2006 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

THE REPUBLIC OF ACASTUS V. THE STATE OF RUBRIA

THE CASE CONCERNING THE ELYSIAN FIELDS

BENCH MEMORANDUM

*****CONFIDENTIAL*****

FOR JUDGES EYES ONLY

VERSION 3.1
2 March 2006 – International Rounds Memorials

2006 Philip C. Jessup International Law Moot Court Competition

BENCH MEMORANDUM

TABLE OF CONTENTS

PART 1: GENERAL INFORMATION 2
I. Introduction 2
II. Synopsis of the Facts 2
States and Geography 3
People and Organizations 3
Laws and Treaties 4
Timeline 5
Prayers for Relief of Each Party 7
III. Sources of International Law 8
A. General 8
B. Treaties 8
C. Customary International Law 9
D. General Principles of Law 10
E. Decisions and Publicists 10
IV. Burdens of Proof 11
PART 2: LEGAL ANALYSIS 12
I. Is Acastus is a "continuation" of Nessus? 12
A. Procedures and Prior History of State Succession at the United Nations 12
B. Vienna Convention on Succession of States in Respect of Treaties 16
C. Succession vs. Continuation 17
D. The Security Council and the Under-Secretary-General for Legal Affairs 18
II. Does Rubria's involvement in the pipeline violate international law? 19
A. Does construction of the pipeline violate the Elysians' rights? 19
B. Is Rubria responsible for damage which would result from construction of the pipeline? 24
III. Are PROF's forced-labor activities imputable to Rubria? 27
A. Forced labor violates international law 27
B. Rubria's Status as Shareholder in the COG 28
C. State Responsibility 28
IV. Does the outcome of the Borius litigation violate Acastus's obligations under the RABBIT? 30
A. What does Article 52 require of Acastus? 30
B. Does the outcome of the *Borius* litigation breach Acastus's Art. 52 duty? 32
C. The emerging concept of "multinational enterprises" 33
PART 3: SUGGESTED QUESTIONS FOR ORALISTS 36
International Law Generally 36
Issue #1: Continuation and Succession 36
Issue #2: The Pipeline 37
Issue #3: PROF and Forced Labor 37
Issue #4: RABBIT, the MCRA, and the *Borius* Litigation 37

PART 1: GENERAL INFORMATION

I. Introduction

The purpose of this bench memorandum is to provide judges in the Philip C. Jessup International Law Moot Court Competition with the basic factual and legal issues in the 2006 Jessup Problem (the "Compromis"). This Bench Memorandum should be read in conjunction with the Compromis and the Corrections and Clarifications to the Compromis. The Compromis is intended to present the competitors with a balanced problem, such that each side has strengths and weaknesses in its case. The Compromis contains a number of legal issues that are relevant to more than one claim for relief, and participants will often be required to argue in favor of a rule of law in support of one claim and distinguish the same rule with respect to another claim. Judges should note and question any internal inconsistencies that may arise in a competitor's or team's argument.

This memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Compromis. Judges should not be surprised when, in evaluating either a Memorial or an oral argument, they see arguments or authorities not discussed in this memorandum. This does not suggest that such arguments are not relevant or credible.

II. Synopsis of the Facts

The year's Jessup Problem reflects the increasing presence of multinational corporations in the international sphere. It explores the complicated relationship between States and private companies and the difficulty of subjecting private conduct to the constraints of international law. Although the dispute arises between two neighboring States, Acastus and Rubria, it concerns the interests of many private actors. There are four issues, three substantive and one procedural.

The Problem concerns a pipeline which is due to be constructed through the Elysium, a region which is home to an indigenous minority. If constructed, the pipeline will decimate the agricultural Elysian society. The pipeline will be situated in the territory of Rubria, and the matter is complicated by the fact that Rubria is also a minority shareholder of the company ("COG") that is building the pipeline. The first question is **whether the construction of the pipeline violates the rights of the Elysians, and whether Rubria's involvement in the pipeline thereby violates international law.**

As work on the pipeline began, a private company ("PROF") providing security to the pipeline project began rounding up Elysians and compelling them to physically labor on the project. The second question is **whether the subjection of the Elysians to forced labor conditions is imputable to Rubria.**

Once the forced labor came to light, the Elysians sued COG, PROF, and both of COG's shareholders in Acastian court. The majority shareholder on this project is another private company, "TNC." TNC is incorporated in Acastus. Acastus has enacted a corporate responsibility act, forbidding its companies from violating international human rights law – including the prohibition on forced

labor. Despite the fact that Acastus incorporated this act into a bilateral treaty with Rubria, and despite the fact that Acastus has committed itself to enforcing human rights violations against its domestic companies, the Acastian court dismisses TNC, and renders a sizeable judgment against Rubria and COG. The third question is **whether the result in this case violates Acastus's obligations to Rubria under the bilateral treaty.**

There is also a preliminary question of standing. Acastus and Rubria came into existence in 2000, when the state of Nessus dissolved. Rubria subsequently joined the United Nations and generally behaved as a brand-new State. Acastus, by contrast, claims to be a "continuation" of Nessus (much like the Russian Federation claimed to be a continuation of the Soviet Union), and has simply assumed Nessus's seat at the United Nations. This is important, because the first two issues above are properly before the Court *only if Acastus is a party to the Statute of the ICJ.* Its claim to such status hinges upon the fact that Nessus was a party to the Statute and accepted its jurisdiction. Thus, the preliminary question is **whether Acastus is a continuation of Nessus.**

States and Geography

NESSUS was a large polyethnic State which, in 2000, dissolved, resulting in the two States who are the parties to this dispute.

ACASTUS is the Applicant in this case. It encompasses the northern portion of the former Nessus. Acastus claims to be a "continuation" of Nessus; that is, even though Nessus has ceased to exist, Acastus claims all rights and obligations of the former Nessus.

RUBRIA is the Respondent in this case. It encompasses the southern portion of Nessus. Rubria denies that Acastus is a continuation of Nessus, but does not itself claim to be a continuation. Rubria is also 49% owner of COG, the company building the pipeline in the Elysium.

CREON is not a party to this case. It is a neighbor country, mentioned in the Compromis only because it is the closest location of oil refining and seagoing export facilities.

The Elysium is a small region which straddles the border between Acastus and Rubria (formerly contained wholly within Nessus). It is the ancestral home of about 5,000 indigenous peoples, the Elysians. The Elysians live in the northern portion of Elysium (that is, in Acastus), and work their fields in the southern portion (that is, in Rubria). The pipeline that forms the basis of the dispute would run through the southern (Rubrian) portion of the Elysium. Elysians can cross the border between Acastus and Rubria freely, with the apparent consent of both States.

Ayala is a village in the (Acastian) Elysium. It is one of the home villages of the Elysians, and is significant as the home of Mr. Davide Borius, a victim of the PROF forced-labor activities.

People and Organizations

the Elysians are an indigenous, pre-industrial peoples living in the Elysium. They have little access to electricity or running water. The Elysians depend for food completely upon the rich agricultural lands in the southern (Rubrian) portion of the Elysium.

Mrs. Doris Galatea is the Member of the Acastan Parliament representing the Elysians. (The Elysians have no representation in the Rubrian Parliament.) She opposes the proposed pipeline, on the grounds that it would make it impossible for her Elysian constituents to continue their way of life. She also revealed to the public the fact that PROF (see below) was forcing Elysians to labor on the pipeline.

President Leon Fides is the President of Rubria.

Mr. Hector Lethe is the Prime Minister of Acastus.

Trans-National Corporation (TNC) is a private Acastian corporation involved in petroleum extraction and refining. TNC is 51 percent owner of COG, the company engaged in the construction of the pipeline in the Elysium.

Ms. Silvia Euterpe is the Chief Executive Officer of TNC.

the Corporation for Oil & Gas (COG) is a Rubrian corporation jointly owned by TNC and the government of Rubria. TNC owns 51% of the shares of COG, and Rubria owns 49%. COG was created for the sole purpose of developing, building, and administering a pipeline from the rich oilfields in the Elysium to the nearby Kingdom of Creon.

Protection & Retention Operations Force (PROF) is a Rubrian corporation formed for the sole purpose of providing security on the COG pipeline. At some point, PROF employees began forcing Elysian men to work on the pipeline project.

Institute of Local Studies and Appraisals (ILSA) is an internationally-respected non-governmental organization, expert in environmental and social effects of industrial projects. ILSA was retained by the Acastian government to determine the effects of the proposed pipeline. In the course of their research, ILSA investigators were the first to discover that PROF was forcing Elysians to labor on the pipeline.

Mr. Davide Borius is a young Elysian man from Ayala. He wrote a letter describing PROF's activities in forcing Elysians to labor on the pipeline, which was delivered by ILSA to Mrs. Galatea. He is also the named plaintiff in the lawsuit against TNC, COG, Rubria and PROF related to the forced labor.

Elysians for Justice is an unincorporated group which sued COG, PROF, TNC, and Rubria in Acastian civil court, alleging damages arising from PROF compelling Elysians to labor on the pipeline.

Laws and Treaties

Acastian International Rights Enforcement Statute (AIRES). A jurisdictional statute giving Acastian domestic courts jurisdiction over cases involving human rights violations that occur abroad, so long as the defendant "is present or may be found in Acastus."

Rubria-Acastus Binding Bilateral Investment Treaty (RABBIT). A bilateral trade treaty between Rubria and Acastus. The RABBIT makes enforcement of the MCRA an obligation of Acastus owed to Rubria. Furthermore, the RABBIT gives the International Court of Justice jurisdiction over all disputes arising under the RABBIT.

Multinational Corporate Responsibility Act (MCRA). An Acastian domestic statute, requiring its companies to abide by international human rights law, anywhere in the world. Although it's only a domestic statute, Acastus has included the MCRA in the RABBIT and promised Rubria it will enforce the MCRA against its companies with respect their conduct in Rubria.

