
BEFORE THE
INTERNATIONAL COURT OF JUSTICE

TEAM NO. 2

THE GOVERNMENT OF PATRIA,

Applicant

against

THE REPUBLIC OF JUSTIA,

Respondent

MEMORIAL FOR APPLICANT

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STATEMENT OF JURISDICTION

Pursuant to Article 40, Section 1 of the Statute of the International Court of Justice, the Government of Patria and the Republic of Justia have agreed to submit to the jurisdiction of the International Court of Justice for decision upon their differences as described in the compromis. The International Court of Justice shall decide the controversy in accordance with the applicable rules of law described in Article 38 of the Statute of the International Court of Justice.

STATEMENT OF FACTS

Pharmaca, Inc., a pharmaceutical firm incorporated in Patria, established a subsidiary in Justia, Subpharm, S.A., and subsequently entered into a licensing agreement. Pharmaca licensed to Subpharm certain patents, trademarks and trade secrets relating to a drug, "Calmian." Subpharm was to exclusively produce and market the drug in Justia.

Political developments in Justia led to the enactment of new legislation in that country designed to, inter alia, register transfer of technology agreements for government approval, shorten foreign-registered patent protection, establish compulsory licensing for certain patent use and know-how, mandate nationalization of foreign enterprises, and structure a new compensation formula in the event of nationalization. Furthermore, Justia, after the initial legislation was passed, announced their intention to denounce certain multilateral and bilateral treaties with Patria that were in conflict with their recently enacted policies.

Although the subsidiary, Subpharm, submitted the licensing agreement to the Justian Registry for approval, the Registry rejected the agreement as contrary to Justian law. Several months later, prior to the grace period allowed in the Justian divestment statute, Justia nationalized Subpharm and continued to produce "Calmian." A Justian special panel awarded compensation, in Justian currency, of one million United States dollars, five million dollars less than Subpharm's assessed value. The compensation was payable over a five year period at two percent interest. Pharmaca was denied any appeal from the decision of the special panel.

The seized Subpharm began to export the drug to several countries contrary to the express agreement. Subsequently, Pharmaca invoked the arbitration clause in the agreement and charged breach of contract for non-payment of royalties for patent rights leased, for secret know-how and for the trademarks. Furthermore, Subpharm was charged for other obligations breached, including exporting the drug and publicly disclosing certain trade secrets.

An international arbitral tribunal found that Pharmaca was entitled to damages or injunctive relief on all issues. Justia, although a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, refused to enforce the award when duly presented by Pharmaca.

Pharmaca, in seeking the award, had exhausted all appeals in Justia. Subsequent to many months of diplomatic discussion between Patria and Justia relating to the dispute, Justia proposed that all internationally-cognizable issues be submitted to the International Court of Justice. Accordingly, Patria submitted its application to this Court for resolution of the mutually agreed upon issues.

QUESTIONS PRESENTED

- I. Whether Justia violated any obligation it might have had under international law to extend national treatment to foreign licensors or investors?
- II. Whether there was a violation of international law in Justian legal procedures and practices relating to the invalidation of the agreement between Pharmaca and Subpharm or to the nationalization of Subpharm?
- III. Whether the compensation for the expropriation of assets belonging to Pharmaca or Subpharm was consistent with international law?
- IV. Whether the provisions of the Justian law that require transfer of technology disputes to be settled in Justian Courts, and according to Justian law, are consistent with international law?

SUMMARY OF ARGUMENT

I.

Justia is in clear derogation of established treaty and customary international law in failing to extend national treatment to Pharmaca, a Patrian company investing in Justia. Both the multilateral Paris Convention for the Protection of Industrial Property and the bilateral Treaty of Friendship and Commerce between Partia and Justia are explicit in mandating reciprocal national treatment to foreigners in commercial operations. To the extent treaties are binding instruments commanding good faith of the parties, Justia is in violation of international law. Justia cannot be excused from its obligations by announcing an intention to denounce the treaties or by claiming a fundamental change of circumstances. Applying the law in existence and not non-binding United Nations General Assembly resolutions, this Court must hold that Justia contravened international law.

II.

Although international law respects the rights of parties engaged in world commerce to freely contract, Justia ex post facto invalidated a technology licensing agreement between Pharmaca and its subsidiary, Subpharm. Settled national and international anti-trust laws not only support similar agreements but sound prudential considerations, favoring both developed and developing countries, clearly justify approval of technology transfer licenses.

Justia's nationalization of Subpharm not only violates the bilateral treaty with Patria, it fails to conform with internationally-condoned procedures and practices. Discriminatory in procedure, the expropriation by Justia of patent and trademark rights, originally registered and in force in Patria, violated the universally accepted principle of territorial limitation. The nationalization, patently illegal in procedure, cannot serve to facilitate the economic development Justia seeks, and is, thus, contrary to the mutual interests of the parties to this dispute.

III.

Although Justia may have a right to expropriate private foreign property, the government fails to fulfill certain international obligations incumbent upon it. Just compensation, representing the genuine value of all assets seized, must be given to the victimized company in a prompt and effective manner. Justia's compensation scheme, in deducting "excess profits," cannot meet the standards of adequacy mandated by international law. Furthermore, the compensation awarded Pharmaca cannot be considered effective and prompt in the manner in which it was given.

IV.

