BEFORE THE

INTERNATIONAL COURT OF JUSTICE

TEAM NO. 2

THE GOVERNMENT OF PATRIA,

Applicant

against

THE REPUBLIC OF JUSTIA,

Respondent

MEMORIAL FOR RESPONDENT

BETSY C. COX
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Agents for Respondent

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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.

FACTS

The parties have agreed to the statement of facts which has been filed before the Court.

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

Justia had no obligation to extend national treatment to Patrian licensors pursuant to either the Paris Convention or the Treaty on Friendship and Commerce. Moreover, the national treatment principle in relation to industrial property rights is no longer customary international law.

In the alternative, if these treaties remain in force, Justia satisfied any national treatment obligation owed.

In exercising her sovereign right to insist on the settlement of transfer of technology disputes in her forum, Justia is following the majority international position. Since Justian law governs the licensing agreement between Pharmaca and Subpharm, both the agreement and the arbitration based on the arbitration clause in the agreement are void. Even if this arbitration clause were valid, international law allows Justia to refuse to recognize the award.

Justia's regulation of licensing agreements pursuant to national law is necessitated by her public policy of prohibiting the imposition of restrictive licensing agreements on licensees. Justia's procedure for enforcing this law and its actual enforcement against Subpharm were consistent with international law.

Justia's nationalization of Subpharm was authorized by customary international law and by applicable treaty law. Justia followed proper procedure in nationalizing Subpharm.

There is no settled international law defining the question of compensation for nationalized assets. Justia's formula for compensation and its implementation were appropriate means of fulfilling her international obligations.

ARGUMENT AND AUTHORITIES

I. JUSTIA CONFORMED TO INTERNATIONAL LAW IN HER TREATMENT OF FOREIGN LICENSORS.

A. Justia Had No Obligation Under Either the Paris Convention or the Treaty On Friendship and Commerce to Extend National Treatment to Patrian Licensors.

1. Denunciation Terminated Any Applicable Treaty Obligations.

A primary emphasis of both the Paris Convention on the Protection of Industrial Property [hereinafter Paris Convention] and the Treaty of Friendship and Commerce between Justia and Patria [hereinafter Friendship Treaty] is that nationals of each member State shall be accorded, in all other member States, the same treatment in regard to protection of their industrial property as is granted to nationals.[1] Justia's obligation to extend national treatment to Patrian nationals had terminated, however, before Patria alleged a violation of this obligation.

Justia followed the prescribed method in both of these treaties for terminating her obligations. Both treaties provide for an initial term of duration after which any party has the right to denounce. The International Law Commission reported that such provisions for denunciation are common to the majority of modern treaties.[2] Customary law, as codified in the Vienna Convention

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1. Paris Convention for the Protection of Industrial Property, March 20, 1883 [as most recently revised at Stockholm on July 14, 1967], art. 2, para. 1, 21 U.S.T. 1583, T.I.A.S. No. 6923; Treaty on Friendship and Commerce, 1925-28, Patria-Justia, art. 8, para. 1, [under 1979 Jessup Competition Statement of Facts, p.6., identical to: Convention of Establishment, Nov. 25, 1959, United States-France, 11 U.S.T. 2398, T.I.A.S. No. 4625].

2. Draft Articles on the Law of Treaties with Commentaries, Adopted by the International Law Commission at its Eighteenth Session, reprinted in, U.N. Conference on the Law of Treaties

on the Law of Treaties [hereinafter Vienna Convention], supports termination or withdrawal when in conformity with a provision of the treaty.[3]

The President of Justia denounced both treaties in September of 1975 to the extent that they were inconsistent with Justia's recently passed Transfer of Technology Law and her economic development goals. Since the patent system embodied in the Paris Convention is clearly biased toward the interests of investors from industrialized countries,[4] the national treatment provision is one of the substantive provisions inconsistent with Justia's laws and goals. Given the express right to ratify the Paris Convention in part,[5] and no restriction on allowing a party to denounce in part, the Court should interpret Justia's denunciation as a revocation of only Articles 1-12, the substantive provisions of the Treaty. In this way, Justia remains a member of the Paris Union as governed by Articles 13-17 and continues to work for equitable modifications of this Convention. Justia's President followed proper procedure in notifying the Director General of

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Off. Rec., First and Second Sessions 26 Mar.-24 May 1968 and 9 April-22 May 1969, Documents of the Conference, 68, U.N. Doc. A/Conf. 39/11/Add., 2 (1971).

3. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Conference on the Law of Treaties Off. Rec., First and Second Sessions 26 Mar.-24 May and 9 April-22 May 1969, Documents of the Conference, U.N. Doc. A/Conf. 39/27, 289.