Timeline

Date	**Description**
"ancient"	Elysian culture forms. Remains unchanged to the present day.
11th century, A.D.	Earliest date of Nessus's independence
1999	Nessus fails to pay its UN dues, submits a multi-year repayment plan.
2000	Nessus dissolves; Acastus and Rubria formed. The border between the two States is drawn at 36th parallel, dividing the Elyisum between them.
April 2001	Rubria applies for UN membership. Acastus delivers a note to UN, indicating its intention to succeed to Nessus's seat.
October 2001	Rubria is admitted to the UN.
2001	Rubria accepts the compulsory jurisdiction of the ICJ.
December 1, 2001	The U.N. Security Council passes Resolution 2386, rejecting Acastus's claim to succession.
December 15, 2001	The U.N. Under-Secretary General issues an interpretation of Resolution 2386, stating that the Security Council's decision does not preclude Acastus .
December 2001	Several States protest Under-Secretary-General's interpretation
2002	Acastus begins sitting behind its own placard in the General Assembly, and flying its flag at UN Headquarters.
2002	TNC geologists discover oil in the Rubrian Elysium.
2002	Acastian M.P. Doris Galatea begins her term in Acastian Parliament, representing the Elysians.
December 10, 2002	The Acastian Parliament passes the Multinational Corporate Responsibility Act (MCRA).
December 15, 2002	The Acastian President promulgates the MCRA, announcing that if Acastian companies fail to respect international human rights, other States "may be assured that compensation will be provided to anyone harmed by [the companies'] actions."
February 1, 2003	Rubria and Acastus sign the RABBIT.
March 15, 2003	RABBIT enters into force.
April 2003	TNC announces that it will begin exploiting the Elysian oil.
May 2003	TNC and the Rubrian government announce formation of COG.
Sometime in 2003	The Rubrian President grants COG exclusive rights to operate in the Rubrian Elysium.
June 2003- April 2004	COG experts study various plans for extraction of oil, including the pipeline.
April 2004	COG experts submit their findings to the company, recommending that a pipeline be constructed through the Elysium.

June 2004	Both shareholders of COG approve the pipeline.
July 2004	Both shareholders of COG approve the security contract with PROF.
August 2004	COG moves 400 experts into the Rubrian Elysium.
Sometime between June 2004 and September 18, 2004	Pipeline plan publicly announced (by implication of other facts in the Compromis. It was probably announced earlier in the year, since ILSA must have had time to prepare its report, discussed below.)
September 18, 2004	ILSA delivers its report to Acastian Parliament on the effects of the proposed pipeline on the Elysians.
September 30, 2004	Mrs. Galatea denounces pipeline in the Acastian Parliament. She also reveals that ILSA has informed her that PROF is subjecting Elysians to forced labor conditions.
September 30, 2004	Davide Borius and "Elysians for Justice" file a lawsuit in Acastian civil court against TNC, PROF, Rubria, and COG.
November 8, 2004	The Acastian civil court dismisses TNC as defendant.
November 8, 2004	The Acastian civil court dismisses PROF as defendant.
November 10, 2004	The Acastian civil court refuses to dismiss Rubria as defendant.
Mid-November 2004 to mid-January 2005	The Acastian civil court hears "two months" of evidence before delivering its verdict.
January 15, 2005	The Acastian civil court issues judgment against two remaining defendants.
January 15, 2005	The Rubrian President immediately sends a diplomatic note to Acastus, protesting the dismissal of TNC and the judgment against Rubria.
March 1, 2005	Agents for Acastus file an application with the International Court of Justice (ICJ).
April 10, 2005	Agents for Rubria file a preliminary objection to the Acastian application, alleging that the Court does not have jurisdiction over matters not connected to RABBIT, since Acastus is not party to the ICJ Statute.
May 1, 2005	Agents for Acastus withdraw its prior application.
Next several months	Acastus and Rubria negotiate the *Compromis*.
September 1, 2005	Acastus and Rubria sign the *Copmromis*.
September 15, 2005	Acastus and Rubria deliver the *Compromis* to the ICJ.
2006	Original target date for full repayment of Nessian UN dues under the 2000 multi-year repayment plan.

Prayers for Relief of Each Party

There are four issues before the Court:

(1) Whether Acastus is a "continuation" of Nessus.

(2) Whether, in permitting the construction of the pipeline (which would destroy the Elysians' agricultural lands), Rubria would violate the rights of the Elysians.

(3) Whether PROF's conduct (forcing Elysians to labor on the pipeline) is attributable to Rubria, and violates international law.

(4) Whether the outcome of the *Borius* litigation – the dismissal of TNC as a defendant and the judgment against Rubria and COG – violates Acastus's obligations under the RABBIT treaty.

Acastus requests that the ICJ adjudge and declare:

(a) the Court has jurisdiction over all claims in this case, since Acastus has succeeded to Nessus's status as a party to the Statute of the Court;

(b) by permitting the construction of the pipeline as proposed, Rubria would violate the rights of Acastus's citizens of Elysian heritage;

(c) the activities of PROF in the Elysium, including the forced labor of civilians, are attributable to Rubria and are violations of international law; and

(d) the outcome of the *Borius* litigation does not place Acastus in breach of Article 52 of the RABBIT.

Rubria requests that the ICJ adjudge and declare:

(a) the Court lacks jurisdiction over all claims other than those under the RABBIT, since Acastus is not the continuation of Nessus and has not accepted the compulsory jurisdiction of the Court in its own right;

(b) by permitting the construction of the pipeline as proposed, Rubria would exercise rights attendant to its sovereignty over territory and natural resources, and would not violate international law;

(c) the actions of PROF are not imputable to Rubria under international law, or in the alternative, did not violate any international legal obligation owed by Rubria to Acastus; and

(d) Acastus is in breach of Article 52 of the RABBIT by virtue of the Acastian civil court's decision.

III. Sources of International Law

This section is an introduction to public international law for judges who might not have professional experience or training in the field. There are important distinctions between international law and most domestic legal systems. The most significant for the moot judge is the rigid definition of what sources of law are acceptable before the Court.

In particular, judges should note that this case is not directly governed by domestic law – it is a case under international law. In particular, although the principal actors are domestic companies, this is **not a case of domestic corporate law, except insofar as domestic legal principles may be proven to have attained the status of international law.**

A. General

The conduct and rules of the International Court of Justice (the "ICJ") are governed by the Statute of the International Court of Justice (the "ICJ Statute"). Under Article 38(1) of its Statute, the International Court of Justice may consider the following sources of international law in order to decide disputes before it:

(a) treaties or conventions to which the contesting States are parties;
(b) international custom, as evidence of a general practice accepted as law;
(c) general principles of law recognized by civilized nations;
(d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Commentators disagree as to whether these sources are listed in order of importance.

Judges from common-law systems should note the status of precedent. Article 59 of the ICJ Statute states that decisions of the Court are binding *only on the parties to the case*, and are without formal precedential effect. In practice, the ICJ often cites its prior decisions, and those of its predecessor, the Permanent Court of International Justice, as persuasive authority, pursuant to Article 38(1)(d). Additionally, the Court frequently evaluates rules of customary international law in its opinions and subsequently relies upon those evaluations in later decisions.

Resolutions of the United Nations General Assembly are not, of themselves, binding upon the Court. Although Resolutions may be evidence of customary international law, the General Assembly is not analogous to a domestic legislature.

B. Treaties

Treaties are agreements between and among States, by which parties obligate themselves to act, or refrain from acting, according to the terms of the treaty. Rules regarding treaty procedure and interpretation are defined in the 1959 Vienna Convention on the Law of Treaties[1] (the "VCLT").

---

[1] 1155 U.N.T.S. 331 (1969), *available at* http://fletcher.tufts.edu/multi/texts/BH538.txt. (hereinafter, the "VCLT").

Article 26 of the VCLT sets out the fundamental principle relating to treaties, that of *pacta sunt servanda:* "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Once a State becomes a party to a treaty, it is bound by that treaty.

Article 34 of the VCLT adds that a treaty does not create rights or obligations for State that are not parties to the treaty. However, even if a State is not party to a treaty, the treaty may serve as evidence of customary international law. Article 38 of the VCLT recognizes this "back-door" means by which a treaty may become binding on non-parties.[2] Judges should be aware, however, that situations arise where some provisions of a treaty – for example, many provisions of the International Covenant on Civil and Political Rights -- may reflect or codify customary international law, while other parts do not.

C. Customary International Law

The second source of international law is customary international law. A rule of customary international law is one that, whether or not it has been codified in a treaty, has binding force of law because the community of States treats it and views it as a rule of law. In contrast to treaty law, a rule of customary international law is binding upon a State whether or not it has affirmatively assented to that rule.

In order to prove that a given rule has become a rule of customary international law, one must prove two elements: widespread state practice and *opinio juris* – the mutual conviction that the recurrence (of state practice) is the result of a compulsory rule.

"State practice" is the objective element, and simply means that a sufficient number of states behave in a regular and repeated manner consistent with the customary norm. Evidence of State practice may include a codificatory treaty, if a sufficient number of States sign, ratify, and accede to a convention. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create "regional customary international law" or whether the practice of particularly affected states, *e.g.* in the area of space law, can create custom that binds other states, although the ICJ has acknowledged the possibility.[3]

Opinio juris is the psychological or subjective element of customary international law. It requires that the State action in question be taken out of a sense of legal obligation, as opposed to mere expediency. Put another way, *opinio juris*, is the "conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it."[4]

Customary international law is shown by reference to treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal

---

[2] The ICJ has also recognized this possibility in the *North Sea Continental Shelf Cases (F.R.G. v. Den.),* 1969 I.C.J. 1 (1969).
[3] *Ibid.*
[4] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

advisers, and the practice of international organizations. Each of these items might be employed as evidence of State practice, *opinio juris*, or both.

In *The North Sea Continental Shelf Cases*, the ICJ stated that the party asserting a rule of customary international law bears the burden of proving it meets each of the two requirements.

D. General Principles of Law

The third source of international law consists of "general principles of law." Such principles are gap-filler provisions: on occasion, the ICJ must have recourse to rules typically found in domestic courts and domestic legal systems in order to address procedural and other issues.

The bulk of recognized general principles are procedural in nature, for example, the laws regarding burden of proof and admissibility of circumstantial evidence. Many others, for example estoppel, waiver, unclean hands, necessity, and *force majeure,* may sound to a common-law practitioner as equitable doctrines. The principle of general equity in the interpretation of legal documents and relationships is one of the most widely cited general principles of international law.

Important for this year's Jessup Problem, general principles may also include commercial principles that are common to many of the major domestic legal systems.[5] At least one commentator has observed that the Iran-U.S. Claims Tribunal has used "general principles" to find general principles of commercial and contract law, including doctrines concerning contract formation, unjust enrichment, and conflicts of laws.[6] Either party to this case might argue that a similar commonality of rules exists with respect to the treatment of corporate entities across many major legal systems.