Justia violates norms of international law in refusing to recognize the choice of law and forum selection clause in the Pharmaca-Subpharm licensing agreement. Prominent national and international tribunals recognize the advantages and even

the necessity behind the parties' right to include these provisions in commercial contracts. Likewise, arbitration is a globally-sanctioned method for adjudicating disputes. Even developing countries that register technology license agreements honor and recognize the benefits of arbitration clauses in those contracts. Justia has no defense in refusing to enforce an international arbitral decision, since it recognized independent jurisdiction and Pharmaca's right to relief on all issues presented.

ARGUMENT AND AUTHORITIES

I. JUSTIA CONTRAVENED INTERNATIONAL LAW IN FAILING TO EXTEND NATIONAL TREATMENT TO PATRIAN COMPANIES INVESTING IN JUSTIA

A. Multilateral and Bilateral Treaties of which Justia is a Signatory Guarantee National Treatment to Foreign Investors.

1. The Paris Convention Guarantees National Treatment.

Justia is a party to the Paris Convention for the Protection of Industrial Property, as revised at Stockholm in 1967 [hereinafter Paris Convention]. The Convention mandates in clear language that "[n]ationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant . . . to nationals; all without prejudice to the rights specifically provided for by this Convention."¹ This Court should take special cognizance of any and all multilateral agreements which require Justia to extend national treatment to Patrian licensors and investors. Although this international convention expressly establishes the duties of the parties to this dispute, a major bilateral treaty between the applicant and respondent mandates similar treatment of foreign investors.

2. The Treaty of Friendship and Commerce Guarantees National Treatment to Patrian Investors.

The Treaty of Friendship and Commerce between Patria and Justia [hereinafter Commerce Treaty], identical to the Convention

1. International (Paris) Convention for the Protection of Industrial Property, as revised at Stockholm, July 14, 1967, art. 2, para. 1. 21 U.S.T. 1583, T.I.A.S. No. 6923 [hereinafter cited as Paris Convention].

of Establishment between the United States and France, establishes a fifty year commitment to reciprocal rights and privileges to nationals and investors of each respective country. Recognizing the good faith obligation to interpret a treaty in light of its object and purpose,² this specific bilateral treaty is unhesitant in according equitable treatment to foreign investors. Article II requires the signatories to permit a foreign national, in this case Pharmaca, to enter Justia for the purpose of "developing and directing the operations of an enterprise in which they have invested ... a substantial amount of capital."³ Two provisions of the treaty require national treatment to Patrian companies who organize subsidiaries under the laws of Justia, acquire majority interests, and control and manage such companies.⁴ Any subsidiaries, according to the Treaty, "shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies."⁵ Thus, under the terms of the treaty, both Pharmaca and its subsidiary, Subpharm, should receive national treatment from Justia.

2. Vienna Convention on the Law of Treaties, opened for signature, May 23, 1964, art. 31, reprinted in 63 Am. J. Int'l L. 875 (1969) [hereinafter cited as Vienna Convention].

3. Treaty of friendship and Commerce Between Patria and Justia, art. 2, para. 1 [for purposes of Jessup Competition, Convention of Establishment Between the United States and France, signed at Paris, November 25, 1959, 11 U.S.T. & O.I.A. 2398, T.I.A.S. No. 4625] [hereinafter cited as Commerce Treaty].

4. Commerce Treaty, supra note 3, art. 5, para. 1.

5. Id.

B. Treaties Of Which Justia Is A Signatory Represent Legally Binding Obligations Upon Justia.

1. Treaties Are Binding Under General Principles of International Law.

The Vienna Convention on the Law of Treaties clearly postulates that a treaty is an international agreement concluded between States in a written form and governed by international law.⁶ It is binding upon the Contracting States and must be performed by them in good faith (pacta sunt servanda).⁷ This Court recognizes the Vienna Convention not as merely new rules of treaty law, but as a formulation of existing rules which were already a part of positive international law.⁸ Indeed, this Court held, even prior to the Convention coming into full force, that "[t]he rules laid down by the Vienna Convention on the Law of Treaties concerning [termination of treaties] may in many respects be considered as a codification of existing customary law"⁹ Given the widespread acceptance of the Convention as a statement of customary international law, the doctrine of pacta sunt servanda must control in the present case. Treaties must be regarded as binding and be performed in good faith.

6. Vienna Convention, supra note 2, art 2.

7. Id.

8. Statement of Mustafa Kamil Yasseer, drafting chairman at Vienna, cited in Briggs, Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice, 68 Am. J. Int'l L. 51, 52 (1974).

9. Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia, [1971] I.C.J. 47.

2. The Limiting Doctrines of Jus Cogens and Rebus Sic Stantibus Are Not Applicable.

This Court must exercise restraint in allowing States such as the respondent to unilaterally plead jus cogens (a violation of a peremptory norm of general international law) to escape their international obligations or deny the validity of legal agreements. The general character and lack of precision in the doctrine make its application tenuous at best.¹⁰

Furthermore, the doctrine of rebus sic stantibus (fundamental change of circumstances) as a ground for unilateral treaty termination bears even stricter scrutiny and restraint.¹¹ This Court has declined to apply the doctrine in any case before it.¹² Municipal courts, while recognizing the existence of rebus sic stantibus as a principle in international law, have "always ended by rejecting the application of it in the particular circumstances of the case before them."¹³

Article 62 of the Vienna Convention outlines the limitations placed on the application of the doctrine in general.¹⁴ Circumstances serving as an essential basis for the consent of the parties to the agreement must have changed unforeseeably so as to

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10. Lagonissi Conference on International Law, Papers and Proceedings 74 (1967).
 11. Vienna Convention, supra note 2, art. 62.
 12. Official Documents, United Nations Report of the International Law Commission, 58 Am. J. Int'l L. 284 (1964). Declined to use the doctrine in the Free Zones Cases, [1958] P.C.I.J., ser. A/B, No. 46, 156-58.
 13. Id.
 14. Vienna Convention, supra note 2, art. 62, para. 1.

