Bench Memorandum for Judges

THE CASE CONCERNING EAST AGNOSTICA

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2015 Philip C. Jessup Competition

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I. PURPOSE OF THE BENCH MEMORANDUM

The purpose of the Bench Memorandum is to provide judges in the Jessup Competition with basic factual and legal information to enable evaluation of the written and oral performances of participating teams. This Bench Memorandum should be read in conjunction with the 2015 Jessup Problem (the "*Compromis*") and the Corrections and Clarifications to the *Compromis*.

The *Compromis* was designed to present the competitors with a balanced problem such that each side has both strengths and weaknesses. Jessup teams should be able to construct good arguments as both the Applicant and as the Respondent. As a judge, your task is to evaluate the quality of each team's analysis, their knowledge of international law, and their advocacy skills. Please make sure not to confuse this task with your own personal evaluation of the merits of the case.

Please note that this memorandum is not meant to be an exhaustive treatise on the legal issues raised in the *Compromis*. In particular, judges should be aware that this Bench Memorandum has been condensed as much as possible, and does not purport to cover all relevant issues in detail, though we do aim to contextualize the law in a manner that is relevant to the issues of the *Compromis*. In many instances, relevant case law is not discussed here, but should be addressed by the participants. The state practice and legal authorities cited herein are illustrative and not intended to be a comprehensive review of all relevant sources of law. As such, judges should not be surprised when participants present arguments or authorities that may not be discussed in this memorandum. This does not suggest that such arguments are not relevant or credible. Judges are encouraged to engage in their own independent research on the issues if they wish to do so.

II. SUMMARY OF THE CASE

The 2015 Jessup *Compromis* focuses on issues of non-intervention into the affairs of other states, territorial integrity in the face of a self-determination claim, the applicability of a treaty under what may or may not be a fundamental change of circumstances, and countermeasures within the context of a treaty dispute between two states -- Agnostica and Reverentia.

In the 18th century, the Kingdom of Credera colonized the Thanatosian Plains, a landlocked region located in the Southern Hemisphere. The Plains have long been home to two ethnic groups – the Reverentians and the Agnosticans. Credera immediately began administering the territory as two separate colonies – Reverentia, located in the east, and Agnostica, located in the west.

Due to Reverentia's proximity to other Crederan colonies, it operated as a manufacturing and urban trade centre. Agnostica's geographic isolation (due to its mountainous borders) led Credera to use it as a source of raw materials due to its fertile land and abundant mineral resources. During the colonial era, Reverentia remained ethnically homogenous. However, a large number of ethnic Reverentians emigrated to Agnostica to take advantage of economic opportunities created by cross-border commerce. Nearly all of the ethnic Reverentians settled in the eastern portion of Agnostica. A 1919 Crederan census found Agnostica to be 70% Agnostican and 30% Reverentian. These Agnosticans of Reverentian descent became known as the Agnorevs and they lived lives that were culturally similar to their Reverentian brethren across the border.

In 1925, Agnostica and Reverentia became states when Credera granted independence to all of its colonial holdings. On 1 August 1925, the Federal Republic of Agnostica and the State of Reverentia were established according to Credera's previously established colonial borders. Though Reverentia was established as a unitary state, Agnostica's federal constitution created two provinces: East Agnostica (home to nearly all of the Agnorevs) and West Agnostica (almost entirely ethnic Agnostican). Under the Agnostican constitution, control over cultural affairs and education was devolved to the provinces, while all other matters were left to the federal government. The constitution also empowered the federal parliament to dissolve the union and create two independent states by a three-quarters vote. Upon decolonization, the majority of the Agnorev population chose to remain within Agnostica and continued to do so despite multiple official Reverentian requests to return. These requests continued for approximately 30 years after independence.

Reverentia began a process of rapid industrialization while Agnostica pursued an economic programme focused on the harvest, extraction, and exportation of its abundant natural resources. One such natural resource was the mineral Marthite, a naturally-occurring mineral salt which was known to possess mildly restorative properties. Marthite has also always been a core ingredient in traditional Reverentian medicine. Both Agnorevs and Reverentians valued Marthite as an essential element of their culture for its use as a traditional medicine. East Agnostica is the only known location in the world of Marthite reserves.

In order to secure Reverentian access to the Agnostican Marthite reserves, the two states embarked upon a bilateral treaty known as the Marthite Convention. Concluded in 1938, the Marthite Convention regulated the exploitation of Marthite in an effort to secure a supply for traditional users within Reverentia and Agnostica. Reverentia was the only party who possessed the technology to mine Marthite and the Convention consequently authorized Reverentia to build and maintain mining factories in Agnostica. Agnostica, however, retained ownership over the factories. In exchange, Reverentia was granted the exclusive purchasing rights to Marthite through the Reverentian Marthite Trust (RMT), a state-owned Reverentian corporation. The Convention also gave RMT the exclusive rights to re-sell the

Marthite to traditional medicinal consumers at a fixed price. Outside sales were only permitted when the Marthite supply exceeded demand by 25%. Until 2011, non-traditional demand was virtually non-existent and the amount of Marthite mined only varied from traditional consumer demand by 5%.

In 2011, scientists from the *Institut Luxembourgeois des Sciences Appliques* (ILSA) discovered that Marthite cured previously untreatable early-childhood autoimmune disorders, a discovery which rapidly boosted its international market value. Within weeks of the study's release, RMT began selling 75% of its Marthite stock to pharmaceutical companies at a price that far exceeded the Convention's fixed price, creating a fear among traditional users that the sales would create a Marthite shortage. Agnostica decried Reverentia's sales as a violation of the Convention and called for its termination. Reverentia objected and continued selling Marthite to pharmaceutical companies. 60 days later, Agnostica provided Reverentia a written notice of termination. Simultaneously, Agnostica entered into a lease with Baxter Enterprises, Ltd., a multinational trading company for the facilities.

Reverentia rejected Agnostica's position and directed its on-site engineers to cease work in East Agnostica and to render inoperable any Reverentian technology at the factories. In late April of 2012, Baxter engineers arrived at the facilities only to find that the withdrawal of personnel and software had crippled all Marthite operations. In an attempt to secure the supply of Marthite, the Agnostican Parliament passed the Marthite Control Act, which banned the sale or transfer of Marthite into Reverentia as well as the unauthorized sale, purchase, or possession of Marthite.

In mid-November of 2012, a young Agnorev miner, Gohandas Sugdy, was arrested with two pocketfuls of Marthite. At his arraignment, Sugdy pleaded with the Agnostican judge to let him go so he could use the Marthite as traditional medicine for his ailing grandfather. Reluctantly, the judge remanded Sugdy to jail while stating that he believed the law to be too harsh. During the night of November 24, Gohandas Sugdy committed suicide, leaving a note that read: "Forgive me, Grandfather." Four days later, Sugdy's grandfather passed away from heart failure.

Sugdy's death sparked Agnorev protests across East Agnostica. Protests intensified from peaceful demonstrations into increasingly violent clashes. On December 26, 2012, tensions rose to a boil and 60 Agnorevs died in a skirmish with the Agnostican police. Agnorevs would commemorate the day as the Boxing Day Massacre. In the aftermath of the violence, Agnorev representatives in the Agnostican Parliament attempted to pass a resolution to de-escalate violence in the East. The resolution failed.

On 5 January 2013, angry Agnorev politicians presented a motion before the Parliament requesting the dissolution of the nation. The vote failed on almost entirely ethnic lines within the Agnostican Parliament. Four days later, President Nuvallus delivered a speech publicly committing Reverentia to the Agnorev cause, promising that if the Agnorevs wished to be free, Reverentia would "do everything in [its] power to ensure that [freedom]". A day later, the Reverentian Parliament adopted a resolution recognizing an independent state in East Agnostica in the event a popular referendum clearly demonstrated the Agnorev's will to secede.

On 16 January, 2013, Agnorev representatives in the East Agnostican provincial assembly authorized a secession referendum to take place on 29 January 2013. On 18 January, President Nuvallus ordered several hundred Reverentian troops to the border with East Agnostica with orders to not leave Reverentian territory. The referendum occurred on January 29 without any incident. 73% of the East Agnostican voters voted for secession in an election where 90% of the province's population voted. Furthermore, external observers declared the election to be free of irregularities.

The former representatives of the East Agnostican provincial assembly, now sitting as the self-styled Agnorev People's Parliament (APP), ratified the secession and sent a delegation to Reverentia to negotiate a swift integration of the territory of East Agnostica with the State of Reverentia. Despite concern from the President of the Security Council and communiques emanating from several regional organizations, President Nuvallus and Tomás Bien, the leader of the APP, announced the Integration Agreement joining East Agnostica and Reverentia on 22 February 2013. Reverentian armed forces promptly swept into East Agnostica. Two days later, on 24 February, the Reverentian Parliament accepted and ratified the Agreement, which declared that the new borders were effective as of 1 March 2013. Prime Minister Moritz denounced the annexation but did not send troops into East Agnostica.

Subsequently, representatives from both sides negotiated the facts of the *Compromis* in preparation for the proceedings before this Court.

III. LEGAL ANALYSIS

A. Question Presented 1: Non-Intervention into the Affairs of Other States and the Concept of Territorial Integrity

The issue presented in QP 1 is a modern inquiry into the classic international law concept of non-intervention by states into the domestic affairs of other states. Classical international law began as the rules regulating the relationships *between* states. In order to ensure the sanctity of this international system, states quickly developed the principle of non-intervention as a means to secure each individual state's sovereignty despite entrance into this co-dependent system of law. As Oppenheim, a noted 19th century publicist, stated, the prohibition of intervention is a "corollary of every state's right to sovereignty, territorial integrity and political independence."[1]

The United Nations has repeatedly clarified that states are strictly prohibited from intervening in the domestic affairs of other states, most famously in Article 2.4 of the UN Charter, which prohibits the threat or use of force against the territorial integrity or political independence of another state.[2] The non-intervention principle, however, is not simply restricted to situations involving use of force, acts of aggression, or armed conflict. It has been further clarified by the International Court of Justice to include the concept that a state cannot intervene in a dictatorial way in the internal affairs of another state.[3]

Within the *Nicaragua Decision*, the ICJ declared that the principle precisely forbids all States (or groups of States) from directly or indirectly intervening "in the internal or external affairs of other States."[4] The Court went on to clarify, however, that for an intervention to be prohibited, it must impinge on matters that are directly within a state's sovereign rights. These include the choice of a political, economic, or social and cultural system and the creation and formulation of foreign policy.[5] An intervention is, therefore, "wrongful when it uses methods of coercion in regard to such choices, which must remain free ones" unmarked by any evidence of coercion which would be evidence of a prohibited intervention.[6] In *Democratic Republic of the Congo v. Uganda*, the Court affirmed that the *Nicaragua Decision* had "made it clear that the principle of non-intervention prohibits a State "to intervene, directly or indirectly, with or without armed force, in support of the internal opposition within a State."[7]

Therefore, Applicant is expected to characterize specific Reverentian actions as an intervention that subverts the political integrity of Agnostica. Good teams should have particularized arguments for specific actions for which they have found support for their legality or illegality. Be wary of generalized arguments that simply assume a certain act is "intervention" because, as stated above, there are legal

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[1] LASSA OPPENHEIM, Oppenheim's International Law at 428

[2] U.N. Charter Art. 2.4

[3] Military and Paramilitary Activities in and Around Nicaragua (United States/Nicaragua), 1986 I.C.J. 14.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 116.

standards for what can be characterized as an intervention. The question that you, as a judge, need to ask yourself is whether the Applicant has demonstrated that Respondent's actions rose to the level of "coercive behavior" under international law.

Agnostica's Prayer for Relief	Reverentia's Prayer for Relief
Reverentia unlawfully interfered in Agnostica's domestic affairs when it mobilized troops to the Agnostican border, supported the Agnorev secession movement via its Parliamentary resolutions, and publicly stated support for the Agnorev population.	Reverentia's actions were purely domestic acts fully within their sovereign authority that did not rise to the international legal standard of what is considered intervention into the affairs of another state.

