# BENCH MEMORANDUM

## CASE CONCERNING THE EGART AND THE IBRA

Version 2.2

9 March 2018

*** * * CONFIDENTIAL * * ***

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The Bench Memorandum is an evolving document. As the competition season progresses, new versions of the Bench Memorandum will become available. ILSA encourages judges and competition staff to make sure that they possess the most recent version of the Bench Memorandum.

ILSA welcomes comments and recommendations on the Bench Memorandum. Please send all suggestions to jessup@ilsa.org.

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# 1 PURPOSE OF THE BENCH MEMORANDUM

The Bench Memorandum provides judges with basic factual and legal information to evaluate the written memorials and oral pleadings of participating teams. It should be read in conjunction with the Jessup Problem.

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

The Bench Memorandum is not meant to be an exhaustive treatise on the legal issues raised in the Problem. Judges should be aware that this document has been condensed in favor of breadth. It does not purport to cover every last detail, though we do aim to contextualize the law both within society and within the events of the Problem. In many instances, relevant case law and State practice is alluded to, but not discussed in depth. The participants should address cases and principles of law. 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 cite authorities that may not be discussed in this memorandum. This is perfectly appropriate, and does not suggest that such arguments are not relevant or credible.

As always, judges are encouraged to engage in their own independent research on the issues or examine the suggested research materials given to students. These materials are available online at www.ilsa.org: the First Batch of Basic Materials; the Second Batch of Basic Materials; and the Jessup Problem Expert Panel Discussion (International Law Weekend, Fordham Law School).

One of the most rewarding parts of Jessup for students is being asked questions during oral arguments. This Bench Memorandum provides two tools to help you ask questions:

- There are questions embedded throughout the Bench Memorandum.
- There are many occasions where there are two bullets outlining the principal arguments for, respectively, Anduchenca (the Applicant) and Rukaruku (the Respondent). When an oralist representing Anduchenca is speaking, you may consider interjecting with arguments and questions from Rukaruku's bullet. And when an oralist representing Rukaruku is speaking, you may consider interjecting with arguments and questions from Anduchenca's bullet.

# 2 SUMMARY OF THE FACTS

The 2018 Jessup Problem concerns four issues: (1) the validity of an inter-State arbitral award; (2) the capture of a marine vessel; (3) the breach of nuclear disarmament obligations; and (4) the conduct of naval warfare. The Applicant (Anduchenca) and the Respondent (Rukaruku) are two States in the Odasarra Region, both with a coast on the Kumatqesh Ocean. Rukaruku is a developed country, whereas Anduchenca is a developing country. Following World War II, Rukaruku provided economic aid to Anduchenca, implemented disarmament programs in Anduchenca, and deployed its navy along the Kumatqesh coast to protect commercial ships of all nations. In 1947, Anduchenca and Rukaruku signed a Treaty of Friendship, Commerce and Navigation (FCN Treaty), which can be found at Annex I of the Problem. The FCN Treaty serves as the basis for the Court's jurisdiction, so it is very important.

In 1967, Anduchenca's military staged a successful *coup d'état* and General Rafiq Tovarish was installed as the country's head of State and head of government. Under the leadership of General Tovarish, Anduchenca adopted a socialist political ideology, which led to strained relations with the other Odasarran States. In 1969, Rukaruku terminated its economic aid and disarmament programs in Anduchenca, but Rukaruku continued to deploy its navy along the Kumatqesh coast.

In 1968, all of the Odasarran States, with the exception of Anduchenca, signed the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) as non-nuclear-weapon States, and ratified it shortly thereafter. Then in 1982, all of the Odasarran States, again with the exception of Anduchenca, signed and ratified the United Nations Convention on the Law of the Sea (UNCLOS).

In 2010, Anduchenca adopted a maritime security law requiring that any foreign government vessel obtain prior authorization to enter its territorial sea. Rukaruku objected to this law as inconsistent with international law, but the Rukarukan Navy nonetheless complied with it.

In August 2015, the Rukarukan Navy began employing autonomous underwater vehicles (AUVs) within and outside the Odasarra Region. The Rukarukan AUVs operating in the vicinity of Anduchenca's coast were programmed to remain at least 12 nautical miles from the coastline. Anduchenca denounced the AUVs as "spy drones," and General Tovarish declared that any AUVs discovered in Anduchenca's territorial sea would be captured.

In October 2015, the Anduchencan Navy captured a Rukarukan AUV (called the "Egart"), which was operating without permission less than 11 nautical miles from the Anduchencan coast. Anduchenca refused to return the Egart to Rukaruku.

In December 2015, Rukaruku instituted arbitration proceedings against Anduchenca under the FCN Treaty. In its Request for Arbitration, Rukaruku claimed that Anduchenca's capture of the Egart violated the FCN Treaty, and named an arbitrator to the tribunal. Anduchenca refused to recognize the arbitration proceedings and did not select an arbitrator. In accordance with the FCN Treaty, the ICJ President appointed the two remaining arbitrators of the tribunal, including herself as the presiding arbitrator. The arbitral tribunal decided to continue with the arbitral proceedings despite Anduchenca's refusal to participate.

In March 2017, the arbitral tribunal rendered an award, concluding that it had jurisdiction over the matter and ruling in favor of Rukaruku on the merits. It therefore ordered Anduchenca to

return the Egart to Rukaruku. Anduchenca stated that the award was "null and void" because the tribunal was "manifestly without jurisdiction."

A few weeks later, the Institute for Legal Studies of Arbitration (ILSA), an international non-governmental organization, published a report that revealed three pieces of information that had not been previously disclosed. First, the Rukaruku-appointed arbitrator and one of Rukaruku's counsel had had three private telephone conversations before and during the tribunal's deliberations. Second, the tribunal had appointed an undisclosed "assistant" who billed substantially more time than the arbitrators and engaged in substantive work on the arbitration. Third, the assistant had prepared a draft of the arbitral award identical to the final version. Anduchenca praised the ILSA report, whereas Rukaruku stated that the irregularities did not warrant calling the arbitral award into question.

In April 2017, the Anduchencan Navy revealed that it had a nuclear-armed submarine (called the "Ibra") equipped with "the world's greatest nuclear weapons." Anduchenca furthermore withdrew from the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons and stated that it would not sign any treaty that might emerge from the conference. In response, the U.N. Security Council adopted Resolution 3790, which can be found at Annex II of the Problem. Resolution 3790, *inter alia*, "[c]alls upon all Member States to take such actions as may be appropriate to support the implementation of the NPT"; and "[d]ecides to authorize Member States ... to take all measures commensurate with their specific circumstances in confronting the Ibra."

On 6 June 2017, two Rukarukan warships fired missiles at the Covfefe, an Anduchencan supply ship on the high seas en route to a rendezvous with the Ibra. The attack killed 10 Anduchencan sailors and seven civilians, and sank the Covfefe. On 14 June 2017, the Rukarukan Navy located the Ibra approximately 20 nautical miles from the Anduchencan coast. Six Rukarukan warships encircled the Ibra and fired a series of torpedoes that forced the Ibra to surface. The personnel on board the Ibra surrendered immediately. The Rukarukan fleet escorted the Ibra to a naval base in Rukaruku, and the crew of the Ibra was delivered to the Anduchencan Embassy in Rukaruku for repatriation. On 19 June 2017, the U.N. Security Council adopted a resolution affirming an agreement between Rukaruku, the International Atomic Energy Agency (IAEA), and two NPT nuclear-weapon States that provided for the complete dismantling of the Ibra and the disposal of all nuclear materials on board under IAEA monitoring and supervision.

On 3 July 2017, Anduchenca filed in the Registry of the Court an Application instituting proceedings against Rukaruku, invoking the FCN Treaty as the basis for the Court's jurisdiction. On 10 July 2017, Rukaruku indicated its intention to file counterclaims, also invoking the FCN Treaty as its jurisdictional basis.

# 3 ANALYSIS OF THE LAW

## 3.1 PRELIMINARY MATTERS

### 3.1.1 Jurisdiction

This is the first Jessup Problem in the history of the competition that is not a "compromis" (*i.e.*, "special agreement"). This carries three major consequences.

- First, teams should avoid referring to the Problem as a "compromis" or "special agreement" in their written memorials and oral pleadings. When citing specific paragraphs of the Problem, teams should refer to it as the "Statement of Agreed Facts" or simply the "Problem."
- Second, teams should not refer to a "compromis" or "special agreement" in the Statement of Jurisdiction of their written memorials. Rather, they should state that the Court's jurisdiction is based on Articles 10(b) and 20 of the FCN Treaty, along with Article 36(1) of the ICJ Statute.
- Third, teams may raise objections to the Court's jurisdiction over any of the claims. Although, as discussed in this Bench Memorandum, there are some potential jurisdictional objections, none of them are very straightforward. As a result, teams should not be penalized for not making any jurisdictional objections.

In any case, all oralists should be able to answer general questions concerning the Court's jurisdiction. You may consider asking the following questions.

| | |
|---|---|
| **Q:** | Agent, what is the basis for the Court's jurisdiction over this claim?<br>• Article 10(b) of the FCN Treaty (for claims concerning the validity of the arbitral award, as well as Articles 6 and 7 of the FCN Treaty)<br>• Article 20 of the FCN Treaty (for claims concerning Articles 16 and 17 of the FCN Treaty) |
| **Q:** | Agent, what are the four bases for the Court's jurisdiction generally?<br>• optional clause declarations (under Article 36(2) of the ICJ Statute)<br>• compromis (*i.e.*, special agreement)<br>• compromissory clause (*i.e.*, dispute resolution clause, dispute settlement clause)<br>• *forum prorogatum* |

It should be noted that Articles 10(b) and 20 require the existence of a "dispute" for the Court to have jurisdiction. This requirement of a "dispute" has engendered a lot of jurisprudence and commentary. Nevertheless, in the present case, the Order of the Court states that "the Agents of the Parties have agreed that a 'dispute' between the Parties exists with respect to each of the ... claims and counter-claims within the meaning of Articles 10 and 20 of the FCN Treaty," so teams should not raise any jurisdictional objections based on the absence of a "dispute."

### 3.1.2 Claims and Counter-Claims

Because Anduchenca initiated the proceedings against Rukaruku, the claims Anduchenca makes against Rukaruku are called "claims" and the claims Rukaruku makes against Anduchenca are called "counter-claims."

- Anduchenca's claims: (1) the invalidity of the arbitral award; (2) Rukaruku's violation of Article 6 of the FCN Treaty; (3) Rukaruku's violation of Article 17 of the FCN Treaty
- Rukaruku's counter-claims: (1) Anduchenca's violation of Articles 7 of the FCN Treaty; (2) Anduchenca's violation of Article 16 of the FCN Treaty.

With respect to counter-claims, Article 80 of the ICJ's Rules of Court provides: "The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party." This provision contains two requirements.

- First, the counter-claim must come within the jurisdiction of the Court. Anduchenca might invoke language in the Court's order on the U.S. counter-claim in *Oil Platforms (Iran v. United States)*[1] to argue that the Court has jurisdiction only over counter-claims that are based on the same treaty provisions as the claims, such that the Court would not have jurisdiction over Rukaruku's counter-claims concerning Articles 7 and 16 of the FCN Treaty. Nevertheless, it should be noted that in its judgment on the merits, the Court noted that the United States itself had limited the scope of the counter-claim.[2] As a result, the better view is that the counter-claims do not need to be based on the same treaty provisions as the claims.[3]
- Second, the counter-claim must be directly connected with the subject matter of the claim of the other party. The Order of the Court notes that "the Agents of the Parties have agreed ... that all of the counter-claims are 'directly connected with the subject matter' of at least one of the claims within the meaning of Article 80 of the Rules of Court," so Anduchenca cannot make an objection on this ground.

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| **Q:** | Agent, what are the two requirements for counter-claims under the ICJ's Rules of Court? |

1 ICJ, *Oil Platforms (Iran v. United States)*, Counter-Claim, Order (10 March 1998), 1998 ICJ Rep. 190, ¶ 36 ("the Court has jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1").

2 ICJ, *Oil Platforms (Iran v. United States)*, Merits, Judgment (6 November 2003), 2003 ICJ Rep. 161, ¶ 111 (noting that "the United States substantially narrowed the basis of its counter-claim" to Article X(1)).

3 *See* Constantine Antonopoulos, *Counterclaims before the International Court of Justice* (TMC Asser 2011), pp. 86-89; Sean D. Murphy, "Counter-Claims Article 80 of the Rules" in Andreas Zimmermann et al., *The Statute of the International Court of Justice: A Commentary* 1000 (2nd edition, OUP 2012), ¶¶ 24-29.

## 3.2 QUESTION 1: VALIDITY OF THE ARBITRAL AWARD

| *Anduchenca's Claim* | *Rukaruku's Claim* |
|---|---|
| The arbitral award of 2 March 2017 is not valid. | The arbitral award of 2 March 2017 is valid. |
| ***Anduchenca's Anticipated Argument*** | ***Rukaruku's Anticipated Argument*** |
| The arbitral award is not valid because (1) Judge Moyet had *ex parte* contacts with Mr. Bouc Chivo; (2) the tribunal exceeded its jurisdiction; (3) the tribunal improperly delegated powers to Mr. Mikkel Orvindari; and/or (4) the tribunal failed to state reasons concerning its jurisdiction. | The arbitration is valid because (1) Judge Moyet's *ex parte* contacts with Mr. Bouc Chivo were not significant enough to justify annulment; (2) the tribunal did not manifestly exceed its jurisdiction; (3) the tribunal properly delegated powers to Mr. Mikkel Orvindari; and/or (4) the tribunal did not fail to state reasons concerning its jurisdiction. |

Question 1 recalls various issues that have arisen recently in international arbitration, in particular *ex parte* contacts in *Croatia/Slovenia*, allegedly excessive delegation of powers to a tribunal assistant (the so-called "fourth arbitrator") in *Yukos Majority Shareholders v. Russia*, the validity of the *Great Britain/Venezuela* boundary award despite its lack of reasoning, and the appointing authority's self-appointment in *Enrica Lexie (Italy v. India)* and *Coastal State Rights (Ukraine v. Russia)*.

The Court has jurisdiction over the claim in Question 1 under Article 10(b) of the FCN Treaty. There are no straightforward objections to jurisdiction or admissibility.

### 3.2.1 Background

Arbitral awards are generally final and binding on the parties to the arbitration. Nevertheless, it is widely accepted that a competent judicial body may annul (*i.e.*, set aside, vacate, or invalidate[4]) an arbitral award on very limited grounds. As a general matter, these grounds of annulment are procedural rather than substantive.

International arbitrations may be categorized into inter-State (or "interstate"), investment (or "investor-State"[5]), and commercial arbitrations.[6] The arbitration in the present case is an inter-

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[4] There are slight differences between these various terms, but these differences are not significant for this Problem.

[5] There is a distinction between investment arbitrations and investor-State arbitrations, but for the most part these two terms are used interchangeably.

[6] This is not a perfect categorization because certain investment and commercial arbitrations may also be inter-State arbitrations (*i.e.*, between two States), and many investment arbitrations may also be considered as commercial arbitrations. To resolve the first issue, teams may choose instead to categorize international arbitrations into public, investment, and commercial arbitrations, but this creates another issue because many consider investment arbitration to be a type of public arbitration.

State arbitration because it is between two States. There is no treaty governing the annulment of inter-State arbitral awards. As a result, the annulment of inter-State arbitral awards is governed by custom and/or general principles of law. In order to identify these rules of custom and/or general principles of law, teams may have recourse to: (1) soft law instruments, such as the ILC[7] Model Rules on Arbitral Procedure (1958) and the IIL/IDI[8] Draft Regulations for International Arbitral Procedure (1875); and (2) instruments designed for commercial or investment arbitration, such as the ICSID[9] Convention (1965), the UNCITRAL[10] Model Law on International Commercial Arbitration (1985, amended in 2006), and the New York Convention on the Recognition and Enforcement of Arbitral Awards (1958). If oralists invoke one of these instruments, you may consider asking one of the following questions.

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| **Q:** | Agent, the ILC Model Rules / the IIL/IDI Draft Regulations are soft law. Why are they applicable here? |
| **Q:** | Agent, the ICSID Convention was designed for investment arbitration. Why is it applicable to this inter-State arbitration? |
| **Q:** | Agent, the UNCITRAL Model Law / the New York Convention was designed for commercial arbitration. Why is it applicable to this inter-State arbitration? |

Teams may also invoke jurisprudence on the annulment of arbitral awards. The ICJ has been asked to annul an arbitral award on two occasions: *Arbitral Award Made by the King of Spain (Honduras v. Nicaragua)* (1960) and *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* (1989). In both cases, the Court upheld the award. A third case in public international law may also be relevant: in *Abyei Arbitration (Sudan/Sudan People's Liberation Movement/Army)* (2009), an arbitral tribunal was asked to determine whether the experts of the Abyei Boundaries Commission exceeded their mandate in delimiting the Abyei Area, and it found that they had committed a partial excess of mandate.