4. Eze, Patents and the Transfer of Technology--With Special Reference to the East African Community, 5 East Afr. L. Rev. 127 (1972).

5. Paris Convention, supra note 1, at art. 20, para. 1(b).

the Paris Union of Justia's denunciation of the Convention.

With regard to the Friendship Treaty, Patria was given constructive notice of Justia's intention to terminate from the President's announcement. Denunciation of a bilateral treaty is "a unilateral declaration addressed to the other contracting party, for which no formalities have been introduced by international law."[6] Because the basis of a treaty obligation is the consent of all parties,[7] it follows that for a treaty to continue to be binding on contracting parties consent to the treaty must be continuing. Justia's public announcement thus operates as a termination of the obligations and rights under the treaty which conflict with her domestic legislation and policy.

Both treaties provide that denunciation takes effect one year after notification is received.[8] In the interim year, Justia passed laws affecting investors and licensors. These laws were enforced only after the expiration of this interim period in order to fulfill Justia's treaty obligations.

2. Independent of Denunciation, a Fundamental Change of Circumstances Terminated Justia's National Treatment Obligations Under the Treaties.

A well-recognized principle of international customary law, rebus sic stantibus, is another valid ground for the termination of a treaty. This principle holds that "a treaty should not be

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6. G. Haraszti, Some Fundamental Problems of the Law of Treaties 253 (1973).

7. J. Brierly, The Law of Nations 51 (1963); W. Friedmann, The Changing Structure of International Law 124 (1964).

8. Paris Convention, supra note 1, at art. 26, para. 3; and Friendship Treaty, supra note 1, at art. XVIII, para. 2.

applied in circumstances which are so different from those for which the parties sought to provide, that its application would be contrary to the parties' shared expectations."[9] Article 62 of the Vienna Convention provides an objective standard for determining whether a party can invoke this doctrine.[10] This standard is satisfied in the present case.

It has taken a quantum leap in the understanding of the economic relationship between developed and developing countries to bring the inadequacies of these treaties to light. The precept that developing nations can compete on the same level with the developed countries without recognition of their economic handicaps simply fails to reflect modern reality. Today, the "New International Economic Order," based on equity, interdependence, and cooperation among all states, recognizes this disparity.[11] Continued adherence to these treaties, consented to without this new awareness, radically transforms the extent of the obligation still to be performed. Requiring developing states to extend equal treatment perpetuates their inability to participate in the world economic community. Therefore, the Court should apply this doctrine to terminate Justia's national treatment obligations.

B. Customary International Law Imposes No National Treatment Standard.

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9. Lissitzyn, Treaties and Changed Circumstances, 61 Am. J. Int'l L. 895-96 (1967).

10. Vienna Convention, supra note 3, art. 62.

11. 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) [hereinafter cited as Charter].

The present customary international law on industrial property rights is in a state of flux as old norms are in the process of being replaced by new ones. When a particular practice or course of conduct comes to command general assent, "it may be said to take on the character of a custom, which involves not merely a habit of action, but a rule of conduct resting on general approval."[12] National treatment of licensors of industrial property was a stable norm of customary international law prior to the global focus on the economic needs of developing countries. Three United Nations General Assembly resolutions passed in 1974 charted the new course of international law necessary to achieve this order.[13] One of the main principles the General Assembly established for restructuring existing international relations was "preferential and non-reciprocal treatment for developing countries, whenever feasible, in all fields of international economic cooperation whenever possible."[14] This principle was accepted by the General Agreement Tariffs and Trade (GATT) as early as 1969.[15] Although General Assembly resolutions are not binding in the sense of treaties, they are a source of international law insofar as they

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12. I W. Walker, Cases on International Law 6 (1947).

13. Charter, supra note 11; 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) [hereinafter cited as Res. 3201]; Program of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, 6th Special Session U.N. GAOR (Agenda Item 7), U.N. Doc. A/RES/3202 (1974).

14. Res. 3201, supra note 13, para. 4(n).

15. An International Code of Conduct on the Transfer of Technology, Report of the UNCTAD Secretariat, U.N. Doc. TD/B/C.6/AC.1/Supp. 1/1, 41 (1975).

reveal a widely accepted practice by many states. They operate as law since they express a consensus of the world community.[16]

In addition to these resolutions, the latest draft by the United Nations Conference on Trade and Development (UNCTAD) of a comprehensive code of conduct to regulate the transfer of technology shows consensus by all groups on the notion of special treatment for developing nations.[17] As the President of this Court has stated, treaties, such as the Law of the Sea Treaty, which are not yet completed but which express the general consensus of States, are sources of international law.[18] The acceptance of UNCTAD's special treatment standard is such an example.