1. The Threat of the Use of Force

Applicant will likely argue that Reverentia's mobilization of forces to its border constitutes an open threat of the use of force against Agnostica. According to Ian Brownlie, the threat of the use of force exists when a state issues "an express or implied promise … of a resort to force [the avoidance of which is] conditional on [accepting …] certain demands of that [state]."[8] The key question here is whether these troop movements constituted a threat to Agnostica and whether they were intended to create a coercive effect on Agnostican domestic policy through the imposition of demands.

Applicant will contend that the timing of the troop movements occurred in a manner that clearly evidenced an improper intent on the part of Reverentia, especially in conjunction with the Reverentian Parliamentary resolution, which included a clause authorizing Reverentia to take all necessary measures to ensure the security of a new East Agnostican state derived from the territory of Agnostica. An open or direct threat of force used to compel another state into ceding its territory or political concessions is commonly acknowledged as a violation of the prohibition of the threat against force in Article 2.4 of the UN Charter.[9] Applicant will therefore argue that Reverentia has violated Article 2.4 with an illegal threat of force.

Respondent will counter that its troop movements were fully within its sovereign rights as a state – rights that include its exclusive authority to use the police power or force (within reason) within its own territory.[10] Respondent will further argue that this act of state did not violate any acts of international law as they all occurred within their own territory and that President Nuvallus issued explicit directions to the armed forces ***not*** to enter into the territory consisting of East Agnostica. Respondent will contend that, rather than looking at all of the circumstances as one totality, the Court should evaluate each event on its own. Strong Respondents will cite to particular sections of the *Nicaragua* decision which support this. Furthermore, Respondent will allege that its troop movements were ordered in an effort to prevent spillover violence into its own borders, while also offering that troop mobilization was a means to

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[8] Ian Brownlie, International Law and the Use of Force by States (1st ed. 1963) at 364.

[9] Malcolm Shaw, International Law, (7th ed. 2008) at 724.

[10] *Saudi Arabia v. Nelson* 510 U.S. 349 (1993) (describing the concept of *acte jure imperii* or acts of state that are fully within the sovereign rights of a state). See also supra n. 3

ensure the presence of aid for any Agnorevs fleeing what might be characterized as a humanitarian crisis. However, characterizations of a humanitarian crisis will be hard to sustain, as the level of discord and number of fatalities within East Agnostica (4 months of protests, 60 reported deaths, and several wounded) pale in comparison to existing situations in Syria, Libya, and Sudan, where hundreds of thousands died in what grew into full-blown civil wars.

Respondent can also argue that the ICJ has previously recognized similar armed forces maneuvers and mobilizations as well below the standard of a threat of the use of force.[11] For example, in *Nicaragua*, American military maneuvers near the Nicaraguan border were not considered to constitute a threat of force.[12] Applicant may attempt to differentiate the specific maneuvers at hand in Nicaragua from this situation by reminding the Court that the situation in Nicaragua referred to poorly-armed guerilla fighters, whereas in this case, there are several hundred professional soldiers from the Reverentian Army.

2. Violation of the Non-Intervention Principle Through Support of a Secession Movement

In *Democratic Republic of the Congo v. Uganda*, the ICJ reiterated that the *Nicaragua Decision* had "made it clear that the principle of non-intervention prohibits a State 'to intervene, directly or indirectly, with or without armed force, in support of the internal opposition within a State.'"[13] Applicant will argue that Reverentia's Parliamentary resolution which declared its full support for the Agnorev secession movement violated the principle of non-intervention because the resolution both prematurely recognized East Agnostica and constituted aid to a secession movement within Applicant's sovereign territory.

Judges should note that the resolution, in its entirety, promises that the state of Reverentia will recognize an unconstitutional referendum within in a neighboring state as both lawful and valid, promote the recognition of this referendum, promote the efficacy of this referendum, extend diplomatic recognition to the entity created from this referendum, and take all necessary measures to ensure that the security and integrity of this new state.

i.) Premature Recognition

Applicant may also argue that the Reverentian Parliament's resolution, recognizing a new state in East Agnostica, was a case of premature recognition constituting a violation of the non-intervention principle. One of the earliest examples held to be an illegal case of premature recognition was the French recognition of the American secession movement in 1778.[14] The British Empire viewed this as an act of war and consequently declared war on the French Empire. Modern states often characterize the choice of whether to deem an entity a state as a political decision, though one within the context of an international legal framework defined by the rules of statehood.[15] Article 1 of the Montevideo Convention is considered customary international law when it comes to defining a state,[16] and both

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[11] *See supra* n. 3 ¶ 227.

[12] *Id.*,

[13] See supra n. 7.

[14] Dugard, The Secession of States and Their Recognition at 38

[15] *Id.* at 39.

[16] Harris, D.J. (ed) Cases and Materials on International Law (7th ed. 2008) at p. 99.

parties to this case have signed and ratified the Convention. The Montevideo Convention summarizes what has come to be known as the "declaratory theory" of statehood, which rests upon the assumption that statehood is created on its own accord when a purported state satisfies the following criteria: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter relations with other states.

In the case of East Agnostica, (b) and (c) are likely the most contestable qualifications of statehood. Rather than a simple question of the location of the borders, East Agnostica's claim of a defined territory lacks legitimacy because it will be very difficult for it to assert an uncontested claim to the land that it holds within its own control. This lack of control of the land also harms East Agnostica's claims to have a proper government, as the general test under international law for who is the legitimate government of the state is the "effective control" test.[17] A state has effective control of the territory when it is clear that it is the controlling authority over the land and all matters that occur within that land.[18] Here, the Agnorev Peoples' Party has a dubious claim to "effective control" of the territory when it was the Agnostican armed forces and police that were maintaining order within the lands that were supposedly in the control of the Agnorev Peoples' Party. However, due to the withdrawal of Agnostican forces, a strong Respondent might be able to build a case for territorial control by the new provisional government.

Respondent can counter with examples of state practice (an element of custom) that reflect that states have often recognized new nations within days of their creation. Immediate examples include the swift recognition of Kosovo by 60 nations within the first month after its declaration of independence and the almost immediate recognition of the state of Bangladesh by dozens following its 1972 War of Independence from Pakistan (in which it was aided militarily by India in what is one of the U.N. Charter era examples of a third-party aided, non-colonial secession movement that was subsequently legitimized).

3. Evidence of an Act of Aggression

An act of aggression is a use of force which is distinguished by its gravity and severity.[19] Applicant might try to argue that the sending of forces to the Agnostican border constituted an act of aggression, though this argument is weakened by the fact that the Reverentian troops were barred from entry into Agnostica, only entered the territory of East Agnostica once they believed it to be part of Reverentia, and justified their troop movements under the need to prevent spillover violence.[20] A stronger argument

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[17] Tinoco Claims Arbitration (Great Britain v. Costa Rica) 1 U.N. Rep. Int'l Arb. Awards 369 (1923)

[18] Id.

[19] *See supra* n. 3, Judge Elaraby Separate Opinion (an act of aggression is an intensified use of force whose gravity and severity distinguish it from simply being a use of force on its own; an act of aggression is also illegal under international law as per the UN Charter) ¶ 18

[20] *See* §1 for the discussion on Reverentia's troop movements. *See also* n. 1 for Oppenheim's reference to "sovereignty." The sovereignty that allows a state to assert control over its military affairs is "internal sovereignty" which is what is protected by the non-intervention principle. Barring human rights violations (and some would say the violation of *jus cogens* norms), internal sovereignty is protected in international law. This same sovereignty allows states the authority to combat internal rebellions while also giving them the authority to provide for their self-defense. Respondent might try and argue as well for a self-defense argument as Reverentia did claim that it sought to prevent spillover violence.

for aggression could be made by alleging that the actual movement of troops into the territory of East Agnostica constituted an armed attack. Respondent may counter with the fact that the armed forces moved into East Agnostica only after obtaining the consent of what they considered to be the legitimate government of the state (the Agnorev Peoples' Party and Tomás Bien). Consent by a state to an intervention effectively legalizes that intervention.[21] However, this argument is also weakened by the previously described problems with the argument that the East Agnostican secession movement, post referendum, created a government with the capacity to issue consent, especially due to the lack of effective control held by Mr. Bien's purported government.

Respondent may counter that it was responding to the consent of the legitimate authority as vested in the Agnorev Peoples' Party by the referendum. The policy implications of such a statement, however, are vulnerable to critique. Judges may wish to ask about the slippery slope implications of vesting such authority in a secession movement that had existed for as short a period of time as the Agnorevs had. The implications of finding such authority within the Agnorev assembly could very well lead to a drastic undermining of the laws of state sovereignty, with a marked effect on numerous states worldwide who all are currently dealing with their own separatist movements.[22] In effect, such a policy could create an "open season" attitude towards assisting and recognizing separatist movements, returning the world to a situation such as in the Cold War where the Soviet Union and the United States continually supported and recognized entities as states in spite of their dubious control or lack of popular support.[23]

4. Responsibility to Protect

We would like judges to be aware that some Respondents are choosing to argue the theory of Responsibility to Protect as a justification for the legality of Reverentia's actions. Responsibility to Protect expands the doctrine of humanitarian intervention imposing a positive obligation on states to intervene in the event of *mass atrocities* (defined as genocide, crimes against humanity, war crimes, and ethnic cleansing). R2Pis controversial as it effectively declares that a state's sovereignty is not an absolute right – a statement that flies in the face of the far more concrete non-intervention doctrine.[24] Judges should press competitors to provide justifications for this theory that lie outside of Article 38.1(d) sources. Judges should also impress upon teams the need to provide state practice of events where states actually have intervened specifically under this doctrine. Judges should also strongly critique the fact that nothing in the Compromis remotely arises to the level of a mass atrocity and they should ask the Respondents to provide examples of where facts in the Compromis fit any one of the four crimes listed earlier. If a team decides to follow this route, judges are more than within their power to ask students what the definitions of these crimes are (as the first three are explicitly defined in the Rome Statute while the United Nations has defined the last) and whether the facts of the Compromis can, in any way,

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[21] Articles of the Responsibility of States for Wrongful Acts (hereafter ARSIWA) art. 20. ("[V]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to that State to the extent that the act remains within the limits of that consent."

[22] James Crawford The Creation of States in International Law (2d ed. 2006) at 403-408.

[23] *See supra* n. 14.

[24] 2005 World Summit Outcome Report, UNGA Resolution 60/1, A/RES/60/1 (24 October 2005).

be considered indicative of these crimes. The short answer is – no. Teams might try and argue that crimes against humanity occurred with the Marthite Control Act – as evidence of widespread and systematic cultural, ethnic, or religious persecution.[25] This is a tough argument as Respondent would need to prove that Agnostica purposefully discriminated against the Agnorevs (ethnically, culturally, or religiously) in a widespread and systematic fashion. The fact that only 18 people were prosecuted under the Marthite Control Act and that, of that 18, only 12 received guilty verdicts and prison sentences weighs against this characterization as does the facially neutral language of the act.

B. Question Presented 2: Secession and the Status of Seceded Territory

Agnostica's Prayer for Relief	Reverentia's Prayer for Relief
Agnostica is still the sovereign authority over the territory of East Agnostica, as the secession was illegal and the territory should be returned to Agnostica.	Reverentia's integration with East Agnostica was consistent with international law and in any event the territory should not be returned back to Agnostica in direct opposition to the express will of the Agnorev people.

At the outset, judges should be aware that the law of secession is by no means as cut and dry as either side may try to present it. In fact, secession is a nuanced field of law characterized by policy arguments that can cut either for or against secession movements based on the actual facts of the situation.[26] In the *Quebec* case, the Canadian Supreme Court surveyed international law and declared that international law was neutral on the question of secession.[27] This means that while the right to secede is not expressly prohibited, it also does not rise to the level of being an express entitlement.[28]

Additionally, while there is an element of the law of self-determination to the question of secession, it is not the only concern. Though the ILC has held that self-determination has risen to the level of a *jus cogens* obligation and the ICJ has confirmed it as an *erga omnes* right, the modern interpretation of self-determination differs greatly from the image of Wilsonian democracy.[29] Though the early 1900's saw growing international support for the right of all people to self-determination, states subsequently began limiting the definition of what could occur under this principle, limiting its impact.[30] Judges should, thus, be wary when Respondents err too heavily on the side of arguing self-determination for the Agnorev people. Self-determination is **not** an absolute entitlement.