radically transform the scope of the obligations to be performed.¹⁵ In the present case, there is an acute absence of any evidence that the economic dilemma of Justia, experienced today by even the developed countries, was "unforeseeable." Therefore, the attempt on the part of Justia to unilaterally denounce their treaty obligations based on rebus sic stantibus must fail. The International Law Commission indicated that the doctrine, when invoked unilaterally, presents grave risks to the security of treaties.¹⁶ It also noted that State practice has shown "a strong disposition to question the right of a party to denounce a treaty unilaterally on this ground."¹⁷

3. The Attempted Unilateral Denunciation by Justia is Ineffective to Excuse Performance.

Although Respondent Justia claims that their obligations under the treaties were excused by their "denunciation," customary international law as well as the specific treaties themselves contradict their position.

Article 43 of the Vienna Convention, established as customary international law, dictates, inter alia, that the "...denunciation of a treaty...as a result of...the provisions of the treaty, shall not in any way impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the

15. Id.

16. Int'l L. Comm'n, Reports (1966) 2 Y.B. Int'l L. Comm'n 233, U.N. Doc. A/6309/Rev. 1 (1966).

17. Id. at 77; Nationality Decree Case [1923] P.C.I.J., ser. C, NO. 2, at 187.

treaty."¹⁸ As explained below, Justia violated international obligations independent of any treaty to which it was a party.¹⁹

Article 42 makes it incumbent upon a party that denounces a treaty to follow the provisions for denunciation set forth in the specific treaty.²⁰ To the extent Justia is to effectuate a positive denunciation of the Paris Convention, it is bound to follow the procedure set forth in Article 26 of that Convention. A denunciation "shall take effect one year after the day on which the Director General has received the notification (emphasis added)."²¹ While the President of Justia indicated that notification would be made, the record discloses no receipt of the formal instrument of denunciation. Furthermore, Justia began violating treaty provisions prior to the one-year grace period. Therefore, the failure to extend national treatment as dictated by the Paris Convention cannot be excused under the alleged denunciation.

Article XVIII(2) of the Commerce Treaty also requires written notice of denunciation. Since Justia clearly failed to follow this "written notice one year in advance" provision,²² it cannot be released from performing their binding treaty obligations.

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18. Vienna Convention, supra note 2, art. 43.
 19. See Parts II, III and IV of this memorial.
 20. Vienna Convention, supra note 2, art. 42.
 21. Paris Convention, supra note 1, art. 26.
 22. Commerce Treaty, supra note 2, art. 18, para 2.

C. United Nations General Assembly Resolutions Do Not Provide An Adequate Basis for Changing Sound Principles of International Law.

1. U.N. General Assembly Resolutions are Not Authoritative.

Justia relies upon two 1974 U.N. General Assembly Resolutions, 3281 (XXIX) and 3201 (S-VI), to provide an independent justification for their actions under international law.²³ Noted authorities, writing specifically on these resolutions, have concluded that General Assembly resolutions do not in any way have the force of law.²⁴ This Court should recognize the limitations inherent in any resolution proclaiming "new international law."

2. International Legal Norms as Used by this Court Cannot Be Altered by Mere Aspirations of Nations.

Although proposed policies emerging in another forum may conflict with the appropriate legal norms, this Court, in the Fisheries Jurisdiction Cases,²⁵ characterized these proposals as mere aspirations of states rather than as expressions of principles of existing law.²⁶ The Court has stated that "its duty is to apply the law as it finds it, not to make it,"²⁷ and that they

23. Charter of Economic Rights and Duties of States, G.A. Res. 3281 29th Session U.N. GAOR (Agenda Item 48), U.N. Doc. A/RES/3281 (1975); Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, 6th Special Session U.N. GAOR (Agenda Item 7), U.N. Doc. A/RES/3201 (1974).

24. Haight, The New International Economic Order and the Charter of Economic Rights and Duties of States 9 Int'l Lawyer 591, 597 (1975).

25. Fisheries Jurisdiction Cases, Merits, Judgment, [1974] I.C.J. 3, para. 53.

26. Id. at para 53.

27. South West African Cases, Judgment, [1966] I.C.J. 4, at 48.

"cannot render judgment sub specie legis ferendae, or anticipate the law before the legislature has laid it down."²⁸

The desirability of this policy is that the Court adds stability to the law and retains its integrity by applying the law as written rather than engaging in judicial lawmaking.

D. Justia Violated International Law in Denying National Treatment to Patrian Investors.

1. The Requirement to Register Contracts Denies National Treatment.

Justia's Law to Regulate the Transfer of Technology requires that agreements between foreign owners and foreign-controlled Justian enterprises be submitted to the Registry for approval.²⁹ To single out and demand registration of the Pharmaca-Subpharm agreement when there is no comparable requirement under the law for contracts between Justian companies to be registered is a violation of both the letter and spirit of national treatment guaranteed in the treaties in existence.