National treatment in relation to industrial property rights is no longer customary international law. As Judge Alvarez said in the Fisheries Jurisdiction Case, this Court must recognize modifications of general principles of law as the result of great changes at the international level, and "if no principles exist governing a given question, principles must be created to conform to these conditions."[19] The standard of preferential treatment for developing nations is one of these new principles which the Court should recognize.

16. R. Higgins, Conflict of Interests, International Law in a Divided World 146 (1965); Falk, On the Quasi-Legislative Competence of the General Assembly, 60 Am. J. Int'l L. 782 (1966).

17. Draft International Code of Conduct on the Transfer of Technology, Report of the UNCTAD Secretariat, U.N. Doc. TD/CODE TOT/ (1978) [hereinafter cited as Latest UNCTAD Draft].

18. Lecture of Jimenez de Arechaqa, President I.C.J., Hague Academy of International Law, 1978 Session, General Course in Public International Law.

19. Fisheries Jurisdiction Case, [1951] I.C.J. 116, cited in C. Jenks, The Prospects of International Adjudication 278 (1974).

C. Even if the Paris Convention and the Friendship Treaty Remain in Force So That Justia Has an Obligation to Extend National Treatment, Justia Satisfied This Obligation.

1. Justia Had No Obligation To Pharmaca, Inc., In Pharmaca's Capacity as a Shareholder of Subpharm, S.A.

Before examining any national obligation under the treaties, it is necessary for this Court to understand the nationality of each of the entities involved. Pharmaca, a Patrian corporation, established Subpharm in Justia as a Soci'ete' Anonyme, a stock corporation considered a national of the country in which it is established.[20] Therefore, any treatment of Subpharm by Justia, since between a state and its national, is beyond the scope of either of these treaties. This Court recognized in the Barcelona Traction Company Case that domestic corporation law applies in disputes of this nature.[21] In that case the Court held that Belgium did not have standing to assert a claim on behalf of its nationals since they were only shareholders of a Canadian corporation. Following the rationale of that decision, Patria cannot bring a claim on behalf of Pharmaca in its capacity as a shareholder of Subpharm.

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20. Sohn and Baxter, Convention on the International Respons ibility of States for Injuries to Aliens, in F. Garcia-Amador, Recent Codification of the Law of State Responsibility for Injuries to Aliens 278 (1974).

21. Cases Concerning Barcelona Traction, Light and Power Company, Ltd. [1970] I.C.J. 4.

2. Justia Fulfilled Her Obligation To Pharmaca, Inc., In Pharmaca's Capacity as a Patrian Corporation Registering A Patent In Justia.

Only one arguable area of contention concerning national treatment remains. This concerns the effect of the patent duration provision of the Justian Law on the Protection of Industrial Property on Pharmaca, Inc. This law,enacted in October of 1975, provides a shorter life for a patent registered by a foreigner or a foreign-owned or controlled enterprise than for a patent registered by a Justian national. Examination of this provision in light of the two treaties reveals that it is completely authorized.

Article 19 of the Paris Convention allows countries of the Union to make special agreements for the protection of industrial property.[22] The Friendship Treaty is one of these special agreements. Article 11 establishes a higher standard of protection for commercial practices than does the Paris Convention. This article authorizes each party to take the "measures it deems appropriate with a view to preventing commercial practices or arrangements... which restrain competition limit access to markets or foster monopolistic control."[23]

Justia's law on the duration of patents appropriately minimizes the problem of monopolistic control fostered by the patent system under the Paris Convention. Eighty-four percent of patents

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22. Paris Convention, supra note 1, art. 19, states:
> It is understood that the Countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, insofar as these agreements do not contravene the provisions of this Convention.

23. Friendship Treaty, supra note 1, art. 11.

in developing countries are owned by foreigners; ninety to ninety-five percent of these are almost entirely unused in production.[24]

By exploiting the national treatment provision of the Paris Convention and using their superior research and development resources, these foreign patent owners are taking out patents merely to secure markets for their exports and to enforce an import monopoly.[25] The developing country whose market is thus manipulated is deprived of the benefits of importing competing products from cheaper sources.[26] This was the exact situation created by Pharmaca in Justia for the first five years of Calmian's patent life. Indeed, for the three years following registry, the patent remained idle. The remedial measures provided by the Paris Convention for such non-use, revocation or compulsory licensing, have proven ineffective.[27] In the absence of effective remedial measures, the provision in Justia's new patent legislation on duration offers a solution to the problem of patent non-use. By making the patent life for foreign-owned or registered patents shorter than nationally registered patents, the advantages of non-use to the non-national are reduced significantly. This in turn promotes the use of the technology in the developing country.