Similarly, Applicants might err heavily on the side of arguing for the inviolability of the territorial integrity of a state. Though it is a commonly acknowledged fact that the principle of territorial integrity

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[25] Rome Statute of the ICC, Art. 7, A/CONF.183/9 (1 July 2002 entered into force).

[26] *Supra* n. 22 at 383.

[27] *The Quebec Case (Reference Re Secession of Quebec)*, 2. SCR. 217 (1998) (Supreme Court of Canada) at ¶ 134.

[28] *Id. See* also Antonello Tancredi, A Normative 'Due Process' in the Creation of States through Secession," in Secession: International Law Perspectives (2006) ed. Marcelo Kohen at 189-91.

[29] *Supra* n. 22 at 384.

[30] *Id.* at 380.

is customary international law, it does not mean that all borders are inviolable at all times for any reason. The discussion on this issue will have to be somewhere between these two absolutes and the best teams will recognize that QP2 can only be properly discussed by addressing all of the elements of law that constitute the law of secession.

In short, the act of secession has been responsible for the creation of a large portion of the current states in the world, be it through decolonization or rebellion. Secession movements provided for a large part of the expansion of the United Nations' member states' from a mere 50 member states in 1945 to the current tally of 192.

1. Are the Agnorevs a "People"?

There is little legal consensus on what is the definition of a "people". Common definitions include the entire population of a territorial unit; a "native" group on the land; a group bound by ethnicity and language; and a disenfranchised portion of a greater population.[31] Students will choose their definitions and attempt to define the status of the Agnorev peoples and many of these definitions will make references to having a tie to the land in some way. Respondents have a difficult task proving the "peoples" status of the Agnorevs as they are explicitly referred to as ethnic Reverentians in this Compromis on multiple occasions. This fact, alone, is strong evidence that the Agnorevs constitute an ethnic minority within Agnostica rather than a separate peoples. Reverentia's repeated entreaties for the return of the Agnorevs in the mid-20th century also speak to their common ethnic bond. Respondents will have to couch their arguments for Agnorev status as a separate peoples in the history of the Agnorevs within Agnostica, but their arguments will be shaky as there is little to suggest within this Compromis of the formation of a new peoples – rather, numerous facts exist to assert the similarity between the Agnorevs and the Reverentians, reaffirming the Agnorevs status as an ethnic minority.

2. Internal Self Determination in the Context of East Agnostica

Both parties to the case have ratified the ICCPR, which states that "all peoples have the right to self-determination" through which they can exercise their economic, social, and cultural rights. However, when determining an issue of self-determination, it is necessary to determine which kind to apply – internal or external self-determination.[32] In General Assembly Resolution 2625 (also known as the *Declaration on Principles of International Law Concerning Friendly Relations* or *Declaration on Friendly Relations (1970)*) the General Assembly reaffirmed self-determination as a right but added the caveat that nothing in the resolution would be construed as encouraging or authorizing actions that could dismember a states' territorial integrity or political unity.[33] This resolution is a precursor to the concept of "internal self-determination" which stands for the idea that a people can achieve their various political and social rights through the internal political mechanisms of a state.[34] Recent examples of such internal

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[31] See supra n.14 at 88-98.

[32] *See* supra n. 27.

[33] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Resolution 2625 (XXV), A/RES/2625 (XXV) (24 October 1970).

[34] R. Higgins, Problems and Process. International Law and How We Use It (1994) at 119-20.

self-determination include the devolution of powers to Scotland and Ukraine's provision of a unique legislature (vested with its own powers) in Crimea.

Here, Agnostica will claim that it had satisfied its obligation to provide internal self-determination to the Agnorev population through the existence of a constitutionally guaranteed provincial assembly with devolved powers. Furthermore, Agnostica can assert that it also constitutionally guaranteed a mechanism by which East Agnostica could have achieved legal independence through a vote for dissolution in the Agnostican Parliament. Applicant will claim that independence is not a guaranteed right of peoples but that it offered a means to achieve it anyway. Applicant will also likely claim that external self-determination, also known as the achievement of full independence or secession, is allowable only when a people are repressed to the extent that the only way to guarantee their rights of internal self-determination (e.g. political participation, equal rights etc.) is through the drastic means of secession. Agnostica will argue that by providing a provincial legislature and Constitutional avenues for external self-determination that it had satisfied every obligation it had under international law to satisfy the Agnorevs' desire for self-determination.

Respondent will counter, however, by questioning the legal content of the provided internal self-determination, pointing to the need for the Agnorevs to achieve a ¾ majority in the parliament despite only possessing 1/3 of the seats. Moreover, Respondent might argue that the constitutional framework allowed East Agnostica full control over legislation related to its cultural affairs, but that the Agnostican Parliament interfered with this constitutional right when it passed the Marthite Control Act which severely impeded Agnorev access to their traditional medicine which was vital to their culture and beliefs.

3. External Self-Determination in the Context of East Agnostica

Some respondents will argue that East Agnostica has a right to external self-determination, resting this claim on the fact that secession is not strictly prohibited by international law in cases where internal self-determination has failed.[35] They will contend that the Agnorev people were unable to properly exercise their rights within the Agnostican Constitutional framework. Respondent will likely note that the proportional representation within the Agnostican Parliament allowed East Agnostica 1/3 of the allowable seats making them subject to a possible tyranny of the majority that would make any possible vote for dissolution an impossibility. Furthermore, Tomuschat argues that a people are "entitled to decide what way to go" and "in each and every case all the possible options are open to them," therefore, "they cannot be prevented from choosing independent statehood." Using the referendum as evidence of the will of the people and the decision of which way they "decided to go," Respondent can argue that the Agnorevs had a right to independence.[36] Furthermore, by alleging that the afforded political rights within Agnostica were meaningless, Respondent will assert that the Agnorev people had a right to external self-determination and the extreme resort of secession due to the failure of any provided internal state mechanisms meant to ensure internal self-determination via the means of political participation and representative bodies.

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[35] *See* supra n. 27.

[36] *See* Christian Tomuschat, *Self Determination in a Post-Colonial World*, in MODERN LAW OF SELF DETERMINATION (Tomuschat ed. 1993) at 12. (Tomuschat is a former member of the International Law Commission).

4. Remedial Secession

Respondent can also argue that the East Agnosticans were entitled to the protections afforded under theory of remedial secession. Remedial secession is a theory that legitimizes secession in the event a people is 1) denied the right of internal self-determination, 2) oppressed, and 3) facing fundamental human rights violations. Classic jurists such as Grotius and Vattel planted the seeds for this theory, which was further developed by language found in the American Declaration of Independence.[37] The modern law of remedial secession has its foundation in the *Declaration on Friendly Relations* (1970), which contemplates secession in the event that a territory's government denies equal rights and self-determination, thus, making itself unrepresentative.[38] Publicists have further elucidated that for remedial secession, one needs to have a peoples within a distinct territory wherein they are the majority population who is denied internal self-determination by means of not being allowed a meaningful voice in government. Furthermore, the people must have been subjected to widespread and gross violations of their fundamental human rights and have exhausted all reasonable opportunities to secure respect for their human rights through the mechanisms of internal self-determination.[39]

Respondent will argue for this theory by coupling prior arguments regarding the lack of meaningful internal self-determination with allegations that the Marthite Control Act, subsequent armed forces mobilization within East Agnostica, and implementation of harsh sentencing which disproportionately impacted Agnorev citizenry as evidence that the Agnorevs' human rights were under threat.

A key aspect to this argument will be alleging that the MCA disparately impacted the Agnorevs' human right to culture (as guaranteed under the ICESCR to which both states are parties) and that it was discriminatory despite its facial neutrality as a licensing scheme. Strong Respondents will have the ready citation to the European Court of Human Rights' *D.H. & Others v. Czech Republic* case that used disparate impact theory to find a facially neutral law a violation of human rights.[40] Strong Applicants will counter that the court specifically held in that case that the facts were shaped due to the longstanding, overt, and systematic racism experienced by the Roma – a claim that cannot be properly applied to the Agnorevs in this situation. Applicants can further distinguish the case as it here we simply have a licensing scheme whereas in *DH*, young Roma children who spoke Romani were forced into examinations held solely Czech, resulting in Roma children being placed disproportionately into remedial schools. There is no evidence in the Compromis of any denials of Marthite licenses nor is there evidence that all of those prosecuted were Agnorev. Further, of 18 prosecutions, 1/3 resulted in acquittals.

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[37] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government[.] [...][W]hen a long train of abuses and usurpations...evinces a design to reduce [a peoples] under absolute Despotism, it is their right, it is their duty, to throw off such Government[.]" THE DECLARATION OF INDEPENDENCE (1776).

[38] See supra n. 30.

[39] *See supra* n. 14 at 117.

[40] *D.H. & Others v. Czech Republic* No 57235/00 E.Ct.H.R. (Grand Chamber)(2007)

Further, in the *Quebec* case, the Supreme Court of Canada found evidence to support the idea that people who are deprived of meaningful political participation can be entitled, as a last resort, to secession.[41] Applicant will respond, however, that the theory of remedial secession is not customary international law, as it is contested to the extent that it cannot be said to have achieved either widespread state practice or *opinio juris*. A good Applicant team might also point out that in the same case, the Supreme Court of Canada acknowledged that it was unclear whether the theory of remedial secession "actually reflect[ed] an established international law standard."[42] Applicant might go on to further quote the same case where the Court declared:

"In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation[.]"[43]

Respondent can counter, however, by pointing out that the Court also allowed for secession when "a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development."[44] However, Applicant will argue that in that case the Quebecois secession movement was not given legal validity as they were fully represented in the federal Government and parliament of Canada and were not victims of their physical existence or integrity. In this instance, Applicant can draw favorable comparisons between the Quebecois minority and the Agnorev minority as two minority groups that have been afforded the constitutional rights which qualify as internal self-determination. Respondent might then argue in response that a primary difference between the Quebec Secession movement and the Agnorev secession movement was the fact that an independence referendum failed in Quebec while a similar referendum received 73% of the votes in favour in this case.

5. Secession – Legality v. Effectiveness

Teams will often try and find a justification for the secession (as the ones listed above) as a way of asserting its legality. Good teams will notice that the arguments for Respondent on these earlier planks are, indeed, weak. That is by design as the Compromis was not meant to evoke a humanitarian crisis and the general lack of intensity to the events (notwithstanding the overwrought Sugdy situation) speaks to that. Furthermore, denying the existence of internal self-determination is very difficult under these facts. Skilled Respondents, however, will note that the law on secession is neutral and that the question that the court should answer is whether or not the secession itself was effective.[45] They will claim that under international law there is no affirmative right to secede nor is there an explicit prohibition, thus, the only question at hand is whether the secession was effective or whether it is ongoing. Respondents will argue that the secession itself is a *fait accompli* using the referendum and withdrawal of Agnostican troops as clear evidence that the secession is over in fact (one can almost think of this is as a *res ipsa* line of logic, i.e., "look, it's obvious that this has happened."). Applicant will assert that it has not once withdrawn a legal claim on the land itself. However, as an issue of fact, the expression of popular will in a free and

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[41] *See supra* n. 27 at para 134.

[42] *Id.* at para 135.

[43] *Supra* n. 27 at para 138.

[44] *Id.*

[45] *See generally supra* n. 27.

fair referendum coupled with the withdrawal of Agnostican forces might weigh the argument concerning the efficacy of this secession in Respondent's favour. Respondent's arguing this line should be challenged, however, on when exactly secession is effective. This is a gray area in the law and skilled Respondents will build on the jurisprudence of the ICJ and arbitral commissions along with treaty law to develop their own standards for when secessions are effective. Some teams might not have reached this level of sophistication in their arguments but this is what will separate excellent teams from the merely very good. Judges can use this as a means to ask Respondent's exactly what standard they would like to apply to determine whether secession is legal. Competitors can draw from a wide array of sources to formulate arguments. Building on Badinter Commission (arbitrating the end of SFRY), the Venice Commission (in response to the Russia-Ukraine dispute), and state practice as exemplified by the secession of Montenegro, a canny Respondent might be able to argue for the existence of a new rule of Federal Secession – or the right for federal entities to secede. As always, judges are encouraged to do their own research into these issues and it is precisely within this gray area that this research could be put to great effect. Discussions can verge into whether or not this line of reasoning is simply a gloss on what is mere power politics (and not law) or whether it reflects a new legal reality. Any assertions made here, however, must be supported and cannot simply be statements of opinion by the agents.