There is much more jurisprudence on the annulment of investment and commercial arbitral awards. As a result, oralists may invoke cases in these two fields to support their arguments. If they do, you may consider asking the following questions.

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|---|---|
| **Q:** | Agent, are the grounds of annulment the same for inter-State arbitration, investment arbitration, and commercial arbitration? Should they be the same? Why or why not? |

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7 The International Law Commission (ILC) was established by the General Assembly in 1947 to undertake the mandate of the Assembly, under Article 13(1)(a) of the U.N. Charter, to "initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification." The ILC today has 34 members.

8 The Institute of International Law (IIL) / Institut de Droit International (IDI) was established by renowned lawyers in 1873 to promote the progress of international law. The IIL today has approximately 161 honorary members, members, and associates.

9 The International Centre for Settlement of Investment Disputes (ICSID) was established by the ICSID Convention in 1966 to administer the conciliation and arbitration of investment disputes.

10 The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 to "promote the progressive harmonization and unification of international trade law."

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| **Q:** | Agent, have annulment bodies considering the annulment of inter-State arbitral awards cited to decisions of annulment bodies considering the annulment of investment or commercial arbitral awards? |

In the present case, Anduchenca could potentially argue many grounds of annulment. In light of limited space (in the written memorials) and time (in the oral pleadings), teams representing Anduchenca should not be penalized for addressing only their two or three strongest arguments. Arguably, the grounds of annulment in the present case, from strongest to weakest, are: *Ex Parte* Contacts (Section 3.2.2); Excess of Jurisdiction (Section 3.2.3); Improper Delegation (Section 3.2.4); and Failure to State Reasons (Section 3.2.5). A final section (Section 3.2.6) is dedicated to other possible arguments.

| | |
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| **Q:** | (for Anduchenca) Agent, what is your strongest ground of annulment? |
| **Q:** | (for Anduchenca) Agent, could you please only argue your two (or three) strongest grounds of annulment? |
| **Q:** | (for Rukaruku) Agent, could you please only respond to the grounds of annulment that Anduchenca argued, and in the order that Anduchenca argued them? |

### 3.2.2 *Ex Parte* Contacts

Anduchenca may invoke *ex parte* contacts (contacts between an arbitrator and a party in the absence of the other party) to attempt to annul the award because such contacts are arguably a "serious departure from a fundamental rule of procedure," which is a widely accepted ground of annulment. Anduchenca may also invoke *ex parte* contacts under a heading of "corruption" or "lack of impartiality"[11] to annul the award. It should be noted, however, that *ex parte* contacts in older inter-State arbitrations were not uncommon, as seen in *Alabama Claims (United States/Great Britain)* (1872)[12] and *Alaska Boundary (United States/Great Britain)* (1903).[13] There are not many modern cases of *ex parte* contacts. The three principal cases are listed below.

| *Year* | *Tribunal* | *Case* | *Description* |
|---|---|---|---|
| 1954 | Inter-State Arbitral Tribunal | *Buraimi Oasis (Great Britain/ Saudi* | During the proceedings, Great Britain complained of procedural misconduct, including the inappropriate behavior of the Saudi arbitrator and attempts to interfere with the independence of the other arbitrators. Three arbitrators |

[11] If Anduchenca chooses to invoke the *ex parte* contacts under the heading of "lack of impartiality," it may also invoke the facts that Judge Bhrasht Moyet was a Rukarukan national and he had been appointed by Rukaruku as an arbitrator in four investor-State arbitrations (Problem, ¶ 21).

[12] *See* V.V. Veeder, "The Historical Keystone to International Arbitration" in David D. Caron et al. (eds.), *Practising Virtue: Inside International Arbitration* 127 (2015), pp. 132-147.

[13] *See* Jan Paulsson, "Moral Hazard in International Dispute Resolution," 25 *ICSID Review—Foreign Investment Law Journal* 339 (2010), pp. 341-343.

| | | | |
|---|---|---|---|
| | | *Arabia)* | resigned, and the tribunal was never reconstituted. |
| 2008 | ICSID Arbitral Tribunal | *Victor Pey Casado v. Chile* | The Chile-appointed arbitrator provided Chile with a partial draft of the decision on jurisdiction drafted by the presiding arbitrator. Chile challenged the Chile-appointed arbitrator, who resigned and was replaced. The Casado-appointed arbitrator was disqualified and also replaced. The reconstituted tribunal rendered an award. |
| 2016 | Inter-State Arbitral Tribunal | *Croatia/ Slovenia* | The Slovenia-appointed arbitrator had *ex parte* contacts with one of Slovenia's agents. The Slovenia-appointed arbitrator and the Slovenian agent resigned and were replaced. The Croatia-appointed arbitrator and the new Slovenia-appointed arbitrator also resigned and were replaced. Croatia withdrew from the proceedings. The reconstituted tribunal rendered a Partial Award (2016) declaring that it had the jurisdiction to proceed, and then a Final Award (2017) on the merits. |

In the present case, the ILSA report revealed *ex parte* contacts between Judge Moyet (the Rukaruku-appointed arbitrator) and Mr. Bouc Chivo (one of Rukaruku's counsel) that took place before and during the tribunal's deliberations (Problem, ¶ 31). On each call, Mr. Chivo requested that Judge Moyet emphasize to the other members of the tribunal certain parts of Rukaruku's arguments already presented in the written and oral proceedings, and Judge Moyet agreed to do so (Problem, ¶ 31). It is clear that this conduct constituted a violation of the prohibition on *ex parte* contacts, but it is debatable whether it justifies the annulment of the award.

- **Anduchenca:** The *ex parte* contacts justify the annulment of the award. The collapse of the arbitral tribunal in *Buraimi Oasis (Great Britain/Saudi Arabia)* shows how *ex parte* contacts undermine the validity of the arbitration as a whole. The present case can be distinguished from *Victor Pey Casado v. Chile* and *Croatia/Slovenia* because the tainted members in this arbitration did not resign.
- **Rukaruku:** The *ex parte* contacts do not justify the annulment of the award. Whether we like it or not, *ex parte* contacts occur in inter-State arbitrations, as seen in *Alabama Claims (United States/Great Britain)* and *Alaska Boundary (United States/Great Britain)*. The important thing is that they do not influence the final decision. In the present case, Judge Moyet was only emphasizing certain arguments of Rukaruku to the other members of the tribunal; those arguments had already been pled in the oral hearings. Moreover, Anduchenca was not participating in the proceedings, so there was little difference between making the arguments to Judge Moyet privately and making the arguments to the tribunal at the hearings.

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| **Q:** | Agent, should Anduchenca's non-participation in the proceedings affect the Court's decision on this issue? |

### 3.2.3 Excess of Jurisdiction / Excess of Powers

Anduchenca may invoke excess of jurisdiction (the tribunal exercised jurisdiction that it did not have) to attempt to annul the award because it would constitute an "excess of powers," which is a widely accepted ground of annulment. The standard of review for excess of jurisdiction (or excess of powers) is not clear.

- **Anduchenca:** The standard is low. If the ICJ considers that the tribunal exercised jurisdiction that it did not have, then the ICJ should annul the award. The ILC Model Rules, the IIL/IDI Draft Regulations, the UNCITRAL Model Law, and the New York Convention do not impose a standard of "manifest" excess.
- **Rukaruku:** The standard is high. In *Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal)*, the Court held that it "has simply to ascertain whether ... the Tribunal acted in *manifest* breach of the competence conferred on it."[14] The ICSID Convention also imposes a standard of "manifest" excess.[15]

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| **Q:** | Agent, what is the standard of review for excess of jurisdiction (or excess of powers)? Does the excess have to be manifest? |
| **Q:** | (for Anduchenca) Agent, why does the ICJ have the power to annul the award on the ground of excess of jurisdiction (or excess of powers) if we accept the principle of *compétence de la compétence*? |

Article 10(a) of the FCN Treaty grants the tribunal jurisdiction over disputes concerning the interpretation or application of Article 7, which provides: "Between the territories of the two Contracting Parties there shall be freedom of commerce and navigation." The question is thus whether the dispute over the Egart's operation was a dispute concerning the interpretation or application of the "freedom of commerce and navigation" between the territories of Anduchenca and Rukaruku.

The ICJ has had to decide whether it had jurisdiction over a dispute allegedly concerning the interpretation or application of the "freedom of commerce and navigation" on at least two occasions:

- In *Military and Paramilitary Activities (Nicaragua v. United States)*, the Court examined the phrase in Article XIX of the U.S.-Nicaragua FCN Treaty (1956). The Court held that "the mining of the Nicaraguan ports by the United States is in manifest contradiction with the freedom of navigation and commerce."[16]
- In *Oil Platforms (Iran v. United States)*, the Court examined the phrase in Article X(1) of the U.S.-Iran Treaty of Amity, Economic Relations and Consular Rights (1955). The

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[14] ICJ, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment (12 November 1991), 1991 ICJ Rep. 53, ¶ 47 (emphasis added).

[15] ICSID Convention, art. 52(1)(b) (emphasis added).

[16] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment (27 June 1986), 1986 ICJ Rep. 14, ¶ 278.

Court treated the two freedoms separately,[17] and concluded that it had jurisdiction over the destruction of Iranian oil platforms because it was capable of having an adverse effect on the freedom of commerce.[18]

| **Q:** | Agent, has this Court ever interpreted a provision with the phrase "freedom of commerce and navigation" in the past? |
|---|---|

In the present case, the parties can debate whether the dispute concerning the Egart's operation was a dispute concerning the interpretation or application of the "freedom of commerce and navigation" between the territories of Anduchenca and Rukaruku.

- **Anduchenca:** The tribunal committed an excess of jurisdiction (or excess of powers) because the dispute[19] over the Egart's operation did not concern the interpretation or application of the "freedom of commerce and navigation" between the territories of Anduchenca and Rukaruku. This is because of four independently sufficient reasons:
    - First, the "freedom of commerce and navigation" is a single freedom concerning commercial shipping. This dispute did not concern commercial shipping.
    - Second, the "freedom of navigation"—especially as understood when the FCN Treaty was signed in 1947—exists only in the high seas, not in the territorial sea.
    - Third, the Egart was not exercising "freedom of navigation" because it was collecting data.
    - Fourth, the Egart was not traveling between Anduchenca and Rukaruku.
- **Rukaruku:** The tribunal did not commit an excess of jurisdiction (or excess of powers) because the dispute over the Egart's operation concerned the interpretation or application of the "freedom of commerce and navigation" between the territories of Anduchenca and Rukaruku. This is because of the following four reasons:
    - First, "freedom of commerce and navigation" is two separate freedoms, as confirmed by the ICJ in *Oil Platforms (Iran v. United States)*.
    - Second, "freedom of navigation" does not refer to specific freedoms that exist in the high seas; rather, it is a generic term that applies anywhere. For example, in *Military and Paramilitary Activities (Nicaragua v. United States)*, the Court held that it applied to port waters.
    - Third, the Egart was exercising "freedom of navigation" because it was navigating.

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[17] ICJ, *Oil Platforms (Iran v. United States)*, Preliminary Objection, Judgment, 1996 ICJ Rep. 803 (12 December 1996), ¶ 38.

[18] ICJ, *Oil Platforms (Iran v. United States)*, Preliminary Objection, Judgment, 1996 ICJ Rep. 803 (12 December 1996), ¶ 51.

[19] Anduchenca may also make the formalistic argument that there was no "dispute" concerning the interpretation or application of Article 7 because the Problem does not indicate that the provision was clearly invoked before Rukaruku instituted the arbitration proceedings. If an oralist addresses this argument in oral proceedings, you should tell him or her that you think that there was clearly a "dispute" concerning the interpretation or application of Article 7, and ask him or her to move on.

- Fourth, the navigation was physically between Anduchenca and Rukaruku.
- Moreover, because Anduchenca did not participate in the proceedings, Anduchenca cannot blame the tribunal for perhaps not considering all of the possible arguments against its jurisdiction, as it was Anduchenca's responsibility to present them.

| **Q:** | Agent, should Anduchenca's non-participation in the proceedings affect the Court's decision on this issue? |
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### 3.2.4 Improper Delegation

A tribunal's or an arbitrator's improper delegation of powers to another person (whether this person is an "assistant" or a "secretary") can be a ground of annulment because it can be considered an "irregular constitution of the tribunal," a "serious departure from a fundamental rule of procedure," and/or an "excess of powers." The question is what constitutes "improper" delegation. There is some case law before national courts on the question. The principal cases are presented below.

| ***Year*** | ***Court*** | ***Case*** | ***Holding*** |
|---|---|---|---|
| 1989 | Italian Supreme Court | *Sacheri v. Robotto* | The tribunal (with technical expertise) delegated to a lawyer the drafting of the entire award. The Court annulled the award, holding that "it amounted to delegating a third person to formulate the final decision, which the arbitrators were not able to conceive and which they could not critically examine once it had been drafted."[20] |
| 2015 | Swiss Supreme Court | *Decision No. 4A_709/2014 (A v. B)* | The sole arbitrator delegated powers to two legal secretaries. The Court upheld the award, holding that tribunal secretaries may assist in many tasks, including the drafting of the award under the control of the tribunal. Nevertheless, "the secretary is forbidden from carrying out any function of a judicial nature."[21] |
| 2016 / 2017 | LCIA Court / English High Court | *P v. Q* | The tribunal delegated substantive tasks to the tribunal secretary. P challenged the tribunal before the LCIA Court, which rejected the challenge on this ground. P then brought the challenge before the English High Court, which also rejected the challenge, holding: "There is nothing offensive per se ... in receiving the views of |

[20] Italian Supreme Court, *Sacheri v. Robotto* (3 July 1989), XVI Yearbook of Commercial Arbitration 156 (1991), ¶ 1.

[21] Swiss Supreme Court, *Decision No. 4A_709/2014* (21 May 2015), ¶ 3.2.2.

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| | | | others, provided the adjudicator makes his own mind up by the exercise of independent judgment."[22] |
| Pending Appeal | Dutch Courts | *Yukos Majority Shareholders v. Russia*[23] | Russia sought annulment of the investment award before the Dutch courts, arguing, *inter alia*, that the tribunal improperly delegated powers to the tribunal assistant. Russia noted, *inter alia*, that the assistant billed 40%-70% more hours than the arbitrators, and this was on top of the many more hours spent by the tribunal's secretary and assistant secretary. The Hague District Court annulled the award on other grounds, which the Yukos majority shareholders appealed to The Hague Court of Appeal. |

If oralists invoke any of these cases, you may consider asking the following questions.

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| **Q:** | Agent, in [case], did the tribunal inform the parties of the appointment? |
| **Q:** | Agent, did [case] concern a commercial, investment, or inter-State arbitration? Is it applicable to our case, which is an inter-State arbitration? Are the standards different for inter-State arbitration? Should they be different? Why? |
| **Q:** | Agent, what is the legal value of a domestic court decision before this Court? Has this Court ever cited to a domestic court decision before on a point of international law? |

In addition to case law before national courts, there are many non-binding instruments on the topic, such as the Young ICCA[24] Guide on Arbitral Secretaries (2014), the ICC[25] Note on the Appointment, Duties and Remuneration of Administrative Secretaries (2012), the LCIA[26] Position on the Appointment of Secretaries to the Tribunal, the HKIAC[27] Guidelines on the Use of a Secretary to the Arbitral Tribunal (2014), and the SIAC[28] Practice Note on the Appointment of Administrative Secretaries (2015). These instruments were designed for commercial arbitration, but teams may nonetheless reference these instruments to support their claims. If oralists invoke any of these instruments, you may consider asking the following question.

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| **Q:** | Agent, why is [instrument] applicable? Was it not designed for commercial arbitration? |

Teams may also invoke the fact that many permanent international courts and national courts have judicial law clerks, and many arbitral institutions (like ICSID and the PCA) have legal staff that assist with arbitrations. On this topic, you may consider asking the following questions.

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22 High Court of England and Wales, *P v. Q*, [2017] EWHC 194 (Comm.), ¶ 67.
23 *Veteran Petroleum Limited v. Russia*; *Yukos Universal Limited v. Russia*; *Hulley Enterprises Limited v. Russia*.
24 "ICC" is the International Chamber of Commerce.
25 "ICCA" is the International Council for Commercial Arbitration.
26 "LCIA" is the London Court of International Arbitration.
27 "HKIAC" is the Hong Kong International Arbitration Centre.
28 "SIAC" is the Singapore International Arbitration Centre.