2. The Disparities in Patent Duration Deny National Treatment.

The Paris Convention in Article 4bis (5) mandates an equal duration of patent rights obtained with the benefit of a foreign priority.³⁰ Similarly, Article VII (1) of the Commerce Treaty requires "national treatment with respect to . . . maintaining patents of invention."³¹

28. Fisheries Jurisdiction Cases, supra, note 35 at 23.

29. A Law to Regulate the Transfer of Technology, 14 July, 1975, art. 2.

30. Paris Convention, supra note 1, art. 4bis, para. 5.

31. Commerce Treaty, supra note 3, art. 8, para. 1.

In Justia's new Law on the Protection of Industrial Property, different lengths of patent protection are given depending on whether the patent is registered by a foreigner or a Justian national. By reducing the protection time of foreign patents exclusively, Justia is in clear "derogation of the national treatment principle of the Paris Convention."³² Moreover, such action violates the bilateral agreement between Patria and Justia with respect to national treatment. Justia must be held accountable.

This Court should find a sufficient basis to award immediate judgment on the merits in favor of Patria. Apart from Justia's insidious abrogation of international treaty obligations, there exists significant alternative reasons to give judgment to Patria.

II. JUSTIA VIOLATED INTERNATIONAL LAW IN FAILING TO RESPECT RIGHTS OF PRIVATE PARTIES TO CONTRACT AND IN NATIONALIZING PRIVATE PROPERTY IN DEROGATION OF INTERNATIONALLY-CONDONED PROCEDURES

A. The Private Agreement Between Pharmaca and Subpharm Met Legal Standards Sanctioned in Leading National and International Law.

1. Autonomy of Parties to Contract is Respected.

Article II (1)(b) of the Commerce Treaty allows foreign nationals to direct the operations of a foreign subsidiary.³³ Article III(2) respects contracts between parties "that provide for the settlement of disputes by arbitration of controversies...."³⁴

32. Statement of Director General at Paris Union, A. Boysch cited in Ad Hoc Group of Governmental Experts on the Revision of the Paris Convention, Second Session (Geneva, December 15-22, 1975), 15 Indus. Prop. 46, 61 (1976).

33. Commerce Treaty, supra note 3, art. 2, para. 1(b).

34. Id. art. 3, para. 2.

The right to contract is clearly recognized in treaty law between the two countries.

Moreover, customary international law applies the principle of "autonomy of the will of the parties" in international contracts.³⁵ Most Western and Socialist countries, including many developing countries, recognize party autonomy and the concept of sanctity of contracts as a universally accepted principle common to domestic and international legal order.³⁶ Therefore, under treaty and customary law, Pharmaca and Subpharm have the right to freely make agreements in an autonomous fashion. Thus, Justia, by invalidating the private agreement between the two companies, violated international law.

2. Settled National and International Antitrust Laws Respect Similar Agreements.

Antitrust law in the United States and the European Economic Community is considered to be "well-settled and relatively conservative."³⁷ As such it provides an appropriate basis for evaluating the licensing agreement between Pharmaca and Subpharm.

The contract law of many nations neither foster nor restrict agreements which embody tie-in or anti-exportation clauses, unilateral grant-back of technical information, or other practices

35. Texaco Overseas Petroleum Co. v. Libya, Int'l Arbitral Tribunal, Merits reprinted in 17 Int'l L. Mat. 1, 11 (1978).

36. Dessemontet, Transfer of Technology Under UNCTAD and EEC Draft Codifications: A European View on Choice of Law in Licensing, 12 J. Int'l L. & Econ. 1, 304 (1977).

37. Davidow, The United States, Developing Countries and the Issue of Intra Enterprise Agreements, 7 Ga. J. Int'l & Comp. L. 507, 508 (1977).

complained of by developing countries.³⁸ Indeed, the enforcement policy of United States antitrust agencies, hardly known for their laxity, has consistently been to refrain from challenging agreements between parents and subsidiaries.³⁹

The EEC policy is similar. Under Common Market Law, the general rule is that stated by the Court of Justice in the Sterling Drug-Centrafarm case: Article 85 of the Treaty of Rome is not violated by "[a]greements or concerted practices between undertakings belonging to the same group in the form of parent company and subsidiary. . . ."⁴⁰

With reference to the specific provisions in the invalidated contract, export limitations have been approved in a number of cases irrespective of whether the grantor had patents in the prohibited countries. In Brownell v. Ketcham Wire & Mfg. Co.,⁴¹ an agreement by an exclusive licensee not to export patented articles to any foreign country was upheld on the ground that "[t]his was an agreement (by the licensee) to honor the territorial limits of the license granted, and was lawful."⁴² A court, in upholding a patent license agreement with export restrictions (similar to the present case), granted the licensor damages for unpaid royalties. The court expressly stated, "[t]he owner or

38. Dessemontet, supra note 36, at 17.

39. Davidow, supra note 37, at 508.

40. Centrafarm BV v. Sterling Drug, Inc., [1974] Comm. Mkt. L.R. 480.

41. 211 F.2d 121 (9th Cir. 1954).

42. Id. at 129.

holder of exclusive patent rights to make, use and sell may carve out of his grant a limited monopoly for a licensee."⁴³

Grant-back clauses, while condemned by Justia in invalidating the private contract, have a well-respected raison d'etre. Recognizing the legitimate interests of a licensor in improvements of its own technology, the licensor must receive assurances that improvements spawned through the transfer would be available to the licensor, at least on a non-exclusive basis, or the transfer would be discouraged.⁴⁴ Both United States and EEC authorities posit that grant-back provisions are not per se unlawful nor constitute an undue imposition on the interests of the developing country.⁴⁵

Secrecy and know-how clauses, such as Clause 10 in the disputed agreement, are vital to preserve the commercial value of the techniques disclosed to the licensee.⁴⁶ Publicists have promoted the conclusion of as many express agreements to secrecy as possible, both for the prevention of misappropriation and to define with greater clarity the legal liability of employees or other third parties regarding eventual leaks.⁴⁷ Justia's

43. American Optical Co. v. New Jersey Optical Co., 58 F. Supp. 601, 606 (D. Mass. 1944).

44. Finnegan, A Code of Conduct Regulating International Technology Transfer: Panacea or Pitfall? 60 J. Pat. Off. Soc. 71, 95 (1978).