It is important to note, however, that "equity" in this sense is a source of international law, brought before the court under Article 38(1)(c) of the Statute of the ICJ. It is an *inter legem* application of equitable principles, and not a power of the Court to decide the merits of the case *ex aequo et bono*, a separate matter treated under Article 38(2) of the Statute.

E. Decisions and Publicists

The final source of international law is judicial decisions and teachings of scholars. This category is described as "a subsidiary means of finding the law." Judicial decisions and scholarly writings are, in essence, research aids for the Court, used for example to support or refute the existence of a customary norm, to clarify the bounds of a general principle or customary rule, or to demonstrate state practice under a treaty.

Judicial decisions, whether from international tribunals or from domestic courts, are useful to the extent they address international law directly or demonstrate a general principle.

"Teachings" refers simply to the writings of learned scholars. Many student competitors make the mistake of believing that every single published article constitutes an Article 38(1)(d) "teaching."

---

[5] Restatement (Third) of Foreign Relations Law of the United States (1987), section 102, cmt. 1.

[6] John R. Crook, "Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience," 83 Am.J. Int'l L. 278, 292-297.

However, the provision is expressly limited to teachings of "the most highly qualified publicists." For international law generally, this is a very short list, and includes names like Grotius, Lauterpacht, and Brownlie. Within the context of a specific field – for example, environmental law – there are additional scholars who would be regarded as "highly qualified publicists."

IV. Burdens of Proof

In the *Corfu Channel Case*,[7] the ICJ set out the burdens of proof applicable to cases before it. The Applicant normally carries the burden of proof with respect to factual allegations contained in its claim, by a preponderance of the evidence. The burden falls on the Respondent with respect to factual allegations contained in a cross-claim.

[7] *Corfu Channel Case (Merits) (U.K. v. Alb.)*, 1949 I.C.J. Rep. 4.

PART 2: LEGAL ANALYSIS

This legal analysis is divided into four sections, based upon the four issues before the Court. The first section deals with the jurisdictional issue arising from Acastus's claim to be a continuation of Nessus. The second and third sections concern Rubria's liability: firstly, whether Rubria's involvement in the pipeline project violates international law; and secondly, whether Rubria is culpable for the subjection of Elysians to forced labor. The final section concerns Acastus's liability for the outcome of the *Borius* litigation.

I. Is Acastus is a "continuation" of Nessus?

Acastus is asserting two separate bases for the Court's jurisdiction. With respect to the claim arising under the RABBIT, Acastus relies upon Article 62 of the RABBIT, which grants the Court jurisdiction.[8] Rubria does not dispute this basis. However, with respect to the pipeline and the forced-labor issue, Acastus asserts that it has succeeded to Nessus's party-status before the International Court of Justice. Rubria disputes this point, and questions the jurisdiction of the Court over these two claims. The first issue, therefore, is whether Acastus has succeeded to Nessus's status as a party to the Statute of the Court.

The ICJ has noted that this question is fundamental. "The Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdiction upon it."[9]

The parties will derive their succession arguments from two sources: past international practice regarding State succession; and the Vienna Convention on Succession of States in Respect of Treaties.

A. Procedures and Prior History of State Succession at the United Nations

At the outset, it should be noted that Nessus "dissolved," peaceably splitting into two separate states. It is thereby distinguished in international law from states that have gained independence from colonial powers or who have emerged as the result of civil war or secession.

There is no formal rule or procedure for State succession at the United Nations. Article 4 of the U.N. Charter provides only:

> 1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
> 2. The admission of any such state to membership in the Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.[10]

---

[8] *Compromis*, para. 16.
[9] Legality of Use of Force (Serb. & Mont. v. Belg.) (Judgment of Dec. 15, 2004 on Preliminary Objections) (hereinafter "*Legality of Use of Force* case"), at para. 44.
[10] U.N. Charter, art. 4.

In response to the problems presented by the breakup of British India, the U.N. Legal Affairs Committee developed three principles to serve as guiding principles for future cases:

> 1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the Organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.
> 2. That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations *unless it has been formally admitted* as such in conformity with the provisions of the Charter.
> 3. Beyond that, each case must be judged according to its merits.[11]

Acastus will focus upon the third principle, focusing on the following facts:

1) Acastus has assumed the financial obligations of Nessus at the U.N.,
2) Acastus has been allowed to sit at Nessus' seat in the U.N.,
3) Acastus' flag has replaced Nessus' flag at the U.N., and
4) Acastus has continued trade treaties with Nessus's former trade partners.

Acastus must argue that the totality of the circumstances indicate that they affirmatively declared their successor status and this declaration was recognized by the U.N., the Under-Secretary-General for Legal Affairs, and other States.

Rubria will base its objections on the second principle, arguing that the Security Council's recommendation in Resolution 2386 clearly states that Acastus should formally apply for membership in conformity with U.N. Charter Article 4(2). Rubria will argue that the U.N. Charter makes the Security Council the first step in the admission of states to the U.N. Rubria should argue that in the present case, the opinion of the Under-Secretary-General for Legal Affairs erred in interpreting Resolution 2386. The Security Council unambiguously recommended that Acastus must apply for membership anew.

Both parties will argue by comparison to recent State succession issues faced by the U.N., most notably the Russian Federation's succession to the USSR's seat at the U.N. and in the Security Council, and the of the Federal Republic of Yugoslavia unsuccessful claim to continue the membership of the former Yugoslavia.

1. Russia

After the break up of the Soviet Union, the Russian Federation presented itself as the continuation of the USSR's membership in the U.N. and its permanent seat on the Security Council. Scholars

[11] U.N. GAOR, 1st Comm., Annex 14g, at 582-83, U.N. Doc. A/C.1/212 (1947) (letter from Chairman of the Sixth Committee to the Chairman of the First Committee).

justify the U.N.'s acceptance of Russia's position by pointing to the fact that Russia comprised a majority of the land and population of the former state, but it is clear that the international community also wished to avoid a fight over one of the five permanent seats on the Security Council.[12] Rubria will point out there is no indication that Acastus has either a majority of the land or population of the former Nessus. Rubria may also argue that Nessus did not possess, and Acastus does not have, any of the compelling geopolitical elements (*e.g.* a Security Council seat or nuclear weapons) that the USSR and Russia had.

2. Former Yugoslavia

With the devolution of the Socialist Federal Republic of Yugoslavia into several new States, the new Federal Republic of Yugoslavia (FRY)[13] unsuccessfully sought to succeed to the SFRY's seat at the U.N. The Security Council recommended against FRY's claim, pointing out that the FRY did not comprise either a majority of the land or population of the SFRY, there was no devolution agreement between SFRY and FRY establishing the FRY as a successor, and there was general objection in the U.N. to the succession.[14] As a result, FRY was required to formally request entry into membership at the U.N.

In this case, the exact division of Nessus' former territory and population between Acastus and Rubria is unclear. We know that Acastus has the industrialized, coastal plains in the north, and Rubria has the bulk of Nessus' natural resources located in the southern mountainous region. The former capital of Nessus is located in what is now Acastus. As well, there has been mixed acceptance by the international community of Acastus' claim to be Nessus' successor. Agents for both parties will rely upon these factors in order to compare the present case to the FRY.

The ICJ twice addressed the status of the FRY before the Court: first, in its 2003 Judgment in the *Application for Revision* case;[15] and second, in its 2004 ruling on the Preliminary Objections in the *Legality of the Use of Force* cases.[16] In the first case, the FRY sought revision of the Court's prior judgment concerning that State's liability to Bosnia & Herzegovina under the Convention on the Prevention and Punishment of the Crime of Genocide. FRY claimed that its October 2000 application for membership to the United Nations, and subsequent admission by the General Assembly, meant that "it has become an unequivocal fact that the FRY did not continue the personality of the [former Yugoslavia], was not a member of the United Nations before 1 November 2000, was not a State party to the Statute [of the ICJ], and was not a State party to the Genocide Convention. . ."[17]

---

[12] *See* Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 Cornell Int'l L.J. 29 (1995).

[13] Constituting Serbia and Montenegro, with the other former members of SFRY (Croatia, Bosnia-Herzegovina, Macedonia, and Slovenia), each applying for new member status at the U.N.

[14] The objection was largely based on Serbia's role in invading Slovenia, Bosnia and Croatia.

[15] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 2003 I.C.J. 7 (Judgment of Feb. 3 on Application for Revision of the Judgment of 11 July 1996 of Preliminary Objections) (hereinafter "*Application for Revision* case")

[16] *Legality of Use of Force* case, *supra* note 9.

[17] *Application for Revision* case, at para. 18.

> The ICJ rejected this argument, stating that FRY's admission as a new member "cannot have changed retroactively the *sui generis* position which the FRY found itself in *vis-à-vis* the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention."[18]

In the *Legality of the Use of Force* case that decision, the Court determined that it had no jurisdiction to entertain claims filed by Serbia & Montenegro against several States, arising out of the NATO-led military action in the Balkans. The Court determined that Serbia & Montenegro was not a member of the United Nations or a party to the Statute of the ICJ at the time its Application was filed with the Court,[19] and therefore did not have access to the Court under Article 35, paragraph 1, of the Statute.

The Court was required to address this issue in order to determine its jurisdiction over the case.

Of particular importance to this case, the Court looked not only at Resolutions passed by the Security Council and the General Assembly, but also at the practice of the United Nations. The Court stated:

> "While it is clear . . . that these resolutions reflected a position endorsed by the vast majority of the Members of the United Nations, they cannot be construed as conveying an authoritative determination of the legal status of the [FRY] within, or vis-à-vis, the United Nations. The uncertainty surrounding the question is evidenced, *inter alia*, by the practice of the General Assembly in budgetary matters during the years following the break-up of the Socialist Federal Republic of Yugoslavia."[20]

In particular, the Court noted that the FRY had continued to pay the membership dues of the former Yugoslavia, minus an amount calculated to reflect the new States that had formed part of the former State,[21] that the Secretary-General considered the General Assembly resolution not to be "an indication that the Federal Republic of Yugoslavia was not to be considered a predecessor State" for the purpose of succession to treaties,[22] and the fact that the Secretariat accepted without comment the FRY's deposit of its recognition of the compulsory jurisdiction of the ICJ, despite the objections of Bosnia & Herzegovina, Croatia, Slovenia, and FYR Macedonia.[23]

In sum, the ICJ regarded FRY's status before the U.N. (and the Court) prior to 2000 as "confused and complex," and reaffirmed its previous characterization of the status as *sui generis*.[24]

Rubria will emphasize that the Court eventually found that FRY was *not* a member of the United Nations at the time (1999) that its Application was filed. The Court stated:

---

[18] *Application for Revision* case, at para. 71.
[19] *Id.* at para. 89.
[20] *Legality of Use of Force* case, at para. 65.
[21] *Id.* at para. 66.
[22] *Id.* at para. 69, *quoting* U.N. Doc. ST/LEG/8. The ICJ noted that the Secretary-General deleted this language "in response to the objections raised by a number of States that the text was contrary to the Security Council and General Assembly resolutions . . . ." *Ibid.*
[23] *Id.* at para. 70.
[24] *Id.* at 71.