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| **Q:** | Agent, should the standard for delegation be the same between arbitral tribunals and permanent international courts? After all, permanent international courts often have judicial law clerks. |
| **Q:** | Agent, should the standard for delegation be the same between institutional arbitral tribunals and *ad hoc* arbitral tribunals? After all, for institutional arbitration the parties accept arbitration conducted by the institution, which may impliedly include assistants. |
| **Q:** | Agent, should the standard for delegation be the same between inter-State, investment, and commercial arbitral tribunals? |
| **Q:** | Agent, should the standard for delegation be the same between international arbitration and domestic litigation and/or arbitration? |

In the present case, the tribunal assistant (Mr. Mikkel Orvindari) summarized the parties' arguments and evidence, attended tribunal deliberations, drafted memoranda to the President of the tribunal, and drafted the award (Problem, ¶¶ 32, 33). In addition, the parties were informed of his existence only upon the submission of the tribunal's final accounting for payment of its fees (Problem, ¶ 32).

- **Anduchenca:** The award is not valid because of the tribunal's improper delegation of power to the tribunal assistant. The parties did not consent to granting decision-making power to a tribunal assistant, and were not informed of his existence.
- **Rukaruku:** The award is valid in spite of the tribunal's delegation of power to the tribunal assistant. There are two independently sufficient reasons:
    - First, the tribunal still had final decision-making power; the assistant simply aided in time-consuming tasks to increase the efficiency and cost-effectiveness of the arbitration.
    - Second, in inter-State arbitration, delegation of decision-making powers is perfectly acceptable and sometimes necessary. For example, in *Palena Frontier (Argentina/Chile)*, the arbitrator was "His Britannic Majesty's Government," and Queen Elizabeth II delegated the task of settling the dispute to a three-member Court of Arbitration.[29]
    - Moreover, asking for Anduchenca's consent to the appointment of the tribunal assistant would have been pointless because it did not participate in the proceedings.

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| **Q:** | Agent, should Anduchenca's non-participation in the proceedings affect the Court's decision on this issue? |

[29] Arbitral Tribunal, *Argentina-Chile Frontier Case (Argentina/Chile)*, Award (9 December 1966), 16 RIAA 109, p. 112.

### 3.2.5 Failure to State Reasons

Historically, many inter-State arbitral awards did not contain reasoning.[30] Today, however, reasoning is generally required, especially because the ICJ addressed the ground of failure to state reasons in both *Arbitral Award Made by the King of Spain (Honduras v. Nicaragua)*[31] and *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*.[32] The standard, however, is unclear.

- **Anduchenca:** The standard is high. In *Arbitral Award Made by the King of Spain (Honduras v. Nicaragua)*, the Court held that the award should contain "ample reasoning and explanations in support of the conclusions."[33] And in *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, the Court held that the reasoning should be "clear and precise."[34]
- **Rukaruku:** The standard is low. Historically, many inter-State arbitral awards did not contain reasoning.[35] As the Court held in *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, a tribunal's reasoning is sufficient even if it is "brief, and could doubtless have been developed further."[36] In both *Arbitral Award Made by the King of Spain (Honduras v. Nicaragua)*[37] and *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*,[38] the arbitral awards contained a mere sentence of reasoning on the issues in question, and yet the Court still considered the reasoning to be "sufficient" or "adequate."

In the present case, it is debatable whether the tribunal failed to state reasons.

- **Anduchenca:** The award is invalid because of the tribunal's failure to state reasons for why it had jurisdiction. The award only had a single sentence justifying the tribunal's jurisdiction: "The tribunal is of the opinion that the present dispute does indeed concern the interpretation and application of Article 7 because the parties dispute whether the Egart was lawfully navigating in the territorial sea of Anduchenca." (Problem, ¶ 26) Nevertheless, this sentence is just an expression of an "opinion"; it does not contain any reasoning.
- **Rukaruku:** The award is valid despite the little reasoning, because it is similar to the limited reasoning given in *Arbitral Award of 31 July 1989*. The reasoning may have left

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30 *E.g.*, Arbitral Tribunal, *Boundary between the Colony of British Guiana and the United States of Venezuela (Great Britain/Venezuela)*, Award (3 October 1899), 28 RIAA 331, p. 338.

31 *See* ICJ, *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment (18 November 1960), 1960 ICJ Rep. 192, ¶ 58.

32 ICJ, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment (12 November 1991), 1991 ICJ Rep. 53, ¶¶ 43, 63.

33 *See* ICJ, *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment (18 November 1960), 1960 ICJ Rep. 192, p. 216.

34 ICJ, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment (12 November 1991), 1991 ICJ Rep. 53, ¶ 43.

35 *E.g.*, Arbitral Tribunal, *Boundary between the Colony of British Guiana and the United States of Venezuela (Great Britain/Venezuela)*, Award (3 October 1899), 28 RIAA 331, p. 338.

36 ICJ, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment (12 November 1991), 1991 ICJ Rep. 53, ¶ 43.

37 *See* ICJ, *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment (18 November 1960), 1960 ICJ Rep. 192, ¶ 58.

38 ICJ, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment (12 November 1991), 1991 ICJ Rep. 53, ¶¶ 43, 63.

more to be desired, but there was not a "failure" to state reasons. Moreover, because Anduchenca did not participate in the proceedings, Anduchenca cannot blame the tribunal for not providing sufficient reasoning to jurisdictional objections that were not presented to it.

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| **Q:** | Agent, should Anduchenca's non-participation in the proceedings affect the Court's decision on this issue? |

### 3.2.6 Other Possible Arguments

Anduchenca could invoke other arguments to attempt to annul the award. Three such arguments are presented below.

- ICJ Judges Serving as Arbitrators: Article 16(1) of the ICJ Statute provides: "No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature." And Article 16(2) provides: "Any doubt on this point shall be settled by the decision of the Court." The question is whether it is appropriate for ICJ judges to serve as arbitrators. In November 2017, the International Institute for Sustainable Development published the so-called "Moonlighting Report," which identified seven current ICJ judges and 13 former ICJ judges who have worked or are currently working as arbitrators in investor-State dispute settlement cases during their ICJ terms.[39] The Court has consistently taken the position that, while it is acceptable for ICJ judges to serve as arbitrators, "they should not accept appointment in an arbitral case, which, in another phase, is subject to being submitted to the Court"[40]—which is the case here. Nevertheless, it is not clear whether this constitutes a ground for annulment of the arbitral award.
- Self-appointment: Anduchenca could argue that the self-appointment by Judge Alice Bacal as the presiding arbitrator (Problem, ¶ 22) constituted an "irregular constitution of the tribunal," and thus a ground for annulment. This argument alone is weak, as there is no express rule prohibiting the appointing authority from appointing him or herself to the tribunal, and in two pending UNCLOS arbitrations—*Enrica Lexie (Italy v. India)* and *Coastal State Rights (Ukraine v. Russia)*—the appointing authority indeed appointed himself to the arbitral tribunal.[41]
- Conflict of Interest: Anduchenca could argue that Judge Bhrasht Moyet had a conflict of interest given his Rukarukan nationality and the fact that he had been appointed by Rukaruku as an arbitrator in four investor-State arbitrations (Problem, ¶ 21). Again, this argument is weak, as these facts alone ordinarily are insufficient to lead to

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39 *See* Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, Commentary, "Is 'Moonlighting' a Problem? The role of ICJ judges in ISDS," *International Institute for Sustainable Development* (November 2017), https://www.iisd.org/sites/default/files/publications/icj-judges-isds-commentary.pdf.

40 U.N. Secretary General, Report, "Conditions of service and compensation for officials other than Secretariat officials: Members of the International Court of Justice," U.N. Doc. A/C.5/50/18 (2 November 1995), ¶ 32.

41 *See* Peter Tzeng, "Self-Appointment in International Arbitration" on *EJIL: Talk!* (7 June 2017), https://www.ejiltalk.org/self-appointment-in-international-arbitration/.

disqualification, let alone serve as a ground for annulment of the award. Nevertheless, Anduchenca could invoke these facts in combination with the *ex parte* contacts argument to demonstrate a lack of impartiality on the part of Judge Moyet.

## 3.3 QUESTION 2: NAVIGATION OF THE EGART

| *Anduchenca's Claim* | *Rukaruku's Claim* |
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| Rukaruku violated Article 6 of the FCN Treaty when the Egart operated in Anduchenca's territorial sea, but Anduchenca did not violate Article 7 of the FCN Treaty when it captured the Egart. | Even if the arbitral award is not valid, Rukaruku did not violate Article 6 of the FCN Treaty when the Egart operated in Anduchenca's territorial sea, but Anduchenca violated Article 7 of the FCN Treaty by capturing the Egart, which it therefore must return to Rukaruku. |
| ***Anduchenca's Anticipated Argument*** | ***Rukaruku's Anticipated Argument*** |
| Rukaruku violated Article 6 because the Egart's operation in Anduchenca's territorial sea did not constitute "innocent passage" or an exercise of the "freedom of commerce and navigation." Anduchenca did not violate Article 7 because the Egart was not exercising the "freedom of commerce and navigation" when Anduchenca captured it. | Rukaruku did not violate Article 6 because the Egart's operation in Anduchenca's territorial sea constituted "innocent passage" and/or an exercise of the "freedom of commerce and navigation." Anduchenca violated Article 7 because the Egart was lawfully exercising the "freedom of commerce and navigation" when Anduchenca captured it. |

Question 2 recalls three recent incidents: in December 2011, Iran captured a U.S. unmanned aerial vehicle allegedly in Iranian airspace; in December 2016, Chinese forces captured a U.S. autonomous underwater vehicle (AUV) in the South China Sea; and in December 2017, Yemeni rebels captured another U.S. AUV off the coast of Yemen. None of these cases was adjudicated by an international court or tribunal. This question is thus meant to examine some of the legal issues that would have been raised in those cases had they been adjudicated on the basis of international law.

Question 2 consists of two separate claims: Anduchenca's claim that Rukaruku violated Article 6 of the FCN Treaty (Section 3.3.1) and Rukaruku's counter-claim that Anduchenca violated Article 7 of the FCN Treaty (Section 3.3.2).

### 3.3.1 Article 6 of the FCN Treaty

Article 6 of the FCN Treaty provides: "Each Contracting Party shall respect the sovereign territory and sovereign waters of the other Contracting Party as required under international law." The question is thus whether the Egart's operation in Anduchenca's territorial sea "respect[ed] the sovereign territory and sovereign waters of [Anduchenca] as required under international law." After discussing jurisdiction (Section 3.3.1.1), this Section examines four potential arguments Rukaruku could make to justify the Egart's operation in Anduchenca's territorial sea: freedom of commerce and navigation (Section 3.3.1.2); innocent passage (Section 3.3.1.3); "non-innocent but lawful passage" (Section 3.3.1.4); and *force majeure* (Section 3.3.1.5). Teams representing Rukaruku, particularly in oral pleadings, should be selective in which arguments they choose to present.

#### 3.3.1.1 Jurisdiction

Rukaruku may raise an objection to the Court's jurisdiction over this claim concerning Article 6 of the FCN Treaty. The reason is that Article 10(a) of the FCN Treaty provides that any dispute concerning Articles 1 to 9 of the FCN Treaty shall first be submitted to arbitration. Article 10(b) only grants the Court jurisdiction to "render a judgment on the merits of the underlying dispute" if it finds that the arbitral award is not valid. In the present case, however, the arbitral award concerned only Article 7 of the FCN Treaty (the Egart's capture) (Problem, ¶ 27), not Article 6 (the Egart's operation).

- **Anduchenca**: The Court has jurisdiction over this claim for three reasons. First, the "underlying dispute" of the arbitration was the operation and capture of the Egart, not simply the capture of the Egart. Second, because Anduchenca did not participate in the arbitration, it did not have the opportunity to file the specific counter-claim concerning the Egart's operation. Third, determining the legality of the Egart's capture would necessarily require a determination on the legality of the Egart's operation.
- **Rukaruku**: The Court does not have jurisdiction over this claim because the "underlying dispute" of the arbitration concerned only the Egart's capture. Anduchenca must first submit the dispute concerning the Egart's operation to arbitration under Article 10(a) of the FCN Treaty.

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| **Q:** | Agent, what is the basis for the Court's jurisdiction over this claim? |

Note that teams may not have thought of this jurisdictional objection, in which case you should feel free to let oralists proceed to the merits of the claim.

#### 3.3.1.2 Freedom of Commerce and Navigation

Rukaruku may argue that the Egart's operation did not violate Article 6 of the FCN Treaty because it was exercising the "freedom of commerce and navigation" under Article 7 of the FCN Treaty. This issue was discussed above in Section 3.2.3.

#### 3.3.1.3 Innocent Passage

In the alternative, Rukaruku may argue that the Egart's operation did not violate Article 6 of the FCN Treaty because it was exercising the right of innocent passage under customary international law. If teams representing Rukaruku raise this argument as well as the argument based on the "freedom of commerce and navigation" under Article 7 of the FCN Treaty, then you may consider asking the following questions.

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| **Q:** | (for Rukaruku) Agent, are you justifying the Egart's operation through two independent arguments (innocent passage, as well as freedom of commerce and navigation)? Or are they related in some way? |
| **Q:** | (for Rukaruku) Agent, supposing that the customary innocent passage regime crystallized after the FCN Treaty was concluded, would that regime override the freedom of commerce and navigation in Article 7 of the FCN Treaty? More generally, can a subsequent customary rule override a treaty provision? (Can you give me an example?) Also, generally speaking, should a *lex posterior* norm override a *lex specialis* |

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| | norm, or the other way around? (Can you give me an example?) |

The ICJ recognized the customary nature of the right of innocent passage in *Military and Paramilitary Activities* and *Qatar v. Bahrain.*[42] Nevertheless, the exact contours of the customary right are up for debate. The United Nations Convention on the Law of the Sea (UNCLOS) contains detailed provisions on innocent passage, but they are applicable to the present dispute only to the extent that they reflect customary international law because Anduchenca is not a party to UNCLOS (Problem, ¶ 48).

Article 17 of UNCLOS provides that ships of all States enjoy the right of innocent passage through the territorial sea, and the subsequent articles of UNCLOS elaborate on this right. The two principal issues are: (1) the legal status of the Egart (Section 3.3.1.3.1); and (2) the innocent passage of the Egart (Section 0).

#### 3.3.1.3.1 Legal Status of the Egart

Article 17 of UNCLOS states only that "ships" enjoy the right of innocent passage, but the Convention does not define the term "ship." Similarly, the ICJ in *Military and Paramilitary Activities* and *Qatar v. Bahrain* held only that "vessels" enjoy the right of innocent passage,[43] without defining the term "vessel." The question is thus whether the Egart qualifies as a "ship" or "vessel." As a side note, under customary law, the right of innocent passage arguably does not apply to warships, as it lacks uniform and widespread State practice and *opinio juris*.

- **Anduchenca**: The Egart is not a "ship" (or "vessel") so it does not enjoy the right of innocent passage. Applying the principle of contemporaneity (terms in a treaty should be interpreted in light of the time at which it was concluded), the word "ship" could not have been intended to refer to AUVs because AUVs did not exist when UNCLOS was concluded. In any case, UNCLOS employs other phrases that could refer to AUVs, such as "underwater vehicles" in Article 20. In the alternative, the Egart is a "warship," so it does not enjoy the right of innocent passage under customary law.
- **Rukaruku**: The Egart is a "ship" (or "vessel") so it enjoys the right of innocent passage. Applying the principle of evolutionary interpretation (terms in a treaty should be interpreted in a manner allowing certain terms to evolve over time), the word "ship" was intended to be an evolving term given the lack of a definition, and it makes sense to apply the rules of innocent passage to AUVs. In any case, the Egart is not a "warship," so any argument based on the inapplicability of the right of innocent passage to warships is irrelevant.

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| **Q:** | Agent, is the Egart a "ship" for the purposes of Article 17 / a "vessel" for the purposes of the ICJ judgments in *Military and Paramilitary Activities* and *Qatar v. Bahrain*? |

[42] ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment (27 June 1986), 1986 ICJ Rep. 14, ¶ 186; ICJ, *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment (16 March 2001), 2001 ICJ Rep. 40, ¶ 223.

[43] ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment (27 June 1986), 1986 ICJ Rep. 14, ¶ 186; ICJ, *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment (16 March 2001), 2001 ICJ Rep. 40, ¶ 223.

| Q: | Agent, although UNCLOS does not contain a definition of "ship," are there other treaties that contain such a definition? Should we consider those other definitions? If so, how does this fall into the framework of treaty interpretation under Article 31 of the Vienna Convention on the Law of Treaties? |
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#### 3.3.1.3.2 Innocent Passage of the Egart

Article 19(1) of UNCLOS defines "innocent passage" as passage that is not "prejudicial to the peace, good order or security of the coastal State," and notes that "[s]uch passage shall take place in conformity with this Convention and with other rules of international law." Article 19(2) lists a series of activities that shall be considered to be "prejudicial to the peace, good order or security of the coastal State," including:

- Article 19(2)(c): "any act aimed at collecting information to the prejudice of the defence or security of the coastal State";
- Article 19(2)(j): "the carrying out of research or survey activities"; and
- Article 19(2)(l): "any other activity not having a direct bearing on passage."