6. Dissolution

Some teams might try and argue that the state of Agnostica was in a process of dissolution prior to the events in question and that the secession of this one federal unit is legal under the framework developed by the Badinter Commission (the commission who evaluated the legality of the break-up of the Socialist Federal Republic of Yugoslavia). Establishing dissolution requires Respondent to prove that in the absence of a federal government which represented the full population of the former Agnostica, there was no government that could claim the authority to prevent the break-up of its constituent pieces.[46] In the case of the SFRY, Badinter determine that the evidence of a prior constitutional crisis over the choice of the President along with widespread ethnic cleansing gave context to the argument that the former Yugoslavia, effectively, no longer existed despite Serbian claims that they effectively continued the SFRY's legal personality.[47] Badinter further examined the facts of the situation finding that most constituent Republics (comprising a large majority of the former Yugoslav population) had, at some point, declared independence or held a plebiscite reflecting popular will while also holding some degree of effective control over their territory.[48] Thus, the Commission found that the SFRY had dissolved (ceased to be) and that the new Republics had legal standing.

However, representatives of Serbia & Montenegro tried arguing that their state was a continuation of the SFRY in an attempt to dissuade the court of the argument that the SFRY had dissolved.[49] Applicant has an easier task here in establishing that Agnostica had not dissolved as the Agnostican state is not only still functioning, it is also an effective government that has governed without interruption, in contrast to the SFRY. They are not making a tenuous claim to be a successor state but rather are the original government of Agnostica that has not ceased its operations or efficacy as a state. Moreover, Applicant

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[46] See Crawford supra n. 22 at 398

[47] *Id.* at 401.

[48] *Id.*

[49] *Id.* at 398-401

can point that the nation was far from being in the throes of a constitutional crisis as they will claim the Constitution was fully obeyed at all times with no derogations from its procedure. Applicant can counter that it was the East Agnosticans who violated the Constitution rather than the Agnostican government itself with their attempts to extra-Constitutionally leave their federation. Respondent can retort that the Marthite Control Act directly overrode East Agnostica's guaranteed rights and that their secession was bolstered by the referendum, as in the former Yugoslav republics. Furthermore, Respondent can argue that they substantially controlled their territory, satisfying one of Badinter's key concerns.

7. The Status of the Territory of East Agnostica

Even if Reverentia's annexation of East Agnostica violated international law, QP2 presents Applicant with the challenge of convincing the Court to order Reverentia to quit its territory and allow Agnostica to retake control. This question is one of the law of state responsibility. The responsibility of a state for an internationally wrongful act contains two duties: (1) cessation and non-repetition and (2) reparation.[50] In its submission, Applicant is asking the Court either to order specifically the cessation and the non-repetition of the unlawful annexation or, if the Reverentia's violation is non-continuing, to order the retrocession of East Agnostica as restitution.

Applicant's argument will rely heavily on the law of state responsibility. ILC Article 30 reflects the customary obligation to cease a continuing internationally wrongful act.[51] As the tribunal in the *Rainbow Warrior* arbitration noted, for the obligation to cease to arise, it is necessary that "the wrongful act has a continuing character and that the violated rule is still in force."[52] Applicant may argue that Reverentia's continued presence in East Agnostica constitutes a continuing violation of Agnostica's territorial sovereignty that must cease.

Even if Reverentia's violation is not continuing, Agnostica should ask for reparation in the form of restitution. As the PCIJ held in *Factory at Chorzów*, the duty to make reparations is a duty "as far as possible, wipe out the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[53] ILC Article 34 expands on this, noting that "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination . . ."[54] Among these, restitution in kind has long been held to be preferred.[55] Agnostica should argue that this requires Reverentia to "return" East Agnostica, as though it never purported to secede.

Respondent's argument will rely heavily on sources outside the law of state responsibility, particularly the right to self-determination. As noted above, the ILC has recognized the right of self-determination as a *jus cogens* norm.[56] As defined by the international community in VCLT art. 53, a *jus cogens* norm is

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[50] ARSIWA 30-31; Shaw, *supra* note 9, at 800.

[51] ARSIWA 30.

[52] *Rainbow Warrior*, XX UNRIAA 215 ¶ 113; *see also* ARSIWA 31.

[53] *Factory at Chorzów* (merits) P.C.I.J. ser. A, no. 17, at 47.

[54] ARSIWA 34.

[55] *Factory at Chorzów* (merits) P.C.I.J. ser. A, no. 17, at 47.

[56] ILC, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.702.

"accepted and recognized by the international community of States as a whole as [one] from which no derogation is permitted."[57] Reverentia's strongest argument here is that to order the cessation of the annexation or the restitution of the territory would violate the expressed will of the population of that territory, thus derogating from their *jus cogens* right to self-determination. Moreover, Reverentia can point to the referendum itself as evidence of this expressed political will. Respondent will likely allude to the high turnout, fair vote without irregularities, and large victory (73% in favour) as evidence of an undeniable political will to no longer be part of Agnostica. In a conflict with the law of state responsibility, Respondent will contend that the *jus cogens* right to self-determination prevails. Thus, Respondent should argue, Agnostica is not entitled to the remedy it seeks.

C. Question Presented 3: The Legality of the Termination of a Treaty

Applicant's Prayer for Relief	Respondent's Prayer for Relief
The Marthite Convention ceased to be in effect as of 2 April 2012 and, in any event, Agnostica did not breach the Convention.	The Marthite Convention was in effect until 1 March 2013, and Agnostica breached that Convention.

1. Shared Issues in Questions Presented 3 and 4

Questions Presented 3 and 4 present several shared issues. The following analysis applies equally to both. Some of these issues present both parties with the challenge of maintaining consistent positions between QPs 3 and 4 as the determination of one can affect arguments in the other. Judges are encouraged to challenge participants should such inconsistencies in their positions arise.

a) Applicability of the Vienna Convention on the Law of Treaties

QPs 3 and 4 relate to the interpretation and application of the Marthite Convention, a treaty. Thus, both raise the issue whether rules codified in the Vienna Convention on the Law of Treaties (VCLT) apply to the Marthite Convention.

The VCLT is the result of a project to codify the law of treaties undertaken by the International Law Commission (ILC) in 1949.[58] The ILC adopted a set of draft articles on the Law of Treaties in 1966.[59] Through the 1968-69 UN Conference on the Law of Treaties, these draft articles evolved into the VCLT.[60] Adopted in 1969, the VCLT entered into force on 27 January 1980.[61]

Under VCLT art. 4, the VCLT as a treaty does not apply retroactively to treaties concluded before its entry into force.[62] Because the Marthite Convention was signed and entered into force in 1938, the

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[57] VCLT art. 53.

[58] *See* Report of the International Law Commission on the work of its first session, *reprinted in* [1949] 1 Y'book Int'l L. Comm'n 277; Anthony Aust, Modern Treaty Law and Practice 5 (3d ed. 2013).

[59] AUST, *supra*, at 5. These draft articles, along with the ILC commentaries, are included in the first batch of basic materials.

[60] Id.

[61] Id.

[62] VCLT art 4.

VCLT *as such* does not apply to it. Instead, only rules in the VCLT that codify or reflect rules of customary international law apply.[63]

Because the VCLT resulted from a codification project, many of its rules are consistent with otherwise applicable rules of customary international law. Indeed, the VCLT text was adopted by all participating states except France, which objected solely in protest to the recognition in the text of the concept of *jus cogens*. This nearly unanimous approval of the VCLT, coupled with its stated aim of codifying customary international law of treaties may help parties to claim that the VCLT *as a whole* is custom.

The VCLT is similarly often treated as reflecting custom in practice. As Aust notes, "[w]hen law of treaties questions arise during negotiations, whether for a new treaty or about one concluded before the entry into force of the Convention, the rules set forth in the Convention are invariably relied upon, even when the states are not parties to it."[64] The ICJ has generally taken a similar approach.[65] When this is true, strong arguments will invoke the relevant ICJ judgment.

b) The General Rule of Treaty Interpretation

One such rule codified in the VCLT is the rule for treaty interpretation in arts. 31-32. In *Libya v. Chad* and *Kasikili/Sedudu Island*, the ICJ expressed its view that these articles reflect customary international law.[66] Article 31(1) provides:

> 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**.[67]

Article 31(2) clarifies that "context" includes the text of the treaty, its preambles and annexes, and agreements made by the parties accepted as relevant to the treaty.[68] Other factors to be considered include:

- Subsequent agreements, subsequent practice of the parties, and relevant other rules of international law. Art. 31(3).[69]
- Special meanings of terms intended by the parties. Art. 31(4).[70]

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[63] AUST, *supra* note 59, at 8 (citing a note by M. Shaw on the application of the 1969 VLCT to a treaty of 1890; *see also* AUST at 11for a discussion of the ICJ's application of VCLT articles considered customary international law to a treaty whose conclusion predated both parties' entry into force of the VCLT in *Gabčíkovo-Nagymaros Project*.

[64] AUST, *supra* note 59, at 10.

[65] Id.

[66] Territorial Dispute (Libya/Chad), 1994 I.C.J. 6 ¶ 41; Oil Platforms (Iran v. U.S.), preliminary objections, 1996 I.C.J. 812 ¶ 23; Kasikili/Sedudu Island (Botsw. v. Namib.), 1999 I.C.J. 1045 ¶ 18; *see also* AUST, *supra*, at 207.

[67] VCLT art. 31(1) (emphasis added).

[68] *See* VCLT art. 31(2).

[69] *See* VCLT art. 31(3).

[70] *See* VCLT art. 31(4).

- Supplementary means of interpretation (e.g., *travaux préparatoires*) to confirm the interpretation reached through Article 31 or if the Article 31 method results in an ambiguous, obscure, or manifestly absurd or unreasonable interpretation. Art. 32.[71]

By highlighting text, context, and object and purpose as the three primary factors considered in treaty interpretation, international law anticipates a balancing between textual and teleological interpretation of treaties.[72] This allows parties considerable flexibility in crafting treaty-interpretation arguments.

c) Intertemporal Law and the Law of Treaties

One question teams have faced is which law of treaties to apply to the Marthite Convention, the law of 1938, when the Convention was concluded, or the present law contemporaneous with the events in the Compromis. Waldock addressed this in his third reports a special rapporteur on the law of treaties, proposing an article providing that treaties are *interpreted* according to the law in force at the time of conclusion, but *applied* according the law in force when the treaty is applied.[73] Rosenne confirms that this statement of the law was not substantially questioned at the ILC or by States.[74]

d) Termination or Suspension of a Treaty as a Consequence of a Material Breach

A shared issue likely to provoke controversy between the parties is the nature of the rule allowing the termination or suspension of a treaty in response to a material breach. Here, the question of the extent to which the VCLT codifies customary international law is crucial.

The relevant VCLT provision, art. 60(1) provides:

> A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.[75]

In *Gabčíkovo-Nagymaros Project*, the Court expressed its view that VCLT Article 60 was "in many respects" a codification of existing customary international law.[76] This is consistent with the application of the doctrine of termination in response to material breach in cases predating the VCLT.[77]

(1) Definition of Material Breach

The first element required by the rule is the existence of a material breach. VCLT Article 60(3) defines "material breach" as either:

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[71] *See* VCLT art. 32.

[72] AUST, *supra* note 59, at 209.

[73] Third report of the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, at 8-9.

[74] SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986, at 76 (1989).

[75] VCLT art. 60(1).

[76] Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. 3 ¶ 46; *see also* AUST, *supra*, at 258.

[77] *See, e.g.*, Diversion of Water from Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 50 (June 28) (Anzilotti, J., dissenting); Tacna-Arica Question (Chile v. Peru), 2 R.I.A.A. 921, 943-44 (1922). Anzilotti, however, characterizes the principle as a general principle of law rather than a rule of customary international law. *Meuse*, at 50.