"[FRY's] admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the Socialist Federal Republic of Yugoslavia broke up and disappeared; there was in 2000 no question of restoring the membership rights of the Socialist Federal Republic of Yugoslavia for the benefit of the Federal Republic of Yugoslavia. At the same time, it became clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization."[25]

While relying upon the methodology used in *Legality of the Use of Force*, Acastus will point out that the Court's conclusion in that case is easily distinguished. Acastus's present-day status is more akin to the status of FRY *prior to* that State's 2000 admission as a new member of the United Nations. The Court admitted that Serbia & Montenegro's application for membership, coupled with the General Assembly's acceptance of the application, made its analysis much simpler. The Court stated:

> "[T]he situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status."[26]

At least one court has viewed the seemingly contradictory actions of the United Nations organs vis-à-vis FRY as denying that State some, but not all, of the privileges of a U.N. Member State. In the *Milutinovic* case, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia determined that the General Assembly Resolution "did not deprive the FRY of all the attributes of United Nations membership: the only practical consequence was its inability to participate in the work of the General Assembly, its subsidiary organs, conferences or meetings convened by it. Apart from that, it continued to function as a member of the United Nations in many areas of the work of the United Nations."[27]

B. Vienna Convention on Succession of States in Respect of Treaties

If Acastus is determined to be a successor to Nessus, the Vienna Convention on Succession of States in Respect of Treaties (VCSS)[28] will be used by the parties to establish whether or not Acastus has been party to the statute of the court for more than 12 months.

Acastus needs to establish itself as a successor state before invoking the Vienna Convention, as it applies only to states that have already succeeded to a predecessor state: "The present Convention applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United

[25] *Id.* at para. 76.
[26] *Id.* at para. 77.
[27] *Prosecutor v. Milutinovic et al. (Decision on Motion Challenging Jurisdiction)* (2003), Case No. IT-99-37-PT (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III) at para. 37.
[28] Vienna Convention on Succession of States in Respect of Treaties, opened for signature Aug. 23, 1978, art. 20, 1946 U.N.T.S. 3, 13-14 (hereinafter "VCSS").

Nations."[29] If Acastus is determined to not be the successor to Nessus, then they may not bring suit against Rubria for the non-RABBIT claims.

Nessus was, and Rubria is, a party to the Vienna Convention on state succession.[30] In issue is whether Acastus can claim a "relation back" to Nessus' status as a party to the statute of the court. Acastus must be able to establish this point to overcome Rubria's objection to the jurisdiction of the Court when a claimant has not been party to the statute for less than 12 months.

Acastus will claim that it has acceded to the statute of the Court by virtue of the declaration of its Foreign Minister to the Secretary General.[31] This does amount to a "notification of succession" under the Vienna Convention.[32] However, Rubria will argue that under the VCSS this declaration is insufficient. Article 9 of the convention states in relevant part:

> 1. Obligations or rights under treaties . . . do not become the obligations or rights of the successor State . . . by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties . . .
> 2. In such a case, the effects of the succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present Convention.[33]

The relevant articles of the VCSS for the parties is article 34.[34] Article 34 provides:

> 1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
>   (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed.[35]

Acastus will rely on this provision to argue that its status as a party to the statute of the court relates back to the date when Nessus became a party (well before the 12 month period that Rubria objects to).

C. Succession vs. Continuation

A further complication is raised by the language used throughout the Compromis to describe Acastus' claim. Acastus' Foreign Minister declares that Acastus will "*continue* the membership of the Republic of Nessus."[36] By contrast, the U.N. Security Council describes Acastus as a "successor

---

[29] VCSS, art. 6.
[30] *Compromis*, para. 36.
[31] Compromis ¶ 8
[32] Art. 2(g)
[33] VCSS, art. 9.
[34] The VCSS covers many different aspects of state succession, including many provisions for "newly independent states." These are states which have emerged form colonial domination or other such control be another state. As this is not the case for Acastus, participants may NOT rely on articles 15 through 30.
[35] VCSS, art. 34.
[36] *Compromis*, para. 8

state."[37] Further, the Under Secretary General for Legal Affairs uses "continuation" when discussing Acastus' status.[38] And finally, the claims for relief of each party rely on different terms. Acastus claims that it is "has succeeded to Nessus." Rubria claims that Acastus "is not the continuation of Nessus." The parties may use the terms interchangeably, but there is a difference. A successor state is a new state that succeeds to the rights of a predecessor State after the predecessor has ceased to exist. Continuation is when a State remains after a breakaway of smaller states. The difference is subtle but can have dramatic effects on a State's rights and responsibilites. A successor state may have to renegotiate any bi-lateral treaties of its predecessor, and may be required to apply for membership in international organizations to which the predecessor was a member. A state which can claim continuation status may by-pass these formalities and pick-up where the predecessor left off.[39]

D. The Security Council and the Under-Secretary-General for Legal Affairs

Both Acastus and Rubria will need to address the issue of the authority of the Under-Secretary-General for Legal Affairs (USG) to interpret Security Council resolutions. In this case, the Security Council issued Resolution 2386 regarding Acastus' status at the U.N., it reads in relevant part:

> Considering that the state formerly known as Nessus has ceased to exist;
> Considering that it is unclear whether Acastus and/or Rubria should properly be deemed the successor state of Nessus as a matter of international law;
> Considering that the State of Rubria has already applied for membership in the United Nations, its application has been granted, and representatives of Rubria, properly credentialed by its government, have taken their place in the councils of the various U.N. bodies and organs;
>
> . . .
> *Decides that Acastus too should apply for membership in the United Nations.*[40]

In response, the USG issued a memorandum interpreting SCR 2386:

> While the Security Council has noted that Nessus has ceased to exist, and has decided that Acastus should apply for membership in its own right, the Resolution *does not prevent Acastus from temporarily continuing the membership of Nessus in the United Nations* until Acastus has been admitted as a new member state.[41]

The parties will dispute which opinion, if any, is binding and authoritative on Acastus's status as a successor state. There is no official statement about the hierarchy of these two entities. However, the Security Council is an organic, constitutional body of the U.N. and has the power to make binding law.[42] The USG is the legal advisor to the Secretary General and has no direct authority over the Security Council. Both Acastus and Rubria should be able to argue the relative roles of the

---

[37] *Compromis*, para. 9.
[38] *Compromis*, para. 10.
[39] Scharf, *supra* note 12, at 49-50.
[40] *Compromis*, para. 9. (emphasis added)
[41] *Compromis*, para. 10. (emphasis added)
[42] U.N Charter, art. 30

USG and the Security Council in the process of recommending states for membership in the U.N. At issue should be the interpretation of the Security Council's authority to "recommend" states for membership, and the use of the phrase "should apply" as opposed to "must apply."

II. Does Rubria's involvement in the pipeline violate international law?

The second issue before the Court is whether Rubria would violate the rights of Elysians by "permitting the construction of the pipeline as proposed." The prayer for relief is deliberately general, since Rubria is "permitting" the pipeline in two senses: first, as a minority shareholder of TNC; and second, as the State on whose territory the pipeline is to be built.

Acastus bears the burden of proving this claim. In order to succeed on this issue, Acastus must prove two points: first, that construction of the pipeline would violate the rights of the Elysians; and second, that the Rubria is responsible for the damage which would result from construction of the pipeline.

A. Does construction of the pipeline violate the Elysians' rights?

Acastus's first hurdle is to demonstrate that there is an international legal obligation, binding upon Rubria. Acastus will probably formulate the obligation as a duty to respect the rights of indigenous communities to their land, to consult them when disposing of their land, and/or to provide them adequate compensation when they are deprived of their land.

Acastus may establish this obligation in one of two ways: either by demonstrating that one or more treaties to which Rubria is a party creates such an obligation, or by showing that such an obligation has become part of customary international law. In either case, Rubria will argue to great effect that the supposed obligation lacks specificity.

1. Treaties binding upon Rubria

Rubria is, and Nessus was, a party to both the International Covenant on Civil and Political Rights[43] and the International Covenant on Economic, Social, and Cultural Rights.[44] Both Conventions recognize, in identical language, the right of "self-determination," stating at Article 1(1), "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[45] While this broad right to self-determination has been roundly criticized as being vague or unenforceable, Article 1(2) of each Convention creates a much more specific right, stating, "In no case may a people be deprived of its own means of subsistence.[46]

Article 1 is frequently cited in tandem with ICCPR Article 27. Article 27 states, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not

---

[43] International Covenant on Civil and Political Rights, U.N.T.S. No. 14668, vol 999 (1976) (hereinafter "ICCPR").
[44] International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec. 16, 1966, 993 U.N.T.S. 3 (hereinafter "ICESCR").
[45] ICCPR, art. 1(1). ICESCR, art. 1(1)
[46] ICCPR, art. 1(2). ICESCR, art. 1(2).

be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[47]

The United Nations Human Rights Committee is the organ charged with monitoring the implementation of the ICCPR. In its communication, *Ominayak v. Canada*,[48] the HRC had the opportunity to interpret Article 1. In *Ominayak*, the provincial government of Alberta had granted oil and gas exploration leases to private companies for the land traditionally occupied by a Cree Indian band. The community alleged violations of Articles 1(1) and 1(2) of the ICCPR. Although the Committee declined to hear the Article 1 claims on jurisdictional grounds, it found that the granting of leases was an expropriation which, coupled with historical inequities, denied Ominayak his right to his own culture.