45. Id. at 95, Dessemontet, supra note 36, at 27.

46. Dessemontet, supra note 36, at 25.

47. Id.

invalidation of the licensing agreements fails to consider the economic and legal realities of technology transfer.

3. Sound Prudential Considerations Support Respecting Agreements.

This Court should recognize that license transactions and the creation of useful and practical technology require the expenditure of tremendous resources for research and development (R and D). Most R and D programs are very expensive and seldom rewarding. A mere one percent of R and D programs produce successful technology.⁴⁸ It is thus supremely important to recognize that multinational enterprises, such as Pharmaca, will undertake foreign investment only if, in light of perceived rules and circumstances, the benefits of such decisions outweigh the risks and detriments. The control of the buying and selling policies of their subsidiaries are inextricably linked to investment decisions.⁴⁹ This has led Joel Davidow, Former Foreign Commerce Chief, Antitrust Division, U.S. Department of Justice, to conclude: "...the consequences of a decline in international investment activity would be so serious for the world economy that both developed and developing countries must consider very carefully before imposing radically different rules of the game on multinational enterprises."⁵⁰

48. Finnegan, supra note 44, at 73.

49. Davidow, supra note 37, at 513.

50. Id.

4. Under International Law, Renegotiation is Required Only If the Government is a Party.

Although Justia afforded Subpharm the option to renegotiate the licensing agreement, such an option is facially capricious and beyond the bounds imposed by international law. The Chairman of the Commission of Transnational Corporations has formulated a Code of Conduct representing a universal concensus as of January 1979 on the activities and treatment of transnational corporations. Under the Code, renegotiation of contracts is only required when the Government or governmental agencies is a party.⁵¹ Since this was a contract concluded between two private parties, under international law, Justia's imposition of renegotiation is flagrantly overbroad.

B. Justia's Procedure of Nationalization of a Patrian Company's Property Exceeded the Norms Condoned by International Law.

1. Nationalization was in Derogation of Treaty Law.

As mentioned earlier,⁵² Article V(1)(b) of the Commerce Treaty allows Patrian companies to acquire majority interests in Justian enterprises. Therefore, the 1976 amendments to the Justian Law on the Protection and Regulation of Foreign Investment, which require 61% Justian ownership of certain enterprises, directly contravenes the express intent of the Treaty with Patria.

Moreover, the Permanent Court of International Justice, in the case concerning Certain German Interests in Polish Upper

51. Transnational Corporations: Code of Conduct; Formulations by the Chairman, Report of the Commission on Transnational Corporations, U.N. Doc. E/C.10/AC.2/8 (1978).

52. See Argument I(A)(2), supra note 4.

Silesia,⁵³ held that certain expropriations are illegal and based its Judgment on the Merits on the theory of protection of "acquired rights." Certain rights, vested in treaty law, when deprived of by a host country are in "derogation from the rules generally applied in respect to the treatment of foreigners."⁵⁴ A subsequent case decided by the Court, the Chorzow Factory Case,⁵⁵ reaffirms the principle that nationalization measures in violation of treaties are unlawful and entail full restitution.⁵⁶ International scholars have concluded that a State, through expropriation, merely acquires title by its own national law--a title that other States may not recognize if they think that the title has been acquired in a manner not recognized by international law.⁵⁷ Indeed, as Professor Wortley of the University of Manchester posits, "to recognize a title so acquired might itself be a breach of international law."⁵⁸

Nationalization of Subpharm and Patrian property rights is facially violative of international law irrespective of the criteria or compensation proposed.

53. [1926] P.C.I.J., ser. A., No. 7, at 21.

54. Id. at 303.

55. [1928] P.C.I.J., ser. A., No. 17.

56. Id.

57. B. Wortley, Expropriation in Public International Law 16-17 (1959).

58. Id. at 17.

2. Nationalization Was Discriminatory in Procedure.

Article IV(1) of the Commerce Treaty indicates, inter alia, that the lawfully acquired rights and interests of nationals and companies of Patria shall not be subjected to "impairment" in Justia, by "any measure of a discriminatory character."⁵⁹ This bilateral provision is firmly consistent with customary international law and decisions of the Permanent Court which forbid discriminatory expropriation.⁶⁰

International treaty and customary law was violated due to discriminatory procedures in the Justian expropriation. First, Justia restricts, under their law, nationalizations to enterprises in certain sectors, including pharmaceutical. Since not all enterprises were subjected to Justian nationalization, it may be inferred that by including pharmaceuticals, a non-strategic industry in the list, Justia was, in reality, isolating a dominant enterprise of the Government of Patria for seizure.

Second, the nationalization of Subpharm was discriminatorily accelerated in violation of Justia's own amendment to the Foreign Investment Law. While the Law allowed a one-year grace period, Justian officials announced the nationalization of Subpharm within nine months of the law's passage. The record shows no other property of any other State where accelerated nationalization was ordered. Under an interpretation of the International Law Commission, Justia is responsible for any nationalization measure if

59. Commerce Treaty, supra note 3, art. 4, para. 1.

60. S. Friedman, Expropriation in International Law 188 (1953); Oscar Chinn Case [1934] P.C.I.J., Series A/B, No. 7, at 22.