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24. The Role of the Patent System in the Transfer of Technology To Developing Countries, Report prepared jointly by the U.N. Dep't. of Economic and Social Affairs, the UNCTAD Secretariat and the Int'l Bureau of WIPO, U.N. Doc. TD/B/AC.11/Rev.1, 42 (1975). [Hereinafter Role of Patents Report.]

25. Role of Patents Report, supra note 25, at 47.

26. Eze, supra note 4, at 137.

27. Role of Patents Report, supra note 25, at 63-64.

II. JUSTIAN LAWS REQUIRING TRANSFER OF TECHNOLOGY DISPUTES TO BE SETTLED IN JUSTIAN COURTS AND ACCORDING TO JUSTIAN LAW ARE CONSISTENT WITH INTERNATINAL LAW.

A. Justia has the Right to Insist on Settlement of Disputes in Her Forum as the Technology-Acquiring State.

A key provision of Justia's "Law to Regulate the Transfer of Technology" is that registration of an instrument, agreement, or contract shall be refused if the agreement imposes a requirement that disputes be settled in the courts of a foreign country, or that a law other than Justia's shall govern the agreement. By insisting on exclusive jurisdiction, Justia is exercising a sovereign right consistent with long-standing international practice. The provision in Justia's Transfer of Technology Law is a version of the Calvo Doctrine which Latin American republics created in 1868 to prevent States from intervening diplomatically against another sovereign to enforce their citizens' claims. Calvo Clauses have been used continuously in Latin America, and two recent codifications of international law have accepted their use with minor limitations.[28]

Justia's particular version of the Calvo Clause closely parallels provisions in the legislation of a significant number of developing nations today, including the Andean Group, Mexico, and Argentina.[29]

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28. See Rest. (2d), Foreign Relations Law of the United States, 202, and Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 22(5) in Steiner & Vagts, Transnational Legal Problems 527-28 (1976).

29. 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. 10 (1977).

In fact, Justia's choice of law provision reflects the majority standard in international formulations on this issue. The Charter of Economic Rights and Duties of States provides that the domestic law of the nationalizing State should govern any disputes arising from the nationalization of foreign property and the resulting compensation controversies.[30] Although the latest[31] UNCTAD draft Code of Conduct shows a split of opinion between developed and developing nations on applicable law in this area, the Group of 77 position, which is supported by the majority of nations, confirms Justian Law. This Group of 77 proposal provides for the law of the technology-acquiring country to govern all matters relating to public policy or sovereignty, including those arising from disputes under the transfer of technology agreement. While choice of forum clauses will be upheld unless the acquiring country has express rules to the contrary, "[a]ny clause which explicitly or implicitly excludes the jurisdiction of the courts and other tribunals of the technology-acquiring country shall be null and void."[32] This view is the natural corollary of the well-established principle of international law that by entering into a foreign nation, a non-national consciously submits himself to the laws of that country.[33]

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30. Charter, supra, note 11, art. 2(c).

31. November 11, 1978.

32. Latest UNCTAD Draft, supra note 17, at 41.

33. P. Jessup, A Modern Law of Nations 103 (1968).

This Court should, therefore, affirm Justia's right to exercise exclusive jurisdiction over licensing disputes. Such action would embrace the majority international standard, recognize the validity of Justia's public policy as a technology-acquiring state, and promote predictability in the area of licensing.

B. Since Justian Law Governs the Licensing Agreement Between Pharmaca and Subpharm, the Agreement and the Arbitration are Void.

Justia exercised her right to enact laws governing transactions in her territory by enacting comprehensive Transfer of Technology legislation.[34] This legislation requires all previously concluded licensing agreements to be brought into conformity and to be submitted for re-registration. When Subpharm submitted the agreement to the Justian Registry, so many of its provisions violated the requirements of the Justian law that the Registry could not approve the licensing agreement for registration. The Registry advised Subpharm to renegotiate and resubmit the agreement. Subpharm, however, refused to do so, and the agreement became void when the deadline for compliance passed. The licensing agreement contained an exclusive arbitration clause.[35] Since the licensing agreement was invalid, however, the arbitration clause in the agreement was also invalidated. Therefore, recognition should not be accorded the arbitration award that Pharmaca obtained.

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34. Law to Regulate the Transfer of Technology, 1975. The Republic of Justia. (Hereinafter Justian Transfer of Technology Law).

