary international law examples for the existence of this rule as one of equity to be applied when not to do so would be unjust); Georg Schwarzenberger, 1 International Law 389 (3d ed. 1957) (stating that the cited rule applies when to do otherwise would be a substantial injustice to the interests of nationals who are shareholders).

Barcelona Traction, however, chose not to rely on customary international law when it denied standing to Belgium, adopting instead municipal law's sharp distinction between shareholder and corporate rights.[72] Signifcantly, the Court in Barcelona Traction expressly noted an exception under customary international law to the rule it adopted in instances where property is nationalized. In a recent case involving standing, this Court in ELSI declined an opportunity to apply Barcelona Traction,[73] thereby allowing a state to bring a claim on behalf of nationals who are shareholders in a company incorporated in another state.[74] Customary international law and the trend established in ELSI support a finding that Bastonia has standing to bring this claim on behalf of Bastonian shareholders injured by Frontera's expropriation of PharmCo.

Given the prominent factual difference between Barcelona Traction and this case, the Court should not apply Barcelona Traction as a bar to standing for Bastonia. In Barcelona Traction there was triangular relationship of countries: Belgium represented the Belgian shareholders who held an majority ownership stake in Barcelona Traction company; Canada represented the company as the state of incorporation; and Spain committed the alleged injury.[75] This Court emphasized that one state, Canada, could assert diplomatic on behalf of Barcelona Traction and

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[72] Richard B. Lillich, Two Perspectives on the Barcelona Traction Case: The Rigidity of Barcelona, 65 Am. J. Int'l L. 522 (1971) (critiquing the Court's failure to examine the large body of customary international law on rights of states to brings claims on behalf of its nationals who are shareholders and noting that Judges Koo, Jessup, Gros, Tanaka and Riphagen strenuously objected to the Court's exclusive reliance on municipal law).

[73] The Court in ELSI refused to adopt the sharp distintion between shareholder and corporate rights which had figured prominently in Barcelona Traction. Sean Murphy, The ELSI Case: An Investment Dispute at the International Court of Justice, 16 Yale J. Int'l L. 391, 418 (1992).

[74] The Court in ELSI rejected the argument of Judge Oda that Barcelona Traction should be applied, and tacitly acknowledged that the United States had standing on behalf of its nationals, Raytheon and Machlett, who were shareholders in Elettronica Sicula S.p.A., a company incorporated in Italy. ELSI, supra note 40.

[75] Barcelona Traction, supra note 71.

bring the claim against the injuring state, Spain, even if Belgium could not. In the present dispute, a bilateral relationship exists between Bastonia and Frontera."[6] However, no country will be able to represent PharmCo, as Canada could have represented Barcelona Traction, and pursue the case against Frontera unless Bastonia has standing." Given this distinct factual difference between the cases, this Court should not bar standing for Bastonia by applying Barcelona Traction.

3. Bastonia has standing to assert diplomatic protection on behalf of PharmCo.

Bastonia also has standing to assert diplomatic protection on behalf of PharmCo because of its strong and continous links to PharmCo. A state may extend diplomatic protection to a corporation when it possesses stronger links to the corporation than those of the state of incorporation."[7] Factors considered in determining the strength of a link between the state and the corporation include: (1) the nationality of those controlling the corporation; (2) the nationality of the stockholders; (3) the distribution of profits; (4) the country of incorporation; and (5) the location of the corporate headquarters."[8] Control is the most important factor."[9] Furthermore, allowing a state to protect a corporation with which it has close links is particularly compelling when the state of

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[6] The Problem, supra note 1, at 1.

[7] Barcelona Traction, supra note 71, at 43, para. 69-73.

[8] Barcelona Traction (concurring opinion of Judge Jessup), supra note 71.

[9] Detlev Vagts, The Corporate Alien: Definitional Questions in Federal Restrains on Foreign Enterprise, 74 Harv. L. Rev. 1489, 1544-51 (1961); Schwarzenberger, supra note 71, at 411.