(a) a repudiation of the treaty not sanctioned by the present Convention; or
(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.[78]

This requirement as a part of customary international law was invoked by the tribunal in *Tacna-Arica Question*, which held that, in order to justify the termination of a treaty, a breach must "operate to frustrate the purpose of the agreement."[79] The Court echoed this position in *Gabčíkovo-Nagymaros Project*, holding that "only a material breach of the treaty itself . . . entitles the other party to rely on it as a ground for terminating that treaty."[80]

(2) Procedural Conditions on Terminating or Suspending a Treaty

The second element necessary to justify the termination or suspension of a treaty is the fulfilment of procedural preconditions. VCLT arts. 65-68 establish procedural conditions on the exercise of the right of termination or suspension for the sake of limiting abuse of that right.[81] Article 65 requires parties seeking to suspend operation of a treaty to notify the other parties to that treaty and allow, except in special cases, those states three months to make an objection to suspension.[82] Additionally, objections must be settled using peaceful means of dispute resolution.[83] Under Article 67(1), notification must be made in writing.[84] Article 67(2) requires the termination or suspension to be made by means of a formal instrument.[85]

But the VCLT is not directly applicable to the present dispute.[86] Thus, if these articles do not reflect customary international law, they are not applicable and showing that a termination or suspension occurred becomes considerably easier. This argument has weight as the state practice on the issue of procedure is far from consistent. According to both Aust and Judge Villiger, no case has been recorded where these procedural requirements have been followed through.[87] Without such practice, custom is difficult to establish. Thus, a party seeking to avoid the procedural requirements might argue that, while required under the VCLT, they are not required by custom. However, several of these provisions found wide approval at the UN Conference on the Law of Treaties. For example, the text of art. 65 was unanimously approved by vote of 106-0 (with two abstentions).[88] The leap from the *travaux* vote to

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[78] VCLT art. 60(3).

[79] *Tacna-Arica Question*, 2 R.I.A.A. at 944.

[80] Gabčíkovo-Nagymaros Project, 1997 I.C.J. 3 ¶ 106.

[81] VCLT arts. 65-68; *see also* Mohammed M. Gomaa, Suspension or Termination of Treaties on Grounds of Breach 157 (1996).

[82] VCLT art. 65.

[83] Id.

[84] VCLT art. 67(1).

[85] VCLT art. 67(2).

[86] *See* supra n. 59 and n. 60.

[87] See Aust supra n. 59, at 260 and Mark E. Villiger Commentary on the Vienna Convention on the Law of Treaties (2009) at 53.

[88] Records of the 25th Plenary Meeting, UN Conference on the Law of Treaties. A/CONF.39/SR.25 (1969) p. 136.

custom, however, is a dangerous one to make without state practice, which, as previously stated, is by no means overwhelmingly consistent.

2. Fundamental Change of Circumstances

Turning to the substance of QP3, one argument Applicant may raise to justify its termination of the treaty is a fundamental change of circumstances (the so-called *rebus sic stantibus* doctrine). Originating in English contract law,[89] the principle has been acknowledged to apply to treaties. But a contentious debate persists on the conditions under which a state can invoke this doctrine. Past abuses of the doctrine between the First and Second World Wars led to a restrictive rendering of the doctrine in Article 62 of the VCLT.[90] Scholars suggested that the concept was applicable only to treaties with unlimited duration and no termination clause. However, the ILC did not choose to endorse this limitation.[91] In the *Icelandic Fisheries Jurisdiction Case*, the ICJ found that Article 62 had risen to the level of customary international law.[92]

The elements of Article 62 are as follows:

i) The change is of circumstances existing at the conclusion of the treaty;
ii) The change is 'fundamental';
iii) The change was not foreseen by parties (i.e. when they concluded the treaty);
iv) The existence of the circumstances constituted an 'essential basis of the consent to the parties to be bound by the treaty'; *and*
v) The effect of the change was to 'radically transform the extent of the obligations still to be performed under the treaty'.[93]

This principle has been invoked by many state parties and it has also been recognized by treaties. However, to date, no international tribunal has applied the concept; similarly, no international tribunal has denied its existence.[94]

The major issues in the present case are (a) whether the change was fundamental/affected an essential basis of consent and (b) whether the change radically transforms the extent of the obligations to be performed under the treaty.

a) Fundamental change/essential basis

Crucial to whether the change in circumstances has been fundamental or impacted an essential basis for consent is the role of Marthite's lack of previous commercial value in the formation of the Convention. For a fundamental change of circumstances to even be considered a means of obviating a treaty, the fundamental change must have occurred within an "essential basis" to the formation of the original

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[89] *Id.* at 262.

[90] Id.

[91] *Id.* at 263.

[92] Fisheries Jurisdiction Case (Merits) (UK v. Iceland) 1974 I.C.J. 55 at para 34.

[93] VCLT art. 62

[94] Aust, *supra* note 59, at 263.

treaty.[95] In *Gabčíkovo-Nagymaros Project*, the ICJ rejected the argument that profound political changes could constitute a fundamental change of circumstances.[96] The Court reasoned that the underlying political background was not an integral part of the original formation of the treaty and was not so closely linked to the formation of the treaty that a change in political circumstances could not be considered a fundamental change in the context of that specific treaty.[97]

Here, however, applicant can argue that the original treaty was created under the presumption that Marthite held no significant commercial value outside of its traditional uses. Applicant can point to the Convention itself, which specifically identifies this lack of commercial value as one of the underlying rationales for agreeing to its articles. It will argue that the ILSA discovery of the inherent value of Marthite would constitute a fundamental change in a concept that was an essential basis to the formation of the original treaty in 1938.

b) Extent of the obligations to be performed

In the present case, the change in circumstances arguably does not change the extent of the remaining obligations. Respondent will likely argue that, in real terms, the change in circumstances has no bearing on the amount of Marthite to be mined or sold and on Applicant's obligation to allow such activity. Applicant will likely argue that the extent of its obligation to sell Marthite to the RMT has vastly changed in nominal terms.

3. Termination as a Consequence of Material Breach

Applicant will likely also argue that its termination of the treaty was justified by Respondent's material breach. In order to do so, Applicant must first show there was a material breach by Respondent. In the present case, this is complicated by the fact that RMT's actions are likely not attributable to Respondent. Second, Applicant must show that any applicable procedural conditions were met.

a) Material Breach by Respondent

First, Applicant must show that Respondent materially breached the Marthite Convention. Applicant will argue that Respondent materially breached the Marthite Convention when it began selling to pharmaceutical companies at a much higher price than the Convention's fixed price. According to the Convention, RMT could sell Marthite outside the traditional market only when the amount of mined Marthite exceeded traditional demand by 125%. However, the Clarification 10 establishes that the greatest variance between the amount of Marthite mined and traditional demand had been, at most, 5%. Thus, when RMT began selling 75% of all mined Marthite to pharmaceutical companies, it was likely doing so in breach of the Convention barring a massive increase in production. Respondent may choose to admit that this was a breach but not of a material nature. This argument may prove difficult, as a breach is material if it violates a provision "essential to the accomplishment of the object and purpose of the treaty."[98] The Marthite Convention's object and purpose was to secure a supply of Marthite for traditional users located within Applicant and Respondent. The sale of 75% of the available Marthite

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[95] *See supra* n. 58.

[96] Gabčíkovo-Nagymaros Project, 1997 I.C.J. 3 ¶ 104.

[97] *Id.*

[98] Aust, *supra* note 59, at 260.

reserves to non-traditional users would likely constitute a breach that undermined the purpose of the treaty. Furthermore, the only entity who would be able to provide the facts rebutting that a sale of 75% did not constitute a breach of the Convention would be Reverentia. As those facts are not present within this Compromis, Judges should note to Reverentia that under the *Corfu Channel* burden shifting test that they have the burden to provide these facts. As the facts are not provided, a negative inference may be made against Reverentia, further solidifying the fact that they likely breached the Convention.

b) Attribution of RMT's Actions to Respondent

Though Respondent may have difficulty rebutting allegations of a material breach, it may have a defense under the law of state responsibility because RMT is a state-owned corporation. Under the law of state responsibility, the "mere fact that a corporation is owned, partially or even entirely, by a state does not automatically permit the piercing of the corporate veil and the attribution of the conduct of the corporation to the state, unless it is exercising elements of governmental authority[.]"[99] In the *Barcelona Traction* case, the ICJ recognized the separateness of corporate bodies at national levels, except for special cases where the corporate veil is a "mere device or vehicle for fraud."[100] This concept was further refined by the US-Iran Claims Tribunal to a basic presumption that, under international law, the acts of a state-owned corporation are not, merely by virtue of shareholding, attributable to the state.[101]

Respondent can argue that while RMT failed its obligations, this rule creates a presumption that its actions are not attributable to Respondent. Respondent can point to President Nuvallus' declaration that he obtained information regarding Marthite stocks from RMT, as evidence of a separation between the management of the corporation and the Reverentian government. Applicant will counter with the fact that it was President Nuvallus who ordered the removal of software and engineers by RMT from the facilities. The *Compromis* is clear that this action was taken upon Nuvallus' direct order. However, Respondent can also argue that such a command was well within his foreign policy powers as the head of government and that nowhere in the facts is there evidence that RMT was run as an empty shell or a vehicle by government officials.[102] Applicant can further counter by referring to Convention Article 4(a) that clearly states that "Reverentia undertakes with RMT" to refer to Respondent's undertakings and obligations rather than RMT. Specifically, Applicant can argue that Respondent materially breached the treaty by breaching its undertaking that RMT will abide by the distribution restrictions under the Marthite Convention.

c) Procedural Preconditions to Terminate the Marthite Convention

If the VCLT rules noted above apply, Applicant did not validly exercise a right of suspension. Applicant did not wait the requisite 90 days between notification of intent to terminate the Convention and purporting to terminate the Convention. Respondent can also argue that Applicant did not attempt to negotiate as required by VCLT art. 65(3) as there is no evidence of such negotiations.

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[99] James Crawford, State Responsibility: The General Part (2013) at 162.

[100] *Barcelona Traction, Light & Power Company, Limited* (Belgium v. Spain), Second Phase, 1970 I.C.J. 3, 39.

[101] *See* e.g. *Schering Corporation v. Iran* (1984) 5 Iran-US CTR 361, 368-371; *Otis Elevator Company v. Iran*, (1987) 14 Iran-US CTR 283, 293-5; *Eastman Kodak Company v. Iran*, (1987) 17 Iran-US CTR 153, 163-8.

[102] *See* supra n. 3.

If the VCLT procedural conditions do not apply, Respondent has a stronger argument that it validly terminated the Marthite Convention.

4. Permanent Sovereignty over Natural Resources

Finally, Applicant may argue that it is not bound by the Marthite Convention because it conflicts with the principle of permanent sovereignty over natural resources. Elaborated in GA resolutions 1803 (XVII), 3201 (S.VI), and 3281 (XXIX), the principle of permanent sovereignty. In *Armed Activities*, the Court recognized the principle as one of customary international law.[103] Paragraph 1 in resolution 1803 provides that "[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."[104] Applicants relying on this may argue that the principle conflicts with the continued application of the Marthite Convention because the Convention would require Applicant to surrender the newly discovered value of its mineral wealth to Respondent.

There are two ways that Applicant can establish that the principle of permanent sovereignty governs in the conflict with the Marthite Convention. First, it can try and show that the principle is a *jus cogens* norm. Second, it can rely of the principle *lex posteriori legi priori derogat*. VCLT art. 64 provides that a treaty is void if it conflicts with a newly emerged *jus cogens* norm.[105] A *jus cogens* norm, as defined in VCLT art. 53 is one that the international community of states as a whole recognizes as not permitting any derogation.[106] In support of this, Applicant can rely on the dissenting opinion of Judge Weeramantry in *East Timor*, where he treated the principle as one of *jus cogens*.[107] Applicants additionally can emphasize the link between permanent sovereignty and self-determination, which is widely accepted as a *jus cogens* principle.