The Human Rights Committee has separately recognized the close relationship between land and culture, noting, "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous people."[49]

The Committee has discussed several times the State obligations deriving from Article 27. In *Länsman v. Finland*,[50] the Committee examined whether a Finnish grant of logging rights over a region used by the indigenous Sami peoples for reindeer herding constituted a violation of Article 27. In finding that the logging did not constitute a violation, the Court also placed great weight on the fact that the complainants were "consulted in the process of drawing up the logging plans and in the consultation, [and] did not react negatively to the plans for logging. That this consultation process was unsatisfactory to the authors and was capable of greater interaction does not alter the Committee's assessment."[51] This has been construed as a duty to consult. Furthermore, the Committee noted with approval that "[Finland] *did* go through the process of weighing the authors' interests and the general economic interests in the area specified in the complaint when deciding on the most appropriate measures of . . . logging methods, choice of logging areas and construction of roads in these areas. The domestic courts considered specifically whether the proposed activities constituted a denial of article 27 rights."[52]

It is unlikely that this pipeline, constructed after a mere cost/benefit analysis, would satisfy the criteria for consultation set out in *Länsman*.

2. Customary international law

Concerning customary international law, Acastus is in the uncomfortable (though not unusual, in the Jessup) position of piecing together a customary norm from several regional instruments and practices.

[47] ICCPR, art. 27.

[48] Communication No. 167/1984, Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada (views adopted on 26 March 1990 at the thirty-eighth session), U.N. Doc. Supp. No. 40 (A/45/40/Supp.2), Annex IX, at 1.

[49] The Rights of Minorities (Art. 27), General Comment No. 23, U.N. Human Rights Committee, 50th Sess., P 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994).

[50] Communication No. 671.1995, Jouni E. Länsman v Finland, (views adopted at the fifty-eighth session), U,N. Doc. CCPR/C/58/D/671/1995.

[51] *Id.* at para. 10.5.

[52] *Id.* at para. 10.5.

The rights of indigenous peoples in the land they occupy have been recognized in several international instruments.

The International Labour Organisation (ILO) has produced at least one convention on the topic of indigenous peoples. This is of particular relevance, since Rubria is a member of the ILO. The ILO's Indigenous and Tribal Peoples Convention of 1989[53] (Convention No. 169) recognizes the rights of indigenous peoples to the lands they occupy. Article 14 of the Convention states,

> "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."[54]

Article 15(1) of the Convention states, "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded [including] the right of these peoples to participate in the use, management and conservation of these resources."[55] Where, as in this case, the State retains rights to the subsoil, the Convention requires that the State

> "establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities."[56]

Rubria will emphasize that the ILO Convention is not directly binding upon it. Mere membership in the ILO does not oblige it to abide by the provisions of each ILO Convention.[57] In fact, its status as evidence of customary international law is somewhat dubious, since although it received the approval of two-thirds of the voting members of the ILO in 1989, the Indigenous and Tribal Peoples Convention has only been ratified by seventeen of the 178 ILO member-states.[58]

---

[53] Indigenous and Tribal Peoples Convention, 1989, C169, I.L.O., 76th Sess., Sept. 5, 1991 (hereinafter "Convention 169").
[54] Convention 169, art. 14(1).
[55] Convention 169, art. 15(1).
[56] Convention 169, art. 15(2).
[57] Article 19(5)(b) of the ILO Constitution obliges each Member to bring each Convention before its competent authorities for legislative enactment or ratification. However, Article 19(5)(e) states "If the Member does not obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member. . . ." ILO Constitution, art. 19.
[58] *See* ILO website, "Ratification status of Convention C169," *available online* at http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169 (last visited 29 November 2006).

Article 21 of the African Charter on Human and Peoples' Rights states, "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it."[59]

A right has been recognized by international tribunals as well. In the *Awas Tingni* case,[60] the Inter-American Court of Human Rights addressed a dispute arising out of Nicaragua's grant of logging rights to a private company over lands occupied by the indigenous Awas Tingni community. The court determined that "Article 21 of the [American Convention on Human Rights][61] protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property. . ."[62] The court rejected Nicaragua's cricticism of the vague, undocumented nature of the Community's claim to the land, stating, "As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property . . . ."[63]

Rubria will distinguish the *Awas Tingni* case by pointing out that the IACHR relied, at least in part, upon the fact that the Nicaraguan Constitution and Nicaraguan Law No. 28 incorporated the communal rights of indigenous communities to the land they occupy into domestic Nicaraguan law.[64]

The next year, the Inter-American Commission on Human Rights (IACHR) revisited the question of indigenous rights to property, this time within the context of the American Declaration on the Rights and Duties of Man,[65] in the *Dann* case.[66] The Danns were members of the Western Shoshone indigenous community whose livestock was removed from their ancestral lands by the U.S. government to make way for gold prospecting activities. The Commission surveyed the development of international law, both in the inter-American regime and worldwide, and considered

> "general international legal principles applicable in the context of indigenous human rights to include:
>
> - the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;
> - the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and

[59] African Charter of Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217, art. 21(1).
[60] The Case of the Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C.) No. 79 (Judgment on merits and reparations of Aug. 31, 2001).
[61] Art. 21 is titled "Right to Property," and does not discuss the rights of indigenous peoples particularly. It reads, in relevant part, "(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law." American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, at art. 21.
[62] *Awas Tingni*, at para. 148.
[63] *Id.* at para. 151.
[64] *Id.* at para. 153.
[65] American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, Ninth International Conference of American States, O.A.S. Doc. OEA/Ser. L/I.4 Rev. (1965)
[66] Mary and Carrie Dann, United States, Case 11.140, Inter-Am. C.H.R. Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1, rev. 1 (2002).

- where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost."[67]

The Commission applied the American Declaration provisions concerning right to equality under the law, right to a fair trial, and right to property as affording the Danns "resort to the [U.S.] courts for the protection of their property rights, in conditions of equality and in a manner that considers both the collective and individual nature of [their] property rights. . . ."[68]

Meanwhile, several international organizations have considered new instruments concerning the rights of indigenous peoples. The Draft United Nations Declaration on the Rights of Indigenous Peoples[69] contains many provisions which touch upon this situation.[70] In particular, Article 26 states:

> "Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas . . ., flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes . . . the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights."[71]

Article XVIII.2 of the proposed American Declaration on the Rights of Indigenous Peoples states, "Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood."[72]

Rubria will point out that most of these documents are in the draft or discussion stages. In response, Acastus must demonstrate that they are not merely aspirational documents, but are attempts by the drafters to codify what they see as existing custom. Rubria may also argue that it owes no duty to the Elysians, since they are not Rubrian citizens or nationals. Acastus should point out that most of the conventions focus not merely on "occupancy" or "ownership," but also on "use" or "access." Furthermore, the preambles and the preparatory work of these conventions indicate that the drafters are aware that indigenous communities that pre-date modern national borders, and therefore may "use" land in multiple States.

---

[67] *Dann* at para. 130 (footnotes omitted).
[68] *Dann*, at para. 171.
[69] Draft Declaration on the Rights of Indigenous Peoples, U.N. ESCCHR, 22d Sess., U.N. Doc. E/CN.4/Sub.2.1993/29/Annex I.23 (1993).
[70] In addition to the cited Article 26, consider Article 27, which reads, "Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. " *Id.* art. 27.
[71] *Id.* art. 26.
[72] Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., OEA/Ser.L/V/II.95, doc. 7 rev. 625 (1997), *available online at* http:// www.cidh.org/annualrep/96eng/chap.4.htm

In the *Fisheries Jurisdiction* case,[73] the ICJ addressed the question of whether Iceland could expand its exclusive fisheries zone to include an area 50 miles off of its coastline. The United Kingdom (and, in a separate case, Germany) complained that this would interfere with the long-standing use by U.K. vessels of the affected waters.[74] While acknowledging that Iceland was entitled to "preferential" rights, the ICJ rejected the notion that this required a "phasing out" of the United Kingdom's exploitation of the region.[75] The ICJ affirmed that both parties were obliged to "take full account of each other's rights," including the U.K.'s traditional use of the waters.

Rubria will distinguish this case on two grounds. First, that case concerned territorial rights of States, as opposed to indigenous rights of people. Second, it concerned the very nuanced regime of Law of the Sea. However, the principals set out by the ICJ in that case may be useful to both parties.

B. Is Rubria responsible for damage which would result from construction of the pipeline?

Even if Acastus is able to demonstrate that Rubria owes an obligation to the Elysians, it must still show that Rubria *itself* violated that obligation. It is not, for example, enough to show that COG is responsible for the construction of the pipeline. Acastus must demonstrate that COG's actions may be imputed to Rubria as a shareholder or that Rubria is in some other respect responsible for the violation of the Elysians' rights.

1. COG as a putative instrumentality of the State

Acastus may attempt to argue that, since Rubria has financed 49% of COG, took part in its formation, and holds seats on the COG Board of Directors, COG is an instrumentality of the State of Rubria or is somehow a para-statal agency. International arbitral tribunals addressing this argument have focused on two aspects of the corporation: the structure of the corporation and the nature of the function performed.[76] The "structural" test has been met where, for example, the corporation is created by public act of the State and the State is the majority shareholder[77] and where the State has the power to appoint the majority of the Board of Directors.[78] These facts do not exist in this case: although Rubria has financed 49% of COG's activities and retains 49% of its shares, it does not have direct control over COG, its activities or decisions.

The "functional" test is met when the corporation fulfills a public function usually reserved to the State, for example construction and maintenance of highways[79] or broadly coordinating regional development.[80] The construction of the Elysian pipeline is a closer case than these two example,

[73] *Fisheries Jurisdiction*, Judgement of 25 July 1974 (UK and Northern Ireland v. Iceland), I.C.J.R. 1974, p. 3
[74] In particular, the U.K. indicated that "its vessels have been fishing in Icelandic waters for centuries and . . . they have done so in a manner comparable with their present activities for upwards of 50 years." *Id.* at para. 63.
[75] *Id.* at para. 69.
[76] *Maffezini v. Spain*, ICSID Case No. ARB/97/07, 5 ICSID Rep. 396 (2002), 124 I.L.R. 9 (2003) (Decision on Jurisdiction of 25 Jan. 2000); *Salini v. Morocco*, ICSID Case No. ARB/00/0, 6 ICSID Rep. 400 (2004), 42 I.L.M. 609 (2003) (Decision on Jurisdiction of 23 July 2001).
[77] *Maffezini*, *supra* note 77, at paras. 83 & 89.
[78] *Salini*, *supra* note 77, at paras. 31-32.
[79] *Id.* at para. 33.
[80] *Maffezini*, *supra* note 77, at para. 86.

but absent a structural link between the State and COG, the Court would not find that COG is a State agency.