"unjustified irregularities which are prejudicial to aliens are committed in the interpretation or application of the said measures."⁶¹ Under the circumstances, Justia's conduct is highly suspect.

3. Nationalization of Patent and Trademark Rights Violated the Principle of Territorial Limitation.

The jurisprudence relating to the territorial effect of nationalization has great value to safeguard Pharmaca's property interests outside of Justia. It is a well-known rule that nationalizations do not, in principle, produce any extraterritorial effect and that they cannot, invariably, impair or affect the existence of companies as legal entities which do not have the nationality of the nationalizing State.⁶² This is one of the many principles of international law which has found uniform world-wide recognition.

Territorial protection is accorded to intellectual property, such as the patents, trademarks and tradenames in the present case. Under binding principles of customary international law, Justia may be able to control the use of the "Calmian" patent and trademark in Justia, but it is beyond her power to "seize" the protection accorded to that right by Patria and other nations in which "Calmian" is registered.⁶³ The rights outside of Justia, under the principle of "territorial limitation," remain vested in

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61. II Y.B. Int'l L. Comm. 46-47, U'N. Doc. A/CN.4/34/Add.1 (1961).
62. Domke, Foreign Nationalizations, 55 Am. J. Int'l L. 585, 600 (1961).
63. Bogdan, Expropriation in Private International Law 72 (1975).

Pharmaca. Justia is given no right to the protection accorded patents and trademarks originally registered in Patria.

Any presentation of the case law supporting the principle of territorial limitation must start with the Chartreuse cases.⁶⁴ In that fact setting, France expropriated monk orders. Monks of the Chartreuse order left France and settled in Spain where they continued to produce their renowned liqueur according to a secret recipe. Courts in many nations had to take a position to the expropriator's claim and all but one (French-governed Tunisia) decided in favor of the exiled monks. The rationale offered was the principle of territorial limitation.⁶⁵ As the United States Supreme Court said when the issue was considered, "The French law [which promulgated the expropriation] cannot be conveyed to have any extraterritorial effect to detach the trademarks in [the U.S.] from the product of the monks, which they are still manufacturing."⁶⁶

The present case is clearly analogous. Pharmaca possesses the original rights to the trademarks and patents of "Calmian" that it is still producing and marketing. Justia is in violation of international law for expropriating and marketing intellectual property rights whose "situs" is Patria.

64. Id. at 73.

65. Id.

66. Baglin v. Cusenier Co., 221 U.S. 580, 596 (1911).

Both Swiss,⁶⁷ United States,⁶⁸ and Italian courts⁶⁹ have recently upheld the principle of territorial limitation of trademark rights in cases of expropriation. Publicists, after reviewing the cases, have concluded that, in litigation involving the question of the right to a trademark, the original owner will prevail against the purchaser, assignee, or distributor of a government that attempts to confiscate that trademark right.⁷⁰ This Court, in accordance with international law, must rule against Justia on this issue.

4. Illegal Nationalizations are Contrary to Mutual Interests.

Although such a proposition is axiomatic with regard to Pharmaca and Patria, the particularities posed by this nationalization and the rationalization offered by Justia cannot be justified in world opinion:

Beneficial as nationalization may ultimately prove to be to a State and to its citizens, there is little to justify placing the burden of a state's economic experimentation upon the shoulders of the foreign investor, who has neither any voice in the decision to indulge in such experimentation, nor any status to enjoy whatever benefits may ultimately be derived therefrom.⁷¹

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67. Zeiss Ikon A.G. v. Mechanik, (Nov. 1953 Schweitzerische Mitteilungen uber Gewerblichen Rechtschutz Urheberrecht 200 (civ. Ct. Basel-Stadt, 1953)).
68. F. Palicio y. Compania, S.A. v. Brush, 256 F. Supp. 481 (S.D. N.Y. 1966).
69. Suit Narodin Pidnik & Bata A.S. v. Societa B.S.F. Striftung, (April, 1956, noted in Comment, 5 Am. J. Comp. L. 641 (1956)).
70. Note, Effects of Confiscation on Trade-marks Registered Abroad, 8 Am. U.L. Rev. 44, 53 (1959).
71. Kissam & Leach, Sovereign Expropriation of Property & Abrogation of Concession Contracts, 28 Ford. L. Rev. 177, 214 (1959).

Other publicists have noted that attacks upon private property, governmental expropriation for example, brings social pains in excess of pleasures. Such nationalizations diminish welfare by inducing among other owners the pain and fear of loss.⁷² Ultimately, the international commercial environment will be impeded and the flow of investment and expanded economic transactions will be stifled. Destructive and politically explosive disputes will be fostered⁷³ if Justia's conduct is to be tolerated.

III. JUSTIA'S COMPENSATION PROVIDED FOR THE EXPROPRIATION OF PHARMACA'S ASSETS DOES NOT MEET THE MANDATES OF INTERNATIONAL LAW

A. Just Compensation is Mandated Under International Law.

While the right to expropriate may exist, the form of expropriation, or the exercise of the right, is a procedure regulated by law. Expropriation must fulfill certain formal conditions, which are appropriate to internationally valid legal acts.⁷⁴

1. Treaty Law Requires Just Compensation for the Expropriation of Property.

Article IV(3) of the Commerce Treaty provides that in the event of expropriation, "just compensation" shall be paid.⁷⁵ This provision is consistent with prevailing treaty law and customary law.

2. Customary International Law Requires Just Compensation.

Multiple authority exists among international judicial and arbitral decisions, in the expressions of national governments,

72. Steiner & Vagts, *Transnational Legal Problems* 411, 1976.

73. Secretary of State Kissinger in address to the U.N. General Assembly as cited in Steiner & Vagts, supra note 72, at 1182.