Second, Applicant could rely on the general principle *lex posteriori legi priori derogat*. Under this general principle of law, later rules of later supersede prior ones.[108] Applicant can argue that the permanent sovereignty principle, first fully elaborated in GA Res. 1802 in 1962, supersedes a treaty from the 1930s.

In response, there are several points Respondent might raise. The first is to challenge the *jus cogens* status of the principle of permanent sovereignty over natural resources. The VCLT definition of *jus cogens* focuses on the acceptance of a rule by the "international community of States as a whole."[109] An argument along these lines that the principle is not *jus cogens* is supported by any evidence that the principle is controversial among states or that states accept derogations. In this case, there are numerous citations to which Respondent can rely on to assert that this principle's *jus cogens* status is debatable at best. As judges, we encourage you to examine Applicant's claims by critiquing the fact that the

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[103] *Armed Activities*, ¶ 244.

[104] G.A. Res. 1803 (XVII) ¶ 1 (Dec. 14, 1962).

[105] VCLT art. 64.

[106] VCLT art. 53.

[107] East Timor (Dissenting Opinion of Judge Weeramantry), 202-204, 210.

[108] *See, e.g.*, Shaw, *supra* note 9, at 123.

[109] VCLT art. 53.

arguments for permanent sovereignty over natural resources as *jus cogens* rose contemporaneously with an open push by decolonized nations to attempt to assert sovereignty over private enterprises that had legal rights to these resources. Moreover, aside from Judge Weeramantry's dissent, the ICJ has been wont to assert the *jus cogens* nature of this right.

Additionally, Respondent should argue that the principle of permanent sovereignty does not, by its own terms, impact the Marthite Convention. Paragraph 8 of GA Resolution 1803 specifies that "[f]oreign investment agreements freely entered into . . . shall be observed in good faith."[110] Characterizing the Marthite Convention as such an agreement, Respondent can argue that the Marthite Convention is specifically protected by the content of the principle of permanent sovereignty over natural resources.

Responding to an argument relying on the *lex posteriori* principle, Respondent might rely on the general principle *lex specialis legi generali derogat*, arguing that the Marthite Convention is a specialized regime that should take precedence over the general rule of permanent sovereignty.[111]

Finally, Respondent might argue that Applicant exercised rather than limited its sovereignty over its natural resources by concluding the Marthite Convention. This parallels *Austro-German Customs Regime*, where the PCIJ determined that Austria did not alienate its independence by entering a customs union with Germany.[112] At any rate, judges should expect this argument to be raised (if at all) as a second or third argument by Applicant. Those Applicants who do raise this argument first are asserting a much less sound basis for their claims under Issue III then they could otherwise address. If that is the case, the bench should try and move Applicants on to other arguments in their submission after a reasonable period of time.

D. Question Presented IV: Treaty Interpretation, Treaty Suspension, Countermeasures

Applicant's Submission	Respondent's Submission
Reverentia's removal of the software at the Marthite extraction facilities violated international law.	Reverentia's removal of the software in the Marthite extraction facilities was consistent with international law.

The main issues involved in QP 4 are: 1) whether, under the terms of the Marthite Convention, the software is the property of Applicant or Respondent/RMT; 2) whether the removal of the software was a lawful suspension of the treaty in response to a material breach; and 3) whether the removal of the software constituted a lawful countermeasure.

QP 4 presents the parties with the challenge of reconciling their arguments with their respective positions on QP 3. Thus, Applicant must argue that it was entitled to the software despite the termination of the Marthite Convention. Respondent must argue that it lawfully withheld the software that the

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[110] GA Res. 1803, para. 8.

[111] Shaw, *supra* note 9, at 124.

[112] Customs Regime Between Germany and Austria, advisory opinion, 1932 PCIJ ser. A/B, no. 41 at 47 *et seq.*

Marthite Convention otherwise required it to provide. For both sides, strong arguments will address both possibilities in the alternative.

1. If the Marthite Convention was terminated / ownership of the software

If Applicant is correct in its position on QP 3, the Marthite Convention was terminated by 2 April 2012 and was therefore not in force when Respondent removed the software from the mining facilities. If the Convention was not in force, QP 4 turns on the issue of whether Applicant owns the software in question. Under Article 1 of the Marthite Convention, Respondent undertook:

> to construct [certain] Marthite mining and mining-support facilities . . . and to provide technology and government engineers to maintain, equip, and operate such facilities.

Under Article 2 of the Convention, "the facilities described in Article 1" belong to the Government of Agnostica. Applicant will likely argue that the software forms part of "facilities" that belong to it. Respondent will likely argue that the software is "technology" that it was obligated to provide while the treaty was in force. The question is one of treaty interpretation. The rules of treaty interpretation discussed in section C.2 above apply.

a) Arguments for Applicant

Applicant should seek to show that the software is part of the mining facility under the meaning of the treaty. To do this, Applicant will likely rely on a teleological interpretation of the treaty. A strong Applicant argument in this respect will rely on definitions of "facility" and "technology" to create ambiguity surrounding the "ordinary meaning" of the treaty. In light of this, Applicant may point to recital (d) of the preamble of the Convention, which refers to the parties' desire "to ensure reliable supply of Marthite." Applicant may also point to Article 12 of the Convention, which establishes its term for 99 years. Applicant can use these to argue that the object of the treaty encompasses the continuing existence of functional mines in Agnostica at the treaty's termination. In light of this, Applicant can argue that software must remain in the facility in order to preserve the effective mining operations and fulfill this aspect of the treaty's purpose.

b) Arguments for Respondent

Respondent should seek to show that the software constitutes "technology" under the meaning of the Marthite Convention, relying on the text of the treaty. For example, the first definition of "facility" listed in Merriam-Webster's online dictionary provides "something (such as a building or large piece of equipment) that is built for a specific purpose."[113] Similarly, the first definition in the Oxford Dictionary of English reads: "a place, amenity, or piece of equipment provided for a particular purpose."[114] This

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[113] Merriam-Webster, *Facility*, http://www.merriam-webster.com/dictionary/facility (last visited Nov. 18, 2014).

[114] OXFORD DICTIONARY OF ENGLISH (3d ed. 2010). Worth noting, though, is that dictionary definitions may also favor Agnostica. For example, the Oxford English Dictionary includes as its third definition of facility "the physical means or equipment required for doing something, or the service provide by this; freq. with modifying word, as ***educational facilities***, ***postal facilities***, ***retail facilities***, etc. In *sing.*: a service or feature of a specified kind; (also) a building or establishment that provides such a service."

Indeed, regarding the meaning of facility, there seems to be a distinction between North American and Commonwealth usage. North American usage seems much more focused on the concept of building or place, and Commonwealth usage on equipment and means. For example:

distinction is supported by the terms of Article 1 of the treaty, explaining that the technology and workers are "to maintain, equip, and operate" the facilities. In light of this, Respondent can argue that the software is "technology," ownership of which need not be transferred to Applicant.

This argument is supported by the text of Article 1 as a whole. Article 1 provides that the "facilities" are something to be constructed. Respondent can argue that, in light of this, facilities should be read to mean buildings and not include machinery or technology. Therefore, Respondent can assert that it had every right to take the software as it belonged to them.

2. If the Marthite Convention remains in force

If Respondent's position on QP 3 is accepted by the Court to be correct, the Marthite Convention remained in force after 2 April 2012. Thus, under the terms of Article 1 of the Marthite Convention, Respondent remained obligated to supply software for the mining during this period. In order to demonstrate that it did not violate this obligation while maintaining that the treaty was in effect, Respondent will need to demonstrate either that the treaty was suspended or that a circumstance precludes the wrongfulness of its actions. As the Court noted in *Gabčíkovo-Nagymaros Project*, these two questions are analytically distinct and subject to separate bodies of rules.[115] This is consistent with VCLT, Art. 73, which provides that "[t]he provisions of the [VCLT] shall not prejudge any question that may arise in regard to a treaty . . . from the international responsibility of a States . . . ."[116]

a) Suspension of the treaty

Dictionary	Definitions of "facility"
Australian Oxford Dictionary (2d ed. 2004)	3. [especially in *pl.*] an opportunity, the equipment, or the resources for doing something. 4. an establishment set up to fulfil a particular function or provide a particular service.
Canadian Oxford Dictionary (2d ed. 2004)	2. [esp. in *pl.*] the physical means, equipment, resources, or opportunity required to do something. 3. *N. Amer.* a building designed for a specific purpose.
New Zealand Oxford Dictionary (2005)	3 [esp. in *pl.*] an opportunity, the equipment, or the resources for doing something. 4. a building or buildings with a specific, usu. Public, use: *the new library is an excellent facility.*
New Oxford American Dictionary (3d ed. 2010)	1. space or equipment necessary for doing something: cooking facilities | facilities for picnicking, camping, and hiking.

NB: the editors of the bench memorandum welcome suggestions for additions to this table, particularly from English dictionaries published outside of Australia, Canada, New Zealand, the United Kingdom, or the United States.

[115] *Gabčíkovo-Nagymaros Project*, at ¶ 47.

[116] VCLT art. 73.

Respondent may argue that its removal of the software was justified because the Marthite Convention was suspended as a consequence of Applicant's breach. In order to do so, Respondent must first show there was a material breach by applicant. Second, Respondent must show that any applicable procedural conditions were met. Finally, Respondent must exercise care not to argue that the suspension of the treaty caused it not to be "in effect" as this would conflict with its submission in **QP3.**

(1) Material Breach

In order to successfully invoke Applicant's breach as a justification for suspending the Marthite Convention, Respondent will need to show that Applicant materially breached the Convention. Article 60(3) includes in its definition of material breach the unlawful denunciation of a treaty.[117] This is consistent with the position of customary international law prior to the VCLT, under which "[t]he denunciation by a party to a treaty when it contains no express term permitting denunciation and no such term can be implied, is unlawful and constitutes a breach of treaty."[118] Because Applicant's denunciation of the treaty was unlawful, Respondent may rely on this as a material breach of the treaty.

(2) Procedural Preconditions

If the VCLT rules noted above apply, Respondent did not validly exercise a right of suspension. The *Compromis* contains no evidence that Respondent either notified Applicant in writing of its plans to suspend performance of the Marthite Convention or effected that plan with a formal instrument. In the absence of notification, compliance with the waiting period was impossible.

If the VCLT procedural conditions do not apply, Respondent has a stronger argument that it validly suspended application of the treaty

(3) Respondent's Semantic Difficulty

Respondent will need to exercise caution in raising the suspension argument. In QP 3, Respondent asks the Court to adjudge and declare that the Convention "was in effect until 1 March 2013." The language used in VCLT Article 60(1) refers to "suspending the operation of [a] treaty."[119] Judges may want to challenge agents of Respondent using the suspension argument on the consistency of their position that the treaty was in effect yet suspended.

b) Countermeasures

If the Marthite Convention remained in force at the time of the withdrawal of the software, Respondent will likely also rely on countermeasures to justify its actions. The main issues are whether Respondent sufficiently called on Applicant to stop its breach and whether Respondent's response was proportional.

A countermeasure is an act taken by one state in response to a violation of international law by another state in order to induce the latter's compliance with international law.[120] A state is not responsible for an act that otherwise would violate international law if that act is a lawful countermeasure.[121]

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[117] VCLT art. 60(3).

[118] Lord McNair, The Law of Treaties 539 (1961).

[119] VCLT art. 60(1).

[120] *See* Shaw, *supra* note 9, at 794. Older authorities often use the term "reprisals" in place of "countermeasures". This usage is outmoded; modern parlance uses "reprisals" to refer to armed actions and "countermeasures" to unarmed actions

The leading judicial authority on countermeasures is the ICJ judgment in *Gabčíkovo-Nagymaros Project.*[122] As the ICJ noted there, countermeasures are subject to conditions under customary international law.[123] First, a countermeasure "must be the response to a previous international wrongful act of another State and must be directed against that State."[124] Second, a state taking a countermeasure "must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it."[125] Third, "the effects of a countermeasure must be commensurate with the injury suffered, taking into account of the rights in question."[126] Fourth, the purpose of the countermeasure "must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible."[127]

The ILC definition of countermeasures contains the same core elements as the ICJ definition. Thus, ARSIWA art. 49(1)-(2) provides:

> 1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
>
> 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.[128]

Consistently with the ICJ's second condition, ARSIWA Article 52(1)(a) provides:

> Before taking countermeasures, an injured State shall . . . call upon the responsible State, in accordance with article 43, to fulfill its obligations under Part Two.[129]

Consistently with the ICJ's third condition, ARSIWA Article 51 provides:

> Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.[130]

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to induce compliance with an international obligation. Additionally, countermeasures are to be distinguished from retorsions. Retorsions are otherwise *lawful* acts taken in response to a violation of international law, for example severing diplomatic relations.