Most commentators assert that Article 19 is customary. Nevertheless, one can attempt to contest this assertion because there is a long line of State practice where foreign submarines conduct espionage in the territorial sea of other States.[44] On the one hand, one could argue that these instances of State practice are violations of the customary rules enshrined in Article 19. On the other hand, one could argue that they show how Article 19 never became customary law.

| Q: | Agent, is Article 19 of UNCLOS customary? If not, are there provisions of Article 19 that are customary? |
|---|---|

In the present case, the parties agree that the Egart was collecting "optical and acoustic data" (Problem, ¶¶ 16, 17). According to Anduchenca, the collection of data "could be used to undermine the national security of Anduchenca" (Problem, ¶ 16), but according to Rukaruku, the collection of data is used by the Rukarukan Navy "to ensure the safe passage of all ships, of all nationalities, transiting those waters" (Problem, ¶ 17).

- **Anduchenca:** The Egart's operation did not constitute innocent passage. Article 19 is customary, and the Egart's collection of optical and acoustic data fell under the three sub-paragraphs listed above. Even if Article 19 is not customary, the Egart's collection of optical and acoustic data cannot be considered "innocent."
- **Rukaruku:** The Egart's operation constituted innocent passage. Article 19 is not customary, but even if it were, the Egart's collection of optical and acoustic data was not "prejudicial to the peace, good order or security of the coastal State," and had a direct bearing on passage because it was used by the Rukarukan Navy "to ensure the safe

[44] James Kraska, "Putting Your Head in the Tiger's Mouth: Submarine Espionage in Territorial Waters" in 54 *Columbia Journal of Transnational Law* 164 (2015), p. 164 ("Incidents by suspected Russian submarines spying in Swedish and Finnish waters in 2014 and 2015, and the ample history of such incidents over the past sixty-five years involving Chinese, British, North Korean, American, and Soviet (and Russian) submarines, suggest undersea spying occurs with some regularity....").

passage of all ships" (Problem, ¶ 17). Moreover, under the principle of good faith, Rukaruku's statement regarding the usage of the data should be taken as true. Anduchenca's statement simply represents a suspicion.

#### 3.3.1.3.3 Surface Navigation

Another potentially relevant provision is Article 20 of UNCLOS, which provides: "In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag." It is not clear, however, whether surface navigation is a requirement for innocent passage, over if it is a separate, unrelated obligation.

- **Anduchenca**: The Egart's underwater navigation (Problem, ¶ 16) also renders the Egart's operation non-innocent. First, Article 20 is customary, as the entire innocent passage regime of UNCLOS is generally regarded as custom. Second, although Article 20 does not expressly state that surface navigation is a requirement for innocent passage, Article 20 is found in the section of UNCLOS entitled "Innocent Passage in the Territorial Sea," and is surrounded by articles concerning innocent passage. Moreover, Article 19(1) provides that "[innocent] passage shall take place in conformity with this Convention ...."
- **Rukaruku**: The Egart's underwater navigation does not render the Egart's operation non-innocent. First, Article 20 is not customary, as seen in the abundant State practice of submarines operating underwater in other States' territorial seas. Second, Article 20 does not expressly state that surface navigation is a requirement for innocent passage; indeed, it fails to mention innocence altogether. Article 19(2) is the provision that defines non-innocent passage, and underwater navigation is not in the Article 19(2) list. Article 20 is a separate, unrelated obligation that does not concern innocent passage.

Anduchenca could make an independent argument that Rukaruku violated Article 20 of UNCLOS because the Egart was operating underwater. Rukaruku has two principal counterarguments: (1) the issue falls outside the jurisdiction of the Court (*i.e.*, it does not concern "sovereign territory" or "sovereign waters" under Article 6 of the FCN Treaty); and (2) Article 20 of UNCLOS is not customary.

### 3.3.1.4 "Non-Innocent But Lawful Passage"

In the alternative, Rukaruku may argue that the Egart's operation constituted "non-innocent but lawful" passage. Under this theory, UNCLOS permits a ship to exercise innocent passage in the territorial sea of other States, but it does not prohibit a ship from exercising non-innocent passage, and under the *Lotus* principle, States are free to do that which is not prohibited.[45]

- **Anduchenca**: The notion of "non-innocent but lawful passage" does not exist in international law, as it is not mentioned in UNCLOS at all. It should be remembered that UNCLOS was intended to be a "comprehensive constitution for the oceans." If such a notion existed, then the drafters of UNCLOS would have included it in the convention. Rather, the only exception to a State's sovereignty over its territorial sea is innocent passage.

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[45] PCIJ, S.*S. Lotus (France v. Turkey)*, Judgment (7 September 1927), PCIJ Series A, No. 10, pp. 18-20.

- **Rukaruku**: The notion of "non-innocent but lawful passage" exists in international law. Indeed, some commentators, as well as some U.S. officials, have recognized this notion.[46] UNCLOS does not expressly prohibit non-innocent passage, and (as stated above) under the *Lotus* principle, States are free to do that which is not prohibited.[47]

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| **Q:** | Agent, does the notion of "non-innocent but lawful passage" exist in international law? |

#### 3.3.1.5 *Force Majeure*

If the Court finds that the Egart's operation in Anduchenca's territorial sea was wrongful, Rukaruku may argue that this wrongfulness should be precluded on the ground of *force majeure*. Article 23(1) of the ILC Articles on State Responsibility provides: "The wrongfulness of an act ... is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation."

- **Anduchenca**: Rukaruku cannot invoke *force majeure* to preclude the wrongfulness of the Egart's operation. The ILC Commentaries to the Articles on State Responsibility note that *force majeure* does not "cover situations brought about by the neglect or default of the State concerned, even if the resulting injury itself was accidental and unintended."[48]
- **Rukaruku**: Rukaruku can invoke *force majeure* to preclude the wrongfulness of the Egart's operation. The ILC Commentaries specifically cite as an example of *force majeure* the diversion of a State aircraft into the airspace of another State due to weather conditions.[49] That situation is analogous to the present situation, as the Egart had been programmed to remain at least 12 nautical miles away from Anduchenca's coast at all times (Problem, ¶ 17).

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| **Q:** | Agent, should the intention of a State be taken into account in determining whether an act was wrongful? That is, if a State accidentally acts in non-conformity with a rule of international law, is that unlawful? Do you have any precedent that supports your answer? |

### 3.3.2 Article 7 of the FCN Treaty

Article 7 provides: "Between the territories of the two Contracting Parties there shall be freedom of commerce and navigation." The question is thus whether the Egart's capture violated the "freedom of commerce and navigation."

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46 *See* James Kraska, "Putting Your Head in the Tiger's Mouth: Submarine Espionage in Territorial Waters" in 54 *Columbia Journal of Transnational Law* 164 (2015), pp. 226-228.

47 PCIJ, S.S. *Lotus (France v. Turkey)*, Judgment (7 September 1927), PCIJ Series A, No. 10, pp. 18-20.

48 ILC, *Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts*, art. 23, cmt. 3.

49 ILC, *Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts*, art. 23, cmts. 3, 5.

#### 3.3.2.1 Jurisdiction

Note that this counter-claim was the very claim before the arbitral tribunal (Problem, ¶ 20). Question 2, however, presumes that the arbitral award is not valid (*i.e.*, Anduchenca wins on Question 1), such that the Court has the jurisdiction to re-adjudicate the claim under Article 10(b) of the FCN Treaty.

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| **Q:** | Agent, if the Court decides that the arbitral award is valid, does it need to decide this counter-claim? |
| **Q:** | Agent, if the Court decides that the arbitral award is invalid, should it give any deference to the holding or reasoning of the arbitral award? |

#### 3.3.2.2 Freedom of Commerce and Navigation

Whether Article 7 was violated depends on whether the Egart's capture violated the "freedom of commerce and navigation." The arbitral tribunal impliedly held that the "freedom of commerce and navigation" referred to two separate freedoms (the freedom of commerce and the freedom of navigation), and concluded that Anduchenca's capture of the Egart "was inconsistent with the mutual commitment of the parties to freedom of navigation" and thus violated Article 7 of the FCN Treaty (Problem, ¶ 27). Because, however, Question 2 assumes that the arbitral award was not valid, the Court may revisit this issue here. This issue was discussed above in Section 3.2.3.

#### 3.3.2.3 Government Ship Immunity

Article 32 of UNCLOS provides: "[N]othing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes." This implies that such immunities exist as a matter of customary law. Rukaruku may argue that the Egart, as a government ship, enjoyed immunity and was thus not subject to capture.

- **Anduchenca**: First, the issue of government ship immunity falls outside the jurisdiction of the Court (*i.e.*, it does not concern the "freedom of navigation" under Article 7 of the FCN Treaty). Second, even if the issue is within the jurisdiction of the Court, Anduchenca did not violate the Egart's government ship immunity because Rukaruku effectively forfeited this immunity by violating Anduchenca's territorial sovereignty when the Egart unlawfully entered into Anduchenca's territorial sea.
- **Rukaruku**: Anduchenca's capture of the Egart violated the Egart's government ship immunity. This is the case even if the Egart's operation violated the sovereignty of Anduchenca. Article 30 of UNCLOS provides, with respect to warships (a type of government ship with immunities), that "[i]f any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately." Article 30 does not permit the coastal State to capture the immunity-bearing ship.

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| **Q:** | Agent, generally, what is the appropriate remedy for a coastal State when a government ship unlawfully enters its territorial sea? Is the remedy restricted to requiring it to leave, as suggested by Article 30 of UNCLOS? What if it does not leave? |

| Q: | Agent, could Rukaruku have brought a counter-claim concerning the alleged violation of the Egart's government ship immunity under Article 6 of the FCN Treaty (rather than Article 7), on the theory that a government ship is part of the "sovereign territory" of the State? |
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#### 3.3.2.4 Countermeasures

In the alternative, Anduchenca may argue that the capture of the Egart was a lawful countermeasure. Article 22 of the Articles on State Responsibility precludes the wrongfulness of an act if the act constitutes a "countermeasure," as elaborated on in Chapter II of Part Three (Articles 49 to 54). Assuming that Rukaruku committed an internationally wrongful act when the Egart operated in Anduchenca's territorial sea, Anduchenca would have to show, *inter alia*, that: (1) it captured the Egart in order to induce Anduchenca to comply with its obligations (Article 49(1)); (2) the capture did not affect the obligation to refrain from the threat or use of force (Article 50(1)(a)); (3) the capture was "commensurate with the injury suffered" (Article 51); (4) Anduchenca called upon Rukaruku to fulfill its obligations and – unless the countermeasure was urgent – notified Rukaruku of its decision to take countermeasures and offered to negotiate with Rukaruku (Article 52); and (5) the countermeasure was or will be terminated as soon as Rukaruku complies with its obligations (Article 53). Anduchenca would probably face significant difficulties in meeting these requirements, particularly because the capture of the Egart was arguably a "use of force," though Anduchenca could potentially argue that its acts of jamming communication links and transmitting false GPS coordinates did not constitute a "use of force."

## 3.4 QUESTION 3: NUCLEAR DISARMAMENT

| *Anduchenca's Claim* | *Rukaruku's Claim* |
|---|---|
| Anduchenca did not violate Article 16 of the FCN Treaty by commissioning and operating the Ibra. | Anduchenca violated Article 16 of the FCN Treaty by commissioning and operating the Ibra. |
| ***Anduchenca's Anticipated Argument*** | ***Rukaruku's Anticipated Argument*** |
| Anduchenca did not violate Article 16 because its commissioning and operating of the Ibra did not violate any alleged customary obligation not to acquire nuclear weapons, any alleged customary obligation to pursue nuclear disarmament obligations, or Security Council Resolution 3790. | Anduchenca violated Article 16 because its commissioning and operating of the Ibra violated the customary obligation not to acquire nuclear weapons, the customary obligation to pursue nuclear disarmament negotiations, and Security Council Resolution 3790. |

Question 3 recalls the recent *Nuclear Disarmament* cases brought by the Marshall Islands against India, Pakistan, and the United Kingdom before the ICJ. In those cases, the Court held that it did not have jurisdiction because of the absence of a "dispute," such that it did not rule on other issues of admissibility or merits. This question is thus meant to examine some of those issues, particularly as many ICJ judges discussed them in their individual opinions.

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| **Q:** | Agent, should we deal with this case just as we dealt with the *Nuclear Disarmament* cases brought by the Marshall Islands? (Answer: No, because the parties have agreed that a "dispute" between the Parties exists, as seen in the Order of the Court.) |

Article 16 of the FCN Treaty provides: "Each Contracting Party shall prohibit the export and import of weapons and ammunition without the express approval of appropriate government departments, and shall comply with all disarmament obligations binding on it under international law." The first obligation contained in this article ("shall prohibit the export and import ...") is not very pertinent to the present case, particularly given that initial findings by the IAEA revealed that the nuclear weapons found on the Ibra were manufactured in Anduchenca (Clarifications, ¶ 10). Teams representing Rukaruku may still try to make an argument based on this obligation, but you should encourage teams to move on to the second obligation contained in Article 16 ("shall comply with all disarmament obligations ...").

Indeed, Rukaruku may argue that Anduchenca violated Article 16 because Anduchenca did not "comply with all disarmament obligations binding on it under international law" in commissioning and operating the Ibra. This Section examines: (1) jurisdiction (Section 3.4.1); (2) the obligation not to acquire nuclear weapons (Section 3.4.2); and (3) the obligation to pursue nuclear disarmament negotiations (Section 3.4.3).

### 3.4.1 Jurisdiction

Anduchenca may object to the jurisdiction of the Court by arguing that the phrase "all disarmament obligations" in Article 16 of the FCN Treaty does not include its nuclear disarmament obligations, such that the present counter-claim does not concern Article 16.

- **Anduchenca:** Applying the principle of contemporaneity (terms in a treaty should be interpreted in light of the time at which it was concluded), the phrase "all disarmament obligations" was not intended to include nuclear disarmament obligations because at the time of the conclusion of the FCN Treaty, there were no nuclear disarmament obligations. Rather, the text and context of Article 16 suggest that the phrase "all disarmament obligations" refers only to the disarmament of conventional weapons.
- **Rukaruku:** Applying the principle of evolutionary interpretation (terms in a treaty should be interpreted in a manner allowing certain terms to evolve over time), the phrase "all disarmament obligations" was intended to be an evolving term such that it includes any future disarmament obligations, including nuclear disarmament obligations. Furthermore, this phrase also includes nonproliferation obligations, as the word "disarmament" in 1947 (when the FCN Treaty was concluded) also included notions of nonproliferation.

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| **Q:** | Agent, what is the meaning of the word "disarmament" in Article 16? What is its scope? Should one apply the principle of contemporaneity or the principle of evolutionary interpretation to interpret it? |
| **Q:** | Agent, what is the difference between "disarmament" and "nonproliferation"? |

### 3.4.2 Obligation Not to Acquire Nuclear Weapons

Article II of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) provides in relevant part: "Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer ... of nuclear weapons [and] not to manufacture or otherwise acquire nuclear weapons ...." Anduchenca acquired nuclear weapons (Problem, ¶ 38), but it is not a party to the NPT (Problem, ¶ 48) so it is not directly bound by Article II. Rukaruku, however, may argue that Anduchenca violated the alleged customary obligation not to acquire nuclear weapons. The principal issues are: (1) jurisdiction (Section 3.4.2.1); (2) the right to invoke responsibility (standing) (Section 3.4.2.2); (3) the customary nature of the obligation (Section 3.4.2.3); and (4) persistent objection (Section 0).

#### 3.4.2.1 Jurisdiction

Anduchenca may argue that the Court does not have jurisdiction over this counter-claim because Article 16 of the FCN Treaty applies only to disarmament obligations, whereas this counter-claim concerns a nonproliferation obligation. Rukaruku may counter that: (1) the phrase "all disarmament obligations" in Article 16 includes nonproliferation obligations because the word "disarmament" in 1947 (when the FCN Treaty was concluded) also included notions of nonproliferation; and/or (2) the obligation not to acquire nuclear weapons is a disarmament obligation.

#### 3.4.2.2 Right to Invoke Responsibility (Standing)

Anduchenca may argue that the counter-claim is inadmissible because Rukaruku does not have the right to invoke Anduchenca's responsibility for violating the alleged customary obligation (*i.e.*, Rukaruku does not have standing). If teams do not raise this point, you may ask the following question.

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| **Q:** | Agent, does Rukaruku have the right to invoke Anduchenca's responsibility for violating this alleged customary obligation (*i.e.*, does Rukaruku have standing)? |

Articles 42 and 48 of the Articles on State Responsibility provide that State A may invoke the responsibility of State B if, *inter alia*:

- Article 42(a): State A is an injured State, and State B breached an obligation owed to State A individually.
- Article 42(b)(i): State A is an injured State, State B breached an obligation owed to the international community as a whole (an obligation *erga omnes*), and the breach specially affected State A.
- Article 48(1)(b): State A is not an injured State, but State B breached an obligation owed to the international community as a whole (an obligation *erga omnes*).