35. The Agreement (found in 1979 Jessup Competition Statement of Facts, pp. 1-2).

C. Even if the Arbitration Clause of the Licensing Agreement Were Valid, International Law Permits Justia to Refuse to Recognize the Award.

1. Recognition of the Arbitration Award is Against Justia's Public Policy.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter the Arbitral Convention], to which Justia and Patria are parties, provides that a Contracting State's courts can refuse to recognize and enforce an arbitral award where enforcement would be contrary to its public policy.[36] Justia's public policy would definitely be violated if the arbitration award were imposed on her. First, the entire arbitration procedure was patently unfair because of the biased composition of the arbitration panel. The International Chamber of Commerce rules specify that each party is entitled to nominate one independent arbitrator and the third arbitrator shall be nominated by a national committee.[37] Here, the panel was composed of one Patrian and two non-Patrians, all presumably nominated by Pharmaca. One of the paramount principles of arbitration, the neutrality of the arbitrators,[38] was thus violated. Secondly, the arbitration was held, not on neutral territory, but in Patria. Thirdly, public policy is violated when the particular arbitration rules are decidedly weighted in favor of developed nations.[39]

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36. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V, para. 2(b), 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

37. Thompson, The Court of Arbitration of the International Chamber of Commerce in Cohn, Domke & Eisemann, Handbook of Institutional Arbitration in International Trade 24 (1977) [These rules were not used here].

38. Steiner & Vagts, supra note 28, at 824.

39. Friedman, supra note 7, at 319.

Finally, an examination of this particular arbitration clause in context reveals that Pharmaca was attempting to use it to violate Justian public policy with impunity. The clause provided that Pharmaca would be entitled to invoke arbitration if the legitimacy of the agreement were questioned. Of the three parties capable of questioning the validity of the agreement, Justia was the only one likely to question it. This was so because it was to Pharmaca's advantage for the agreement to continue to operate and Subpharm was completely controlled by Pharmaca at the inception of the agreement. This indicates that Pharmaca was attempting to preclude Justia from regulating any aspect of the agreement. Such a practice by transnational corporations clearly contravenes public policy. For all of the aforementioned reasons, Justia was entitled by the Arbitral Convention to refuse recognition and enforcement of the award.

2. Subpharm's Refusal to Participate in the Arbitration Rendered the Award Void.

Since the arbitration was conducted without Subpharm, only one party to this conflict was heard. A fundamental element of arbitration was lacking, for "an arbitration is the reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by another person or persons."[40] It is well recognized that the initiation of arbitration proceedings by one party and the refusal

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40. Gill, The Law of Arbitration 1 (19), in J. Lew, Applicable Law in International Commercial Arbitration 11 (1978). [Emphasis added].

to appear by the other party is a ground for contesting the validity of an arbitral award.[41]

Admittedly, if the arbitration clause of the agreement were valid, the Arbitral Convention would seem to require that Pharmaca receive some relief. The remedy for failure to arbitrate, however, is quite distinct from the enforcement of an arbitral award. Given the biased nature of the arbitration panel, it would be a travesty of justice to enforce this arbitral award as the remedy here. If any relief is proper, this Court should either order Subpharm to submit to arbitration with Pharmaca or render judgment on the merits itself. Justia maintains that the Court should settle the dispute. In the alternative, the Court should establish guidelines for fair arbitration using the International Chamber of Commerce rules rather than Patrian rules so that a fair arbitration is possible.

III. JUSTIA FOLLOWED PROPER INTERNATIONAL PROCEDURES AND PRACTICES IN INVALIDATING THE LICENSING AGREEMENT AND IN NATIONALIZING SUBPHARM.

A. Justia's Transfer of Technology Law Serves the Important State Interest of Eliminating Restrictive Business Practices.

1. National Transfer of Technology Laws on Licensing Are Permitted by Treaty Law.

Even if Justia's obligations under the Paris Convention and the Friendship Treaty remain, she is not prohibited from enacting laws to regulate transfer of technology agreements. Justia acted consistently with international treaty and customary law in shaping her domestic industrial property laws to suit the nation's

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41. Steiner & Vagts, supra note 28, at 825.

particular needs and interests.[42]

2. Regulation of Licensing Agreements is Necessitated by Justia's Public Policy of Prohibiting the Imposition of Restrictive Licensing Agreements on Licensees.