2. Shareholder Liability

Liability as a shareholder is probably the first basis that occurs to most Acastian advocates. Unfortunately, it is not a very strong basis. COG is a corporation organized under the laws of Rubria and, as such, its two shareholders enjoy limited liability under Rubrian law. Acastus's slim hope is to prove that there is an equitable "general principle of law" recognized by States which allows the ICJ to set aside the corporate form and impose liability directly on the shareholders.

While it is true that most States that recognize corporate forms recognize exceptions to the concept of limited liability, such exceptions are *extremely* limited.[81] The common exceptions – undercapitalization and a "corporate alter ego" – are not supported at all on these facts. There is no evidence that Rubria exercised direct control over COG; in fact, it is a minority shareholder of the company. In such case, its mere vote in favor or against a corporate action does not *in itself* subject Rubria to liability.

Acastus will point out that the Iran-U.S. Claims Tribunal has recognized an exception to this principal where the State was using its ownership interest to control or direct the corporation to a particular result.[82] However, the same tribunal did not attribute to Iran a private company's confiscation of private property, where there was no indication that Iran used its ownership interest to direct the specific confiscation in question.[83]

3. State Responsibility for Private Actors

Acastus may also argue that COG's activities may be imputed to Rubria by means of customary notions of State responsibility for private actors' actions which it controlled or subsequently ratified. A more complete discussion of this principle is contained in Section III.C, *infra*.

Generally speaking, the actions of private parties are not attributable to States.[84] Two recognized exceptions to this rule exist where (a) the private party is empowered by the government to exercise governmental authority,[85] and (b) where the private party is acting on the instructions of, or under the direction or control of, the State.[86]

---

[81] See, *e.g.*, Karl Hofstetter, "Parent Responsibility for Subsidiary Corporations: Evaluating European Trends," 39 *Int'l & Comp. L.Q.* 576, 580-93 (1990). The most commonly recognized exceptions among U.S. and European legal systems include the following: undercapitalization of the subsidiary; and the *alter ego*, where the degree of control exercised by the parent warrants disregard of the separate corporate identity.

[82] *Foremost Tehran Inc. v. Iran*, 10 Iran-U.S. Claims Trib. Rep. 228 (1986) and *American Bell Int'l Inc. v. Iran*, 12 Iran-U.S. Claims Trib. Rep. 170 (1986).

[83] *SEDCO Inc. v. Iran*, 15 Iran-U.S. Claims Trib. Rep. 23 (1987).

[84] James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT & COMMENTARIES 110 (2002).

[85] *See, e.g.*, art. 5 of the ILC's Articles on State Responsibility, "State Responsibility: Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading," U.N. GAOR Int'l L. Comm'n, 53d Sess., U.N. Doc. A/CN.4/L.602/Rev.1 (2001) (hereinafter "Articles on State Responsibility").

[86] *See, e.g.*, Articles on State Responsibility, art. 8.

In order to succeed on this theory, Acastus must characterize the building of the pipeline as an exercise of government authority or must characterize the relationship as one where Rubria "directs or controls" COG. The former is unlikely: COG's activities appear to be a purely private enterprise – the extraction and removal of oil for private profit. The latter is likewise unlikely, since Rubria is a minority shareholder, and no action could be taken without the approval of its private partner, TNC.

4. Direct Liability for Authorization of the Pipeline

Acastus's best approach is to allege that Rubria violated its obligations to the Elysians by granting COG "exclusive rights to operate within the region."[87] This was the basis of the complainant's case in the *Ominayak* case before the Human Rights Committee, on which basis the Committee found an Article 27 violation. The success of this claim will turn entirely upon Acastus's ability to present a viable international customary law that prohibits Rubria from granting such rights, or from granting such rights without consulting or compensating the Elysians.

C. Affirmative defenses and other matters

Rubria may claim that Acastus cannot make this claim on behalf of the Elysians before the ICJ. It does not seem likely that such a defense based upon standing would prevail on these facts.

Although only States may bring claims before the ICJ, Acastus is bringing a claim on behalf of the Elysians under the well-established doctrine of "diplomatic protection." The traditional and firmest basis for establishing standing under this doctrine is the nationality of the harmed individuals. That is, a State is accorded standing to seek redress for harm to its nationals, wherever they might be found. In principle, state sovereignty dictates that a State is free to designate as its "national" any person it sees fit.

Rubria might argue that the Elysians are not, in fact, Acastian nationals. This is not a very good argument for Rubria. Rubria may point out that in the key case dealing with the issue, the *Nottebohm Case*,[88] the ICJ focused on a "genuine link," rather than formal notions of citizenship or nationality. The Court held that a State must demonstrate a sufficiently close nexus between the claiming state and the individual. Therefore, "mere nationality" (*e.g.* a State designating an otherwise unrelated person a "national" for the purpose of establishing standing in a case) is insufficient. In this case, however, Acastus has granted the Elysians "all rights of citizenship,"[89] the Elysians dwell within Acastus, and they have voting and other rights of citizens. A genuine link exists.

Another argument is <u>exhaustion of local remedies</u>. In order for a State to exercise diplomatic protection, the protected nationals must exhaust local remedies available in the accused State. In this

---

[87] *Compromis*, para. 20.
[88] *Nottebohm Case (Liechtenstein v. Guatemala)* 1955 ICJ 4.
[89] *Compromis*, para. 4.

case, however, the Clarifications explicitly state that the Elysians have exhausted all remedies available in Rubria.[90]

III. Are PROF's forced-labor activities imputable to Rubria?

In order to prevail on its claim that Rubria is liable for the activities of PROF in the Elysium, Acastus must prove that PROF's activities are violations of international law, and that those activities are attributable to Rubria. In the first instance, Acastus must also demonstrate that this conduct is, in fact, forced labor (or some other proscripted activity).

A. Forced labor violates international law

It is well established that forced labor is illegal under international law. The 1932 Convention Concerning Forced or Compulsory Labour,[91] promulgated by the ILO, defines forced labor as: "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[92] Applicant has a fairly clear argument for the illegality of PROF's abduction and forced labor. The letter by Mr. Borius and the testimony at trial provide enough evidence to prove that the labor was not voluntary and that the armed status of PROF constitutes "menace of any penalty."[93]

The Forced Labour Convention contains a few exceptions to this rule which Rubria may attempt to argue. They include 1) work done in the "important direct interest for the community called upon to do the work"[94] and 2) that the workers were compensated for their labor.[95] Rubria may argue that the pipeline will be beneficial to the Elysians as it will bring jobs and revenue to the area. Rubria may also claim that the bag of sorghum given to the workers at the end of each day constitutes "payment."

The ILO's 1959 Abolition of Forced Labour Convention96 eliminated these exceptions. Article 1 of that Convention states simply:

> "Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour:
> (a) As a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
> (b) As a method of mobilising and using labour for purposes of economic development;
> (c) As a means of labour discipline;
> (d) As a punishment for having participated in strikes;
> (e) As a means of racial, social, national or religious discrimination."[97]

[90] *Clarifications,* clarification 11.
[91] Convention Concerning Forced or Compulsory Labour (No. 29), *entered into force* May 1, 1932, 39 U.N.T.S. 55 (hereinafter "Convention 29").
[92] *Id.*, art. 2.1.
[93] *Compromis*, para. 26.
[94] Convention 29, art. 10.2.a
[95] *Id.*, art. 14.
[96] Abolition of Forced Labour Convention (No. 105), *entered into force* Jan. 17, 1959, 320 U.N.T.S. 291.

Acastus may also argue that PROF's conduct is tantamount to slavery. This argument is useful, since the prohibition of slavery is a *jus cogens* norm of international law, against which no exception may be had. This argument is difficult, however, as the Slavery Convention,[98] the leading international instrument on the topic, defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[99] This is a very high standard, and does not appear to be met in this case.

B. Rubria's Status as Shareholder in the COG

Once again, Acastus may attempt to impute PROF's conduct to Rubria by dint of Rubria's status as a shareholder of COG. However, as discussed above, [100] mere shareholders are *rarely* held liable for the actions of corporations in any domestic corporate regime. **Corporate forms and shareholder liability are NOT in issue.** As there is no evidence offered as to the domestic laws of either state as to their laws concerning corporate forms, neither party can offer a meaningful argument about shareholder liability in this case. Students may attempt to couch their arguments in terms of their home countries' corporate law, but those laws are not applicable here.

There is no uniform or customary international law concerning corporations and shareholder liability. The issue here is Rubria's liability based on its control over COG and the law of state responsibility for what it knew or should have known about the activities of PROF in the Elysium.

C. State Responsibility

Notwithstanding the illegality of the forced labor, Acastus must prove the activities of PROF are attributable to Rubria. The question here is: was there an international obligation for Rubria to monitor the activities of PROF?

One source of law in this area is the Articles on State Responsibility,[101] a longtime project of the International Law Commission (ILC), an expert committee charged by the United Nations with development of principles of international law. The Articles are intended to codify the international law principles of state responsibility. The Articles have never been presented in a form susceptible of state signature or ratification; but they were approved by the General Assembly by Resolution in 2001. A competitor seeking to base an argument on the Articles must argue either that the specific provision cited is a codification of existing customary law, or that the work of the ILC, a commission of experts on the topic of state responsibility, is deserving of consideration as a "most highly qualified publicist" under Article 38(1)(d) of the Statute of the ICJ. If the student chooses the latter route, the bench should be mindful that Article 38(1)(d) is merely "supplemental" to the other sources of international law.

---

[97] *Id.*, art. 1.
[98] Slavery Convention, *entered into force* March 9, 1927, 212 U.N.T.S. 17.
[99] *Id.*, art. 1.
[100] *See supra* section II regarding Rubria's shareholder liability and corporate responsibility.
[101] Articles on State Responsibility, *supra* note 85.

Article 1 of the Articles on State Responsibility provides that the "every internationally wrongful act of a State entails the international responsibility of that State." Article 2 provides that a State commits an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to it and constitutes a breach of its international obligations. Article 3 states that how a state characterizes an act under its domestic law is immaterial if international law provides that it is unlawful. Both parties will invoke the *Corfu Channel*[102] case with respect to what they reasonably should or could have known about PROF's activities and whether that knowledge leads to liability. In *Corfu Channel*, Albania bore responsibility for damage to British ships when it was determined that Albania either knew or should have known about mines laid in its waters.