Article 42(a) is customary, but it is not clear whether Articles 42(b)(i) and 48(1)(b) are customary. In *Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the Court upheld standing based on a breach of an obligation owed to a group of States parties to a treaty (an obligation *erga omnes partes*), but the Court has never upheld standing based on a breach of an obligation *erga omnes*. In the *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* cases, the Court effectively rejected standing based on a breach of an obligation *erga omnes*, but this decision has been widely criticized.

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| **Q:** | Agent, has the Court ever upheld a State's right to invoke responsibility (*i.e.*, standing) based on a breach of an obligation *erga omnes*? |
| **Q:** | Agent, what obligations has this Court previously recognized as *erga omnes*?<br>• the prohibition on aggression, the prohibition on genocide, the principles and rules concerning the basic rights of the human person (including protection from slavery and racial discrimination)[50]<br>• the obligation to respect the right to self-determination[51]<br>• many obligations of international humanitarian law[52] |

[50] ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Second Phase, Judgment (5 February 1970), 1970 ICJ Rep. 3, ¶ 34.

[51] ICJ, *East Timor (Portugal v. Australia)*, Judgment (30 June 1995), 1995 ICJ Rep. 90, ¶ 29; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Composition of the Court, Order, Dissenting Opinion of Judge Buergenthal (30 January 2004), 2004 ICJ Rep. 7, ¶¶ 155-156.

[52] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Composition of the Court, Order, Dissenting Opinion of Judge Buergenthal (30 January 2004), 2004 ICJ Rep. 7, ¶¶ 155, 157.

Rukaruku may try to invoke Anduchenca's responsibility based on Articles 42(a), 42(b)(i), and 48(1)(b) of the Articles of State Responsibility, but the debate is likely to focus on Article 48(1)(b) (obligations *erga omnes*).

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| **Q:** | Agent, is the obligation not to acquire nuclear weapons an obligation *erga omnes*? |

#### 3.4.2.3 Customary Nature of the Obligation

It is not clear whether the obligation not to acquire nuclear weapons is customary.

- **Anduchenca**: The obligation is not customary. It may be the case that almost all (188 out of 193) U.N. Member States are parties to the NPT, but this State practice and *opinio juris* does not support the customary nature of the obligation because Article II of the NPT by its own terms applies only to the non-nuclear-weapon State Parties to the treaty. Moreover, in the *North Sea Continental Shelf* cases, the ICJ held that a norm can become customary only if "specially affected" States participate. Four "specially affected" States (India, Israel, North Korea, Pakistan) do not consider themselves to be bound by the obligation, so it cannot be customary.
- **Rukaruku:** The obligation is customary. Almost all (188[53] out of 193) U.N. Member States are parties to the NPT, showing widespread State practice and *opinio juris*. Moreover, in July 2017, 122 States adopted the Treaty on the Prohibition of Nuclear Weapons, which reaffirms the obligation.

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| **Q:** | Agent, how many U.N. Member States are parties to the NPT? Is this sufficient State practice to establish the customary nature of the treaty? |
| **Q:** | Agent, how many Member States are there of the United Nations? |

Teams representing Rukaruku may also attempt to argue that the customary norm is a *local* custom particular to the Odasarran region, as opposed to a *general custom* applicable to all States.

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| **Q:** | Agent, could Article II possibly apply to the Odasarran States as a *local* custom (as opposed to a *general* custom)? Has this Court ever upheld the existence of a local custom? |

#### 3.4.2.4 Persistent Objection

If the obligation not to acquire nuclear weapons is customary, Anduchenca may argue that it is a persistent objector to the obligation. In *Norwegian Fisheries (United Kingdom v. Norway)*, the Court held that even if a certain rule had "acquired the authority of a general rule of international law," it "would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast."[54] As one commentator helpfully summarizes, "a

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[53] Note that there are also a few parties to the NPT that are not U.N. Member States, so oralists may cite slightly different numbers.

[54] ICJ, *Fisheries Case (United Kingdom v. Norway)*, Judgment (18 December 1951), 1951 ICJ Rep. 116, p. 131.

State which persistently objects to a rule of customary international law during the formative stages of that rule will not be bound by it when it comes into existence."[55]

- **Anduchenca**: Anduchenca is a persistent objector because: (1) it has declined to sign, ratify, or accede to the NPT since 1968 (Problem, ¶ 9); (2) its Ministry of Foreign Affairs has stated on numerous occasions over the past 50 years that the Treaty "establishes and aggravates an inherent inequality between nuclear-weapon States and non-nuclear-weapon States" (Problem, ¶ 9); (3) it refused to attend the second substantive session of the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons (Problem, ¶ 39); and (4) it refused to sign the Treaty on the Prohibition of Nuclear Weapons (Problem, ¶ 39).
- **Rukaruku**: Anduchenca is not a persistent objector because: (1) Anduchenca has not clearly objected to the customary obligation not to acquire nuclear weapons, but rather only objected to the NPT and its inherent inequality (Problem, ¶ 9); and (2) Anduchenca did not object to the customary obligation "during the formative stages of the rule" because it had already become custom by 1967, when Anduchenca began objecting to the NPT (Problem, ¶ 9).

### 3.4.3 Obligation to Pursue Nuclear Disarmament Negotiations

Article VI of the NPT provides: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control." As mentioned above, Anduchenca is not a party to the NPT (Problem, ¶ 48) so it is not directly bound by Article VI. Rukaruku, however, may argue that Anduchenca violated the alleged customary obligation to pursue nuclear disarmament negotiations. The key issues are: (1) the right to invoke responsibility (Section 3.4.3.1); (2) the interests of third States (Section 3.4.3.2); (3) the customary nature of the obligation (Section 3.4.3.3); (4) persistent objection (Section 3.4.3.4); and (5) the violation of the obligation (Section 3.4.3.5)

#### 3.4.3.1 Right to Invoke Responsibility (Standing)

As with the obligation not to acquire nuclear weapons, Anduchenca may argue that this counter-claim is inadmissible because Rukaruku does not have the right to invoke Anduchenca's responsibility (*i.e.*, Rukaruku does not have standing). The issues would be the same as those described above in Section 3.4.2.2, but there could be a richer discussion on the question of whether the obligation to pursue nuclear disarmament negotiations is *erga omnes*.

- **Anduchenca**: The obligation is not *erga omnes*. In *Legality of the Threat or Use of Nuclear Weapons*, the Court did not state that the obligation is "owed to the international community as a whole," and President Bedjaoui in his declaration may have called the

[55] Olufemi Elias, "Persistent Objector" in *Max Planck Encyclopedia of Public International Law* (September 2006), ¶ 1.

obligation "opposable *erga omnes*," but he acknowledged he was "go[ing] beyond" the Court's conclusion.[56]

- **Rukaruku**: The obligation is *erga omnes*. In *Legality of the Threat or Use of Nuclear Weapons*, the Court held that "fulfilling the obligation expressed in Article VI of the [NPT] ... remains without any doubt an objective of vital importance to the whole of the international community," and President Bedjaoui in his declaration expressly stated that the obligation was "opposable *erga omnes*." It is true that President Bedjaoui acknowledged he was "go[ing] beyond" the Court's conclusion, but that is only because the case was an advisory opinion, so there was no need for the Court to actually find standing.

#### 3.4.3.2 Interests of Third States

Anduchenca may argue that any finding concerning the obligation to pursue nuclear disarmament negotiations would improperly implicate the interests of other States with nuclear weapons. In *Monetary Gold (Italy v. France, United Kingdom, United States)*, the Court held that it could not decide a dispute where the legal interests of a third State "would not only be affected by a decision, but would form the very subject-matter of the decision."[57] As clarified in subsequent jurisprudence, the *Monetary Gold* principle applies only where a determination on the responsibility of a third State is a necessary prerequisite to the Court's decision.[58] In their individual opinions to the *Nuclear Disarmament (Marshall Islands v. India; Marshall Islands v. Pakistan; Marshall Islands v. United Kingdom)* judgments, Judges Tomka, Cançado-Trindade, Xue, Bhandari, and Crawford discussed the *Monetary Gold* principle.

- **Anduchenca:** The claim is inadmissible for two independently sufficient reasons. First, as Judges Xue and Bhandari stated in their individual opinions to the *Nuclear Disarmament* judgments, the *Monetary Gold* principle applies because the other nuclear-weapon States are absent.[59] Second, as Judge Tomka stated in his individual opinion, the

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[56] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Declaration of President Bedjaoui (8 July 1996), 1996 ICJ Rep. 268, pp. 273-274.

[57] ICJ, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom, United States)*, Preliminary Question, Judgment (15 June 1954), 1954 ICJ Rep. 19, p. 32.

[58] *See* ICJ, *Certain Phosphate Lands (Nauru v. Australia)*, Preliminary Objections, Judgment (26 June 1992), 1992 ICJ Rep. 240, ¶ 55 (holding that the legal interests of New Zealand and the United Kingdom would not form the very subject-matter of the decision because "the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite to the [decision of the Court]"); ICJ, *East Timor (Portugal v. Australia)*, Judgment (30 June 1995), 1995 ICJ Rep. 90, ¶ 35 (holding that the legal interests of Indonesia would form the very subject-matter of the decision because "[i]n order to decide the claims . . . , [the Court] would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct"); *see also* ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, Dissenting Opinion of Judge Crawford (5 October 2016), ¶ 32 (stating that the *Monetary Gold* principle "applies only where a determination of the legal position of a third State is a necessary prerequisite to the determination of the case before the Court").

[59] ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, Declaration of Judge Xue (5 October 2016), ¶ 9; ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, Separate Opinion of Judge Bhandari (5 October 2016), ¶ 18.

multilateral nature of a dispute concerning nuclear disarmament negotiations makes adjudication of the dispute without the presence of the other nuclear-weapon States impossible.[60] Anduchenca cannot conduct negotiations on nuclear disarmament alone. If the Court passes judgment on Anduchenca, it would necessarily also pass judgment on the other nuclear-weapon States.

- **Rukaruku:** The claim is admissible because the *Monetary Gold* principle does not apply. The principle applies only where a determination on the responsibility of a third State is a necessary prerequisite to the Court's decision. As the Court held in *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, the Court may make a decision that would simultaneously imply a concurrent determination of the responsibility of a third State.[61] Moreover, the factual circumstances surrounding Anduchenca's situation are distinct enough from those of any other nuclear-weapon State, such that if the Court passes judgment on Anduchenca, it would not be passing judgment on the other nuclear-weapon States.

#### 3.4.3.3 Customary Nature of the Obligation

It is not clear whether Article VI of the NPT is customary.

- **Anduchenca:** Article VI is not customary. In the *North Sea Continental Shelf* cases, the ICJ held that a norm can become customary only if "specially affected" States participate. Four "specially affected" States (India, Israel, North Korea, Pakistan) do not consider themselves to be bound by Article VI of the NPT, so this is not a customary obligation.
- **Rukaruku:** Article VI is customary. Almost all (188 out of 193) U.N. Member States are parties to the NPT, showing widespread State practice and *opinio juris*. Moreover, in July 2017, 122 States adopted the Treaty on the Prohibition of Nuclear Weapons, which "[r]eaffirm[s] that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control ...."

Anduchenca and Rukaruku may also resort to the jurisprudence of the Court. As already cited above, in *Legality of the Threat or Use of Nuclear Weapons*, the ICJ unanimously held: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[62] In his declaration, President Bedjaoui stated: "As the Court has acknowledged, the obligation to negotiate in good faith for nuclear disarmament concerns the 182 or so States parties to the Non-Proliferation Treaty. I think one can go beyond that conclusion and assert that there is in fact a

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60 *See* ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, Separate Opinion of Judge Tomka (5 October 2016), ¶¶ 38-41.

61 ICJ, *Certain Phosphate Lands (Nauru v. Australia)*, Preliminary Objections, Judgment (26 June 1992), 1992 ICJ Rep. 240, ¶ 55.

62 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), 1996 ICJ Rep. 226, ¶ 105(2)(F).

twofold general obligation, opposable *erga omnes*, to negotiate in good faith and to achieve the desired result."[63]

- **Anduchenca:** The Court's holding applies only to NPT State Parties. Although President Bedjaoui in his declaration opined that the obligation is "general," the fact that he considered his opinion to "go beyond" the Court's conclusion shows that the Court did not consider the obligation to be "general."
- **Rukaruku:** The Court's holding applies to all States. After all, the text of the holding simply states "[t]here exists an obligation" without specifying that it applies only to NPT State Parties. In his declaration, President Bedjaoui made clear that the disarmament obligation is "general" and not just limited to the NPT State Parties.

#### 3.4.3.4 Persistent Objection

If the obligation to pursue nuclear disarmament negotiations is customary, Anduchenca may argue that it is a persistent objector to the obligation. This argument raises the same issues discussed above in Section 0 concerning Anduchenca's alleged persistent objection to the obligation not to acquire nuclear weapons.

#### 3.4.3.5 Violation of the Obligation

As a reminder, Article VI of the NPT provides: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control." Also as a reminder, in *Legality of the Threat or Use of Nuclear Weapons*, the Court unanimously held: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[64]

Teams should understand the distinction between a *pactum de contrahendo* and a *pactum de negotiando*. A *pactum de contrahendo* is an agreement that creates an obligation to conclude a future agreement (an agreement to agree).[65] A *pactum de negotiando*, on the other hand, is an agreement to negotiate with an intention to conclude a future agreement, but it does not create an obligation to conclude that future agreement (an agreement to negotiate).[66] Article VI arguably contains both a *pactum de negotiando* ("pursue negotiations in good faith") and, in light of the Court's advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, a *pactum de contrahendo* ("bring to a conclusion negotiations").

| **Q:** | Agent, what exactly is required by Article VI of the NPT? |
|---|---|

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63 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Declaration of President Bedjaoui (8 July 1996), 1996 ICJ Rep. 268, pp. 273-274.

64 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), 1996 ICJ Rep. 226, ¶ 105(2)(F).

65 Hisashi Owada, "Pactum de contrahendo, pactum de negotiando" in *Max Planck Encyclopedia of Public International Law* (April 2008), ¶ 3.

66 Hisashi Owada, "Pactum de contrahendo, pactum de negotiando" in *Max Planck Encyclopedia of Public International Law* (April 2008), ¶ 5.

| Q: | Agent, is Article VI of the NPT a *pactum de contrahendo* or a *pactum de negotiando*? |
|---|---|

The Court has had many opportunities to offer its views on the meaning of good-faith negotiations. For example, in the *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)* cases, the Court held that negotiations must be "meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it."[67] Furthermore, in *Interim Accord (Macedonia v. Greece)*, the Court held that "[n]egotiations with a view to reaching an agreement also imply that the parties should pay reasonable regard to the interests of the other."[68] Teams may also have recourse to General Assembly Resolution 53/101 "Principles and guidelines for international negotiations" as an expression of the international community's view on what is required in good-faith negotiations.

- **Anduchenca:** Anduchenca did not violate the obligation to negotiate. The obligation to negotiate is not an obligation to not acquire nuclear weapons. It merely requires, as a long-term goal, the conclusion of negotiations leading to nuclear weapons. Now is not the most appropriate time to conclude such negotiations, given that nuclear-weapon States have made clear their position that now is not the time for a treaty on the prohibition of nuclear weapons.
- **Rukaruku:** Anduchenca violated the obligation to negotiate because: (1) it kept its nuclear-armed submarine a secret, showing that it was not pursuing negotiations "in good faith"; (2) it announced the existence of the Ibra while negotiations for the Treaty on the Prohibition of Nuclear Weapons was ongoing (Problem, ¶ 38); (3) it refused to attend the second substantive session of the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons (Problem, ¶ 39); and (4) it has asserted that it will never give up its "right" to possess nuclear weapons (Problem, ¶ 40).

### 3.4.4 Obligation Under Security Council Resolution 3790

Article 25 of the U.N. Charter provides that U.N. Member States "agree to accept and carry out the decisions of the Security Council." When the Security Council intends a provision in a resolution to be mandatory, usually: (1) the resolution contains or refers to a determination of the existence of a threat to the peace, breach of the peace, or act of aggression; (2) the resolution includes the words "acting under Chapter VII"; and (3) the provision begins with the word "decides."[69] Nevertheless, this practice is not uniformly adhered to by the drafters of Security Council resolutions, especially in light of the fact that such resolutions are the result of complex political negotiations.[70]

For the same reason, the interpretation of Security Council resolutions is a complicated task. In its *Kosovo* advisory opinion, the Court explained:

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67 ICJ, *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, Judgment (20 February 1969), 1969 ICJ Rep. 47, ¶ 86.

68 ICJ, *Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia v. Greece)*, Judgment (5 December 2011), 2011 ICJ Rep. 644, ¶ 132.

69 Michael C. Wood, "The Interpretation of Security Council Resolutions," 2 *Max Planck Yearbook of United Nations Law* 73 (1998), p. 82.