Licensing agreements, by which the owner of a given technology grants a company the right to use the process in exchange for compensation, are common means by which technology is transferred. Unfortunately, the superior bargaining position of transnational enterprises, like Pharmaca, gives them the power to both dictate terms and conditions unfavorable to the interests of the local economies, and to control production from the transferred technology so as to reap excessive profits.[43] Thus, an important policy question to the developing countries is how to treat direct foreign investment so as to maximize national economic development. The reasonable path, followed by Justia, is to enact legislation requiring technology transfer agreements to be regulated by a government agency. If certain restrictive clauses are contained in the licensing agreement, the Registry will refuse to accept the agreement. The object is not to make the transfer of technology unprofitable, but rather to improve the bargaining position of the developing countries in order to expedite their technological development.

The Pharmaca-Subpharm agreement is a prime example of the need for regulation. Each of its eleven clauses relating to the

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42. Kunz-Hallstein, Patent Protection, Transfer of Technology and the Developing Countries--A Survey of the Present Situation 6 Int'l Rev. Indus. Prop. & Copyright L. 433 (1975).

43. Radhu, Transfer of Technical Know-How Through Multinational Corporations in Pakistan, 12 Pakistan Dev. R. 362 (1973).

use of the patent and trademark constituted an unfair restraint on the freedom of action of Subpharm as technology-acquirer. Each of these clauses served to fill the coffers of Pharmaca at the expense of Subpharm and Justia. Taken in their entirety, these clauses constituted an unconscionable, crippling yoke on Subpharm.

One of the most onerous of these clauses was a requirement that the agreement remain in force two years beyond the expiration of the patent. This is an extremely punitive manner of enforcing control over the manufacture of Calmian after the process is to be returned to the public domain. A related clause would also force Subpharm to pay the royalties for Calmian and 14% of the net sales to Pharmaca during these two years between the expiration of the patent and the expiration of the agreement. Another clause restricting the economic advancement of Justia prohibits Subpharm from exporting Calmian. This absolute prohibition directly contravenes the Justian public policy of encouraging exports. The tie-in clause, obligating Subpharm to purchase the four essential chemicals for Calmian's manufacture from Pharmaca, subjects Subpharm to the likelihood of overpricing by Pharmaca.[44] Yet another oppressive clause is the requirement of a grant-back of all improvements on the making of Calmian without compensation. Not only does this strengthen Pharmaca's monopoly position by providing it new technology, but it also precludes licensees like Subpharm from ever realizing the benefits of their own research and development.[45]

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44. Soberanis, Legal Aspects Concerning the Technology Transfer Process in Mexico, 7 Ga. J. Int'l & Comp. L. 24 (1972).

45. Jones, Relevancy for the EEC of American Experience With Industrial Property Rights, 10 J. World Trade L. 524 (1976).

Many other developing countries have recognized the need to prohibit restrictive business practices in licensing agreements. Among these nations with legislation similar to Justia are Mexico, the Andean Group, Argentina, Brazil, Spain, and Pakistan. The Ad Hoc Group of Experts established by the U.N. General Assembly to formulate recommendations on remedial action recommended that suitable control procedures be established as soon as practicable in developing countries.[46]

The antitrust laws of major developed nations have recognized the illegality of restrictive practices. Several of the licensing practices that the U.S. Justice Department considers violative of their antitrust laws are found in the agreement. These include enforcing a patent license or collecting a royalty beyond the patent's term, as well as exclusive grant-back clauses.[47]

One of the main objectives of an international code of conduct to regulate the transfer of technology is to prevent technology suppliers from abusing their dominant position through restrictive clauses in licensing agreements. A section of the latest UNCTAD draft is similar to that of Justia in the practices it prohibits.[48] Although there is disagreement between the developing and developed nation groups over the degree of abuse which must be present before a particular practice is prohibited,

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46. Restrictive Business Practices in Relation to the Trade and Development of Developing Countries, Report by UNCTAD Ad Hod Group of Experts, U.N. Doc. TD/B/C.2/119/Rev.1, 11 (1974).

47. Investing, Licensing and Trading Abroad--United States, prepared and published by Business International Corporation 15 (1978).

48. Latest UNCTAD Draft, supra note 17, at 12-17.

there is consensus on those practices deemed restrictive and on the necessity for regulating them. This consensus indicates that Justian law reflects an emerging principle of international law.

B. The Procedure for Enforcing Justia's Transfer of Technology Law and Its Actual Enforcement Against Subpharm Were Consistent with International Law.

1. The Justian Law Provided Adequate Time and Notice for Licensing Agreements to be Brought Into Compliance.

Licensing agreements concluded before the Justian Transfer of Technology Law entered into force are given one year to be brought into conformity with the law.[49] After Subpharm was informed of the Minister of Industry's decision to confirm the Registry's decision in not registering the agreement, Subpharm had at least four months to bring the agreement into accord with Justian law. As the Justian law was reasonable in the time it allowed for registration of licensing agreements, and as Justia followed the specified procedure in enforcing this law, the relevant due process considerations were satisfied.