[121] *Id.*; ARSIWA art. 22.

[122] Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. 7.

[123] *Id.* ¶ 83.

[124] *Id.* ¶ 84.

[125] *Id.* ¶ 85.

[126] *Id.* ¶ 86.

[127] *Id.* ¶ 87.

[128] ARSIWA art. 49(1)-(2).

[129] ARSIWA art. 52(1)(a).

[130] ARSIWA art. 51.

Tribunals considering countermeasures after the adoption of ARSIWA have treated ARSIWA and *Gabčíkovo-Nagymaros Project* as a consistent body of law. For example, in *ADM v Mexico*, an ICSID Additional Facility tribunal considered "as an authoritative statement of customary international law on countermeasures the position of the International Court of Justice, as confirmed by the ILC Articles."[131]

(1) Internationally Wrongful Act

Assuming that the Marthite Convention remains in force, it will be straightforward for Respondent to show Applicant committed an internationally wrongful act. The most likely violation of international law that Respondent might rely on is the denunciation of the Marthite Convention. VCLT Article 26 codifies the general principle of law *pacta sunt servanda*.[132] In the terms of the article, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[133] Consequently, "[t]he denunciation by a party to a treaty when it contains no express term permitting denunciation and no such term can be implied, is unlawful and constitutes a breach of treaty."[134] If Applicant's denunciation was indeed unlawful, Applicant was in breach of the Marthite Convention. This is a violation of international law that supports Respondent's resort to countermeasures.

(2) Calling upon & Notification

The second element that Respondent must show is that it called upon Applicant to cease its wrongful act. In the present case, Respondent "categorically rejected Applicant's [denunciation]," removed its engineers from the mining facilities, and directed the engineers to remove software "until such time as Applicant agrees to respect its treaty obligations." The issue is whether this suffices as a call for Applicant to end its unlawful denunciation.

In its commentaries to ARSIWA, the ILC noted that "there are usually quite extensive and detailed negotiations over a dispute before the point is reached where some countermeasures are contemplated."[135] Consistent with this, in *Gabčíkovo-Nagymaros Project*, the Court considered the sufficiency of Czechoslovak/Slovak calls on Hungary to resume its performance of a treaty between the parties.[136] In that case, Czechoslovakia "informed Hungary that it would feel compelled to take unilateral measures if Hungary were to persist in its [non-performance]."[137] As evidence of this, the Court cited a *Note Verbale* dated 30 October 1989.[138] However, Czechoslovakia continued to plan, as

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[131] ADM v. Mexico ¶ 125.

[132] VCLT art. 26.

[133] Id.

[134] Lord McNair, The Law of Treaties 539 (1961).

[135] ARSIWA Commentaries at 136.

[136] *Gabčíkovo-Nagymaros Project*, at ¶ 84.

[137] *Id.* ¶ 61.

[138] Id.

opposed to implement, its response as late as spring 1991.[139] Thus, giving Hungary over one year to resume performance was held sufficient to enable countermeasures.[140]

Applicant will likely argue that it was not notified of the intention to take countermeasures with sufficient time. In support of this point, Applicant may rely on authorities such as the ARSIWA Commentaries and *Gabčíkovo-Nagymaros Project*. In the absence of a delay between the announcement of Respondent's rejection of Applicant's position and the countermeasure, Applicant will argue it was not notified.

Respondent will likely argue that its intention to take countermeasures was made clear from its actions leading up to withdrawal of the software. On 21 February 2012, Respondent made its position clear that there was "no reason" to end the Marthite Convention. In response to an argument that applicant was also not notified, Respondent may argue that, consistently with art. 52(b), the countermeasures were urgent.[141] In support of this, Respondent may argue that notifying Applicant would have given applicable the opportunity to remove the software first, thus preventing the countermeasure.

(3) Proportionality

The third element Respondent must show to demonstrate that its countermeasures were lawful is their proportionality. The proportionality analysis must "tak[e] into account the gravity of the internationally wrongful act and the rights in question."[142] As an ICSID Additional Facility tribunal noted in *ADM v. Mexico*, "[p]roportionality requires not only employing the means appropriate to the aim chosen, but implies an assessment of the appropriateness of the aim itself."[143]

In support of the proportionality of the countermeasure, Respondent may contrast the present case from *ADM v. Mexico*. In that case, the tribunal considered whether Mexico could suspend an obligation to an American investor under the investment protection provisions of NAFTA in response to a U.S. violation of trade-regulating provisions of NAFTA.[144] The tribunal held that because "the obligations allegedly breached by the United States do not involve investment protection standards for private individuals . . . [t]he adoption of the Tax [against investors] was not proportionate or necessary and reasonably connected to the aim said to be pursued."[145] The present case is distinguishable because Respondent's aim and measure are arguably much more connected. Respondent was withholding support for mining Marthite, which it was being denied the right to buy. Because of the connection of these two aims, Respondent's measure can be argued to be more proportional than the measure at issue in *ADM v. Mexico*.

Applicant will likely argue that the consequences of Respondent's measure make it disproportional. In *Gabčíkovo-Nagymaros Project*, the Court considered obligations outside the treaty in question in

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[139] Id.

[140] *Id.* ¶ 84.

[141] ARSIWA art. 52(2).

[142] *ADM v. Mexico* ¶ 152.

[143] *Id.* ¶ 154.

[144] *Id.* ¶ 155.

[145] *Id.* ¶ 158.

making a proportionality determination.[146] There, the Court held that because "Czechoslovakia, by unilaterally assum[ing] control of a shared resource, and thereby depriv[ing] Hungary of its right to an equitable and reasonable share of the natural resources of the Danube [it] failed to respect the proportionality which is required by international law."[147] In the present case, Applicant may argue that Respondent's countermeasure is inconsistent with international obligations beyond the Marthite Convention. One example (of many possibilities) would be article 12 of the ICESCR, under which both parties must "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[148] By reducing the global supply of Marthite to a trickle, Respondent arguably has taken a measure inconsistent with this right. On that ground, its countermeasure is arguably disproportional.

(4) Directed Against and Reversibility

The fourth element Respondent must show to demonstrate that its countermeasure was lawful is that it was directed against Applicant to induce compliance, and that it was reversible. This element should not be in serious contention.

The countermeasure is directed against Applicant because it is the non-performance of an obligation under a bilateral treaty with Applicant. In ARSIWA's terms, the violation justified as a countermeasure must be the non-performance of an obligation "towards the responsible State."[149] Because the obligation to provide software is owed only to Applicant in the bilateral Marthite Convention, the countermeasure is directed against Applicant.

The reversibility of the countermeasure is supported by the 2 May 2012 article by the Reverentian Vice-President. Reverentia ordered the removal of engineers and software until Applicant returned to compliance with the Marthite Convention.

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[146] *Gabčíkovo-Nagymaros Project*, at ¶ 85.

[147] Id.

[148] ICESCR art. 12(1).

[149] ARSIWA art. 49(2).

IV. Appendix A: Introduction to International Law

This section is an introduction to public international law for judges who may 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.

A. General

The conduct and rules of the International Court of Justice (ICJ) are governed by the Statute of the Court. Under Article 38(1) of the ICJ Statute, the ICJ 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 the first three 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 effect as precedent. 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 Vienna Convention on the Law of Treaties (VCLT).

Article 26 of the VCLT sets out the fundamental principle relating to treaties, *pacta sunt servanda*, which provides, "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. The ICJ has also recognized this possibility in the *Federal Republic of Germany v. Denmark, North Sea Continental Shelf Cases*, 1969. 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.

Article 31 of the VCLT states that "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." The article further provides that the context of a treaty can be taken from a variety of sources including the treaty's preamble and annexes, any prior or subsequent agreements between the parties related to the treaty, and any relevant rules of international law. Article 32 states that when interpretation methods under Article 31 would lead to an ambiguous or unreasonable result, supplementary methods of interpretation can be used, including reference to the preparatory work of the treaty and the circumstances of its conclusion.

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 a sufficient number of states behaving in a regular and repeated manner consistent with the customary norm. Evidence of state practice may include a codifying treaty, if a sufficient number of states sign, ratify, and accede. 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.

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."

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

D. General Principles of Law

The third source of international law consists of "general principles of law." Such principles are gap-filler provisions, utilized by the ICJ in reference 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 (e.g., burden of proof and admissibility of evidence). Many others, such as waiver, estoppel, unclean hands, necessity, and *force majeure,* may sound familiar 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.

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* (within the case) application of equitable principles, and not a power of the Court to decide the merits of the case *ex aequo et bono* (that is, to simply decide the case based upon a balancing of the equities), 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." 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, Oppenheim, Jennings, and Kelsen.. This list of names is NOT exclusive but the concept still generally applies to an elite category of jurists whose writings have transcended above others. However, as per the language of the statute, students are free to cite to any publicists. When in doubt about the validity of a source, please feel free to question oralists about the identity and validity of their cited author. Furthermore, authoritative sources within this list include the writings of former Judges, the secondary opinions of Judges who are not in the majority of their cases, and documents created by the International Law Commission (ILC). Within the context of a specific field, there are additional scholars who would be regarded as "highly qualified publicists."

F. Burdens of Proof

In the *Corfu Channel Case* (*U.K. v. Albania*, 1949), 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. However, the Court may draw an adverse inference if evidence is solely in the control of one party that refuses to produce it.

V. Appendix B: Timeline of Events

18th Century	Credera colonizes the Thanatosian Plains, creating the colonies of Agnostica and Reverentia
1919	Crederan Census determines that Agnostica's population is 70% ethnic Agnostican and 30% ethnic Reverentian.
1925	Credera grants independence to both Agnostica and Reverentia.
1 August 1925	Establishment of the Federal Republic of Agnostica and the State of Reverentia.

1925 – approximately 1950s	Reverentian authorities make attempts to encourage Agnorevs to return to Reverentia. 85% of Agnorevs stay within Agnostica.
April 14, 1938	Conclusion of the Marthite Convention which was subsequently ratified by both Agnostica and Reverentia. The agreement under the Convention runs smoothly until late 2011.
1955	Release of Agnostican ministry study detailing the relative wealth and prosperity of the Agnorevs compared to the average Agnostican family.
1959	Agnostica and Reverentia join the United Nations.
1961	Agnostica and Reverentia ratify the Montevideo Convention.
1983	Agnostica and Reverentia ratify the ICCPR, ICESCR, and the 1969 VCLT.
1990	Agnostica and Reverentia ratify ICERD.
Late 2011	ILSA announces scientific findings regarding the healing characteristics of Marthite when used to treat infant and early-childhood autoimmune diseases. Within weeks, RMT starts selling 75% of the total quantify of Marthite mined to pharmaceutical companies.
1 February 2012	Prime Minister Moritz proposes terminating the Marthite Convention to President Nuvallus.
21 February 2012	President Nuvallus rejects Prime Minister Moritz' proposed termination.
2 April 2012	Agnostica declares the Marthite Convention to be terminated and without further effect. Prime Minister Moritz also discloses that Agnostica will be leasing the Marthite facilities to Baxter Enterprises, a multinational corporation based in the Cayman Islands.
3 April 2012	Agnostica announces that the lease with Baxter has entered into force. President Nuvallus orders Reverentian engineers at the facilities to return to Reverentia and to remove any software installed by RMT at the facilities.
Late April 2012	Baxter engineers arrive at the facilities only to find that the Reverentian withdrawal of software and engineers has crippled mining capacity. Baxter's personnel describe the actions as sabotage.
2 May 2012	Reverentia's Vice President publicly accuses Agnostica of breaching the Marthite Convention while defending Reverentia's actions as reversible and by no means sabotage.
End May 2012	Marthite facilities have returned to an operational capacity. However, without the software, production relies heavily on manual labour provided by local Agnorevs.
31 August 2012	Despite being unable to restore software systems at the facilities, Baxter engineers report production of up 100 kg/day of Marthite. Nearly all extracted Marthite is sold to Baxter with 2-3 kg sold daily to traditional Marthite users at inflated prices.