Rubria will rely on the language by the Court that says "it cannot be concluded from the mere fact of the control exercised by a State over its territory . . . that that State necessarily knew or ought to have known, of any unlawful acts perpetrated therein, nor yet that it necessarily knew or should have known the authors." Acastus will reply that Rubria (like Albania in *Corfu Channel*) controls all relevant information, and bears the burden of demonstrating whether it met its obligations in monitoring or remaining seized of the scope of PROF's activities. This obligation will be argued under the standard set in the *Military and Paramilitary Activities* case.

In *Military and Paramilitary Activities in and against Nicaragua,*[103] the ICJ addressed the issue of when the actions of private actors are attributable to the State. In *Nicaragua*, the U.S. was engaged in funding and supplying weapons to *Contra* forces in the Nicaraguan civil war. The U.S. was not held liable for the specific acts of human rights violations by the *Contras*. The Court established the "effective control" test, stating "it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[104]

The scope of a state's responsibility for the actions of individuals was further examined by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia. In *Prosecutor v. Tadić*, the Chamber stressed that:

> The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.[105]

The inquiry focuses on what the government did with respect to prospective conduct. Both parties will need to discuss whether Rubria was or should have been aware of PROF's activities when Rubria (a) approved the contract between COG and PROF, (b) knew that PROF was an armed force, and (c) had employed PROF to quell disruptions related to the pipeline.

---

[102] *Corfú Channel* (France v. Albania), 1949 I.C.J. 4 (April 9).
[103] *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* , 1986 I.C.J. 14, 114 (Jun. 27).
[104] *Id.* at para. 115.
[105] Case IT-94-1, *Prosecutor v. Tadić*, (1999) *I.L.M.*, vol. 38, p. 1518, at p. 1541, para. 117.

The standard for state involvement set by the Court in *Nicaragua* (and the tribunal in *Tadić*) is high. Recognizing that paramilitary contras were recruited, organized, paid and commanded by the United States, the Court nonetheless held the United States was not responsible for the criminal acts and human rights abuses of the Contras. Nicaragua failed to show the United States had effective control over the operations of the alleged violations. Similarly, Acastus has the burden of showing that Rubria exercised effective control over PROF.

IV. Does the outcome of the Borius *litigation violate Acastus's obligations under the RABBIT?*

The fourth issue is Rubria's only affirmative claim against Acastus. Rubria bears the burden of showing that the "outcome of the *Borius* litigation" violates Article 52 of the Rubria-Acastus Binding Bilateral Investment Treaty (RABBIT). The *Borius* case was a suit brought by Davide Borius and "Elyisians for Justice" against TNC, COG, PROF and Rubria arising out of the fact that Borius and other Elysians were forced to labor on the pipeline project. The Acastian civil court dismissed TNC and PROF as defendants, found for the plaintiffs, and imposed a sizeable judgment against COG and Rubria, the two remaining defendants.

At the outset, please note that the only potential breach of Article 52 of the RABBIT arising out of the *Borius* case was the civil court's decision to dismiss TNC as a defendant-party. In its prayer for relief, Rubria claims that "Acastus is in breach *of Article 52 of the RABBIT* by virtue of the Acastian civil court's decision."[106] The MCRA, referenced in Article 52, only discusses Acastian corporations. TNC was the only party to the suit that was an Acastian corporation.

Rubria might claim that the Acastian civil court acted improperly in imposing a judgment against COG and Rubria, either because the court lacked jurisdiction or because the judgment was somehow in violation of international law or the MCRA itself. Both arguments are outside the scope of Rubria's pleading which explicitly limits the parties to discussion of a breach of Article 52 of the RABBIT.

Rubria bears the burden of proving this claim. The argument will turn on two questions. First, what does Article 52 require Acastus to do? Second, does the outcome of the *Borius* litigation breach that obligation? In addition, Rubria may attempt to bring the emerging concept of the "multinational enterprise" to bear on this issue. Finally, Acastus may attempt to raise one or more affirmative defenses pertaining to this issue.

A. What does Article 52 require of Acastus?

The nature of the obligation is a question of treaty interpretation. As such, the parties should rely on Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which is regarded as a codification of customary international law regarding the law of treaties. Article 31 sets out the general rule for treaty interpretation:

[106] *Compromis*, para. 38(d) (emphasis added).

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> . . .
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended."[107]

Article 32 refers to supplemental means of interpretation, and applies only when the plain meaning of a term is "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."[108] In such case, the Court may determine the meaning of the term by reference to supplementary means of interpretation, "including the preparatory work of the treaty and the circumstances of its conclusion."[109]

On December 15, 2002, the Prime Minister of Acastus promulgated the Multinational Corporate Responsibility Act (MCRA). The MCRA requires that an Acastian corporation "in its conduct abroad, comply with all governing norms of conventional and customary international law."[110]

Rubria cannot rely directly upon the MCRA, because domestic statutes do not in and of themselves create international obligations. That is, simply because Acastus has passed the MCRA does not make it liable to other States if it fails to effectively enforce the law.

For this reason, Rubria insisted that Article 52 be included in the RABBIT.[111] Article 52 acknowledges the MCRA, and then states,

> "Acastus undertakes that, in carrying out its obligations under this Treaty, it will enforce all aspects of its domestic law, including the MCRA, in its form as of the date of the entry into force of this Treaty."[112]

As a result of this provision, it is unquestionable that Acastus owes a duty to Rubria to enforce the MCRA. Rubria will bolster the obligation by arguing that it was induced to sign the treaty by the Acastian Prime Minister's public promise that Acastian corporations "will obey the standards of this Act, and we will hold them to those standards. In the unlikely event that they fall short of full compliance, you may be assured that compensation will be provided to anyone harmed by their actions."[113] Although this statement was not directed at Rubria, it was directed to Acastus's "trading partners around the world."[114] Rubria will point out that an unambiguous, unilateral statement by a head of government can create an obligation in international law.[115]

The parties' arguments will focus on the exact nature of the obligation. Relying upon the plain language of the RABBIT, Acastus will argue that the obligation "to enforce" merely means to make

---

[107] VCLT, art. 31.
[108] VCLT, art. 32.
[109] *Ibid.*
[110] Multinational Corporate Responsibility Act, contained in *Compromis*, Annex (hereinafter "MCRA"), at Sec. 4.
[111] *Compromis,* para. 15.
[112] *Compromis*, para. 15.
[113] *Compromis*, para. 14.
[114] *Ibid.*
[115] Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. at 269-70.

its corporations susceptible to civil suit and to subject TNC to its judicial process. Acastus will argue that neither the RABBIT nor the MCRA promises a certain result.

Rubria will attach a different meaning to "enforce." It will contend that the RABBIT requires Acastus to impose a judgment against its corporations where they violate the MCRA, *i.e.* where they violate international human rights law. As evidence of the meaning the parties attached to the word "enforce," Rubria will point to the December 15, 2002, statement of the Acastian Prime Minister, who promised that when Acastian corporations violated the MCRA, Acastus's other States "may be assured that compensation will be provided to anyone harmed by their actions."[116] Under Article 32 of the Vienna Convention, in order to make use of this extraneous evidence, Rubria must convince the Court that the plain meaning of "to enforce" is ambiguous or unclear.

Rubria may also find support in Article 27 of the Vienna Convention on the Law of Treaties. Article 27 forbids a State party to a treaty from "invok[ing] the provisions of its internal law as justification for its failure to perform a treaty."[117] The Acastian court dismissed TNC as a defendant prior to a hearing on the merits of the case. The dismissal was based upon Acastus's domestic corporate law of limited liability, that "we cannot hold a mere shareholder liable for the actions of the corporation in which it owns stock."[118] If Rubria is correct as to the meaning of "enforce," Acastus cannot rely on its domestic corporate law to absolve it of its obligation to enforce the MCRA.

B. Does the outcome of the *Borius* litigation breach Acastus's Art. 52 duty?

The previous question – the exact content of Acastus's duty – will determine the threshold that Acastus's civil court needed to meet. But the facts that the parties will apply are the same, regardless of which rule is applied. The bench should press each oralist to ensure (s)he can apply the facts of the case to either party's interpretation of the obligation.

Acastus will point out that TNC was duly dismissed under a generally-applicable domestic rule, namely that mere shareholders cannot be held liable for the conduct of the company. Rubria may reply that Article 26 of the Vienna Convention requires that treaty obligations must be performed "in good faith,"[119] and that dismissing TNC prior to a trial on the merits does not constitute adequate "enforcement" to meet the obligation. To demonstrate that the enforcement was inadequate, Rubria may point out that, as 51 percent shareholder, TNC is not a "mere shareholder," but is in fact the *controlling* shareholder in a one-share, one-vote corporation like COG.[120] Rubria might also argue that TNC's protection as a "mere shareholder" is inadequately supported, either in the civil court's decision or elsewhere in the *Compromis*, and that information could have been developed in a full trial.

[116] *Compromis*, para. 14.
[117] VCLT, art. 27.
[118] *Compromis*, para. 28.
[119] VCLT, art. 26.
[120] *Compromis*, para. 19.

In response, Acastus should argue that plaintiffs did not contend that COG was a mere "alter ego" of TNC,[121] nor did they satisfy the civil court that piercing the corporate veil was otherwise justified. As the very least, Acastus cannot be held responsible for failure by the plaintiffs to properly state their case: Acastus is obliged to compensate only victims who can *prove* a violation of the MCRA. Furthermore, Rubria was a party to the *Borius* case. Rubria had the opportunity to raise issues related to TNC's dismissal at trial, but chose not to participate.

C. The emerging concept of "multinational enterprises"

The competitors will likely focus on the emerging concept of "multinational enterprises." Rigid adherence to domestic notions of corporate personality have long allowed companies to evade domestic environmental and human rights regulations, for example by forming "off-shore subsidiaries" beyond the reach of national legislation and domestic enforcement. In response, many international organizations have begun to consider the concept of "multinational enterprises." Although this concept might aid Rubria's argument, **it has by no means reached the level of customary international law, and is not a very strong argument.**

In this context, Rubria may take issue with the court's narrow application of the MCRA. The civil court stated, "While [the MCRA] may be adequate to impose legal obligations on corporate entities that operate directly in foreign countries . . . it does not make Acastians into guarantors of proper behavior by foreign companies in which they may invest."[122] Rubria may argue that there is an emerging recognition in international law of the concept of the "multinational enterprise." The International Labour Organisation (of which Rubria is, and Nessus was, a member) has promulgated the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[123] The Tripartite Declaration states that

> "[T]he advances made by multinational enterprises in organizing their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with national policy objectives and with the interest of the workers. In addition, the complexity of multinational enterprises and the difficulty of clearly perceiving their diverse structures, operations and policies sometimes give rise to concern either in the home or in the host countries, or in both."[124]

In addition, the Organisation for Economic Co-operation and Development (of which Acastus is a member) has promulgated the OECD Guidelines for Multinational Enterprises.[125] The Guidelines state that "Governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country."[126]

---

[121] *Compromis*, para. 28.
[122] *Compromis*, para. 28.
[123] International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 17 I.L.M. 422, 424-28 (Nov. 16, 1977) (hereinafter "*Tripartite Declaration*").
[124] *Tripartite Declaration*, para. 1.
[125] Organisation for Economic Co-operation & Development, Guidelines for Multinational Enterprises, *available online at* http://www.oecd.org/document/28/0,2340, en_2649_34889_2397532_1_1_1_1,00.html (Revision 2000); (hereinfer "*OECD Guidelines*")
[126] *OECD Guidelines*, section I(2).