[10] German Interests in Upper Silesia, 1926 P.C.I.J. (ser.A) No. 6 (May 25). The Court held that the Geneva Convention had adopted the criterion of control by concluding that the company in question had German nationality because five of the seven members of the "board of control" were German nationals. See also Barcelona Traction (concurring opinion of Judge Jessup), supra note 71, at 312. Judge Jessup concluded that a critical factor in the links theory is the nationality of those controlling the company. Id.

incorporation refuses to represent the corporation effectively.[41]

The control and domination of all aspects of PharmCo's management by Bastonians forges a pivotal link to Bastonia.[42] Bastonian shareholders also had significant control over PharmCo because IPC owned the largest single block of PharmCo stock, 49% of all shares.[43] Fronteran law prohibited foreign majority ownership of PharmCo.[44] Furthermore, IPC received 60% of PharmCo's profits and owned a 100-year lease interest in PharmCo's property site.[45] Bastonia has continually maintained these links since PharmCo's inception.[46] Despite PharmCo's incorporation and location in Frontera, Frontera has steadfastly refused to effectively represent the shareholders' interests in PharmCo.[47] Since PharmCo's link with Bastonia is so strong, Bastonia may extend diplomatic protection on behalf of PharmCo.

Customary international law rather than Fronteran municipal law is the appropriate choice of law governing the nationalization of PharmCo. The Treaty contains no clause concerning choice of law. Resolution 1803 and recent arbitral decisions affirm the applicability of customary international law to the expropriation of alien property.[48] The Court should apply customary international

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[41] See Restatement, supra note 15, at § 713, cmt. e.

[42] The Problem, supra note 1, at 1.

[43] Id. In the majority of publicly traded corporations, this huge block of stock would be sufficient to give IPC effective control of the corporation.

[44] Id.

[45] Id.

[46] Id.

[47] Id. at 4.

[48] Resolution on Permanent Sovereignty Over Natural Resources, G.A.Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. 17, U.N. Doc. A/5217 (1962) [hereinafter Resolution 1803]. Although the Charter of Economic Rights and Duties of States refers questions of appropriate compensation to the laws of the nationalizing state, this resolution is not considered to be a codification of international law. G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974) [hereinafter Resolution 3281]. See Saudi Arabia v. Arabian American Oil Co., 27 I.L.R. 172 (1958); Sapphire Int'l Petroleum, Ltd. v. National Iranian Oil Co., 35

law as the choice of law.

B. Frontera must compensate IPC for the expropriation of PharmCo.

Frontera violated customary international law by expropriating PharmCo without compensation. A state may not expropriate foriegn-owned property without providing full compensation.[87] A long line of judicial and arbitral decisions indicate "the overwhelming practice and the prevaling legal opinion"[88] require the expropriating government to pay damages equivalent to the full value of the property taken.[89] The modern customary international law standard of full compensation for nationalization was codified in United Nations General Assembly Resolution 1803.[90] All political and economc regions of the world accepted 1803, which passed by a

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I.L.R. 136, 175 (1963) (Cavin, sole arb.).

[87] Resolution 1803, supra note 88. See also Chorzow Factory Case, supra note 30; Brownlie, supra note 3, at 541; Bin Cheng, General Principles of Law as Applied to International Courts and Tribunals, 39 (1953); Whiteman, supra note 20, at 541; Samy Friedman, Expropriation in International Law 204 (1953).

[88] Rudolf Dolzer, New Foundations on the Law of Expropriation of Alien Property, 75 Am. J. Int'l L. 553, 558-59 (1981).

[89] Chorzow, supra note 36, at 25 (illegal expropriation requires resitution in kind; otherwise legal takings must be compensated at "the value of the undertaking at the moment of dispossession plus interest to the day of payment"); Norweqian Shipowners Claim, (Nor. v. U.S.) 1 Rep. Int'l Arb. Awards 307, 443-45 (Oct. 13, 1922) (Anderson, Vogt and Valloton, arbs.) ("just compensation" equals fair actual value of the property); Patrick M. Norton, A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation, 85 Am. J. Int'l L. 474, 476-77 (1991). In a 1938 dispute over Mexico's nationalization of U.S.-owned oil fields, the U.S. Secretary of State averred international law required payment of prompt, adequate and effeqtive compensation. Note of August 22, 1938, from the U.S. Secretary of State Cordell Hull to the Mexican Minister of Foreign Affairs, 17 Dept. of St. Bull. 747 (1947), reprinted in G. Hackworth, 3 Digest of International Law 655-65 (1942). Although no longer referred to as the Hull Doctrine, this measure of compensation remains applicable.