2. Pharmaca Waived Its Right to Contest the Decision of the Justian Registry Before this Court Because It Did Not Exhaust All Local Remedies.

A well-settled rule of international law is that an alien must exhaust remedies available to him under the laws of the host State before an international claim can be brought on his behalf.[50] The Justian Transfer of Technology Law provided a two-step appeals procedure for licensors who were not satisfied with the Registry's

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49. Justian Transfer of Technology Law, supra note 34, at art. 13.

50. Jessup, supra note 33, at 104.

decision. On the advice of Pharmaca, Subpharm declined to follow the second step of the appeals procedure, a special action before a special panel of the Justian Supreme Court.

The Justian appeals procedure closely parallels that of Mexico in that the first step of the review process is to an administrative authority and the second step is to a competent judicial authority. The record in Mexico is strong evidence of the fairness of such an appeals procedure.[51] Pharmaca's subjective conclusion of the hopelessness of an appeal is therefore an inadequate ground for sidestepping a legitimate local appeals procedure.

This Court held in the Interhandel Case that a plaintiff corporation had not exhausted local remedies even though it had spent nine years in unsuccessful litigation in American courts and had been informed by the State Department that its case was hopeless.[52] Pharmaca's position falls far short of the Interhandel plaintiff's to the extent to which it pursued local remedies. Therefore, in breaching its obligation to pursue all local remedies, Pharmaca waived its right to complain about the non-registration of its agreement, and Patria has no standing to assert this claim on Pharmaca's behalf.

C. Justia's Nationalization of Subpharm Conformed With International Law.

1. Justia's Right to Nationalize Is Recognized by Customary International Law.

International law has always recognized the sovereign right

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51. Soberanis, supra note 44, at 29-30.

52. M. Akehurst, A Modern Introduction to International Law 101 (1977).

of a nation to take property belonging to aliens.[53] This includes the right to nationalize, which has been defined as "the compulsory transfer to the state of private property dictated by economic motives and having as its purpose the continued and essentially unaltered exploitation of the particular property."[54] The nationalizing states are not alone in maintaining the right of nationalization, as capital-exporting states concede this right in principle and practice.[61] Recent draft codifications and General Assembly resolutions such as the Charter further affirm this right.[62]

The nationalization of Subpharm constituted a valid exercise of Justia's sovereign right. Since under Justian law the patent had expired so as to place it in the public domain and the licensing agreement regulating the exchange of patent, trademark, and know-how rights had become void before the nationalization, Justia acquired all of these rights and was authorized to use them in continuing to manufacture the drug.

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53. C. Amerasinghe, State Responsibility for Injuries to Aliens 130 (1967).

54. I. Foighel, Nationalization 19 (1957).

55. Amerasinghe, supra note 53, at 130, 32.

56. Charter, supra note 11, at art. 2, para. 2(c); Transnational Corporations: Code of Conduct; Formulations by the Chairman of the Intergovernmental Working Group on a Code of Conduct, U.N. Doc. E/C.10/AC.2/8, para. 57 (1978).

2. Even if the Friendship Treaty Applies, Justia's Nationalization Was Authorized.

Nationalization is authorized by the Friendship Treaty if it is for a public purpose.[57] The absence of an international standard of public purpose means that the nationalizing state's own concept controls as long as the taking is in good faith and not arbitrary.[58] Justia's nationalization of Subpharm clearly served the vital public purpose of bringing such technology under Justian control after Subpharm had repeatedly repudiated Justian law.

D. The Procedure of Nationalizing Subpharm Violated No International Law.

Justia's Foreign Investment Law provides that all enterprises in certain areas, including pharmaceuticals, must have at least 61% of their shares owned by Justian nationals or by the Government of Justia. The consequence for failure to comply within one year is nationalization. Well aware of this law, Subpharm refused to conform to it as its 80% ownership by Pharmaca remained unchanged throughout the year. Justia notified Subpharm of its intention to nationalize nine months after the Foreign Investment Law was in effect. The acceleration of the normal deadline was justified by the statement of Pharmaca's president that his company would not change its 80% ownership policy. Nevertheless, it was a complete year after the law was in effect before Subpharm was actually nationalized.

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57. Friendship Treaty, supra note 1, at art. IV.

58. Fifth Report on International Responsibility, [1960] 11 Y.B. Int'l L. Comm'n. 60, U.N. Doc. A/CN.4/125.

Pharmaca's operation of Subpharm accentuates Justia's need to nationalize. Pharmaca's worldwide blind adherence to an 80% ownership policy in utter disregard of the different stages in the industrial development of the different nations in which it did business, was totally unjustifiable. Therefore, Justia's 61% national ownership requirement was a legitimate means of halting such despotic control.