74. Friedman, supra note 60, at 182-3.

75. Commerce Treaty, supra note 3, art. 4, para. 3.

and among commentators for the view that a taking is illegal under international law if it is made without provision for prompt, adequate and effective compensation.⁷⁶

Indeed, the essence of a wrongful taking is the fact that it is uncompensated regardless of whether the taking itself was wrongful under international law.⁷⁷ The specifics of the compensation offered Pharmaca by Justia must be carefully examined.

B. Justia Violated International Law in Failing to Provide Adequate, Prompt and Effective Compensation for the Seizure of Pharmaca's Assets.

1. The Compensation Was Not Adequate.

The Commerce Treaty, Article IV(3), mandates that "just compensation" shall represent "the equivalent of the property taken."⁷⁸ Among customary international law, the OECD relied on the terms "genuine value" to define whether the compensation is adequate.⁷⁹ This definition has found support among such distinguished groups as the American Bar Association Section of International and Comparative Law.⁸⁰ Sohn and Baxter of Harvard have indicated that the fair market value or of the use thereof shall be determinative

76. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

77. Sohn and Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 Am. J. Int'l L. 545, 535 (1961).

78. Commerce Treaty, supra note 3, art. 4, para. 3.

79. Draft Convention on the Protection of Foreign Property, reported in 1962, Committee for Invisible Transactions, OECD (1962).

80. ABA-Section of International and Comparative Law, The Protection of Private Property Invested Abroad, 1963.

of adequacy.⁸¹ In this light, this Court should evaluate the provisions for compensation established by Justia.

Justia's deduction of so-called excess profits from an already undervalued assessment of Subpharm's worth, has no foundation in generally accepted principles of international law as recognized by major nations.⁸² Since there was no "excess profits" provision under the laws of Justia at the time Subpharm's profits were earned, the insertion of an excess profits recapture provision in the expropriation legislation is tantamount to nationally authorized international confiscation.⁸³ Recalling the necessity to secure an adequate return for an uncertain R and D effort, Justia's practice is all the more indefensible.

2. The Compensation Was Not Effective.

The compensation provided for the seizure of Subpharm was made in Justian currency. The issue is raised as to whether under international law the compensation was truly effective. Noted commentators have rejected the solution of payment in the currency of the nationalizing State. Payment in this manner will seldom constitute any redress to the company entitled to compensation, since it normally will be precluded from re-investment in the same or similar kinds of business.⁸⁴

81. Sohn and Baxter, supra note 77, at 553.

82. Kennecott Copper Corporation Memorandum re: Expropriation of the Properties of Sociedad Meirera El Teniente by Chile in Light of International Law Principles, as cited in II Lillich, The Valuation of Nationalized Property in International Law 115 (1973).

83. Id., at 125.

84. Foighel, Nationalization and Compensation 259-60, 1963.

To be effective, compensation, in this case, must be paid in currency other than Justian currency since Justia has excluded the possibility of foreign re-investment or reduced it to such restricted fields that it has no practical significance.⁸⁵

3. The Compensation Was Not Prompt.

Promptness is one of the key issues in the current struggle between irresponsible State action and the claims of foreign investors.⁸⁶ With repayment over a five-year period at a meager 2% interest rate, Justia's method of compensation strikes at the very issues of adequacy and equity. Discounted to present value, the payment of one million equivalent U.S. dollars (less than 20% of the assessed value) provides an even smaller compensation amount. For compensation to truly reflect an adequate return, Pharmaca deserves an expedited payment of genuine value or substantially higher interest rates.

In sum, apart from the mere legalities of the taking itself, Justia stands in violation of international law in failing to provide adequate, effective and prompt compensation for the nationalization of Subpharm.

IV. JUSTIA VIOLATED NORMS OF INTERNATIONAL LAW IN MANDATING THAT THE DISPUTE BETWEEN PHARMACA AND SUBPHARM BE SETTLED USING JUSTIAN LAW IN JUSTIAN COURTS

A. International Law, in Contrast to Justian Policy, Recognizes and Supports Choice of Law Provisions in International Business Contracts.

84. Foighel, Nationalization and Compensation 259-60, 1963.

85. Id. at 260.

86. Restatement, The Foreign Relations Law of the United States §193, (Proposed Official Draft, 1962).

1. Trends of International Tribunal Decisions Recognize Choice of Law Provisions.

Under the influence of contractual practice, international juridical analysis has been much more refined in the field of choice of law since the Permanent Court of International Justice delivered its judgment in the cases related to the Serbian and Brazilian Loans in 1929.⁸⁷ The trend now is to "delocalize" the contract or to sever its automatic connections to some national law.⁸⁸ This is precisely what Pharmaca and Subpharm did well before the adoption of Justia's Law to Regulate the Transfer of Technology which banned such agreements. As the International Arbitral Tribunal observed, in upholding a choice of law provision in a concession contract, ". . . today when the municipal law of a given State, and particularly the municipal law of the contracting State, governs the contract, it is by virtue of the agreement between the parties and no longer by a privileged and . . . mechanical application of the municipal law. . . ." ⁸⁹

This Court should recognize that not only international but national law supports the autonomy of the will of the parties to govern their choice of law.