[90] Resolution 1803, supra note 88. International tribunals since this resolution have recognized this codification. Texas Overseas Petroleum Co. & California Asiatic Oil Co. v. Libyan Arab Republic, 17 I.L.M. 1 (1978) [hereinafter TOPCO]; Kuwait v. American Independent Oil Co. Arbitration, 22 I.L.M. 942, 976, 66 I.L.R. 519 (1982) (Reuter, Sultan and Fitzmaurice, arbs.) [hereinafter Aminoil-Kuwait]; Sedco, Inc. v. Iran, 14 Iran-U.S. C.T.R. 223, 234 (1987) [hereinafter Sedco]. See also Norton, supra note 90, at 477, et seq.; C.F. Amerasinghe, Issues of Compensation for the Taking of Alien Property in Light of Recent Cases and Practice, 41 Int'l & Comp. L. Q. 22, 32 (1992).

nearly unanimous vote."[92] No resolution since 1803 carries the same authority. Later General Assembly resolutions suggesting that less than full compensation might be appropriate[93] were not supported by "any of the developed countries with market economies which carry on the largest part of international trade".[94] Therefore, those resolutions do not reflect a change in customary international law.[95] Moreover, modern tribunals have reaffirmed the authority of 1803 holding the minimum standard of compensation required by international law remains full compensation."[96]

Frontera has refused to return PharmCo or provide any compensation for this taking. Since 1991, Fronteran owners of wholly Fronteran-owned manufacturing

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[92] The Resolution was adopted by a vote of 87 to 2, with 12 abstentions. Only France and South Africa dissented. Stephen M. Schwebel, The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources, 49 A.B.A. J. 463 (1963).

[93] Declaration on Permanent Sovereignty over Natural Resources, G.A. Resolution 3171 (XXVII) 28 U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N.Doc. A/903 (1974); Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR 6th Sp. Sess., Supp. No. 1, U.N. Doc. A/9559 (1974); Resolution 3281, supra note 88.

[94] TOPCO, supra note 92, at 30. See also Aminoil-Kuwait, supra note 92.

[95] North Sea Continental Shelf Case, 1969 I.C.J. Rep. 3 (holding that a rule of customary international law changes only if the states most particularly affected by that rule agree to the change).

[96] The Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179, provides that judicial decisions are a subsidiary means for determining rules of law. Decisions affirming full compensation include: Libyan American Oil Co. and Libya (April 12, 1977) (Mahmasiani, arb.), reprinted in 20 I.L.M. 1 (compensation at full value is the undisputed minimum standard); TOPCO, supra note 92; Aminoil-Kuwait, supra note 92, at 976. The International Center for Settlement of Investment Disputes has in recent years determined full compensation is the appropriate standard. Benvenuti et Bonfant v. Congo, 21 I.L.M. 740 (1986). The decisions of The Iran-US Claims Tribunal, constituting the largest body of work examining in detail the relevant law on the appropriate measure of compensation, affirm full compensation: American International Group, Inc. v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 96 (1983) [hereinafter AIG] (award of full compensation based on customary international law); Sedco, supra note 92, at 629 (award of full compensation would be the same under customary international law or the treaty). See also Norton, supra note 91, at 483.

concerns received restitution: their property was returned.[98] Frontera clearly accepts that full compensation is proper when the law is applied to its own nationals. However, customary international law insists that the same law be applied to everyone. Frontera must provide full compensation to IPC.