70 Michael C. Wood, "The Interpretation of Security Council Resolutions," 2 *Max Planck Yearbook of United Nations Law* 73 (1998), p. 82.

> While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. ... The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.[71]

| | |
|---|---|
| **Q:** | Agent, what are the rules of interpretation governing Security Council resolutions? Does the VCLT apply to the interpretation of Security Council resolutions? |
| **Q:** | Agent, are there general rules of interpretation in international law that apply to treaties, judgments, arbitral awards, Security Council resolutions, and General Assembly resolutions? If not, should there be? |

In the present case, Security Council Resolution 3790 provides: "The Security Council ... *[a]cting under Chapter VII of the Charter of the United Nations*: 1. Calls upon all Member States to take such actions as may be appropriate to support the implementation of the NPT and to restrict the proliferation of nuclear weapons and nuclear-armed vessels, whose very existence constitutes a threat to peace ...."

- **Anduchenca:** Anduchenca did not violate Paragraph 1 of Resolution 3790 because it does not represent a binding decision of the Security Council because it does not begin with the word "decides" (like Paragraph 4, as examined below in Question 4). Even if it did, it is unlikely that the Security Council would have adopted a decision making Anduchenca's conduct unlawful when that would probably imply that the conduct of India, Pakistan, and Israel are also unlawful.
- **Rukaruku:** Anduchenca violated Paragraph 1 of Resolution 3790. Paragraph 1 is a binding decision of the Security Council because the Council was expressly "[a]cting under Chapter VII" and Paragraph 1 refers to a determination on the existence of a threat to peace. Anduchenca's commissioning and operation of the Ibra violated Paragraph 1 because it undermines the implementation of the NPT and expands the proliferation of nuclear weapons and nuclear-armed vessels.

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| **Q:** | Agent, does this Court have the power to rule the legality and/or propriety of Security Council resolutions? |
| **Q:** | Agent, the Security Council made a finding of fact in Paragraph 1 of Resolution 3790: it stated that the "very existence" of nuclear weapons and/or nuclear-armed vessels "constitutes a threat to peace." Is this Court bound by this factual finding? |

[71] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (22 July 2010), 2010 ICJ Rep. 403, ¶ 94.

## 3.5 QUESTION 4: ATTACKS ON THE COVFEFE AND THE IBRA

| *Anduchenca's Claim* | *Rukaruku's Claim* |
|---|---|
| Rukaruku violated Article 17 of the FCN Treaty when it attacked the Covfefe and when it captured the Ibra. | Rukaruku did not violate Article 17 of the FCN Treaty by attacking the Covfefe or by capturing the Ibra. |
| ***Anduchenca's Anticipated Argument*** | ***Rukaruku's Anticipated Argument*** |
| Rukaruku violated Article 17 because the attack on the Covfefe and the capture of the Ibra constituted unlawful uses of force that could not be justified by Security Council authorization or self-defense. Even if they were justified, they were still unlawful because they violated the principles of distinction and proportionality. | Rukaruku did not violate Article 17 because the attack on the Covfefe and the capture of the Ibra constituted lawful uses of force justified by Security Council authorization and self-defense. Moreover, they did not violate the principles of distinction or proportionality. |

Article 17 of the FCN Treaty provides: "Each Contracting Party shall refrain from the threat or use of force against the territorial integrity or political independence of the other Contracting Party, except as permitted under international law." The language of Article 17 comes from Article 2(4) of the U.N. Charter, which embodies the customary prohibition on the use of force. As a result, a violation of Article 17 of the FCN Treaty is equivalent to a violation of Article 2(4) of the U.N. Charter and a violation of the customary prohibition on the use of force.

In the present case, there are two incidents in question:

- Rukaruku's attack on the Covfefe: On 6 June 2017, two Rukarukan warships fired 12 cruise missiles at the Covfefe, four of the missiles hit their target, and the attack killed 10 Anduchencan sailors and seven civilians employed by a private contractor engaged by the Anduchencan Navy (Problem, ¶ 43).
- Rukaruku's capture of the Ibra: On 14 June 2017, six Rukarukan warships enclosed the Ibra and fired a series of torpedoes that forced it to surface, one of the ships swept the submarine's deck with machine-gun fire, and a boarding party gained access to and seized operational control of the submarine (Problem, ¶ 46).

Rukaruku's attack on the Covfefe and capture of the Ibra constituted uses of force. Rukaruku may argue that these acts were not uses of force "against the territorial integrity or political independence" of Anduchenca, especially as they did not occur in the territory or territorial sea of Anduchenca. Nevertheless, it is widely accepted that the phrase "against the territorial integrity or political independence" in Article 2(4) does not restrict the scope of the prohibition

on the use of force.[72] If an oralist representing Rukaruku nevertheless argues this point, you should say that you are not convinced and you should ask Rukaruku to move on.

The principal question is whether Rukaruku's attack on the Covfefe and capture of the Ibra breached the prohibition on the use of force (*jus ad bellum*) (Section 3.5.1); and/or international humanitarian law (*jus in bello*) (Section 3.5.2). As a preliminary matter, Anduchenca and Rukaruku may debate whether only *jus ad bellum*, only *jus in bello*, or both *jus ad bellum* and *jus in bello* apply to the attack on the Covfefe and/or the capture of the Ibra.[73]

| | |
|---|---|
| **Q:** | Agent, does *jus ad bellum*, *jus in bello*, or both *jus ad bellum* and *jus in bello* apply to the attack on the Covfefe / the capture of the Ibra? |

### 3.5.1 *Jus ad Bellum*

There are two principal exceptions to the prohibition on the use of force: (1) Security Council authorization (Section 3.5.1.1); and (2) self-defense (Section 0). Rukaruku may invoke both of them, but should not be penalized for invoking just one of them if it believes that arguing the other exception is weak.

| | |
|---|---|
| **Q:** | (for Rukaruku) Agent, are you invoking both Security Council authorization and self-defense to justify both the attack on the Covfefe and the capture of the Ibra? |

#### 3.5.1.1 Security Council Authorization

Paragraph 4 of Security Council Resolution 3790 authorizes all U.N. Member States "to take all measures commensurate with their specific circumstances in confronting the Ibra, with the goal of neutralizing the threat that it poses to international peace and security." The question is whether this language authorizes the use of force.

The Security Council very rarely uses the phrase "use of force" in authorizing the use of force. Rather, the Security Council most commonly employs the phrases "all necessary means" or "all necessary measures,"[74] which are now widely accepted to mean that the Security Council is authorizing the use of force. Nevertheless, the Security Council may still authorize the use of force without using the phrases "all necessary means" or "all necessary measures." As the U.N. Office of Legal Affairs stated in a legal opinion concerning Security Council Resolution 1509:

> [I]t does not follow from the fact that no such express wording ["necessary means" or "necessary measures"] appears in the resolution that the Security Council has not exercised that power and granted such authorisation. Whether it has done so depends upon the interpretation of the resolution, specifically, on the ordinary and

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[72] Oliver Dörr & Albrecht Randelzhofer, "Article 2(4)" in Bruno Simma et al. (eds.), 1 *The Charter of the United Nations: A Commentary* 200 (3rd edition, OUP 2012), p. 215 & n.79.

[73] *See* Jasmine Moussa, "Can *jus ad bellum* override *jus in bello*? Reaffirming the separation of the two bodies of law," 90 *International Review of the Red Cross* 963 (2008), p. 968.

[74] Niels Bokker, "Outsourcing the Use of Force: Towards More Security Council Control of Authorized Operations?" in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* 202 (OUP 2015), p. 211; Nico Krisch, "Article 42" in Bruno Simma et al. (eds.), 2 *The Charter of the United Nations: A Commentary* 1330 (3rd edition, OUP 2012), p. 1342.

> natural meaning which is to be given to its terms when they are read in the context of the resolution as a whole and in the light of its object and purpose, and against the background of the discussions leading to, and the circumstances of, its adoption ....[75]

At least five past Security Council resolutions employed the phrase "measures commensurate to the specific circumstances" (or some variation thereof), which at least one author has called "Article 41½ resolutions."[76]

- Resolution 665 on Iraq (1990), Resolution 787 on Yugoslavia (1992), and Resolution 875 on Haiti (1993) concern the enforcement of economic sanctions. They authorize States "to use such measures commensurate [to or with] the specific circumstances ... to halt [inward and/or outward] maritime shipping ... in order to inspect and verify their cargoes and destinations."[77]
- Resolution 1973 on Libya (2011) concerns the enforcement of an arms embargo. It authorizes States "to use all measures commensurate to the specific circumstances to carry out ... inspections [of vessels and aircraft]."[78]
- Resolution 2240 on Libya (2015) concerns migrant smuggling and human trafficking. It authorizes States "to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers in carrying out [the inspection and seizure of vessels]."[79]

It should also be emphasized that Paragraph 4 of Resolution 3790 authorizes only measures "commensurate with the specific circumstances in confronting the Ibra." In the examples above, the resolution specified to a certain extent what such measures would be, namely, inspecting, verifying, and seizing vessels. Nevertheless, Paragraph 4 of Resolution 3790 does not provide such details; rather, it simply specifies the goal of "neutralizing the threat that [the Ibra] poses to international peace and security."

- **Anduchenca:** Resolution 3790 did not authorize the use of force because the phrases "all necessary means" and "all necessary measures" are absent. The phrase "all measures commensurate with" only permits the inspection, verification, and seizure of vessels, nothing more. Even if Resolution 3790 authorized the use of force, it only authorized measures "commensurate with their specific circumstances." The attack on the Covfefe was not commensurate with its specific circumstances because the Covfefe was only a supply ship, yet the attack killed 10 Anduchencan sailors and seven civilians (Problem,

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75 Secretariat of the United Nations, Legal Opinion, "Note to the Under-Secretary-General of the Department of Peacekeeping Operations, United Nations" (13 October 2003), 2003 *United Nations Juridical Yearbook* 538, p. 539.

76 Niels Bokker, "Outsourcing the Use of Force: Towards More Security Council Control of Authorized Operations?" in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* 202 (OUP 2015), p. 213.

77 U.N. Security Council Resolution 665 (1990), ¶ 1; U.N. Security Council Resolution 787 (1992), ¶ 12; U.N. Security Council Resolution 875 (1993), ¶ 1.

78 U.N. Security Council Resolution 1973 (2011), ¶ 13.

79 U.N. Security Council Resolution 2240 (2015), ¶ 10.

¶ 43). The capture of the Ibra was also not commensurate with its specific circumstances because the firing of the torpedoes could have resulted in many deaths.

- **Rukaruku:** Resolution 3790 authorized the use of force because the phrase "all measures commensurate with" permits the use of force. It is true that this phrase has only been used in the context of inspection, verification, and seizure of vessels, but in all those resolutions these activities were specified. Paragraph 4 of Resolution 3790, on the other hand, is open-ended, only specifying the goal of "neutralizing the threat that [the Ibra] poses to international peace and security." Both the attack on the Covfefe and the capture of the Ibra were in pursuit of this goal, and were moreover commensurate with the specific circumstances because of the extreme danger that the Ibra, as a nuclear-armed submarine, posed to the region and the world.

There is general agreement, though not absolute consensus, that the principles of necessity and proportionality apply to any use of force authorized by the U.N. Security Council. As these two principles in the context of *jus ad bellum* have been discussed more prominently in the context of self-defense, they are addressed below under the heading of self-defense: necessity (Section 3.5.1.2.2); and proportionality (Section 3.5.1.2.3).

| | |
|---|---|
| **Q:** | Agent, do the principles of necessity and/or proportionality apply to uses of force authorized by the U.N. Security Council? Does the word "commensurate" in Paragraph 4 of Resolution 3790 imply a requirement of necessity and/or proportionality? |

#### 3.5.1.2 Self-Defense

Article 51 of the U.N. Charter provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations." In addition to the requirement of an "armed attack," the ICJ has repeatedly held that acts of self-defense must satisfy the requirements of necessity and proportionality.[80] This Section examines these three requirements in turn: armed attack (Section 3.5.1.2.1); necessity (Section 3.5.1.2.2); and proportionality (Section 3.5.1.2.3).

##### 3.5.1.2.1 Armed Attack

In the present case, Rukaruku invoked self-defense before Anduchenca engaged in an armed attack against it. The principal question here is thus whether a State may invoke self-defense *before* an armed attack has occurred (so-called anticipatory, preemptive, or preventive self-defense). There is no consensus on this question, and the ICJ has expressly avoided addressing it.[81] The following table shows three major theories among commentators.[82]

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[80] ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment (27 June 1986), 1986 ICJ Rep. 14, ¶ 194; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), 1996 ICJ Rep. 226, ¶ 141; ICJ, *Oil Platforms (Iran v. United States)*, Preliminary Objection, Judgment, 1996 ICJ Rep. 803 (12 December 1996), ¶ 43; ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment (19 December 2005), 2005 ICJ Rep. 168, ¶ 147.

[81] ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment (27 June 1986), 1986 ICJ Rep. 14, ¶ 194; ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment (19 December 2005), 2005 ICJ Rep. 168, ¶ 143.

| *Theory* | *Supporting Arguments* |
|---|---|
| A State may invoke self-defense only *after* an armed attack has occurred. | • The plain language of Article 51 ("if an armed attack occurs") suggests that States may invoke self-defense only after an armed attack has occurred.<br>• If States could invoke self-defense before an armed attack has occurred, then States could abuse the doctrine to start wars, such as the U.S. invasion of Iraq in 2003. |
| A State may invoke self-defense *before* an armed attack has occurred, but only in accordance with the strict *Caroline* test, *i.e.*, when "the necessity of that self-defence is instant, overwhelming and leaving no choice of means, and no moment for deliberation." | • Article 51 preserves the pre-Charter "inherent right" of self-defense, which includes the possibility of invoking self-defense before an armed attack has occurred.<br>• The pre-Charter "inherent right" of self-defense included the *Caroline* test (1837), as the military tribunals at Nuremberg and Tokyo (1945-1948) cited the *Caroline* test.<br>• It is unreasonable to require States to wait for an armed attack to actually occur for it to invoke self-defense. |
| A State may invoke self-defense *before* an armed attack has occurred, in accordance with a test not as strict as the *Caroline* test. | • Some modern State practice supports this theory. For example, the U.S. 2002 National Security Strategy provides: "If necessary, however, under long-standing principles of self-defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack. When the consequences of an attack with [weapons of mass destruction (WMD)] are potentially so devastating, we cannot afford to stand idly by as grave dangers materialise. This is the principle and logic of pre-emption."<br>• This theory is the most appropriate in light of modern threats such as terrorism and WMD, including nuclear weapons. |

Teams representing Rukaruku should be able to identify the theory to which they subscribe, though they may not necessarily organize the theories on this question into these three categories.

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| **Q:** | Agent, may a State invoke self-defense before an armed attack has occurred? If so, what are the conditions under which a State can invoke self-defense? Is it not true that [cite a supporting argument of another theory]? |

[82] The information contained in this table is primarily taken from Ashley S. Deeks, "Taming the Doctrine of Pre-emption" in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* 661 (OUP 2015).

Under the first theory, Rukaruku could not lawfully invoke self-defense. Under the second theory, Rukaruku very likely could not lawfully invoke self-defense. Under the third theory, Rukaruku could plausibly argue that it had the right to self-defense.

- **Anduchenca:** A State may invoke self-defense only *after* an armed attack has occurred, so Rukaruku breached *jus ad bellum*. Even if a State could invoke self-defense *before* an armed attack has occurred, the attack on the Covfefe and the capture of the Ibra do not meet the *Caroline* test.
- **Rukaruku:** A State may invoke self-defense *before* an armed attack has occurred under certain situations, particularly when one is dealing with WMD such as nuclear weapons. In the present case, the Ibra was armed with nuclear weapons capable of "accurately strik[ing] targets throughout the Odasarra Region" (Clarifications, ¶ 5), so the attack on the Covfefe and the capture of the Ibra were appropriate.

#### 3.5.1.2.2 Necessity

The necessity requirement provides that a State may act in self-defense only when it has reasonably exhausted peaceful means of achieving the self-defense objective (e.g., diplomatic means). For example, in *Oil Platforms (Iran v. United States)*, the ICJ held that U.S. attacks on Iranian oil platforms were not "necessary," noting that "there is no evidence that the United States complained to Iran of the military activities of the platforms."[83]

As for the attack on the Covfefe, Rukaruku's objective was "to deprive the Ibra of supplies, which would require it to surface" (Problem, ¶ 44). The question of necessity thus turns on whether Rukaruku could have taken other measures to deprive the Ibra of supplies and/or require the Ibra to surface.