2. Prominent National Law Recognizes Choice of Law Provisions.

In the United States, the eminent Judge Learned Hand is given credit for adopting what is known as the modern view toward

87. Serbian and Brazilian Loans [1929] P.C.I.J., ser. A/B, No. 14 and 15.

88. See supra note 35, at 12.

89. Id.

forum and law selection agreements. Judge Hand reasoned there was no longer any "absolute taboo against such contracts" and that a test of reasonableness should be used to evaluate the effect to be given them.⁹⁰ In Bremen v. Zapata Off-Shore Co.,⁹¹ the Supreme Court of the United States recognized the realities of trade and commerce in world markets and international waters and immediately rejected the "parochial concept that all disputes must be resolved under our laws and in our courts."⁹² This Court should be mindful of these legal and economic trends and evaluate the agreement accordingly.

3. Policy Objectives are Realized in Choice of Law Provisions.

The argument that forum selection and choice of law clauses oust a court of jurisdiction was rejected by the United States Supreme Court as "hardly more than a vestigial legal fiction" designed to protect "the power and business of a particular country." Such arguments have "little place in an era when all courts are overloaded and when business once essentially local now operates in world markets."⁹³

With respect to the particularities of patent license agreements, as in the present case, these contracts generally present more difficult conflict questions than other types of agreements. Choice of law provides a degree of predictability where certainty

90. Krenger v. Penn. R.R., 174 F.2d 356 (2d Cir. 1948) cert. denied 338 U.S. 866 (1949).

91. 407 U.S. 1 (1972).

92. Id. at 9.

93. Id. at 10.

among the parties is desperately needed.⁹⁴ The ensuing feeling of legal security on the part of the prospective licensor (Pharmaca) benefits not only the licensor's operations, but also the scope of the exchange of technology and ultimately the licensee (Subpharm).⁹⁵

This Court should reject Justia's parochial position on choice of law and reaffirm international law and public policy in favor of Patria.

B. International Law Promotes Support of the Arbitration Clause as the Legal Vehicle for the Settlement of the Dispute Between Pharmaca and Subpharm.

1. International and National Law Recognizes Arbitration.

Article III(2) of the Commerce Treaty clearly recognizes the enforceability of arbitration clauses in contracts between companies of Patria and Justia.⁹⁶ Furthermore, the implicit goal of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of which Justia has never denounced, is to encourage the recognition of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed.⁹⁷ This Court should take judicial notice of the fact that even the Mexican Registrar of Technology Transfer accepts clauses establishing an arbitration procedure for

94. Brumbaugh, *International Contracts: Choice of Law and Language* 36 (W.C.M. Reese ed. 1961).

95. Dessemontet, *supra* note 36, at 7.

96. Commerce Treaty, *supra* note 3, art. 3, para. 2.

97. *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15 (1974).

the settlement of disputes arising out of an agreement subject to registration.⁹⁸ Given the parallels between the Mexican and Justian laws, Justia's restrictive posture is alien to international norms.

Prominent national law also forces local courts to accept the validity of agreements to arbitrate. In short, the advantages that arbitration produces in the international sphere has led many nations to rationally honor these private agreements. Justia has little authority in denying reasonable international trends.

2. Sound Policy Supports Recognition of Arbitration.

Arbitration has been considered by United States courts to be an efficient, informal, flexible, confidential, quick and inexpensive manner of handling disputes. It is particularly well-suited to the settlement of international disputes where the inconvenience, expense and uncertainty causes jurisdictional and conflict of laws problems.⁹⁹ Insofar as developing countries are concerned, it is beneficial to those without a well-established judicial tradition.¹⁰⁰ In sum, this Court should recognize arbitration as the appropriate legal vehicle for the settlement of the dispute between Pharmaca and Subpharm.

C. Justia Violates Prudent International Law in Not Enforcing the Arbitral Award.

Under international law, where recourse to appeal is useless or impracticable in affording a claimant relief, a party

98. Dessemontet, supra note 36, at 33.

99. American Almond Prods. Co. v. Consolidated Pecan Sales Co., 114 F.2d 448, 450 (2d Cir. 1944).

100. Dessemontet, supra note 36, at 34.

is excused from appealing to or exhausting his local remedies.¹⁰¹
The resort to the local courts, in the instant case, would not have resulted in an effective remedy for Pharmaca. Therefore, Pharmaca, despite not fully litigating the issues in Justia, is justified in seeking enforcement of the international arbitral award.

Although a "public policy" defense to enforcement of the award is available under the Arbitral Awards Convention,¹⁰² this Court should recognize that mere national policy is not to be equated with public policy.¹⁰³ An enlightened and expansive view of "international public policy" rejects any of Justia's defenses here.

101. Borchard, *The Diplomatic Protection of Citizens Abroad*, 823 (1922).


102. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, art. 5, para. 2(b), 21 U.S.T. 2517, T.I.A.S. No. 6997, 30 U.N.T.S. 3.

103. *Parsons & Wh. Or. Co., Inc. v. Societe G. de L. du P. (R)*, 508 F.2d 969, 974 (2d Cir. 1974).

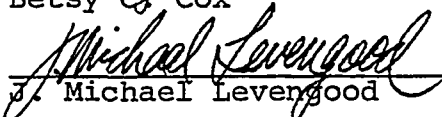
CONCLUSION

It is respectfully requested that this honorable court issue a declaration stating that Justia violated international law and issue an order mandating enforcement by Justia of the international arbitral award in favor of Pharmaca.

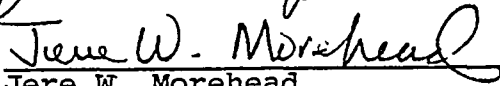
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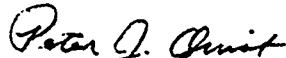
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Michael Levengood



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Peter J. Quist



Audrey S. Winter