None of the factors that might mitigate full compensation apply in this case.[99] Mitigation of full compensation might be appropriate in limited and exceptional circumstances.[100] Factors to be considered include whether the company secured its initial position through force or fraud,[101] the fairness of distribution of profits,[102] whether an initial investment made during a colonial period resulted in unjust enrichment as a result of a colonial situation,[103] and whether the investment has contributed to the economic development of the state.[104] Although IPC initially invested during the colonial period, no hint of force or fraud attaches to their actions. Given that Bastonian nationals made the entire initial investments in plant, manufacturing and equipment and Bastonians managed the company,[105] receipt of 60% of gross annual profits constitutes a reasonable return on ownership of 49% of the shares, compensation for management and control and a fair distribution of profits as a method to recoup the initial investment. PharmCo

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[98] The Problem, supra note 1, at 3.

[99] Resolution 3281 advocated a measure of compensation which would take into consideration the circumstances of the expropriation. Resolutions 3281, supra note 88.

[100] Richard B. Lillich, The Valuation of Nationalized Property in International Law 198 (1972).

[101] Id.

[102] Id.

[103] Id.; Gunnar Lagergren, Five Important Cases on Nationalization of Foreign Property: The Iran-U.S. Claims Tribunal 11 (1988).

[104] An investment which has brought new capitol and technology into a developing country deserves better treatment than a purely exploitive investment. Lillich, supra note 100, at 200; Langergren, supra note 103, at 11.

[105] The Problem, supra note 1, at 2.

has contributed to Frontera's economic development. Fronteran investors receive 40% annual gross profits in return on their investment for no capital outlay, while PharmCo has provided jobs to Fronterans and tax revenues to Frontera.[106] Under these circumstances, full compensation for IPC's investment loss remains the appropriate standard of compensation.

Furthermore, allowing Frontera to pay less than full compensation for PharmCo will seriously undermine the stability of international investments made in good faith. Inequitably compensated expropriations can only have a chilling effect on investments in the developing world.[107] Compensation must be calculated on a basis that would warrant the upkeep of a flow of investment in the future.[108] This need to encourage investment in the developing world has substantially eroded the rationale for partial compensation.[109] In order to ensure continued Bastonian investment in Frontera, the IPC must receive full compensation. Furthermore, an award of full compensation will support continued cooperation and investment between the developing and industrealized worlds.

C. Frontera's expropriation in the absence of a public purpose violates international law.

Frontera violated international law by expropriating PharmCo without a valid public purpose. A State cannot legally expropriate foreign-owned property without

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[106] The Problem, supra note 1, at 1.

[107] Aminoil-Kuwait, supra note 92, at 603; INA Corp. v. Iran, 8 Iran-U.S. Cl. Trib. Rep. 373, 401 (1985) (separate opinion of Holzmann) (stating that in an increasingly interdependent world the law should encourage investment, not discourage it by increasing its risks). AIG, supra note 97, at 117 (concurring opinion of Mosk) (asserting that the risk of inadequate compensation for takings may discourage much needed international investments in the developing countries).

[108] Aminoil-Kuwait, supra note 92, at 603.

[109] In the fifteen to twenty years since the Charter on Economic Rights and the New International Economic Order, many developing states have entered into bilateral investment treaties wpecifically requiring full compensation. This is evidence that both industrialized nations and the developing world accept that foreign investors are far more likely to invest in such states if they believe their assets will be protected. Norton, supra note 91, at 496-497.

a valid public purpose.[110] Typically, a full scale nationalization of entire sectors of the economy furthers specific national programs to reorder industry or to benefit a specific economic reform program.[111] A taking for private profit or purely political reasons violates the public purpose requirement.[112] Consistent refusal to compensate for an expropriation strongly suggests an arbitrary confiscation with no public purpose.[113] Furthermore, if the former government has not demonstrated a valid purpose, the new government which assumes the rights and obligations of the former government is required to state the public purpose for which the property is nationalized.[114]

Frontera has established no currently valid public purpose for the expropriation of Pharmco. The RPG's sweeping acclaimation of economic freedom in General Law No. 1991/007 does not articulate a general program of economic reform. Since formerlly wholly Fronteran-owned corporations have been restored to private ownership, the RPG's continued full-scale expropriation of all manufacturing concerns does not comport with an economic reform program requiring governmental management and

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[110] "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest". Resolution 1803, supra note 88. See also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964); Walter Fletcher Smith v. Compania Urbanizadora del Parque y Playa de Marianao, 24 Am. J. Int'l L. 384, 386-87 (1930); Renato Riberio, The Valuation of Nationalized Property in International Law 92-94 (1977); TOPCO, supra note 92; Norton, supra note 91, at 475.