Both the Tripartite Declaration and the OECD Guidelines shy away from a precise definition of a "multinational enterprise." However, by way of illustration, the Tripartite Declaration explains:

> "Multinational enterprises include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based. The degree of autonomy of entities within multinational enterprises in relation to each other varies widely from one such enterprise to another, depending on the nature of the links between such entities and their fields of activity and having regard to the great diversity in the form of ownership, in the size, in the nature and location of the operations of the enterprises concerned. Unless otherwise specified, the term 'multinational enterprise' is used in this Declaration to designate the various entities (parent companies or local entities or both or the organization as a whole) according to the distribution of responsibilities among them, in the expectation that they will cooperate and provide assistance to one another as necessary to facilitate observance of the principles laid down in the Declaration."[127]

Likewise, the OECD Guidelines state:

> "[Multinational enterprises] usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed. The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines."[128]

Rubria will point out that the MCRA explicitly references the OECD Guidelines, stating "In interpreting and implementing the standards of this Act, reference shall be had to the General Policies set out in the 2000 Guidelines for Multinational Enterprises promulgated by the Organisation for Economic Co-operation and Development."[129]

Rubria may conclude that the emerging concept of a multinational enterprise should have led the civil court to take a broad reading of the phrase "conduct abroad" in the MCRA,[130] especially in light of the fact that TNC is the controlling shareholder of COG and voted affirmatively (and determinatively) in favor of the decision to hire PROF.

Acastus may rightly question whether the concept of a "multinational enterprise" is recognized in international law. Although the term appears in multiple locations, there is simply no recognized

[127] *Tripartite Declaration*, para. 6.
[128] *OECD Guidelines*, section I(3).
[129] MCRA, at Section 3.
[130] MCRA, at Section 4.

obligation, either in treaty or customary law, to set aside national concepts of corporate forms in favor of the multinational enterprise.

Acastus will also reply in the first instance that both the OECD Guidelines and the Tripartite Declaration are non-binding instruments. Both are guidelines to member States – and in most cases, are guidelines to the member States to issue non-binding guidelines to corporations. Furthermore, the reference in the MCRA to the OECD Guidelines are to the General Policies, contained at Section II. The General Policies are a list of hortatory aims for multinational enterprises, including respect for human rights and sustainable development, good corporate governance, and capacity building.[131] Neither document was intended by the parties to be binding upon member States.

Acastus will correctly argue that, while the concept of a "multinational enterprise" may be gaining favor in international development circles, the law before the Court – the MCRA (and the RABBIT) – refers only to "domestic corporations" of Acastus. Therefore, this development in the law, no matter how advanced Rubria may portray it, should have no effect upon the Court's interpretation of Acastus's obligations under the RABBIT.

D. Affirmative Defenses

To further bolster its case, and in the alternative to the arguments above, Acastus may resort to one or more affirmative defenses.

As noted above, Article 27 of the Vienna Convention forecloses Acastus from relying upon its domestic corporations law as a justification for its breach of RABBIT Article 52. Therefore, if Rubria succeeds in showing that the dismissal of TNC was *prima facie* a breach of Article 52, Acastus cannot defend simply by arguing that the civil court was correct.

Acastus might also attempt to rely on the equitable doctrine of "unclean hands." Since Rubria has failed to enforce international law against *its* domestic corporations, PROF and COG, it cannot plead Acastus's failure to enforce international law against TNC. The flaw in this argument is that, while Acastus is obliged under the RABBIT to enforce the MCRA against TNC, Rubria has no corresponding domestic law. More importantly, Article 52 of the RABBIT does not create any reciprocal obligations for Rubria: only Acastus is bound to enforce the MCRA. While there is a lack of symmetry in Rubria's position, in order to succeed on this argument, Acastus must show that Rubria's failure to enforce international human rights law against COG and PROF is a violation of its duties under international law.

[131] *OECD Guidelines*, section II.

PART 3: SUGGESTED QUESTIONS FOR ORALISTS

These questions are merely suggestions for the oral rounds. Judges are of course welcome to ask any questions they like.

International Law Generally

1. Is there any priority or hierarchy of the sources of international law mentioned in Art. 38?
2. If a State has conflicting obligations under these two treaties (or under a treaty on the one hand and customary international law on the other), which obligation controls? What principles does the Court use to determine which obligation controls?
3. What is customary international law? What are the elements of customary international law?
4. When a student attempts to assert that a given rule is or is not an obligation under customary international law, the court should ask the student to demonstrate (1) widespread and consistent practice by States consistent with that rule, and (2) that the State practice is, in fact, motivated by a sense of obligation (opinion juris)?
5. Whenever a student enunciates a standard of law, (s)he should be pressed to enunciate where the standard comes from and why it binds the parties?
6. What is *opinio juris*? How is it proven?
7. Where can we find evidence of State practice? What State practice is relevant?
8. Is this Court bound by its prior decisions?
9. What are *travaux preparatoires*? When are the records of the drafting and negotiations of the treaty relevant?
10. What specific remedies is your Party looking for? Is this Court permitted by its Statute to grant those remedies?
11. If this Court determines (notwithstanding, of course, Agent's compelling arguments) that the paucity of facts allows multiple, conflicting inferences, what should this Court do then?
12. What is the standard of proof with respect to this issue? Which party bears the burden of proof?

Issue #1: Continuation and Succession

For Acastus

1. How does a state become the continuation of, or successor to, a predecessor state?
2. Is Acastus claiming to be a successor or continuation of Nessus? What is the difference? Should that affect this court's decision?
3. What factors contribute to a decision in determining successor status at the U.N.? Are those factors present here?
4. What is the authority of the Under-Secretary-General in interpreting Security Council Resolutions?
5. If we decide that Acastus is not the continuation of or successor to Nessus, is your standing before this court foreclosed?
6. Why has Acastus not applied for membership in the U.N.? Should this affect the court's decision?
7. Is acting like Nessus' successor the equivalent to being Nessus' successor?
8. How does Acastus claim to have party status to the ICJ for more than 12 months?

For Rubria

1. If Acastus was allowed to sit in Nessus' seat at the U.N., fly its flag in place of Nessus' flag, and assume Nessus' U.N. debt, how is Acastus not Nessus' successor?
2. If the Security Council's role is to recommend states for membership in the U.N., do the Secretary General and the General Assembly have the authority to use legal council to interpret those recommendations?
3. If Security Council Resolution 2283 reads "Acastus should apply for membership," MUST they apply for membership?

Issue #2: The Pipeline

For Acastus

1. What obligation, precisely, has Rubria breached? Where does that obligation come from?
2. Does Rubria owe *any* duty to the Elysians, given that they are not Rubrian citizens?
3. On what basis does Acastus assert standing to advance this claim? Is this a breach of Acastus's rights, or is Acastus asserting rights on behalf of the Elysians?

For Rubria

1. Does Rubria accept that it has *any* duty to the Elysians vis-à-vis the Elysium? What conduct on Rubria's part might constitute a breach of international law?
2. Apart from Rubria's ownership interest in COG, did Rubria breach its obligation to include the Elysians in decisions regarding the Elysium when it granted exclusive rights in the Elysium to COG?

Issue #3: PROF and Forced Labor

For Acastus

1. How is Rubria linked to PROF's activities?
2. What is the test for determining State Responsibility of non-state actors?
3. Which standard of State responsibility would be more advantageous to your argument: the *Corfu Channel* ("known or should have known") test or the *Military and Paramilitary Activities in and against Nicaragua* (the Control Test)?

For Rubria

1. If Rubria knew that PROF was an armed force, hired to put down resistance to the pipeline, should Rubria have kept itself more aware of PROF's activities?
2. Which standard of State responsibility would be more advantageous to your argument: the *Corfu Channel* ("known or should have known") test or the *Military and Paramilitary Activities in and against Nicaragua* (the Control Test)?

Issue #4: RABBIT, the MCRA, and the *Borius* Litigation

For Acastus

1. Is TNC's status as controlling shareholder of COG sufficient to justify this Court treating COG as TNC's *alter ego*, despite the civil court's determination?
2. What credence should the International Court of Justice give the findings of fact (and the findings of law) of the Acastian civil court? To what extent (and for what reasons) should this Court defer to the civil court?

For Rubria

1. On what basis can Rubria claim relief for the Acastian civil court's dismissal of TNC as a defendant in *Borius*? After all, Davide Borius and "Elysians for Justice" were the party plaintiffs. Is Rubria purporting to claim on their behalf?
2. "Unclean hands": Can Rubria plead Acastus's failure to enforce international human rights law against TNC when, in fact, Rubria was TNC's co-shareholder and is implicated (or not implicated) to the same extent as TNC in every COG action?
3. "Unclean hands": Can Rubria plead Acastus's failure to enforce international human rights law against its domestic corporation, TNC, when, in fact, Rubria has failed to enforce the same provisions against its domestic corporations, COG and PROF?
4. (If Rubria attempts to argue that the civil court's decision was substantively incorrect) Didn't Rubria have the opportunity to advance these arguments before the civil court, since it was a party defendant in the *Borius* case?
5. (If Rubria attempts to argue that the civil court's decision was substantively incorrect) Is it the proper role of the International Court of Justice to review findings of fact of domestic trial courts? In what situations is that appropriate?

For Both

1. What is the precise scope of Acastus's obligation under Article 52?
2. What is the status of the concept of a "multinational enterprise" under international law?
3. Since Rubria and COG did not appeal the court's dismissal of TNC at trial, is Rubria estopped from asking the ICJ to review that dismissal now?