IV. THE COMPENSATION AWARDED BY JUSTIA FOR THE NATIONALIZATION OF SUBPHARM WAS CONSISTENT WITH INTERNATIONAL LAW.

A. There is No Settled International Law Defining the Quantum of Compensation for Nationalized Assets.

Although it is generally recognized by both customary law and the practice of the majority of states that there is a duty to pay some compensation for nationalized assets,[59] there is considerable controversy over the quantum of compensation necessary to make expropriations valid.[60] One standard long espoused by the United States and other capital-exporting countries is that the compensation must be "prompt, adequate, and effective."[61] This standard of "full" compensation is generally considered synonymous with the subjective determination of the value of the nationalized entity. Its general abandonment in current practice indicates that it is not the accepted international standard.[62]

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59. Amerasinghe, supra note 53, at 147.

60. W. Friedman, O. Lissitzyn, and R. Pugh, Cases and Materials on International Law 812 (1969).

61. Id. at 803.

62. Fatouros, International Law and the Third World, 50 Va. L. Rev. 814 (1964).

Since the nationalization is for the public benefit of the nationalizing state, fairness and justice demand that the nationalized corporation receive less than full value.[63] The full value rule is particularly inappropriate when the nationalizing state is a developing nation who is unable to pay such a rigorous amount without substantially hampering its economic and social development. The special circumstances of the developing nation are recognized as relevant considerations.[64]

State practice reveals the absence of any consensus for calculating compensation.[65] Even with the other widely used formulations of "appropriate" or "just" compensation, there is no standard of interpretation. The nonexistence of any international legal principles here is recognized by the recent draft code of the U.N. Commission on Transnational Corporations which attempts to reflect the general agreement of nations.[66] The international obligations that this formulation expresses are the achievement of a just outcome and the observance of due process. As long as these obligations are complied with, the comments to this Code indicate that national law controls in determining the modalities of compensation.[67] The Charter lends support to

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63. Amerasinghe, supra note 53, at 157.

64. Komunu, Compensation for Expropriation in the Third World, 10 Stud. Comp. Int'l Dev. 3 (1975).

65. Amerasinghe, supra note 53, at 153.

66. Transnational Corporations: Code of Conduct, supra note 56, at para. 52 and Annex.

67. Id. at Annex.

this interpretation as it calls for "appropriate compensation" taking into account relevant national laws, regulations, and pertinent circumstances.[68]

B. Justia's Formula for Compensation and Its Implementation In Respect to Subpharm Were Appropriate Means of Fulfilling Its International Obligations.

Justia's formula for the compensation of nationalized assets is a fair reflection of the purpose of such compensation: a careful balancing of the interests of the parties to achieve an equitable distribution of the benefits of foreign investment between the host country and the foreign investor.[69] Besides providing for the reasonable value of Subpharm's physical plant and other property it owned, Justia included the valuation of goodwill in the compensation figure. By recognizing this intangible asset, Justia included in her formula an item normally not found.[70] The Justian compensation formula also included a deduction for excess profits. This deduction is based on the principle of unjust enrichment.[71] Such a calculation is essential for achieving a just balancing of the parties' interests.[72]

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68. Charter, supra note 11, at art. II(2)(C).

69. Komunu, supra note 64.

70. Amerasinghe, supra note 53, at 158.

71. Komunu, supra note 64, at 16.

72. Note, Nationalization, 14 Harv. Int'l L. J. 388 (1973).

The special panel of governmental experts who determined the compensation for Subpharm adhered to this formula so that the final amount of compensation was reasonable in amount. Pharmaca's plea for six million dollars recovery should be considered in light of the typical practice of many transnational corporations who inflate value in these circumstances. Studies indicate that foreign private investment in less developed nations yield stockholders prodigious wealth far out of proportion to the cost of these ventures.[73] Since Justian law on deriving the amount of compensation for Subpharm's nationalization resulted in an equitable recovery for Subpharm's stockholders, Justia fulfilled any and all international obligations.

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73. Komunu, supra note 64, at 11-12.

CONCLUSION

It is respectfully requested that this honorable Court issue a declaration:

(1) Recognizing the existence of the New International Economic Order, and

(2) Stating that Justia violated no international law with respect to her actions in regard to Subpharm, Pharmaca, or Patria.

It is further requested that this Court issue an order invalidating the arbitral award obtained by Pharmaca.

RESPECTFULLY SUBMITTED:

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