1 October 2012	The Agnostican Parliament passes the Marthite Control Act.
Mid November 2012	Supervisors at the largest Marthite facility begin instituting random searches of workers after reports of theft of petty cash.
23 November 2012	Gohandas Sugdy, a 19 year old Agnorev miner, is arrested under the Marthite Control Act for possessing two pocketfuls of Marthite
24 November 2012	Gohandas Sugdy has his arraignment in which he explains that he took the Marthite to save his ailing grandfather. The judge regretfully remands Sugdy to jail to await trial. During the night, guards discover that Sugdy hanged himself in an apparent suicide. Within hours of his death, Agnorev protestors begin collecting peacefully outside the jail in which he died.
28 November 2012	Gohandas Sugdy's grandfather dies of apparent heart failure.
November-December 2012	The crowd protesting outside the jail grows and Agnorev protests intensify as speakers begin airing long-standing Agnorev grievances held against the Agnostican majority population. Demonstrations increase in number, frequency, and intensity. Prime Minister Moritz mobilizes troops in an effort to maintain order.
26 December 2012	Police and protestors clash in Thanatos. 60 demonstrators are killed and several protestors and lightly armed police are injured. The day is remembered by the media as the Boxing Day Massacre.
2 January 2013	As protests continue, Tomás Bien proposes a resolution in the Agnostican Parliament requesting a de-escalation of the police and military presence in East Agnostica. The resolution fails 46-54 with all East Agnostican members voting in favour.
4 January 2013	Bien publicly announces his intent to pursue dissolving East and West Agnostica under the Agnostican Constitution.
5 January 2013	Bien presents his dissolution motion in the Agnostican Parliament where it fails with all 67 West Agnostican representatives voting against and 29 or 33 East Agnostican representatives voting to support dissolution.
9 January 2013	President Nuvallus delivers a speech supporting the Agnorevs wherein he declares that Reverentia will do all in its power to ensure Agnorev freedom.
10 January 2013	Reverentia's Parliament adopts the resolution titled "On the Crisis in East Agnostica." Prime Minister Moritz promptly denounces the resolution.
16 January 2013	East Agnostica's provincial parliament schedules a plebiscite on the question of succession. Prime Minister Moritz orders the National Police to block the referendum.
18 January 2013	President Nuvallus orders several hundred Reverentian soldiers to the border with East Agnostica with order to not leave Reverentian territory. He issues a diplomatic note to Prime Minister Moritz stating that the troop movements are related to his concerns over both spillover violence and the need to provide aid to any Agnorevs taking flight from Agnostica.

29 January 2013	The plebiscite is held with 73% of voters supporting secession.
30 January 2013	The newly christened Agnorev People's Parliament (formerly the East Agnostican provincial parliament) ratifies the secession of East Agnostica and sends a delegation to Reverentia with the purpose of discussing the integration of the "territory of the Agnorev people" with the State of Reverentia.
6 February 2013	The President of the Security Council expresses his concerns over the territorial integrity of Agnostica and the possibility of an illegal interference into Agnostica's domestic affairs. Subsequently, the European Union, ASEAN, and other regional bodies with interests in the region issue communiqués describing the potential annexation by Reverentia as a "threat to international peace and stability."
18 February 2013	5 of the largest pharmaceutical companies announce the suspension of Marthite purchases pending a conclusive legal resolution to the status of East Agnostica and Marthite itself.
22 February 2013	President Nuvallus and Tomás Bien announce the signing of the Integration Agreement making East Agnostica a semi-autonomous province of Reverentia. Reverentian army units immediately move into East Agnostica.
24 February 2013	Reverentia's Parliament ratifies the Integration Agreement.
25 February 2013	The APP ratifies the Integration Agreement.
1 March 2013	The annexation is declared effective by the terms of the Integration Agreement.

VI. Appendix C: Guide to People, Places, and Acronyms

Agnorev
A person of Reverentian ethnicity and descent living in Agnostica; the population grew as a direct result of cross-border migration during the colonial era.

Agnorev Peoples' Parliament (APP)
Self-styled governing body composed of members of the former provincial assembly of East Agnostica.

Agnostica
A mineral resources rich nation; the Applicant

Agnostican Parliament
Agnostica's federal Parliament.

Antonis Nuvallus
President of Reverentia.

Baxter Enterprise, Ltd.
A multinational corporation incorporated in the Cayman Islands.

Credera
Former ruler of the countries now known as Agnostica and Reverentia.

East Agnostica
One of the two federal provinces of Agnostica; home to the overwhelming majority of Agnostica's Agnorev population. Post-integration agreement, held out to be a province of Reverentia.

East Agnostican provincial assembly
Constitutionally guaranteed local assembly with control over cultural affairs and education.

Gohandas Sugdy
19 year old Agnorev miner whose suicide became a rallying point for Agnorev frustrations.

ICJ
The International Court of Justice

ILSA
Institut Luxembourgeois des Sciences Appliquees.

Integration Agreement
Agreement signed between President Nuvallus and Tomás Bien making East Agnostica a semi-autonomous province of Reverentia with the APP as its provincial legislature.

Marthite
A mineral-salt found only in East Agnostica; commonly used in traditional Reverentian medicine it soon became renowned for its healing properties in treating early childhood and infant auto-immune diseases.

Marthite Control Act (MCA)
Act passed by Agnostican Parliament banning the sale or transfer of Marthite into Reverentia as well as the unauthorized purchase, sale, or possession of Marthite within Agnostica.

Marthite Convention
Treaty between Agnostica and Reverentia governing the production and sale of Marthite.

Maxine Moritz
Prime Minister of Agnostica.

Reverentia
An industrialized state; the Respondent

Reverentian Marthite Trust (RMT)
A state-owned Reverentian corporation which had the authority to sell Marthite under the Convention.

The Reverentian Times
A national print newspaper located in Reverentia.

Tomás Bien
The Agnorev head of the East Agnostican provincial legislature and a member of the Agnostican federal Parliament.

Thanatos
The capital of East Agnostica.

Thanatosian Plains
Landlocked region which is home to Reverentia and Agnostica.

Tuklu Range
Mountain range which surrounds Agnostica on all sides except its shared border with Reverentia.

VCLT
The Vienna Convention on the Law of Treaties

West Agnostica
The second province within the Federal Republic of Agnostica; home to the Agnostican capitol and Parliament.

VII. Appendix D: Suggested Questions for the Oral Rounds

A. International Law Generally

1. Is there any priority or hierarchy of the sources of international law mentioned in Art. 38 of the ICJ Statute?
2. What is customary international law? What are the elements of customary international law?
3. When asserting a state's obligations under customary international law:
    a. Where can we find evidence of relevant State practice?
    b. What is *opinio juris*? How is it proven?
4. Is the ICJ bound by its prior decisions?
5. What specific remedies is the Applicant/Respondent seeking? Is the ICJ permitted by its Statute to grant those remedies?
6. What is the basis of standing for the party seeking relief?
7. What is the standard of proof with respect to this issue? Which party bears the burden of proof?
8. If this Court determines that the lack of factual certainty allows multiple, conflicting inferences, what should this Court do then?
9. If a state has conflicting obligations under two treaties (or a treaty on the one hand and customary international law on the other), which obligation controls? What principle does the Court use to determine which obligation controls?
10. What is the Court to do if it finds there is a lacuna in the law?
11. What is the definition of "territory?"
12. When two States are Parties to an earlier treaty, and one is a Party to a later treaty but the other is only a signatory, what law governs a conflict between those two States?

B. Question Presented 1

1. What is the principle of non-intervention and how has it been defined?
2. What acts constitute interference? What acts constitute intervention?
3. What are the standards of premature recognition? How does one decide when a state has prematurely recognized an entity?
4. Is there more than one kind of recognition? Which is applicable here?
5. Do Reverentian troop movements constitute a threat of force? What exactly is a threat of force and do you have any examples from cases where courts have deemed troop movements to be a threat of force?
6. Could Reverentia act with the consent of the APP and Tomás Bien?
7. Is there a difference between intervention and interference? What constitutes interference and when can it rise to the level of intervention?
8. When does an act rise to being an act of aggression? Do threats ever rise to the level of an act of aggression? Examples?
9. What are the limits set on a state's internal authority?
10. What are the situations in which a state can cite spillover violence as means to take security measures?

C. Question Presented 2

1. When does internal self-determination fail enough that it validates a right to external self-determination? Is there a right to external self-determination?

2. What does it mean when courts say that self-determination is an *erga omnes* obligation? What are *erga omnes* obligations?
3. Are the Agnorevs a people? Why or why not?
4. What is remedial secession? Can you name successful examples of remedial succession? Has this theory risen to the level of customary international law?
5. Does the ICCPR create an affirmative duty for Agnostica to allow or even assist the Agnorevs in their quest for independence?
6. What is the difference between internal and external self-determination?
7. Isn't it true that territorial integrity is not an absolute rule? When and where can territorial integrity be violated?
8. How does the ICJ's Advisory Opinion on Kosovo affect the definition of what is and is not a people?
9. Was the referendum a legal act? If illegal, how can this court consider it a valid representation of the popular will of the Agnorev people? If legal, what impact or effect does it have on the situation?
10. Has the situation in East Agnostica risen to the level of severity necessary to constitute *jus cogens* violations?
11. What is the legal impact of a declaration of independence?
12. If the secession is illegal, can the territory of East Agnostica be returned to Agnostica? What, if any other avenues, could Agnostica follow to redress this situation?
13. How does the jurisprudence of the Badinter Commission affect East Agnostica's claims for independence? Can a non-federal unit secede?
14. What is the difference between the dissolution of a state and secession? Aren't the two so intricately connected that the difference is merely semantic?

D. Question Presented 3

1. What is *rebus sic stantibus*?
2. What is the doctrine of error? What does it do to treaties? How does invoking error affect your arguments in Issue 4?
3. How would a ruling on the basis of error affect claims by either party on the continued existence of the treaty?
4. How do you determine the "essential basis" of a treaty?
5. Can Reverentia be held liable for the actions of RMT? Is RMT an independent body? What is the legal standard for state responsibility for acts taken by a state-owned corporation? When can you pierce the corporate veil?
6. Has the doctrine of fundamental change of circumstances risen to be custom? Who said so and how often has it been successfully applied in the decisions of international tribunals?
7. Is the Marthite Convention subject to the guidelines of the Vienna Convention of the Law on Treaties?
8. Are there procedural elements of the VCLT which have risen to the level of custom?
9. Was Agnostica's denunciation of the treaty improper? What makes it proper?
10. Didn't Agnostica have a duty to negotiate with Reverentia following its unilateral announcement of termination?
11. What are the standards for what might be a reasonable period of notice for a party attempting to terminate a treaty?
12. What does *pacta sunt servanda* mean? Why is it a principle this Court may apply?

13. Has Reverentia violated the Marthite Convention independent of the actions of RMT?

E. Question Presented 4

1. For Agnostica: you just argued that you successfully terminated the treaty? Why should Reverentia be obligated to continue to let you use the software?
2. For Reverentia: you just argued that the treaty was "in effect". How is that consistent with your refusal to provide the software?
3. How should a court interpret a treaty? What sources should it consider?
4. Why is the meaning you suggest the "ordinary" meaning of the text?
5. What are the object and purpose of the Marthite Convention? How are they relevant?
6. When can a party unilaterally suspend performance of a treaty?
7. What is a material breach of a treaty? Did Agnostica materially breach the Marthite Convention?
8. What are countermeasures?
9. Are countermeasures different from reprisals? How/why not?
10. Shouldn't Reverentia have called upon Agnostica to comply with the treaty before taking countermeasures? Did it? If it didn't, why is the countermeasure nonetheless lawful?
11. Is this countermeasure proportional? What if one child dies per day because of it? Ten children? Etc.