- **Anduchenca:** The attack on the Covfefe was not necessary because Rukaruku could have taken other measures: (1) Rukaruku could have informed Anduchenca of its intention to attack the Covfefe, such that Anduchenca would have withdrawn it; and (2) Rukaruku could have forced the Ibra to surface by other means; indeed, eight days later the Rukarukan Navy located the Ibra (Problem, ¶ 46).
- **Rukaruku:** The attack on the Covfefe was necessary because Rukaruku could not locate the Ibra and cutting off its supplies is a straightforward way to require it to surface. Rukaruku had no other reasonable option. After many States had expressed to Anduchenca their concerns over the Ibra, Anduchenca maintained that it would never give up its right to possess nuclear weapons (Problem, ¶ 40). And the Covfefe refused to respond to the Rukarukan warships' attempts to communicate via radio with it (Clarifications, ¶ 9).

As for the capture of the Ibra, Rukaruku's objective was "to neutralize the threat posed by this nuclear-armed submarine in our neighborhood" (Problem, ¶ 44). The question of necessity thus turns on whether Rukaruku could have taken other measures to neutralize this threat.

- **Anduchenca:** The capture of the Ibra was not necessary because the Ibra did not pose a threat to international peace and security.

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[83] ICJ, *Oil Platforms (Iran v. United States)*, Merits, Judgment, 2003 ICJ Rep. 161 (6 November 2003), ¶ 76.

- **Rukaruku:** The capture of the Ibra was necessary because after many States had expressed to Anduchenca their concerns over the Ibra, Anduchenca maintained that it would never give up its right to possess nuclear weapons (Problem, ¶ 40).

| Q: | Agent, is this requirement of necessity here the same as the requirement of military necessity in international humanitarian law? If not, how are they different? |
|---|---|

#### 3.5.1.2.3 Proportionality

The proportionality requirement provides that a State may act in self-defense only when: (1) the act of self-defense is proportionate to the armed attack to which it responds; and/or (2) the harm inflicted by the act of self-defense is proportionate to the harm prevented by the act of self-defense. For example, in *Armed Activities (DRC v. Uganda)*, the ICJ held that "the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence."[84]

- **Anduchenca:** The attack on the Covfefe and/or the capture of the Ibra were not proportionate because the Ibra did not pose a threat to international peace and security.
- **Rukaruku:** The attack on the Covfefe and/or the capture of the Ibra were proportionate because they were undoubtedly much less harmful than a potential nuclear strike by the Ibra.

| Q: | Agent, is this requirement of proportionality here the same as the requirement of proportionality in international humanitarian law? If not, how are they different? |
|---|---|

### 3.5.2 *Jus in Bello*

*Jus in bello* (also called "international humanitarian law" (IHL), "the law of armed conflict," and "the law of war") contains four basic principles that Anduchenca could attempt to argue Rukaruku breached: the principle of distinction (Section 3.5.2.1); the principle of proportionality (Section 3.5.2.2); the principle of military necessity (Section 3.5.2.3); and the principle of humanity (Section 3.5.2.4). Teams are not expected to argue all four: the first two are the most relevant.

#### 3.5.2.1 Principle of Distinction

The principle of distinction contains two obligations. First, the parties to the conflict must at all times distinguish between civilians and combatants:[85] attacks may be directed against combatants[86] unless they are *hors de combat* (e.g., captured, unconscious, shipwrecked),[87] whereas attacks may not be directed against civilians[88] unless they "take a direct part in

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84 ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment (19 December 2005), 2005 ICJ Rep. 168, ¶ 147.

85 Additional Protocol I, art. 48; ICRC, *Customary IHL Database*, rule 1.

86 ICRC, *Customary IHL Database*, rule 1.

87 ICRC, *Customary IHL Database*, rule 47.

88 ICRC, *Customary IHL Database*, rule 1.

hostilities."[89] Second, the parties to the conflict must at all times distinguish between civilian objects and military objectives:[90] attacks may be directed against military objectives,[91] whereas attacks may not be directed against civilian objects.[92] Article 52 of Additional Protocol I defines "military objectives" as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."

As for the attack on the Covfefe:

- **Anduchenca:** The attack on the Covfefe violated the principle of distinction for two reasons. First, the attack killed seven civilians who were not taking a direct part in hostilities. The ICTY Appeals Chamber has held that providing food and supplies does not constitute taking a direct part in hostilities,[93] and indeed the Covfefe was carrying in its cargo bedding, medical supplies, communications equipment, food, and water (Clarifications, ¶ 8), so the civilians were not taking a direct part in hostilities. Second, the Covfefe was not a military objective because it did not make an effective contribution to military action (neither the Covfefe nor the Ibra were engaged in any military action) and its destruction did not offer a definite military advantage for the same reason.
- **Rukaruku:** The attack on the Covfefe did not violate the principle of distinction. The critical question is whether the Covfefe was a military objective. It is true that the attack killed civilians, but the presence of civilians within or near military objectives (e.g., civilians working in a munitions factory) does not render such objectives immune from attack under the principle of distinction; rather, the presence of civilians is taken into account under the principle of proportionality.[94] The Covfefe was a military objective because it was supplying the Ibra, which contains nuclear weapons capable of "accurately strik[ing] targets throughout the Odasarra Region" (Clarifications, ¶ 5).

As for the capture of the Ibra, it would be difficult for Anduchenca to argue that its capture violated the principle of distinction because there is no indication that there were civilians on board, and the Ibra was undoubtedly a military objective.

#### 3.5.2.2 Principle of Proportionality

The principle of proportionality prohibits attacks that "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[95]

As for the attack on the Covfefe:

- **Anduchenca:** The attack on the Covfefe violated the principle of proportionality. The incidental civilian loss, injury, and damage were significant: (1) the death of seven civilians (Problem, ¶ 43); and (2) the sinking of the Covfefe and its cargo (Clarifications,

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89 Additional Protocol I, art. 51(3); ICRC, *Customary IHL Database*, rule 6.
90 Additional Protocol I, art. 48; ICRC, *Customary IHL Database*, rule 7.
91 ICRC, *Customary IHL Database*, rule 7.
92 ICRC, *Customary IHL Database*, rule 7.
93 ICTY, Appeals Chamber, *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgement (17 July 2008), ¶ 177.
94 ICRC, *Customary IHL Database*, rule 8, commentary (citing many national military manuals).
95 Additional Protocol I, arts. 51(5)(b), 57(2)(a)(iii); ICRC, *Customary IHL Database*, rule 14.

¶ 9). The "concrete and direct military advantage anticipated" was minimal because it did not contribute to the surfacing of the Ibra.

- **Rukaruku:** The attack on the Covfefe did not violate the principle of proportionality. The "concrete and direct military advantage anticipated" was significant: the Ibra would have to surface in the near future, eliminating a nuclear threat to the region. The incidental loss, injury, and damage—just seven civilian lives and cargo—were minimal when compared to the significant military advantage gained.

As for the capture of the Ibra, it would be difficult for Anduchenca to argue that it violated the principle of proportionality because there was very little incidental loss, injury, or damage (Problem, ¶ 46).

#### 3.5.2.3 Principle of Military Necessity

The principle of military necessity "permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict."[96]

As for the attack on the Covfefe:

- **Anduchenca:** The attack on the Covfefe breached the principle of military necessity. The attack was not necessary: Rukaruku could have instead impeded, encircled, detained, and/or simply followed the Covfefe in order to achieve the purpose of neutralizing the Ibra.

- **Rukaruku:** The attack on the Covfefe did not breach the principle of military necessity. The attack was necessary: Prime Minister Dage noted that the Covfefe was "about to deliver supplies" to the Ibra (Problem, ¶ 44), and there are no facts to show that the Rukarukan warships were physically close enough to the Covfefe to be able to impede, encircle, detail, and/or follow it; indeed, the fact that only four of the 12 cruise missiles hit their target (Problem, ¶ 43) suggests that the Rukarukan warships were rather far away. The attack was the most straightforward way to force the Ibra to surface so that it could be neutralized, especially given that it is very difficult to locate a submarine.

As for the capture of the Ibra, it would be difficult for Anduchenca to argue that it violated the principle of military necessity because Rukaruku's acts were targeted at capturing the submarine.

#### 3.5.2.4 Principle of Humanity

The principle of humanity prohibits "[t]he use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering."[97] Rukaruku's attack on the Covfefe and capture of the Ibra likely did not violate the principle of humanity because none of its acts caused superfluous injury or unnecessary suffering.

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[96] U.K. Ministry of Defence, *Manual on the Law of Armed Conflict*, ¶ 2.2

[97] ICRC, *Customary IHL Database*, rule 70; *see also* Additional Protocol I, art. 35(2) ("It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.").

# 4 APPENDIX A: INTRODUCTION TO INTERNATIONAL LAW

This Appendix is a primer on public international law for judges who may not have any background in the field.

## 4.1 SOURCES OF INTERNATIONAL LAW

The sources of international law are listed in Article 38(1) of the Statute of the International Court of Justice (ICJ). The first three subparagraphs are the three sources of international law: (a) treaties (*i.e.*, conventions); (b) custom; and (c) general principles of law. The fourth subparagraph is not a source of international law; rather, it is a "subsidiary means" for the determination of rules of law: (d) judicial decisions and teachings (e.g., treatises, commentaries, monographs, articles, and other scholarly works). In other words, one can use judicial decisions and teachings to help identify and determine the rules of treaties, custom, and general principles of law.

ICJ Statute, Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, 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.

There is no hierarchy between the three sources of international law. Some commentators argue that unilateral acts—of both States and international organizations—are a fourth source of international law.

### 4.1.1 Treaties

The first source of international law is treaties (*i.e.*, conventions). Treaties are international agreements between States. The rules governing treaties are set forth in the Vienna Convention on the Law of Treaties (VCLT). Many, but not all, provisions of the VCLT are considered to reflect customary international law.

Article 26 of the VCLT sets out the fundamental principle relating to treaties: *pacta sunt servanda*. Article 26 provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Ordinarily, the provisions of a treaty bind only the States party to the treaty. Nevertheless, the provisions of a treaty may reflect customary international law, in which case they bind all States. It is not uncommon for certain provisions of a treaty to

reflect customary international law while other provisions of the same treaty do not reflect customary international law.

Article 31 of the VCLT sets out the general rule of interpretation. 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." In short, three elements must be examined in interpreting a treaty: (1) the text; (2) the context; and (3) the object and purpose. Article 31(2) provides that the "context" of a treaty includes the text, the preamble, the annexes, and other agreements and instruments specified in subparagraphs (a) and (b). Article 31(3) further provides that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and (c) any relevant rules of international law applicable in the relations between the parties.

### 4.1.2 Custom

The second source of international law is custom. Custom is established if there is sufficient (1) State practice; and (2) *opinio juris*. State practice refers to the conduct of States. *Opinio juris* refers to the belief on the part of the State engaging in the practice that "this practice is rendered obligatory by the existence of a rule of law requiring it."[98] Evidence of State practice and *opinio juris* may be found in, *inter alia*, a State's military acts, executive acts, administrative acts, legislative acts, judicial decisions, policy decisions, policy statements, conclusion of treaties, diplomatic correspondence, opinions of national legal advisers, comments at conferences, and voting in U.N. General Assembly resolutions, as well as in the conduct of international organizations.

The degree of State practice and/or *opinio juris* necessary to qualify a rule as customary is not clear. Nevertheless, the ICJ has given some vague guidance on this issue. In the *North Sea Continental Shelf* cases, the ICJ held that "State practice, including that of States whose interests are specially affected, [must be] both extensive and virtually uniform."[99] And in the 1974 *Fisheries Jurisdiction* cases, the ICJ considered a "generally accepted" rule to be customary.[100] Nevertheless, in *Military and Paramilitary Activities*, the ICJ held that "the corresponding practice [does not have to] be in absolutely rigorous conformity with the rule."[101]

### 4.1.3 General Principles of Law

The third source of international law is general principles of law. There is no consensus over the definition of general principles of law. The majority of such general principles of law are procedural in nature, such as good faith, estoppel, *res judicata*, and clean hands.

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[98] ICJ, *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, Merits, Judgment (20 February 1969), 1969 ICJ Rep. 3, ¶ 77.

[99] ICJ, *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, Merits, Judgment (20 February 1969), 1969 ICJ Rep. 3, ¶ 74.

[100] ICJ, *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment (25 July 1974), 1974 ICJ Rep. 3, ¶ 52; ICJ, *Fisheries Jurisdiction (Germany v. Iceland)*, Merits, Judgment (25 July 1974), 1974 ICJ Rep. 175, ¶ 44.

[101] ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment (27 June 1986), 1986 ICJ Rep. 14, ¶ 186.

### 4.1.4 Judicial Decisions and Teachings

As noted above, judicial decisions and teachings, though listed in Article 38(1), are not a source of international law. Rather, they are a "subsidiary means for the determination of rules of law." In other words, the ICJ may use them to identify and determine the rules of treaties, custom, and general principles of law.

Judicial decisions include international and domestic decisions of both permanent courts and arbitral tribunals. As a matter of practice, however, the ICJ most often cites to its own precedent and the precedent of its predecessor, the Permanent Court of International Justice (PCIJ). Because judicial decisions are not a source of international law (but only a subsidiary means for the determination of rules of law), the ICJ is not bound by its own precedent. This is reinforced by Article 59 of the ICJ Statute, which provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

Teachings refer primarily to scholarly writings. Notably, they include only the teachings of "the most highly qualified publicists," such as Grotius, Lauterpacht, Oppenheim, McNair, Brownlie, current and former ICJ judges (including their declarations, separate opinions, and dissenting opinions), as well as the documents produced by the International Law Commission (ILC). Many students cite the scholarly writings of individuals who are not among "the most highly qualified publicists." As a result, you may question oralists about the identity of the author of any scholarly source they cite.

## 4.2 INTERNATIONAL DISPUTE SETTLEMENT

### 4.2.1 Terminology

The terminology used before the ICJ (and in international dispute settlement more generally) differs in various ways from the terminology used in domestic dispute resolution. The following differences should be noted.

- The words "settle" and "settlement" are for the most part synonymous with "resolve" and "resolution." The ICJ tends to use the words "settle" and "settlement."
- The party that filed the case is called the "applicant" (not the "plaintiff").
- The party against whom the case is filed is called the "respondent" (not the "defendant").
- The written pleadings filed by the parties are called "memorials" (not "briefs" or "cases").
- The individuals representing States are called "agents" (if they are direct representatives) or "counsel" (if they are external legal advisers).[102] In Jessup, the oralists should be called "agents."
- The judges on the ICJ may be referred to as "Your Excellency" (not "Your Honor"), though in practice this is not common. In Jessup, the oralists should refer to the judges as "Your Excellency" and/or the President of the bench as "Mr./Mme President."

[102] More specifically, there are "agents," "co-agents," "deputy agents," "assistant agents," "advocates," "counsel," and others.

### 4.2.2 Judicial Settlement vs. Arbitration

Article 33(1) of the U.N. Charter lists many means of dispute settlement in international law: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements. The table below examines the differences between two of them: judicial settlement (e.g., before the ICJ) and arbitration.

| *Judicial Settlement* | *Arbitration* |
|---|---|
| • The judicial body usually has the jurisdiction to settle **more than one dispute**. | • The judicial body usually has the jurisdiction to settle **only one dispute**. |
| • The judicial body is usually called a **court** if it is permanent, or a **tribunal** if it is not permanent.[103] For example, the International Criminal Court (ICC) is permanent, so it is a court; the International Criminal Tribunal for the Former Yugoslavia (ICTY), on the other hand, is not permanent, so it is a tribunal. | • The judicial body is usually called a **tribunal**, though in some arbitrations, particularly inter-State arbitrations, the judicial body is officially called a **court of arbitration** or something else. It is by definition not permanent. |
| • The members of the judicial body are usually called **judges**. | • The members of the judicial body are usually called **arbitrators**. In many cases, at least some if not all of the arbitrators are appointed by the parties to the dispute. |
| • A final decision rendered by the judicial body is usually called a **judgment**. | • A final decision rendered by the judicial body is called an (arbitral) **award**. |

One must not confuse arbitral institutions (also called "arbitration centers") with arbitral tribunals. Arbitral institutions are organizations that administer arbitrations, such as the Permanent Court of Arbitration (PCA), the International Centre for Settlement of Investment Disputes (ICSID), and the International Chamber of Commerce (ICC). Arbitral tribunals, on the other hand, are judicial bodies that settle disputes. Therefore, it is usually incorrect to say, "The PCA/ICSID/ICC held ...." Rather, one should normally say, "the PCA/ICSID/ICC tribunal held ...."

### 4.2.3 Jurisdiction

The fundamental principle in international dispute settlement is the principle of consent: a court or tribunal has jurisdiction to settle a dispute only if the parties consented to the court or tribunal doing so. This consent may be given before or after the dispute arises. There are four bases for the ICJ's jurisdiction:

[103] One exception to this rule is the International Tribunal for the Law of the Sea (ITLOS), which is a permanent judicial body.