[111] For example, the purposes of the Iranian nationalizations, to reorder Iranian industry and redistribute wealth, were valid. See Affidavit of A.H. Danesh-Bor (President of Central Insurance of Iran), American International Group, Inc. v. Iran, 493 F.Supp. 522 (D.D.C. 1980), remanded, 657 F.Supp. 430 (D.C.Cir. 1981). However, in most cases of nationalization, Iran promised to pay. Id.

[112] A majority of states interpret the public utility rule to mean a state has no right to take private property for any other purpose. See, Akinsanya, supra note 26, at 19-25.

[113] British Petroleum Exporting Company v. Libya, 56 I.L.R. 297 (Lagergren, sole arb. 1973) (evidence of no offer of compensation supported finding of no public purpose).

[114] See supra notes 8-19 and accompanying text. A change in government does not change the rights, obligations and liabilities of the state.

control of private industry. Further, present refusal to compensate only formerly foreign-owned manufacturing concerns suggests an arbitrary motive rather than a valid public purpose.[115] Therefore, Frontera's continued expropriation appears to by a confiscation lacking a valid public purpose.

D. Discriminatory treatment of Bastonian nationals by the RPG violates principles of international law.

Frontera discriminated against Bastonian nationals by effectively compensating only Fronterans for Fronteran-owned corporations. A state illegally nationalizes foreign property rights if it discriminates against aliens or foreign nationals.[116] Foreign nationals residing within a foreign state are entitled to same protection of their persons and property as that afforded to nationals,[117] and in some instances, aliens are entitled to greater protection.[118] A state may not expropriate foreign-owned property without compensation.[119] However, that state does not violate international law by taking the property of its own nationals for less than full compensation.[120]

Frontera's refusal to restore or compensate only those companies with partial

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[115] In fact, it suggests a discriminatory motive which is not a valid public purpose. See infra notes 116-120 and accompanying text.

[116] D.P. O'Connell, The Law of State Succession 103 (1956) (expropriation is legal provided title holders are not subjected to discrimination); Brownlie, supra note 3, at 438 (discrimination expropriation is per se wrongful); J.L. Brierly, The Law of Nations, 284 (6th ed. 1963) (legal expropriation must be nondiscriminatory); Martin Domke, Foreign Nationalizations,, 55 Am. J. Int'l L. 500-503 (1961); S.D. Blanchard, The Threat U.S. Private Investment in Latin America, 5 J. Int'l L. & Econ. 230 (1971).

[117] Akinsanya, supra note 26, at 21.

[118] An objective, international standard will apply to protect an alien from treatment below what international law requires. Brierly, supra notes 116, at 276-287.

[119] See supra notes 89-109 and accompanying text.

[120] Case of Lithgo and Others, 102 Eur. Ct. of H.R. (ser. A) at 120-21 (1986). This result may be justified by a state's right to strike a balance between the interests of its individual citizens and the interests of the state.

alien ownership while providing restitution to Fronteran nationals of wholly Fronteran-owned corporations discriminates against aliens. Although Frontera has not provided compensation to its own nationals owning shares in partially foreign-owned corporations, the action nevertheless remains discriminatory. Since Bastonian nationals have no voice in the Fronteran political or legislative process, they are denied any benefit from the nationalization of their property interest which may be enjoyed by Fronterans. Thus, Frontera's discrimination against Batonian nationals violates international law.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the government of Bastonia respectfully requests this court to:

1. DECLARE that the Frontera-Bastonia Bilateral Investment Treaty binds the Revolutionary People's Government of Frontera.

2. DECLARE that Frontera breached the Bilatera Investment Treaty and must compensate the International Pharmaceutical Company for the damage caused by this breach.

3. DECLARE that Frontera must give the International Pharmaceutical Company full compensation for Frontera's illegal expropriation of PharmCo.

Respectfully submitted,

Team #515A