- optional clause declarations (under Article 36(2) of the ICJ Statute) – Both States make a declaration stating that they will accept the jurisdiction of the Court over any dispute (or certain disputes) filed against it by another State that has also made such a declaration.
- compromis (*i.e.*, special agreement) – Both States conclude a treaty to submit the dispute to the Court after the dispute has arisen.
- compromissory clause (*i.e.*, dispute resolution clause, dispute settlement clause) – Both States concluded a treaty (often before the dispute arose), which provides for submission of any dispute (or certain disputes) to the Court.
- *forum prorogatum* – One State institutes proceedings against a second State over which the Court does not have jurisdiction, but the second State consents to the Court's jurisdiction for the case.

#### 4.2.4 Admissibility

The distinction between jurisdiction (of the court or tribunal) and admissibility (of the claim) is often unclear. Indeed, international courts and tribunals have diverged on the exact differences between jurisdiction and admissibility. In general, the ICJ considers issues of jurisdiction to be those relating to the jurisdictional provisions of the ICJ Statute (Articles 34-37), such as whether the parties consented to the Court's jurisdiction, whereas issues of admissibility include a range of other issues that could prevent the Court from adjudicating the merits of the dispute. Commentators generally agree that the *Monetary Gold* principle, mootness, and standing are issues of admissibility.

#### 4.2.5 Burden of Proof

The burden of proof is about which party has the burden of proving a matter of fact or law.

With respect to matters of general international law (e.g., jurisdiction, admissibility, the law of treaties, the law of State responsibility), the Court adopts the principle of *jura novit curia* ("the court knows the law"), according to which the Court is the one that is supposed to know the law.[104] As a result, neither party has the burden of proof. As the Court held in the 1974 *Fisheries Jurisdiction* cases, "the burden of establishing or proving rules of international law cannot be imposed on any of the parties, for the law lies within the judicial knowledge of the Court."[105]

With respect to matters of specific international law (e.g., bilateral treaties, local customs) and national law (if relevant), the Court treats the existence of such rules of law as matters of fact, such that the party asserting it has the burden of proof.[106] For example, the Court held in *Asylum* that "[t]he Party which relies on a [local custom] must prove that this custom is established in such a manner that it has become binding on the other Party."[107]

With respect to matters of fact, the Court adopts the principle of *onus probandi incumbit actori* ("the burden of proof is on the claimant"). As the Court has held on multiple occasions, the party

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[104] Robert Kolb, *International Court of Justice* 934-35 (Hart 2013).

[105] ICJ, *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment (25 July 1974), 1974 ICJ Rep. 3, ¶ 17; ICJ, *Fisheries Jurisdiction (Germany v. Iceland)*, Merits, Judgment (25 July 1974), 1974 ICJ Rep. 175, ¶ 18.

[106] Robert Kolb, *International Court of Justice* 935 (Hart 2013).

[107] ICJ, *Asylum (Colombia/Peru)*, Judgment (20 November 1950), 1950 ICJ Rep. 266, p. 276.

alleging the fact bears the burden of proving it.[108] However, the Court clarified in *Croatian Genocide* and *Diallo* that this principle "is not an absolute one."[109] For example, the Court has held that neither party has the burden of proof with respect to facts that are "notorious" or "undisputed,"[110] and that sometimes a party cannot be required to prove a "negative fact."[111]

### 4.2.6 Standard of Proof

The standard of proof is about the degree of certainty that must be proven by the party that bears the burden of proof.

The ICJ has not articulated consistent standards of proof, employing a variety of terminology, such as "(in)sufficient," "satisfying," "convincing," "conclusive," and "decisive." The Court has, however, recognized that "claims against a State involving charges of exceptional gravity [e.g., use of force, genocide] must be proved by evidence that is fully conclusive [*i.e.*, a higher standard]."[112] In addition, the Court held in *Corfu Channel* that if evidence is in the "exclusive territorial control" of the respondent, then the claimant "should be allowed a more liberal recourse to inferences of fact and circumstantial evidence."[113]

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[108] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment (18 November 2015), ¶ 172 (Nov. 18); ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment (26 November 1984), 1984 ICJ Rep. 392, ¶ 101; ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment (20 April 2010), 2010 ICJ Rep. 14, ¶ 162.

[109] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment (18 November 2015), ¶ 172 (Nov. 18); ICJ, *Ahmadou Sadio Diallo (Guinea v. DRC)*, Merits, Judgment (30 November 2010), 2010 ICJ Rep. 639, ¶ 54.

[110] Robert Kolb, *International Court of Justice* 935 (Hart 2013).

[111] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment (18 November 2015), ¶ 172 (Nov. 18); ICJ, *Ahmadou Sadio Diallo (Guinea v. DRC)*, Merits, Judgment (30 November 2010), 2010 ICJ Rep. 639, ¶ 54.

[112] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment (18 November 2015), ¶ 178 (Nov. 18) (quoting *Bosnian Genocide*); ICJ, *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment (9 April 1949), 1949 ICJ Rep. 4, p. 17.

[113] ICJ, *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment (9 April 1949), 1949 ICJ Rep. 4, p. 17.

# 5 APPENDIX B: TIMELINE OF EVENTS

**Middle Ages (5th-15th Centuries) to Present**: Odasarra Region (which both Anduchenca and Rukaruku are a part of) relies on trade amongst the five individual states within it.

**1650s to Present**: Rukaruku is the dominant military, diplomatic, and economic power in the Odasarra Region.

**September 1939 – 2 September 1945**: World War II devastates the Odasarra Region, excluding Rukaruku, and becomes a hub for illicit international arms trafficking.

**1946 – 1948**: Rukaruku facilitates a program to stabilize the Region in addition to concluding bilateral Treaties of Friendship, Commerce and Navigation with each of the other Odasarran States. The treaties include promoting the disarmament of the Region.

**12 March 1947**: Anduchenca and Rukaruku sign their Treaty of Friendship, Commerce and Navigation (FCN Treaty). The treaty entered into force ten days later.

**1947 – 1967**: Rukaruku provides present day US$33.8 billion in economic aid to Anduchenca. Part of this sum goes to the disarmament programs. The two countries have strong political relationships at this time.

**26 October 1967**: Anduchenca's military, with the support of the country's socialist movement stage a successful coup d'état. General Rafiq Tovarish is installed as the country's Head of State and government.

**1 July 1968**: All of the Odasarran States, except Anduchenca, sign the Treaty on the Non-Proliferation of Nuclear Weapons as non-nuclear-weapon States, and ratify it shortly thereafter.

**Early 1969 – 1970s**: Rukaruku terminates economic assistance to and disarmament programs in Anduchenca. Odasarran States verbally dispute with Anduchenca.

**December 1982**: All of the Odasarran States, except Anduchenca, sign and ratify the United Nations Convention on the Law of the Sea.

**1995 – Present**: Rukarukan Navy implements an aggressive strategy to end the illicit small-arms trade in the region. At least 40 occasions have resulted in the Rukarukan Navy engaging with suspected trafficking vessels.

**August 2010**: Anduchenca adopts a law stating any foreign government vessels must stay 12 nautical miles from its coastline unless prior authorization is obtained. Rukaruku objects to this law but nonetheless keeps its vessels 12 nautical miles away from Anduchenca's coastline.

**August 2015**: Rukarukan Navy employs autonomous underwater vehicles in its operations. These vehicles are programmed to remain at least 12 nautical miles away from Anduchenca's coastline.

**25 September 2015**: Anduchenca's General Tovarish declares Rukaruku is using "spy drones" to conduct surveillance of Anduchenca's naval activities.

**29 October 2015**: Chief of Staff of the Anduchencan Navy releases a statement revealing they have captured a "Rukarukan spy drone" and will be investigating the technology to assess any violations of sovereign or international law. A spokeswoman for Rukaruku's Ministry of

External Relations states the autonomous underwater vehicle, known as the Egart, was doing nothing illegal and insists it be returned.

**November 2015**: The two states dispute over the Egart's return to Rukaruku.

**1 December 2015**: The Prime Minister of Rukaruku offers to travel to Anduchenca to negotiate the Egart's return. General Tovarish responds, stating there is no negotiation to be had and no return to be discussed.

**20 December 2015**: Rukaruku instituted arbitration proceedings against Anduchenca under Article 10(a) of the FCN Treaty, citing Article 7 was violated. Judge Moyet is appointed Rukaruku's party-appointed arbitrator. Anduchenca does not respond to the Request for Arbitration.

**28 February 2016**: In accordance with Article 10(a) of the FCN Treaty, the ICJ President (Judge Bacal) appoints the two remaining members of the tribunal. Judge Tong is appointed on behalf of Anduchenca and Judge Bacal appoints herself as the presiding arbitrator.

**1 March 2016**: Anduchenca releases a statement saying it will not attend, participate, or acknowledge any rulings that come from the arbitral proceedings.

**March 2016 – March 2017**: The arbitral proceedings continue without Anduchenca, and consider jurisdiction questions due to Anduchenca's objection. All communications and materials were sent to Anduchenca with invitations to respond and present its arguments. Anduchenca never took these opportunities.

**2 March 2017**: The tribunal releases a 30-page award, resolving the dispute in favor of Rukaruku, concludes Article 7 of the FCN Treaty was violated, and orders Anduchenca to return the Egart.

**3 March 2017**: A spokeswoman of the Ministry of Foreign Affairs of Anduchenca states the award is "null and void" due to a lack of jurisdiction.

**21 March 2017**: The Institute for Legal Studies of Arbitration (ILSA), an international nongovernment organization, releases a report titled "The Ruka Ruse," which gives three pieces of information that make the arbitration seem questionable and insufficient. Judge Moyat's impartiality, an assistant's hiring and role (named Mr. Orvindari), and an identical draft of the award supposedly written by Mr. Orvindari were all questioned in the report.

**27 March 2017**: A spokesperson for Rukaruku's Ministry of External Relations addresses the ILSA report, stating some irregularities occurred during the arbitral proceedings, but that the arbitral award was not invalid and that Anduchenca should still return the Egart.

**2 April 2017**: The Sydney Morning Herald publishes an article stating Anduchenca has commissioned a nuclear-armed submarine called the Ibra.

**9 April 2017**: General Tovarish confirms the existence of the Ibra and refuses to reveal how Anduchenca acquired the nuclear weapons. He also stated Anduchenca would not attend or sign any treaties resulting from the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons sessions in June or July 2017.

**23 April 2017**: The Ministry of Foreign Affairs of Anduchenca states there is no threat to peace or security due to Ibra, and that it is a right to possess nuclear weapons.

**8 May 2017**: The Security Council adopts Resolution 3790 to confront the threat of nuclear weapons. The Minster of Foreign Affairs of Anduchenca submits a letter to the Security Council, stating Anduchenca's rejection of Resolution 3790 as lawless.

**6 June 2017**: Two of Rukarukan's warships fire 12 missiles at a supply ship titled Covfefe 250 nautical miles away from the Anduchencan coast. Four of the missiles hit. 10 Anduchencan sailors die as well as seven civilians. It is revealed Covfefe was directed to deliver provisions and personnel to the Ibra. Rukaruku's Prime Minister Dage releases a statement claiming responsibility for the attack and the reasons for it being peace and prevention of war.

**14 June 2017**: The Rukarukan Navy locates Ibra and seizes the submarine with all personnel on board.

**19 June 2017**: The Security Council adopts a Resolution with Rukaruku and other parties, providing the complete dismantling of Ibra and the disposal of all nuclear materials.

**3 July 2017**: Anduchenca files in the Registry of the Court an Application instituting proceedings against Rukaruku, invoking the FCN Treaty. The Vice President assumes the role of Acting President.

**10 July 2017**: Rukaruku indicates its intentions to file counter-claims, also citing the FCN Treaty.

# 6 APPENDIX C: PROPER NOUNS IN THE PROBLEM

All of the proper nouns (*i.e.*, names) in the Problem are words in foreign languages related to the Problem. This table explains the meaning behind most proper nouns in the Problem.

| *Proper Noun* | *Explanation* |
|---|---|
| Alice | In Spanish, "la cabecilla" (which is "Alice Bacal" backwards, plus an extra 'l') means "leader" or "ringleader" (of a gang). This is a reference to how Judge Alice Bacal presided over the allegedly corrupt arbitration. |
| Anduchenca | In Chinese, the proverb "an du chen cang" (暗渡陈仓) (literally, "to secretly cross Chencang") generally means "to feign one thing while doing another," but more specifically means "to attack under the cover of a diversion." It is the eighth stratagem of the "Thirty-Six Stratagems," an ancient Chinese essay on military strategy. It refers to a military strategy used by Liu Bang against Xiang Yu in 206 BC, where Liu Bang overtly pretended to work on repairing a road for attack, but instead snuck through the passage of Chencang. This is a reference to how Anduchenca has been building a surface navy, only to distract observers from its nuclear-armed submarine. |
| Bacal | *See supra* Alice. |
| Bhrasht | In Hindi, "bhrasht" means "corrupt." This is a reference to the allegedly corrupt nature of Judge Bhrasht Moyet's conduct. |
| Bouc | In French, "bouc" means "goat," and "bouc émissaire" means "scapegoat." This is a reference to how Rukaruku may have simply used Mr. Bouc Chivo as a scapegoat for its improper conduct in the arbitration. |
| Chivo | In Spanish, "chivo" means "goat," and "chivo expiatorio" means "scapegoat." This is a reference to how Rukaruku may have simply used Mr. Bouc Chivo as a scapegoat for its improper conduct in the arbitration. |
| Covfefe | This is a May 2017 reference from Twitter with no known meaning. |
| Dage | In Chinese, the phrase "da ge" (大哥) means "big brother"; the fictional character Big Brother in the George Orwell novel *1984* maintained surveillance over everyone. This is a reference to Rukaruku's alleged espionage on Anduchenca. |
| Egart | In French, "arbitrage" (which is the reverse of the two proper nouns in the title of the case, "Egart" and "Ibra") means "arbitration." This is a reference to the arbitration in the Problem. |

| | |
|---|---|
| Freund | In German, "freundschaft" means "friendship." This is a reference to the friendly relations between Anduchenca and Rukaruku when they signed the FCN Treaty. |
| Fudichou | In Chinese, the military proverb "fu di chou xin" (釜底抽薪) (literally, "to take firewood from under a boiling pot") means "to indirectly attack the enemy by cutting off its supply." This is a reference to Rukaruku's decision to attack the supply ship Covfefe in order to neutralize the Ibra. |
| Ibra | (1) *See supra* Egart.<br>(2) In Arabic, the proverb "ibra fi kumat qesh" (literally, "a needle in a haystack") generally means "something very difficult to find," but more specifically means "looking for something small in a large area, with dire consequences if the small thing is not found" (because if a horse eats the needle then it can die). "Ibra" is the name of Anduchenca's nuclear-armed submarine that Rukaruku is looking for, and "Kumatqesh" is the name of the ocean in which Rukaruku is searching. The consequences are dire because if the submarine is not found, Anduchenca could use it to launch a nuclear attack. |
| Kakak | In Indonesian, "kakak" means "older sibling." This is a reference to how Rukaruku treats Anduchenca like a younger and less-developed sibling. |
| Kilinda | In Swahili, "kilinda" means "protector." This is a reference to the objective of the IAEA to help protect the world from non-peaceful uses of nuclear energy. |
| Kumatqesh | *See supra* Ibra. |
| Mitrata | In Hindi, "mitrata" means "friendship." |
| Mou | In Chinese, the phrase "tong mou" (同谋) means "accomplice." This is a reference to the conspiracy theory that Judge Mou Tong was an accomplice in the corrupt arbitration. |
| Moyet | In Russian, the proverb "ruka ruku moyet, vor vora kroyet" (рука руку моет, вор вора кроет) (literally, "a hand washes a hand, a thief covers a thief") originates from the Latin proverb "manus manum lavat," which means "people should help each other." The Russian variant, however, is usually used in the context of meaning "a thief should help another thief so they can cover up for each other." |
| Odasarra | In Spanish, "arrasado" (which is the reverse of "Odasarra") means "destroyed" or "devastated." This is a reference to the state of the Odasarra Region after World War II. |
| Persahabatan | In Indonesian and Malay, "persahabatan" means "friendship." This is a |

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| | reference to the friendly relations between Anduchenca and Rukaruku when they signed the FCN Treaty. |
| Rafiq | In Arabic, the word "rafiq" means "companion; partner; comrade." It is used in the phrase "rafiq al-saleh," which means "fellow soldier." This is a reference to General Rafiq Tovarish's title of "Brotherly Leader of the Revolution." |
| Rukaruku | *See supra* Moyet. |
| Schaft | *See supra* Freund. |
| Tong | *See supra* Mou. |
| Tovarish | In Russian, the word "tovarish" (товарищ) means "friend; comrade." It was commonly used in Soviet times. This is a reference to General Rafiq Tovarish's title of "Brotherly Leader of the Revolution." |
| Vrede | In Dutch, the word "vrede" means "peace." This is a reference to the objective of the IAEA to promote the peaceful use of nuclear energy. Also, the word "vrede" appears in the word "Vredespaleis," which is the Dutch name (*i.e.*, the local name) for the Peace Palace, where the ICJ sits. |